IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

OAK RIDGE ENVIRONMENTAL PEACE ALLIANCE, NUCLEAR WATCH OF NEW MEXICO, NATURAL RESOURCES DEFENSE COUNCIL, RALPH HUTCHINSON, ED SULLIVAN, JACK CARL HOEFER, and LINDA EWALD, Plaintiffs, v. JAMES RICHARD PERRY, SECRETARY, UNITED STATES DEPARTMENT OF ENERGY, and LISA E. GORDON-HAGERTY, ADMINISTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION, Defendants.	**Case No. 3:18-cv-00150** **REEVES/POPLIN** **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE THIS COURT'S JUDGMENT**

Defendants submit their Response in Opposition to Plaintiffs' Motion to Enforce this Court's Judgment (ECF No. 67) ("Motion").

INTRODUCTION

Plaintiffs' Motion effectively seeks to enjoin any and all construction activities associated with the Uranium Processing Facility ("UPF") and Extended Life Program ("ELP") at the Y-12 National Security Complex, pending completion by the National Nuclear Security Administration ("NNSA") of the additional seismic analysis ordered by the Court. Plaintiffs seek this relief despite the fact that they did not seek a preliminary injunction during the more than two years that this action was pending, despite the fact that, since the beginning of 2018, NNSA has spent $793 million on the UPF and approximately $114 million on implementation of the ELP, and despite the fact that the Court did not grant any injunctive relief in its order and judgment. Plaintiffs also seek this relief without seeking to show, as they must, that they satisfy the requirements for the grant of the extraordinary remedy of an injunction and without showing that such a grant would be narrowly tailored to redress their alleged injury. Finally, Plaintiffs seek this relief, notwithstanding that it would impede safety by precluding safety improvements while NNSA completes its supplemental seismic review and determines at its conclusion what, if any, additional or different safety measures it should adopt to address seismic risks.

The Motion should be denied. First, NNSA's decision in its October 4, 2019 Amended Record of Decision ("2019 AROD"), 84 Fed. Reg. 53133, 53134 (Oct. 4, 2019), to authorize continuing construction of the UPF and implementation of the ELP on an interim basis is consistent with the Court's order and eminently reasonable. NNSA, of course, recognizes that the Court required it to undertake additional analysis of new seismic information under the National Environmental Policy Act ("NEPA"), and the agency is, in fact, proceeding to complete

that analysis on an expedited basis. However, NNSA disputes that the Court ordered cessation of all construction activity associated with the previously-approved action, pending the completion of that analysis. In these circumstances, the agency may continue to implement the interim safety improvements authorized by the 2019 AROD while it completes the seismic analysis ordered by the Court and determines what, if any, changes to make in light of that analysis.

Second, the Motion is based upon a fundamental misunderstanding of the differences between the remedies of vacatur and injunction. As the Supreme Court affirmed in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), vacatur of a decision for violation of NEPA is not tantamount to injunctive relief and does not preclude all activities implementing the challenged action, pending the completion of the NEPA compliance ordered by the court.

Third, Plaintiffs' Motion is an untimely request for injunctive relief that has been waived. Indeed, Plaintiffs are seeking post-judgment relief that they did not request in their complaint or seek on summary judgment and without filing a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) or 60.

Finally, Plaintiffs seek a stop work order, without carrying their burden of showing, as they must, that it is required to avoid irreparable injury, that it is in the public interest, or that injunctive relief is otherwise justified. The requested injunctive relief is not necessary or narrowly tailored to redress Plaintiffs' alleged injury. NNSA is in the process of completing the seismic analysis ordered by the Court and implementation of the actions approved by the 2019 AROD will not preclude NNSA from taking a hard look at the new seismic information or making appropriate modifications to its previous action at the conclusion of this review.

By contrast, the hardships to Defendants and the public interest weigh heavily in favor of

allowing NNSA to continue with the actions authorized on an interim basis by the 2019 AROD. NNSA has projected that it would sustain cost impacts ranging from $650 million to $950 million in the event of a six- to twelve-month shutdown of these activities. *See* Declaration of Robert Raines in Support of Defendants' Response in Opposition to Plaintiffs' Motion to Enforce this Court's Judgment ("Raines Decl.") (attached as Exhibit 1) ¶7. Public safety would also be substantially compromised by delaying by an estimated fourteen to twenty months the completion of safety improvements that will be needed, regardless of the ultimate decision NNSA makes at the conclusion of its further NEPA review. *See id.*; Declaration of Teresa M. Robbins in Support of Defendants' Response in Opposition to Plaintiffs' Motion to Enforce this Court's Judgment ("Robbins Decl.") (attached as Exhibit 2) ¶¶5, 9, 11-14. Of particular relevance, this fourteen to twenty-month delay would needlessly extend enriched uranium ("EU") operations in Building 9212—a building that is in critical need of retirement—by a commensurate period of time. *See* Robbins Decl. ¶5. Finally, such a shutdown would result in the layoff of over 1,000 contract and subcontract employees, difficulties in rehiring should construction subsequently resume (including the potential inability to hire suitable, replacement labor), and substantial complications resulting from the potential suspension, termination, modification, and/or renegotiation of contracts, leases, and purchase agreements. *See* Raines Decl. ¶¶3-7.

Consistent with this Court's judgment, NNSA may complete the additional seismic analysis ordered by the Court without having to stop work on the actions authorized by the 2019 AROD. These actions were not enjoined by the Court, will further public safety at Y-12, and will avoid the substantial harm to NNSA and the public that would result from an unnecessary shutdown of this construction.

ANALYSIS

I. NNSA is in compliance with the Court's Order, and the actions approved in the 2019 AROD sensibly implement safety improvements on an interim basis that will be needed, regardless of the ultimate decision that NNSA makes at the conclusion of its additional seismic review.

In its September 24, 2019 order, the Court rejected Plaintiffs' contentions that a new or supplemental environmental impact statement ("EIS") was required because NNSA had unlawfully segmented its modernization program at Y-12 in order to avoid NEPA review. The Court specifically concluded that NNSA had lawfully tiered the 2011 Site-wide Environmental Impact Statement ("2011 SWEIS") to prior NEPA analysis. *See* Memorandum Opinion and Order (ECF No. 63) ("Order") at 56-61.

The Court also rejected Plaintiffs' multiple arguments that a new or supplemental EIS was required due to changed circumstances. According to Plaintiffs, the actions approved in the 2016 Amended Record of Decision ("2016 AROD")—the reduced-scale UPF and the upgrades to existing facilities under the ELP—had not been adequately reviewed in the 2011 SWEIS and the 2016 Supplement Analysis. In rejecting these contentions, the Court determined that the newly-approved actions were a hybrid of two alternatives that NNSA had previously reviewed in the 2011 SWEIS and that no further NEPA analysis was required because the modified actions, including the ELP, were within the range of alternatives previously reviewed:

> The question before this Court is simple: Whether the 2011 SWEIS properly analyzed the substantive environmental effects of a range of alternatives, and whether the likely environmental effects of the ELP fell within that range. . . . Because the environmental effects in the 2011 SWEIS were evaluated along a spectrum—from 'no action' at one end, to a brand-new UPF at the other, and with an 'Upgrade in-Place" program occupying the middle—the Court again finds that the ELP was adequately considered as part of the 2011 SWEIS.

Order at 71.

However, the Court did find NNSA's NEPA review of seismic risks at Y-12 deficient, including particularly its review of new seismic hazard maps issued by the U.S. Geological Survey in 2014.[1] Based on this deficiency, the Court vacated NNSA's 2016 and 2018 Supplement Analyses and its decision in the 2016 AROD to construct a reduced-scale UPF and upgrade several facilities in which some EU operations will continue for the foreseeable future.[2] The Court further required NNSA to complete additional analysis of seismic risks at Y-12, specifically ordering the agency to "conduct further NEPA analysis—including at minimum, a supplement analysis—that includes an unbounded accident analysis of earthquake consequences at the Y-12 site, performed using updated seismic hazard analyses that incorporate the 2014 USGS seismic hazard map." Order at 104. The Court did not order injunctive relief or a shutdown of any operations at Y-12.

On remand, NNSA has committed to undertake on an expedited basis the additional seismic review ordered by the Court, *see* 2019 AROD, 84 Fed. Reg. at 53134, and presently estimates that it will take six to twelve months to complete.[3] *See* Robbins Decl. ¶16. At the

[1] The Court also found error in categorical exclusion determinations issued by NNSA for various projects implementing the ELP and vacated "any challenged categorical exclusion that has been approved for a project not yet complete." Order at 104. By way of remedy, the Court ordered that "further NEPA analysis should be conducted for any currently ongoing project where NNSA has applied a categorical exclusion that was challenged in this case, and the relevant exclusions should be prepared in a manner consistent with the letter of the relevant DOE regulations." *Id*. NNSA has determined that fourteen such projects have not yet been completed and is working to address the NEPA violations for those projects identified by the Court. *See* Robbins Decl. ¶15.

[2] Various documents in the record suggest that the use of Buildings 9204-2E and 9215 for EU operations is likely to continue for at least 25 more years, starting around 2016 and 2017, or at least until the early 2040s. *See, e.g.*, AR_00026127-29, 00026147, 00020405 n.1, 00026289.

[3] Defendants reserve all rights of appeal in connection with the Court's Order and judgment, including the Court's conclusion that NNSA violated NEPA in connection with its seismic analysis. Defendants also reserve all rights of appeal on any subsequent order that the Court may

conclusion of this review, NNSA will determine what modifications, if any, it should make to the actions previously approved in the 2016 AROD. Pending the completion of this review, NNSA has concluded that it should continue to implement those previously-approved safety improvements on an interim basis, given that they will improve safety at Y-12 while the agency completes the additional analysis ordered by the Court. *See* 2019 AROD, 84 Fed. Reg. at 53134.

This approach complies with the Court's Order and is the most appropriate path forward. The decision is consistent with the Court's Order because NNSA is completing the very seismic analysis that the Court has required it to undertake. Further, because Plaintiffs did not seek and the Court did not order any injunctive relief, nothing in the Order precluded NNSA from issuing the 2019 AROD, which authorized continuing construction activities on an interim basis, pending the completion of the additional seismic analysis by NNSA.[4] In this regard, the actions authorized by the 2019 AROD are of an entirely different quantum than those authorized by the 2016 AROD; NNSA has projected that the interim actions approved by the 2019 AROD are likely to continue for six to twelve months, *see* Robbins Decl. ¶16, as opposed to the previously-approved actions that were projected to continue through at least the early 2040s for continued EU operations in Buildings 9204-2E and 9215 and beyond for the UPF. *See* footnote 2, above. In effect, the situation is analogous to one in which the NNSA approves an action, but subsequently prepares a supplement analysis to determine if new information gives rise to

issue and/or to the extent the Court has not ruled on the Motion by the time a notice of appeal is due on or around November 22, 2019.

[4] Plaintiffs suggest that language in the Court's Order stating "'what matters is that NNSA adequately discloses the potential environmental impacts of any decision it makes, *and that it does so in a timely fashion*'" means that no further construction can proceed, until the new analysis is completed. Motion at 12 (quoting Order at 101). That is not what this language means. Rather, the Court simply indicated NNSA should complete the additional NEPA review and disclose its finding in a timely fashion, which NNSA is doing through its expedited analysis.

significant environmental effects beyond those previously reviewed that require the preparation of a new or supplemental EIS. *See* 10 C.F.R. § 1021.314(c). In those circumstances, nothing in the regulations or otherwise requires the agency to enjoin itself from performing the previously-approved action while the additional analysis is on-going.

Finally, NNSA has properly supported the issuance of the 2019 AROD with the analysis in the 2011 SWEIS, which the Court concluded "adequately accounted for the environmental impacts that would result from building a single 'big box' UPF, as well as the impacts that would result if only existing buildings were renovated to meet modern environmental standards (to the extent doing so would be feasible)." Order at 74. Because NNSA's switch to a "hybrid approach" fell within the range of alternatives previously considered in the 2011 SWEIS, the agency was not required to prepare a new or supplemental EIS to consider the environmental effects of this modification of the action previously-approved in the prior 2011 Record of Decision ("2011 ROD") before proceeding with its implementation. *Id*. As NNSA explained:

> With respect to the environmental impacts associated with the revised UPF strategy and the Extended Life Program, the court determined that "[b]ecause the environmental effects in the 2011 SWEIS were evaluated along a spectrum—from 'no action' at one end, to a brand-new UPF at the other, and with an 'Upgrade-in-Place' program occupying the middle,'' NNSA's new strategy is adequately supported by the Y–12 SWEIS, and the court did not vacate the 2011 ROD or Y–12 SWEIS or enjoin any activities at Y–12. The court also found the NEPA analysis in the 2016 Supplement Analysis and the 2018 Supplement Analysis deficient only as to their analysis of new information pertaining to seismic risks. Thus, consistent with 10 CFR 1021.315(e), the existing 2011 ROD for the Y–12 SWEIS can be amended. However, in accordance with the court's determination that additional NEPA analysis of new information pertaining to seismic risks at Y–12 is needed, further NEPA documentation will be developed on an expedited basis that includes an unbounded accident analysis of earthquake consequences at Y–12, using updated seismic hazard analyses that incorporate the 2014 United States Geological Survey maps.

84 Fed. Reg. at 53134. The 2019 AROD is consistent with the Court's Order.

By the same token, the actions approved in the 2019 AROD sensibly implement on an interim basis improvements at Y-12 that will enhance safety at Y-12, regardless of the ultimate decision that NNSA makes at the conclusion of its new seismic review. The decision in the 2011 ROD to construct a single "big box" UPF required the continuing use of legacy facilities for EU operations, pending the completion of that approved project, which was projected to take until around 2025 to construct. *See* AR_00020708; AR_00019025; AR_00019093; AR_00019375. Only at the conclusion of that multi-year construction project could these EU operations then be transitioned into the newly-constructed UPF. So, too, did the action approved in the 2016 AROD require the continuing use of legacy facilities for EU operations for a period of years—until approximately 2025 for Building 9212 and beyond for the refurbished Buildings 9204-2E and 9215—as would any variation on these options that NNSA may approve at the conclusion of the new seismic review. *See* Robbins Declaration ¶9. The simple fact is that the legacy facilities will remain in service for the foreseeable future, regardless of what alternative NNSA ultimately selects. *See id.*

Likewise, NNSA's decision to continue forward with the construction of the UPF, pending its further NEPA review, will enhance safety at Y-12 by ensuring that there are no undue delays in its completion and the subsequent transfer of EU operations from Building 9212, which the Defense Nuclear Facilities Safety Board ("DNFSB") has termed the "'highest hazard nuclear facility at Y-12,'" to the new facility. *See* ECF No. 47, Am. Compl. ¶ 65 (quoting DNFSB report). Any delay in the construction of the new UPF would result in incremental delays in the retirement of this aging facility. *See* Raines Decl. ¶7; Robbins Decl. ¶5. Even if NNSA were to determine as a result of its supplemental seismic analysis that additional upgrades to the new UPF are appropriate or that it should further modify the previously-approved action to

incorporate additional changes in the configuration of the EU processing facilities, NNSA has concluded that the continuing construction would not preclude it from making such changes to facility design. *See* Raines Decl. ¶8. NNSA therefore reasonably concluded in the 2019 AROD that it should continue to implement these safety measures on an interim basis, while it decides what changes, if any, to make to the previous design at the conclusion of the seismic analysis:

> This amended decision will enable NNSA to maintain the required expertise and capabilities to deliver uranium products while modernizing production facilities. This amended decision to continue operations on an interim basis will avoid many of the safety risks of operating aged buildings and equipment by relocating processes that cannot be sustained in existing, enduring buildings or through process improvements. Through an Extended Life Program, mission-critical existing and enduring buildings and infrastructure will be maintained and/or upgraded, which will enhance safety and security at the Y–12 site, pending further review of seismic risks at Y–12. Such continued operations are consistent with the court's ruling and will continue to implement safety improvements under previously approved contracts, pending the completion of additional NEPA documentation on an expedited basis. Once further seismic analysis has been performed, NNSA will issue a new ROD describing, what, if any, changes it has decided to make in light of that analysis.

84 Fed. Reg. at 53134.

Finally, NNSA estimates that resuming construction on the new UPF after a six- to twelve-month work stoppage would result in estimated cost impacts ranging from $650 to $950 million. *See* Raines Decl. ¶7. By contrast, NNSA estimates that it will spend approximately $513 million over a period of six months if it continues with construction of the new UPF. *See id*. ¶8. Based on these numbers, the agency has concluded that proceeding forward with this construction on an interim basis, pending a final decision on what changes, if any, to incorporate into the previously-approved design, is an appropriate means of mitigating potential harm to taxpayers, regardless of the ultimate decision that is made at the conclusion of the new seismic review. *See id.* In fact, NNSA has concluded that the substantial delays and higher costs that would result from a shutdown of ongoing safety improvements through the construction of UPF

and implementation of ELP upgrades could jeopardize its ability to fulfill its national security mission. *See* Robbins Decl. ¶¶11, 13-14.

In short, by continuing to construct the new UPF and implement upgrades to legacy facilities, pending completion of the additional seismic review, NNSA is acting (i) consistent with the Court's judgment, (ii) to enhance safety at those facilities, and (iii) efficiently manage scarce resources to complete a critical mission.[5] The Motion should be denied.

II. Plaintiffs erroneously conflate injunctive relief and vacatur.

Notwithstanding the sound basis for Defendants' action, Plaintiffs seek to vacate the 2019 AROD as allegedly inconsistent with the Court's Order, effectively seeking injunctive relief in the form of a stop work order that would preclude any further construction of the UPF and implementation of the ELP until NNSA completes its further seismic analysis. *See* Motion at 10 ("Where, as here, a court vacates an agency decision ROD based on a NEPA violation pending further analysis that is required by law, the vacated decision no longer has any legal effect and a court can reasonably expect that the agency will not undertake the activities under that vacated ROD until the agency has cured the legal violation the court identified."). These efforts are based upon a fundamental misunderstanding of the relief Plaintiffs sought and the relief the Court granted in this action. As the Supreme Court explained in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), vacatur and injunctive relief are distinct forms of relief, and the extraordinary remedy of injunction is inappropriate where vacatur is sufficient to

[5] Plaintiffs incorrectly characterize the 2019 AROD as "disavowing any possible need for an SEIS." Motion at 10. As Plaintiffs themselves recognize, the very purpose of a supplement analysis is to determine whether a new or supplemental EIS is required. *Id*. at 9-10 (citing 10 C.F.R. § 1021.104(b). Therefore, to the extent that NNSA prepares a supplement analysis to satisfy the Court's requirement that it undertake additional seismic analysis under NEPA, that analysis would necessarily contemplate that a supplemental EIS may be required at its completion.

redress a plaintiffs' alleged injury. Here, the Court has vacated the 2016 AROD, but has not enjoined NNSA from undertaking further work on an interim basis while it decides what modifications, if any, to make to the previously-approved action as a result of the new seismic analysis. Because Plaintiffs' Motion is based on the mistaken understanding that vacatur and injunctive relief are synonymous, it should be denied.

In *Monsanto*, conventional alfalfa growers and environmental groups sued the U.S. Department of Agriculture and the company that developed and held the intellectual property rights to a genetically-altered variety of alfalfa, known as Roundup Ready Alfalfa, that had been "genetically engineered to be tolerant of . . . the active ingredient of the herbicide Roundup." *Id*. at 146. The plaintiffs alleged that the agency had violated NEPA by not preparing an EIS before deregulating the genetically-altered alfalfa. The challenged decision placed the crop outside the agency's regulatory authority under a statute that authorized the agency to "issue regulations 'to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States.'" *Id*. at 144 (citation omitted). The district court ruled for plaintiffs and, to remedy the NEPA violation, vacated the agency's decision; ordered the agency "not to act on the deregulation petition in whole or in part until it had completed a detailed environmental review; and enjoined almost all future planting of the genetically engineered alfalfa pending the completion of that review." *Id*. The government appealed only the scope of the relief granted, and a divided panel of the circuit court affirmed the district court's grant of a permanent injunction. *Id*. at 148. However, the Supreme Court reversed.

The Supreme Court began its review of the propriety of the injunctive relief by affirming that a court may only grant injunctive relief for a NEPA violation where a plaintiff demonstrates

that it satisfies the four-factor test that applies to the award of such relief:[6]

> "[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). The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 31 – 33, 129 S.Ct. 365, 380–382, 172 L.Ed.2d 249 (2008).

Id. at 156–57. Consistent with these principles, the Court concluded that the district and circuit courts erroneously relied upon statements from two Ninth Circuit opinions, which erroneously suggested that there is a presumption in favor of the grant of an injunction in a NEPA case:

> Insofar as the statements quoted above are intended to guide the determination whether to grant injunctive relief, they invert the proper mode of analysis. An injunction should issue only if the traditional four-factor test is satisfied. See *Winter, supra,* at 31 – 33, 129 S.Ct., at 380–382. In contrast, the statements quoted above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted. Nor, contrary to the reasoning of the Court of Appeals, could any such error be cured by a court's perfunctory recognition that "an injunction does not automatically issue" in NEPA cases. See 570 F.3d, at 1137 (internal quotation marks omitted). It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above.

Id. at 157–58.

The Court then applied these principles to hold that the district court erred in granting an injunction against even partial deregulation by the agency and the planting of any genetically-modified alfalfa, during the agency's preparation of the required EIS. *See id*. at 159-165. The

[6] The Court noted that "[b]ecause Petitioners and the Government do not argue otherwise, we assume without deciding that the District Court acted lawfully in vacating the deregulation decision." 561 U.S. at 156.

Court reasoned that, although "[t]he District Court may well have acted within its discretion in refusing to craft a judicial remedy that would have *authorized* the continued planting and harvesting of [Roundup Ready Alfalfa] while the EIS is being prepared," it did not follow that the court "was within its rights in *enjoining* [the agency] from allowing such planting and harvesting pursuant to the authority vested in the agency by law." *Id*. at 160. This was because "the order enjoining any deregulation whatsoever does not satisfy the traditional four-factor test for granting permanent injunctive relief," including particularly the requirement that respondents show "they will suffer irreparable injury" in the absence of such an injunction. *Id*. at 162. The Court ultimately concluded:

> An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. See, *e.g., Weinberger v. Romero–Barcelo,* 456 U.S. 305, 311–312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). If a less drastic remedy (such as partial or complete vacatur of [the agency's] deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted. See *ibid.;* see also *Winter,* 555 U.S., at 31 – 33, 129 S.Ct., at 380–382.

Id. at 165–66. Thus, *Monsanto* establishes that vacatur and injunction are distinct remedies, that an injunction can only issue if the plaintiff carries its burden of demonstrating that this remedy is supported by the four-part equitable test for the grant of this extraordinary relief, and that vacatur does not preclude at least partial implementation of the challenged agency action, pending further NEPA compliance deemed necessary to remedy a NEPA violation.

Consistent with these principles, the district court in *Highway J. Citizens Grp., U.A. v. U.S. Dep't of Transp.,* recognized that the award of vacatur does not equate to a stop work order:

> The only reason the plaintiffs give for reopening this action is that the defendants are violating my previous orders in this case. However, during the course of the prior litigation, I never ordered the defendants to do or not do anything. I did not enjoin the defendants from engaging in any construction activities on Highways J and 164. I did not incorporate the terms of any settlement agreement the parties may have executed into a consent decree. All that I did was vacate the 2002 ROD

> and the 2005 and 2006 wetlands permits. Thus, it is inaccurate to describe WisDOT's current actions as being in violation of an order I entered in this case.

Highway J. Citizens Grp., U.A. v. U.S. Dep't of Transp., No. 05-C-0212, 2013 WL 5433990, at *3 (E.D. Wis. Sept. 27, 2013) (footnote and citation omitted). As under *Monsanto*, this opinion affirms that vacatur and injunctive relief are distinct remedies and an order vacating a ROD does not preclude an agency from taking action to continue construction activities authorized under the previously-challenged action. *See also Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 364 n.46 (D.C. Cir. 1981) ("We also emphasize that, despite our decision to require a meeting, we affirm that portion of the District Court's judgment which denied appellants' request for an injunction halting work on the Locks and Dam 26 project. It is possible that as a result of the meeting the Corps might decide that its plans should be altered. In the interim, however, it may go forward with construction.").

Pursuant to this authority, the underlying basis of Plaintiffs' motion—namely, that the Court's Order purportedly precluded the agency from issuing the 2019 AROD—is based upon a fundamental misunderstanding of the differences between vacatur and injunctive relief. Contrary to Plaintiffs' contentions, the Court's order of vacatur did not equate to a stop work order. Rather, both before and after the Court's Order, the agency retained the authority to revise the 2011 ROD, so long as the decision is supported by a prior EIS. *See* 10 C.F.R. § 1021.315(e) ("DOE may revise a ROD at any time, so long as the revised decision is adequately supported by an existing EIS."). Here, NNSA satisfies this requirement, given that its revision of the 2011 ROD in the 2019 AROD is supported by the analysis in the 2011 SWEIS. The fact that the Court has required NNSA to further supplement this analysis to consider new seismic information does not mean that the agency must immediately cease implementing all activities previously approved in the 2016 AROD. As *Monsanto* and the other cases discussed above

correctly recognize, vacatur does not have the same effect as an injunction. In fact, upholding Plaintiffs' view that vacatur and injunction are virtually synonymous would effectively negate the need for a party ever to seek injunctive relief in addition to requesting vacatur. Indeed, such a result would allow parties to sidestep the need to satisfy the requirements for obtaining an injunction simply by requesting vacatur, notwithstanding that courts have repeatedly affirmed that injunctive relief is an extraordinary remedy that should only be granted in NEPA cases where plaintiffs satisfy these requirements. To the extent Plaintiffs' desired a stop work order, they should have sought injunctive relief in addition to the remedy of vacatur.

The primary case cited by Plaintiffs in support of a contrary conclusion—*Pub. Employees for Envtl. Responsibility v. United States Fish & Wildlife Serv*., 189 F. Supp. 3d 1 (D.D.C. 2016) ("*PEER*")—does not advance their position. In that case, the court vacated "depradation orders" issued by the U.S. Fish & Wildlife Service that authorized "commercial freshwater aquaculture producers and states and tribes to kill double-crested cormorants," a species of bird that preys upon fish. *Id*. at 2. However, in granting such relief, the court erroneously treated vacatur and injunctive relief as synonymous.[7] In fact, in describing the standards for considering a request for vacatur, the court quoted with approval a D.C. Circuit Court decision stating: "'[W]hen an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance.'" *Id*. at 2 (quoting *Realty Income Tr. v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir.

[7] *See*, *e.g.*, 189 F. Supp. 3d at 2 (on the same day as the court granted plaintiffs' motion for summary judgment and remanded to the agency, "the Court ordered FWS to submit a proposed remediation plan and any comments *on the injunctive relief sought by PEER*.") (emphasis added); *id*. at 3 ("Absent a strong showing by FWS that *vacatur* will unduly harm economic interests like aquaculture or recreational fishing, the Court is reluctant to rely on economic disruption as the basis for denying plaintiffs *the injunctive relief they seek*.") (emphasis added).

1997)). This conflation of vacatur and injunctive relief is plainly contrary to the ruling in *Monsanto* and Sixth Circuit case law and does not provide appropriate guidance for this case. *See, e.g.*, *Brown v. City of Upper Arlington*, 637 F.3d 668, 673 (6th Cir. 2011) ("Injunctions are 'drastic and extraordinary' orders which 'should not be granted as a matter of course.'" (quoting *Monsanto*, 561 U.S. at 311-12)).

On the other hand, notwithstanding this error in its analysis, the court in *PEER* did correctly recognize that "'[t]he decision whether to vacate depends on the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change that may itself be changed.'" *PEER*, 189 F. Supp. 3d at 2 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Here, as explained below, Plaintiffs have made no effort to demonstrate, as they must, that the equities of the case purportedly favor vacatur of the 2019 AROD, much less a stop work order against the actions it authorized, notwithstanding the extremely disruptive consequences that would result from a cessation of these interim improvements. The court also correctly acknowledged that the remedy of vacatur did not preclude the issuance of individual depradation permits in accordance with applicable procedures, pending the completion of supplemental analysis under NEPA. *See id*. at 5 ("if the Court were to vacate these orders, the parties agree that alternative routes remain available for the management of cormorant populations, for example, through individual predation permits under the Migratory Bird Treaty Act."). Thus, even under the principal opinion cited by Plaintiffs, the court both (1) required plaintiffs to make a showing that the requested remedy of vacatur would not have unduly disruptive consequences; and (2) recognized that vacatur did not preclude the agency from approving interim measures to implement elements of the challenged action, pending further NEPA compliance. Both aspects of the court's ruling are inconsistent

with the Motion, as Plaintiffs have not addressed the disruptive consequences of a stop work order and have failed to recognize that vacatur does not categorically preclude further agency action, pending further NEPA compliance.

Under *Monsanto* and the other above-discussed precedent, the Motion should be denied because it erroneously treats vacatur and injunctive relief as synonymous and would negate the need for a plaintiff to demonstrate that the four-part test for the grant of an injunction is satisfied before a court may grant this extraordinary relief.

III. Plaintiffs' motion is an untimely request for injunctive relief.

Plaintiffs' Motion also suffers from the further defect that it effectively seeks injunctive relief, notwithstanding that Plaintiffs sought no such relief in their original or amended complaint, Plaintiffs have not requested leave to amend their complaint to request such relief, and Plaintiffs did not raise or establish their entitlement to such relief in their motion for summary judgment.[8] In these circumstances, the Motion is untimely, and Plaintiffs have waived any claim to such relief. *See, e.g., Gregory v. Shelby Cnty.*, 220 F.3d 433, 442–43 (6th Cir. 2000) ("This Circuit has held that a party's failure to advance a theory of recovery in a pretrial statement constitutes waiver of that theory."); *Imperial v. Suburban Hosp. Ass'n,* 37 F.3d 1026, 1031 (4th Cir.1994) (prayer for injunctive relief in complaint abandoned where relief was never pursued in district court); *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864 (9th Cir. 2017) ("A plaintiff may waive a claim for injunctive relief by failing to argue its merits at summary judgment."). As explained by the U.S. District Court for the Western District of Tennessee, requests for injunctive relief are waived if not timely asserted:

[8] Plaintiffs' Motion also improperly seeks to add a new claim challenging the 2019 AROD, after the case has closed.

> [I]f a request for injunctive relief is not included in the final pretrial order, it is ordinarily deemed to be waived. (citing *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002)) (additional citation omitted). *See also Alexander v. Riga*, 208 F.3d 419 (3rd Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001) (holding that plaintiffs who sought injunctive relief in their complaint, but failed to raise the issue again until six days after the jury rendered a verdict, waived the claim); *see Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, No. 3:10-CV-83, 2015 WL 9582550, at *4 (S.D. Ohio Dec. 31, 2015).
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> Our sister courts reject untimely claims for injunctive relief. *See Alexander v. Riga*, 208 F.3d 419 (3rd Cir. 2000) (rejecting a claim for injunctive relief asserted after trial that was not included in the pretrial order as untimely); *Carpet Group Intern. v. Oriental Rug Importers Ass'n*, 2005 WL 3988699, at *8 (D. N.J. 2005), *aff'd*, 173 Fed. Appx. 178 (3rd Cir. 2006) (disallowing a petition to enjoin what the jury found to be anticompetitive conduct, because plaintiffs "did not assert their prayer for injunctive relief in the final pretrial order nor in the trial brief"); *Florida v. Elsberry*, 1985 WL 6278 (N.D. Fla. 1985) (holding that a plaintiff waived the request for injunctive relief in its complaint and amended complaint, where it did not reiterate that claim anywhere in the exhaustive pretrial stipulation or mention it in any of the pretrial conferences or orders).

Thomas v. Schroer, No. 13-CV-02987-JPM-CGC, 2017 WL 6489144, at *8–9 (W.D. Tenn. Sept. 20, 2017), *aff'd sub nom. Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019). It is too late in the day for Plaintiffs to seek to add a prayer for injunctive relief, after the case has been fully litigated and reduced to judgment.

Compounding these problems, Plaintiffs also effectively seek to alter or amend the judgment by adding additional relief not specified in the current judgment, but without filing the requisite motion under Fed. R. Civ. P. 59(e) or 60, much less seeking to demonstrate that they satisfy the requirements for granting such relief. Nor could Plaintiffs succeed on such a motion, as it is improper to use such motions to reargue the case and seek relief that should have been raised before judgment was issued. As the Sixth Circuit has explained:

> A motion under Rule 59(e) is not an opportunity to re-argue a case. *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir.1992) ("Rule 59(e) motions are aimed at *re* consideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued. Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." []).

Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998); *see also Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615–16 (6th Cir. 2010) ("If a permissive amendment policy applied after adverse judgments, plaintiffs could use the court as a sounding board to discover holes in their arguments, then 'reopen the case by amending their complaint to take account of the court's decision.'" *James v. Watt*, 716 F.2d 71, 78 (1st Cir.1983) (Breyer, J.). That would sidestep the narrow grounds for obtaining post-judgment relief under Rules 59 and 60, make the finality of judgments an interim concept and risk turning Rules 59 and 60 into nullities."); M.K. Kane, 11 Fed. Prac. & Proc. Civ. § 2810.1, "Grounds for Amendment or Alteration of Judgment" (3d ed. 2019) ("reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly"). By seeking new relief after the entry of judgment that they could have pursued while this case was being actively litigated, Plaintiffs request relief that they have waived and that does not provide the proper basis for a post-judgment motion. The Motion should be denied as an untimely and improper request for relief.

IV. Plaintiffs have not and cannot demonstrate that injunctive relief is appropriate.

Even if Plaintiffs' motion were timely and properly before the Court (which it is not), the Motion should be denied because Plaintiffs have not satisfied and cannot meet the standards for the grant of injunctive relief. Again, injunctive relief is an extraordinary remedy and can only be awarded where Plaintiffs carry their burden of satisfying the four-factor equitable test for granting such relief, as described in *Monsanto*. Here, Plaintiffs do not even seek to satisfy these requirements, nor could they. Rather, as demonstrated by the declarations submitted by Defendants, these four factors weigh heavily in favor of the denial of injunctive relief.

To begin with, Plaintiffs cannot satisfy the first two prongs—(1) that they have suffered an irreparable injury and (2) that remedies available at law are inadequate to compensate for that injury—because the remedies granted by the Court are sufficient to redress Plaintiffs' alleged harm. As the Court has recognized, NEPA is a procedural statute that does not mandate specific outcomes. Order at 9. Here, the Court has determined that NNSA has violated NEPA with respect to its review of new seismic information, and NNSA is in the process of remedying that violation by undertaking further seismic analysis. Upon the completion of that analysis, NNSA will determine how, if at all, to modify its previously-approved action. In the interim, Plaintiffs do not have a legally-protected interest under NEPA in compelling NNSA to forego the important safety improvements at Y-12 that the agency has already initiated.

As discussed above, this continuing work will enhance safety at Y-12 on an interim basis, pending completion of the further NEPA review ordered by the Court. And, as discussed above, this continuing work does not preclude NNSA from adopting any appropriate modifications to the previously-approved action that the agency may deem appropriate at the conclusion of this review. Thus, NNSA's action seeks to fully comply with the Court's order, while preserving the agency's ability to meet its national security mission and mitigating the potentially catastrophic harm that would result from a work stoppage, regardless what action it approves at the conclusion of the new NEPA process. Plaintiffs' request to effectively enjoin any and all construction activities associated with the UPF and ELP pending completion of the additional seismic analysis is overbroad and fails to satisfy the first two prongs of the test for granting injunctive relief because Plaintiffs cannot demonstrate irreparable harm or the inadequacy of the remedies granted by the Court. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief

to the plaintiffs"). Simply put, the cessation of the safety improvements authorized by the 2019 AROD is not necessary in order to ensure that NNSA completes the additional NEPA analysis that the Court deemed necessary to remedy the insufficiencies it found in the prior analysis.[9]

Plaintiffs likewise have not and cannot satisfy the third prong—that, considering the balance of hardships between the parties, a remedy in equity is warranted. Here, Plaintiffs have identified no hardships that they would sustain if NNSA is not precluded from continuing the actions authorized by the 2019 AROD. In fact, the record is quite to the contrary, as evidenced by the fact that Plaintiffs did not seek preliminary injunctive relief over the more than two years that have elapsed since they filed this case and the more than three years that have passed since NNSA issued the 2016 AROD. Plaintiffs cannot suddenly demonstrate an imminent need for the challenged construction activities to immediately cease, having stood by while these construction activities were on-going over the course of this entire litigation without seeking to stop their implementation. Because continuing forward with these interim construction activities would not prevent the agency from taking a hard look at the new seismic information and approving appropriate action at the conclusion of this review, Plaintiffs can demonstrate no undue hardship from this action.

Plaintiffs' argument that agencies shall not make an "'irreversible and irretrievable commitment of resources' before completing legally required NEPA analysis" is unavailing. Motion at 12 (citation omitted). The improvements authorized by the 2019 AROD are being performed on an interim basis under previously-approved contracts and implement appropriate

[9] As noted above, NNSA is also remedying the categorical exclusion violations identified in the Court's order. *See* footnote 1; *see also* Robbins Decl. ¶15. Plaintiffs' suggestion that the 2019 AROD's failure to mention the categorical exclusions somehow demonstrates an intent to violate the Court's order is without basis. *See* Motion at 13-14. The scope and subject matter of the 2019 AROD simply did not concern the categorical exclusions.

enhancements to safety, regardless of the ultimate decision that NNSA makes at the conclusion of the new NEPA process. Robbins Decl. ¶9; Raines Decl. ¶8. Plaintiffs' contention that these improvements may ultimately "prove inadequate to meet NNSA's enriched uranium mission requirements" by no means shows that the expenditure of funds on these improvements in the interim is an "entirely untenable" approach. *Id*. at 13. Regardless whether NNSA adopts additional safety measures at the conclusion of the new NEPA process, the interim enhancements to safety that it undertakes pending the completion of that additional analysis will ultimately reduce operational risks at Y-12. Even an entirely new UPF facility would require continued EU operations in existing facilities, until it is constructed. There is no reason to delay implementation of these important safety improvements while NNSA completes the additional seismic review, and Plaintiff can demonstrate no hardship from their continued implementation.

By contrast, the hardships imposed on Defendants from a stop work order would be extraordinary. Defendants estimate that they would sustain a total economic loss ranging from $650 million to $950 million for a six- to twelve-month shutdown. *See* Raines Decl. ¶7. There would also be extensive burdens associated with laying off approximately 1,000 workers, terminating existing contracts and leases, and disrupting procurement of supplies and equipment for the project, only to have to potentially restart these processes at the conclusion of the additional seismic review, depending upon the results of that analysis. *See id*. ¶¶3-6. NNSA anticipates that these heavy burdens would result in approximately fourteen to twenty month delays in the completion of the project, should it subsequently be reauthorized with or without modifications. *See id*. ¶7. When coupled with the substantial expenses that Defendants have continued to dedicate to the challenged project over the course of this litigation while Plaintiffs elected not to seek preliminary injunctive relief, the equities of the situation plainly favor

Defendants. In this regard, NNSA has already spent approximately $2.9 Billion on the UPF project (including $793 million since the beginning of 2018), the construction of the project is now 25% complete, and the project overall, including design, construction, and procurements, is now 44% complete. *See id*. ¶2. In addition, NNSA has spent approximately $114 million on the ELP since the beginning of 2018, and approximately $176 million on it since issuance of the 2016 AROD. *See* Robbins Decl. ¶7. The Supreme Court in *Monsanto* discussed similar reliance expenses in support of its ruling in noting that the respondents "did not seek preliminary injunctive relief pending resolution of" their claims, and that the genetically-altered alfalfa "enjoyed nonregulated status for approximately two years," during which time "more than 3,000 farmers in 48 States planted an estimated 220,000 acres of" the crop. *Monsanto*, 561 U.S. at 146. The balance of the hardships weigh heavily in favor of Defendants.

The fourth prong of the test for injunctive relief—whether the public interest would be disserved by a permanent injunction—likewise heavily favors Defendants. Again, if construction activities were to be enjoined pending additional seismic review, NNSA estimates that EU operations would continue in Building 9212 for an additional fourteen to twenty months beyond the currently projected date for transitioning these operations into the new UPF. *See* Robbins Decl. ¶5. The public interest would clearly not be served by continuing these operations in this building—the EU processing facility at Y-12 that DNFSB has deemed most in need of retirement due to safety deficiencies—any longer than necessary.

Likewise, NNSA would not implement on-going safety improvements under the ELP to other EU processing facilities during the period of a stay of construction. There is no reason to defer completion of these important safety improvements, given that they will be needed

regardless of the ultimate action NNSA approves at the conclusion of the new seismic review. *See id*. ¶9. As the Field Office Manager for NNSA Production Office has explained:

> Failing to continue with these activities associated with ELP would result in increased hazards to the workforce and increase the likelihood of a facility failure. A delay in implementing these ELP activities, as well as a delay in moving operations out of Building 9212, equates to a delay in efforts to improve worker and facility safety, which is inconsistent with my mandate as the NNSA official required to ensure safe and secure operations at Y-12.

Id. ¶13.

Finally, the effects on the surrounding community would be devastating. Again, NNSA projects that over 1,000 job losses would occur and that these jobs losses and the accompanying disruption in the purchase of goods and services would delay approximately $513 million in construction spending over the next six months. *See* Raines Decl. ¶¶3, 5. As summarized by NNSA:

> The process of shutting down construction on the UPF project would result in the layoff of over 1,000 contractor and subcontractor employees, suspend the hiring of an additional 500 contractors, result in the cessation of over $3M of work accomplished on a daily basis (or an estimated $513M over six months), and substantially complicate the management of over $1,000M of active contracts as of October 2019, some of which would require termination.

See Raines Decl. ¶3. This harm is in addition to the deferred safety improvements that would result from a stop work order. The public interest would be heavily disserved by the shutdown of construction sought by Plaintiffs.

For all these reasons, the relief granted by the Court is sufficient to remedy Plaintiffs' alleged injury by requiring the completion of additional NEPA analysis, but without disrupting critical safety improvements at Y-12 and imposing the collateral harm to the public at large that would result from the extraordinary remedy of an injunction. Plaintiffs have not met their burden of demonstrating entitlement to injunctive relief, and the Motion should be denied.

CONCLUSION

Plaintiffs' Motion seeks to shut down all interim construction activities associated with the UPF and the ELP at Y-12, notwithstanding that: (1) NNSA is proceeding to undertake further seismic analysis in conformance with the Court's opinion; (2) these interim construction activities will enhance public safety while this seismic analysis is on-going and will be needed, regardless of the decision that NNSA adopts at the conclusion of this review; (3) the Motion erroneously treats vacatur and injunctive relief as synonymous; (4) Plaintiffs did not seek preliminary or permanent injunctive relief throughout the pendency of this action, and the Motion represents an untimely and improper request for such relief; and (5) Plaintiffs have not sought to demonstrate, and cannot show, as is their burden, that the four-factor test for the grant of the extraordinary remedy of an injunctive is met. On the latter point, an injunction is not necessary to remedy the procedural harm alleged by Plaintiffs, whereas its grant would cause inordinate harm to the Defendants and the public at large by causing cost impacts that could approach $1 billion and needlessly extending the period in which EU operations would continue in Building 9212, the EU facility at Y-12 in most need of retirement. These factors all weigh heavily against the relief sought by Plaintiffs. The Motion should be denied.

Respectfully submitted this 4th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 4, 2019, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties registered with CM/ECF. The foregoing document was also sent to the below individual via overnight delivery by Federal Express:

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