UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

OAK RIDGE ENVIRONMENTAL PEACE ALLIANCE, NUCLEAR WATCH NEW MEXICO, NATURAL RESOURCES DEFENSE COUNCIL, RALPH HUTCHISON, ED SULLIVAN, JACK CARL HOEFER, and LINDA EWALD,	)	
Plaintiffs,	)	
v.	)	**No. 3:18-cv-00150 REEVES/POPLIN**
JAMES RICHARD PERRY, Secretary, United States Department of Energy, and LISA E. GORDON-HAGERTY, Administrator, National Nuclear Security Administration,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF
<u>THEIR MOTION TO ENFORCE</u>

Plaintiffs submit this reply in support of their Motion to Enforce ("Motion"), ECF No. 67, to explain that Defendants' Opposition, ECF No. 68, is an exercise in misdirection that tries to evade this Court's authority to enforce its judgment by falsely characterizing Plaintiffs' Motion as a request for injunctive relief. Indeed, Defendants' Opposition is a straw man response to a motion Plaintiffs did not file (and relief Plaintiffs have not sought). Because Defendants neither contest this Court's authority to enforce its judgment nor provide any persuasive reason for this Court to decline to do so, this Court should grant Plaintiffs' Motion.

I. DEFENDANTS DO NOT CONTEST THIS COURT'S AUTHORITY TO ENFORCE ITS JUDGMENT AND PROVIDE NO PERSUASIVE REASON FOR THIS COURT TO DECLINE TO DO SO

Critically, Defendants entirely fail to dispute that this Court has the inherent authority, described in Plaintiffs' Motion, to enforce its Judgment and Opinion by vacating the National Nuclear Security Administration's ("NNSA") 2019 Amended Record of Decision ("AROD") and issuing the declaratory relief Plaintiffs requested. *See* Motion, ECF No. 67, at 2–3. In light of Defendants' deafening silence regarding the Court's authority, there can be no legitimate dispute that the remedy Plaintiffs requested is well within the Court's discretionary "ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991).[1]

Nor is there any legitimate doubt that Defendants' conduct has abused the judicial process. Notably, just as Defendants fail to dispute that the Court has inherent enforcement authority, they do not (and cannot) dispute Plaintiffs' explanation of the timeline under which

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[1] Defendants' characterization of Plaintiffs' Motion as seeking injunctive relief is not only entirely without merit, as discussed below, but is also a far cry from any attempt to dispute the well-recognized fact that district courts have the "'inherent power to enforce compliance with their lawful orders.'" *SEC v. Dollar General Corp.*, 378 Fed. Appx. 511, 516 (6th Cir. 2010) (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966)).

NNSA issued its cursory, two-page AROD a mere three days after the Court issued its 104-page Opinion. *See* Motion, ECF No. 67, at 3–7. In fact, Defendants make no effort to explain how NNSA could rationally have responded to this Court's thorough Opinion in a mere three days, an exceedingly brief period during which NNSA, by its own admission, did not cure the defects discerned by the Court. Defendants also fail to address the fact that, as Plaintiffs pointed out, NNSA stated that "construction will continue" on *the same day* the Court issued its ruling. *See id.* at 7 n.2. This timeline, and the crucial fact that the 2019 AROD is not based on any analysis even remotely resembling the new analysis of seismic hazards this Court ordered, leave little room to doubt that the 2019 AROD reflects anything but flagrant disregard for this Court's ruling.

Moreover, Defendants' Opposition plainly does not respond to Plaintiffs' core argument that the Court's exercise of its inherent authority to enforce its Judgment is appropriate in light of NNSA's disregard for the Court's detailed ruling. For example, as discussed below, Defendants fail to respond to Plaintiffs' explanation of the deficiencies this Court identified in NNSA's 2011 Site-Wide Environmental Impact Statement ("SWEIS"), or Plaintiffs' explanation that in light of those serious defects—including the fact that the 2011 SWEIS does not provide any meaningful analysis of seismic risks—the 2011 SWEIS simply cannot serve as any logical basis for the 2019 AROD. *See* ECF No. 67, at 11–12; *see also* Opinion, ECF No. 63, at 84 (finding that the 2011 SWEIS violates "the very letter of NEPA").

Instead, Defendants assail a straw man, arguing against a motion for injunctive relief that Plaintiffs have not filed (and need not file to obtain the relief actually sought). By failing to respond to Plaintiffs' actual arguments, Defendants have conceded them, and for this reason alone, the Court should grant Plaintiffs' Motion. *See*, *e.g.*, *Kline v. Mortg. Elec. Sec. Sys.*, 154 F.

Supp. 3d 567, 581 (S.D. Ohio 2015) ("failure to respond to … arguments … amounts to a concession"); *Rouse v. Caruso*, No. 06-CV-10961-DT, 2011 WL 918327, at *18 (E.D. Mich. Feb. 18, 2011) ("'It is well understood that … that when a [party] files an opposition … and addresses only certain arguments … a court may treat those arguments that the [party] failed to address as conceded.'" (quoting *Hopkins v. Women's Div., General Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003)).[2]

II. DEFENDANTS FAIL TO SHOW THAT THE 2019 AROD COMPLIES WITH THIS COURT'S OPINION

Defendants have no persuasive response to Plaintiffs' explanation that the 2019 AROD is fundamentally inconsistent with this Court's Opinion and its thorough reasons for vacating the 2016 AROD, the 2016 Supplement Analysis ("SA"), and the 2018 SA. *See* Motion, ECF No. 67, at 8–14. Instead, Defendants' view is that this Court's vacatur of the 2016 AROD—the remedy Congress specified for unlawful agency action, 5 U.S.C. § 706(2)—has no legal or practical consequence, because NNSA can ostensibly reinstate exactly the same actions authorized under the vacated decision without actually curing the legal defects identified by the Court. *See* Opposition, ECF No. 68, at 7 (asserting that nothing prevents NNSA "from performing the previously approved action while the additional analysis [required by the Court] is on-going"). Defendants' position fails on the facts and the law.

[2] Defendants take note of their appeal rights. Opposition, ECF No. 68, at 5 n.3. Such an appeal would not affect this Court's jurisdiction to enforce its judgment, because a "district court has jurisdiction to act to enforce its judgment so long as the judgment has not been stayed or superseded." *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987).

A. Defendants Cannot Distinguish the 2019 AROD from the Decision This Court Vacated

The 2019 AROD resurrects precisely the same decision that this Court vacated; it authorizes the same construction on the same buildings under the same contracts. Although Defendants assert that the 2019 AROD is of a "different quantum" than the 2016 AROD, *id.* at 6, Defendants contradict themselves in the same paragraph by admitting that the 2019 AROD allows "performing the previously approved action," *id.* at 7. Indeed, the 2019 AROD is plainly a "decision to *continue to implement*" an approach that was "previously approved in a July 12, 2016 [AROD]," under the very same "previously approved contracts." 84 Fed. Reg. 53,133–34 (emphasis added). In short, the 2019 AROD resurrects the very same actions authorized under the AROD that this Court determined must be vacated as not in accordance with NEPA.

Moreover, Defendants' assertion of a "different quantum" cannot withstand any logical scrutiny. Defendants claim that the 2019 AROD is of a "different quantum" because it will authorize activities only until NNSA produces the analysis of seismic risks this Court required and issues yet another AROD deciding "what modifications, if any, it should make to the actions previously approved in the 2016 AROD." Opposition, ECF No. 78, at 6. However, this assertion makes no sense in light of the fact that the 2019 AROD authorizes *construction activities* with effects that will last well beyond the life of the 2019 AROD itself; the construction authorized under the 2019 AROD is indisputably of the same "quantum" as under the 2016 AROD because it is the same construction of long-term facilities. Because the actual activities authorized will last well beyond the 2019 AROD and contribute to the same facility life-span as contemplated under the 2016 AROD, Defendants offer only a distinction without a difference.

Furthermore, the 2019 AROD also reflects the same analytic approach NNSA previously adopted in the now-vacated 2016 AROD and 2018 SA. As this Court noted, the 2018 SA found

that the "documented safety basis" for facilities at issue would need to be updated "to reflect updated seismic hazard information" from an upcoming NNSA study. Opinion, ECF No. 63, at 51. As the 2018 SA states, the "documented safety basis" reflects an assessment of the "hazards of a facility" as well as "proposed controls that will be employed to ensure that operations can be conducted safely." AR31085. Thus, under the agency's previous, now-vacated decision, NNSA planned to continue construction activities while undertaking a new study of seismic hazards and, after that new study was complete, to decide what changes, if any, to make to the facilities in light of seismic risks. The 2019 AROD adopts exactly the same approach: "performing the previously approved action while the additional analysis is ongoing." Opposition, ECF No. 68, at 7. Accordingly, it is beyond dispute that the 2019 AROD merely revives the *same* decision this Court vacated in the absence of any attempt by NNSA to first cure the major legal defects discerned by the Court, thus reflecting a willful disregard for the Court's ruling.

B. Defendants' Purported Reliance on the 2011 SWEIS Flouts this Court's Ruling and NEPA's Implementing Regulations

Defendants also baselessly assert that the 2019 AROD is consistent with this Court's ruling because they claim it is based on the 2011 SWEIS that the Court did not vacate. Opposition, ECF No. 68, at 7. However, while this Court's ruling did not formally vacate the 2011 SWEIS, it identified serious deficiencies in the 2011 SWEIS's discussion of seismic hazards that render that document unfit to undergird the 2019 AROD, as Plaintiffs explained. *See* Motion, ECF No. 67, at 10–11. This Court found that in the 2011 SWEIS, "[b]y the very letter of NEPA, NNSA has violated its obligation to make 'explicit' reference to any methodologies or studies upon which it relied" for any seismic analysis. Opinion, ECF No. 63, at 84.

Likewise, the Court found that in the 2011 SWEIS "no specific impacts were analyzed with respect to the UPF alternative, Upgrade in-Place alternative, or the Capability-Sized

alternatives," because "NNSA simply found there were 'no greater impacts than the No Action alternative." Opinion, ECF No. 63, at 98. The Court further found that even if this bounding analysis was "nominally justified" in 2011, *id.* at 100, ongoing reliance on such bounded analysis "is arbitrary and capricious in light of the new information" that has become available since that time, *id.* at 103. Because the Court found that NNSA's reliance on this bounded analysis was arbitrary and capricious in the 2016 AROD, the 2019 AROD's reliance on this *same* bounded analysis is equally arbitrary and capricious. Accordingly, Defendants' assertion that "NNSA has properly supported the issuance of the 2019 AROD with the analysis in the 2011 SWEIS," Opposition, ECF No. 68, at 7, is entirely without merit. Indeed, Defendants wholly failed to respond to Plaintiffs' explanation that the 2019 AROD cannot rely on a 2011 SWEIS this Court already found severely deficient in its analysis of seismic risks and its use of a bounding analysis, thus conceding this issue. *Kline*, 154 F. Supp. 3d at 581 ("failure to respond to … arguments … amounts to a concession").

Defendants' scant discussion of the Court's Opinion regarding the 2011 SWEIS is disingenuous. Defendants assert that the 2019 AROD can rely on the 2011 SWEIS because the Court found that NNSA did not have to prepare a Supplemental Environmental Impact Statement ("SEIS"). Opposition, ECF No. 68, at 7 (quoting Opinion, ECF No. 63, at 74). However, as Plaintiffs explained, the portion of the Court's ruling on which Defendants' selectively rely addressed *only* whether an SEIS was necessary due to *changed circumstances*. Motion, ECF No. 67, at 9–10. In asserting that this Court found that the 2011 SWEIS was adequate, and can thus purportedly support the 2019 AROD, Defendants conveniently—and repeatedly—ignore this Court's *separate* ruling that NNSA failed to properly consider new information, and that an SEIS

still may be necessary to analyze new information. *See id.* Defendants' misrepresentation of the Court's ruling provides no grounds for the Court to decline to enforce its judgment.

Defendants fare no better by pointing to DOE's NEPA regulations, which, for similar reasons, do not support the 2019 AROD. Defendants assert that the 2019 AROD is "consistent with 10 C.F.R. § 1021.315(e)." Opposition, ECF No. 68, at 7. However, that regulation actually states that "DOE may revise a ROD at any time, *so long as the revised decision is adequately supported by an existing EIS*." 10 C.F.R. § 1021.315(e) (emphasis added). As discussed above and in Plaintiffs' Motion, the 2011 SWEIS cannot (and does not) provide adequate support for the 2019 AROD because the Court found that the 2011 SWEIS did not contain sufficient legally required analysis of seismic risks and plainly does not provide the analysis of new information regarding seismic risks that this Court held NNSA must provide in order to comply with NEPA. Accordingly, Defendants' reliance on this regulation is misplaced.

Likewise, Defendants' reliance on DOE's regulation regarding Supplement Analyses is equally unavailing. Defendants suggest that this 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 significant environmental effects beyond those previously reviewed that require the preparation of a new or supplemental EIS." Opposition, ECF No. 68, at 6–7 (citing 10 C.F.R. § 1021.314(c)). Defendants' analogy is fatally flawed because it again ignores this Court's ruling. To begin with, the approach Defendants describe is the one the agency took with the 2016 AROD and 2018 SA, which this Court already vacated. Moreover, contrary to Defendants' strained analogy, the present circumstance is an extremely unusual situation in which NNSA has resurrected the same decision the Court already vacated for being arbitrary, capricious, and contrary to law without correcting the legal violations the Court identified by

providing the additional analysis the Court found is necessary. NNSA's disingenuous analogy is unavailing.

C. Defendants' Portrayal of the 2019 AROD as Authorizing "Interim" Action Flouts NEPA's Implementing Regulations and Plain Language

Defendants' attempt to defend the 2019 AROD as merely authorizing "interim" actions is wholly without merit. Although Defendants repeatedly defend the 2019 AROD as merely "interim" in nature, Opposition, ECF No. 68, at 1, 2, 3, 4, 6, 8, 9, 11, 16, 20, 21, 22, 25, Defendants notably fail to mention that NEPA's implementing regulations address the situations in which "interim" actions may be taken. DOE's own regulations define "interim action" as "an action concerning a proposal that is the subject of an ongoing EIS and that DOE proposes to take before the ROD is issued, and that is permissible under 40 C.F.R. § 1506.1." 10 C.F.R. § 1021.104. This definition is plainly applicable not only because Defendants repeatedly characterize the 2019 AROD as "interim," but also because it is "the subject of an ongoing EIS," as demonstrated by the fact that the 2019 AROD explicitly purports to be based on the 2011 SWEIS. Likewise, the 2019 AROD constitutes action DOE proposes to undertake before a final "ROD is issued," because the 2019 AROD states that once NNSA completes the Court-ordered analysis of seismic hazards, it will issue a new ROD announcing what, if any, changes it plans to make in light of the new analysis. Accordingly, DOE's own definition of "interim action" makes clear that the actions authorized under the 2019 AROD must be "permissible" under the Council on Environmental Quality's ("CEQ") regulations implementing NEPA (i.e., 40 C.F.R. § 1506.1). 10 C.F.R. § 1021.104. The 2019 AROD flunks that test.

The relevant CEQ regulation, which is incorporated in DOE's definition and is "binding on all Federal agencies," 40 C.F.R. § 1500.3, specifies that an interim action must not "prejudice the ultimate decision on the program," and further specifies that "[i]nterim action prejudices the

ultimate decision on the program when it tends to determine subsequent development or limit alternatives." *Id.* § 1506.1. Here, the actions authorized in the 2019 AROD plainly *do* prejudice the ultimate decision because they "determine subsequent development" by authorizing construction that literally sets in stone (or concrete) the agency's preferred course of action. Likewise, the actions authorized in the 2019 AROD "limit alternatives" because they commit hundreds of millions of dollars to construct the agency' preferred alternative, despite the Court's emphasis that in light of new information about seismic risks, "an analysis of environmental impacts *between* the[] alternatives" is "pressing." Opinion, ECF No. 63, at 100; *see also id.* at 101 (finding that NNSA "must strictly adhere to NEPA's procedural requirements, and fully disclose the environmental costs of a *range* of alternatives before a final decision is made"). Plainly, spending hundreds of millions of dollars on construction activities for facilities that will remain in place for many decades "limit[s] alternatives" other than the same decision NNSA made in the now-vacated 2016 AROD and resurrected in the 2019 AROD. Accordingly, because the actions authorized in the 2019 AROD "prejudice the ultimate decision on the program," they cannot qualify as lawful "interim" actions under NEPA's implementing regulations.[3]

Moreover, Defendants' attempt to defend the 2019 AROD as merely "interim" also fails as a matter of plain language. The word "interim" means "impermanent" or "temporary." *See*

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[3] Defendants defy logic by suggesting that continuing construction would not impair their later ability to adopt design changes. Opposition, ECF No. 68, at 9. NNSA's entire enriched Uranium strategy is an *integrated* approach that relies on both the new Uranium Processing Facility ("UPF") and ongoing operations in aging facilities, for which the Court-ordered new seismic analysis is especially important. Thus, if the additional seismic review reveals risks so great that costs or physical or technical challenges make the continued reliance on aging facilities for the foreseeable future infeasible or even impossible, NNSA may need to reconsider alternatives it previously discarded, such as a single new UPF. NNSA's ability to consider and implement alternatives becomes less and less possible as concrete is poured for the current design UPF and hundreds of millions of dollars are spent on the agency's current approach.

Interim, Merriam-Webster, https://www.merriam-webster.com/dictionary/interim (last visited Nev. 12, 2019) (providing synonyms); *see also Interim*, Black's Law Dictionary (4th ed. 1996) (defining "interim" as "temporary or provisional"). There is nothing impermanent or temporary about the actions authorized in the 2019 AROD. To the contrary, the authorized actions constitute construction activities on a new Uranium Production Facility ("UPF") that is intended to be used indefinitely and on existing buildings that Defendants recognize are intended to be used "at least until the early 2040s." Opposition, ECF No. 68, at 5 n.2. Indeed, Defendants concede that these construction activities aim to allow ongoing operations in existing buildings "for the foreseeable future." *Id.* at 5. Because the construction activities authorized in the 2019 AROD have effects that NNSA intends to last "for the foreseeable future," there is clearly nothing "interim" about these activities, and Defendants' attempt to defend the 2019 AROD as merely "interim" must fail.

D. Defendants Fail to Show That Their Action Will Result in "Timely" Compliance with This Court's Judgment or NEPA

Attempting to evade this Court's insistence on timely compliance with NEPA, Defendants construe the Court's ruling extremely narrowly to claim that it meant only that "NNSA should complete the additional NEPA review and disclose its finding in a timely fashion, which NNSA is doing through its expedited analysis." Opposition, ECF No. 68, at 6 n.4. This constrained reading again reveals Defendants' disregard for the Court's ruling, which repeatedly emphasized the need for timely NEPA compliance. *See* Opinion, ECF No. 63, at 101, 102, 103 (emphasizing "NEPA's requirement for full and timely public disclosure"). As Plaintiffs explained, Motion, ECF No. 67, at 12—and Defendants wholly failed to rebut—timeliness in the NEPA context requires completing the legally required analysis *before* taking action. *See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)

(NEPA's action-forcing procedures require agencies to "take a 'hard look' at the environmental consequences *before* taking a major action" (emphasis added)); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.").

Consistent with this fundamental NEPA principle, this Court held that NNSA "must strictly adhere to NEPA's procedural requirements, and fully disclose the environmental costs of a *range* of alternatives before a final decision is made." Opinion, ECF No. 63, at 101. Although Defendants attempt to avoid this holding by characterizing the 2019 AROD as merely operating "on an interim basis, pending a final decision," Opposition, ECF No. 68, at 9, the plain fact is that the 2019 AROD authorizes construction activities that are intended to last "for the foreseeable future." *Id.* at 5. Moreover, NNSA's plan for a "final" decision is merely to decide "what changes, if any, to incorporate into the previously-approved design." *Id.* at 9. NNSA's chosen course of barreling forward with the same decision the Court vacated before providing the analysis the Court determined is required by federal law is plainly inconsistent with the Court's emphasis on "timely" compliance with NEPA, and Defendants' unduly constricted reading of the Court's ruling is without merit.

Likewise, Defendants wrongly deny that the 2019 AROD's plan to commit hundreds of millions of dollars to construction activities before providing the Court-ordered analysis of seismic risks constitutes an "irreversible and irretrievable commitment of resources." Opposition, ECF No. 68, at 21. However, Defendants concede, as they must, that the 2019 AROD is a decision to proceed with activities under "previously approved contracts." *Id.*; *see also* 84 Fed. Reg. at 53,134. As Plaintiffs explained, entering into and implementing contracts before

preparing required NEPA analysis plainly constitutes an unlawful "irreversible and irretrievable commitment of resources." Motion, ECF No. 67, at 12–13. As the Court of Appeals for the Ninth Circuit explained, an agency violates NEPA when it reaches the "point of commitment" by "sign[ing] a contract … and then work[ing] to effectuate the agreement" before "consider[ing] the potential environmental effects of the proposed action" as NEPA requires. *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). Where "contracts were awarded prior to the preparation" of required environmental analysis, "the agency did not comply with NEPA's requirements concerning the timing of their environmental analysis, thereby seriously impeding the degree to which their planning and decisions could reflect environmental values." *Id.* at 1143–44. Accordingly, Defendants' decision to proceed under "previously approved contracts" for actions this Court already vacated flouts NEPA and the Court's emphasis on timely legal compliance.

E. Defendants Approach to Categorical Exclusions Again Reveals Disregard for the Court's Ruling

Defendants attempt to defend the 2019 AROD's wholesale failure to even acknowledge this Court's ruling regarding categorical exclusions by addressing the issue entirely in footnotes. Opposition, ECF No. 68, at 5 n.1; *id.* at 21 n.9. However, although NNSA belatedly indicates that it is planning to correct the legal violations the Court identified for fourteen ongoing projects, *id.* at 5 n.1, Defendants' purported explanation for why the 2019 AROD is silent as to the Court's ruling regarding categorical exclusions defies logic. Defendants assert that the 2019 AROD did not address this aspect of the Court's ruling because "[t]he scope and subject matter of the 2019 AROD simply did not concern the categorical exclusions," *id.* at 21 n.9. This is false. The 2019 AROD authorized continuing the same activities previously authorized under the now-vacated 2016 AROD; as Defendants concede, these activities include at least fourteen projects for which NNSA previously invoked categorical exclusions this Court found unlawful.

Accordingly, the "scope and subject matter" of the 2019 AROD plainly *did* encompass categorical exclusions. Although Defendants appear to be progressing toward compliance with the Court's ruling regarding categorical exclusions, the fact that the 2019 AROD was wholly silent as to this aspect of the Court's ruling, and Defendants' disingenuous excuse for that silence, reveal the agency's cavalier attitude toward the Court's judgment.

III. DEFENDANTS' ARGUMENTS REGARDING INJUNCTIVE RELIEF ARE WITHOUT MERIT

Defendants' Opposition fundamentally mischaracterizes Plaintiffs' Motion to Enforce this Court's Judgment as a motion for permanent injunctive relief, which is a motion that Plaintiffs did not file. Because Defendants' arguments invoke an inapposite legal standard, rely on inapplicable case law, and misrepresent the nature of the default relief that Congress provided in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, the Court should disregard Defendants' arguments against injunctive relief as wholly irrelevant to the current Motion.

A. Defendants' Arguments about Injunctions are Irrelevant Because Plaintiffs Have Not Sought an Injunction

Defendants inaccurately characterize Plaintiffs' Motion as "effectively seeking injunctive relief," yet Defendants simultaneously contradict that characterization by recognizing *in the same sentence* that in reality "Plaintiffs seek to vacate the 2019 AROD." Opposition, ECF No. 68, at 9. Moreover, Defendants point to nothing in Plaintiffs' Motion (or Plaintiffs' prior summary judgment briefing) that actually requests injunctive relief, because no such request exists. In fact, Defendants concede that Plaintiffs have acted appropriately by seeking vacatur rather than injunctive relief, acknowledging that "vacatur and injunctive relief are distinct forms of relief, and the extraordinary remedy of injunction is inappropriate where vacatur is sufficient to redress a plaintiff's alleged injury." *Id.* at 10–11. Here, Plaintiffs have not sought the

"extraordinary remedy" of an injunction, but have instead sought only the ordinary, default remedy for unlawful agency action that Congress provided in the APA. *See* 5 U.S.C. § 706(2)(A) ("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"); *see also* Motion, ECF No. 67, at 15 (requesting vacatur of the 2019 AROD). Accordingly, because Plaintiffs have not requested an injunction, this Court should disregard Defendants' irrelevant arguments about the standards for granting an injunction.[4]

B. Plaintiffs Have Not Sought an Injunction Because the Congressionally Chosen Remedy of Vacatur Should be Sufficient

Anomalously, Defendants argue that Plaintiffs' request for the ordinary statutory remedy of vacatur is tantamount to a request for the extraordinary remedy of injunctive relief while at the same time accusing Plaintiffs of wrongly treating vacatur and injunctions as synonymous. Opposition, ECF No. 68, at 10–11. Defendants apparently seek to gain some tactical advantage by muddying the remedial waters, but their obfuscation lacks legal or logical merit.

Plainly put, Plaintiffs have not sought injunctive relief because the statutory remedy of vacatur is sufficient to redress Plaintiffs' injuries by ensuring that NNSA cannot undertake activities authorized under the vacated decision until NNSA issues a new, lawful decision supported by the analysis that the Court held is necessary to comply with NEPA. *Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 4 (D.D.C. 2016)

[4] Defendants also mistakenly argue that Plaintiffs have waived any right to seek injunctive relief in this case, mistakenly asserting that Plaintiffs' Complaint disavowed the prospect that injunctive relief may be necessary at some juncture. Opposition, ECF No. 68, at 17. However, Plaintiffs' Complaint is captioned as a "complaint for injunctive and declaratory relief," ECF No. 47, at 1, and requests, among other things, "any further relief as the Court may deem just and proper," *id.* at 62. Accordingly, while Plaintiffs have not sought injunctive relief at this stage, Defendants' assertion that Plaintiffs have waived the right to do so is wholly without merit.

("Obviously, the effect of vacatur is to stop the[] activities" authorized under decisions "the Court has found wanting."). Indeed, Plaintiffs have sought this default, statutory remedy precisely because it is the remedy that Congress found is the appropriate manner of redressing injuries caused by unlawful agency action. Plaintiffs did not ask the Court to exercise any additional equitable authority to grant further injunctive relief because it should not be necessary to bring the agency into compliance with federal law.[5]

To illustrate why vacatur should be sufficient and injunctive relief unnecessary, it is important to understand that, although the two remedies may share some practical consequences of stopping certain activities for a period of time, the remedies differ starkly in how they reach their respective conclusions. When a court vacates an unlawful agency decision, the agency is free to make a *new* decision—even the same substantive decision—once it corrects the legal violations a court has identified. Thus, here, Plaintiffs do not dispute that *after* NNSA conducts and publishes the new analysis of seismic risks that the Court found necessary to comply with NEPA, the agency could issue a new AROD that reflects a decision to pursue the same course. Of course, Plaintiffs would be free to challenge any new decision and the new NEPA analysis it relies upon in federal court.[6] However, under basic APA principles, an agency is not free to simply revive a decision that a court vacates as unlawful *before* the agency even attempts to achieve legal compliance, because until the agency cures its legal violation (or at least purports

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[5] Again, Plaintiffs have not waived and do not waive their right to seek injunctive relief if it should become necessary. For example, if this Court vacates the 2019 AROD and Defendants nonetheless again flout the Court's ruling by continuing activities under the vacated decisions, it may at some point become necessary to seek an injunction or other appropriate relief (e.g., a motion to hold NNSA officials in contempt for violating the Court's rulings).

[6] Of course, no new case is necessary here because the 2019 AROD is not actually a new decision, but merely a resurrection of the 2016 AROD this Court vacated.

to do so by preparing the additional analysis required by a court), resurrecting the same decision is unlawful for the same reasons previously identified by the court. That is what NNSA has done here, and that is why vacatur of the 2019 AROD is critically necessary.[7]

In stark contrast, when a court issues an injunction against an agency's action, an agency may not revive that decision in any manner or take any action in furtherance of it unless and until the agency successfully petitions the court to lift the injunction. *See All. for the Wild Rockies v. Bradford*, 864 F. Supp. 2d 1011, 1017 (D. Mont. 2012) ("Supreme Court authority teaches that a party moving to dissolve an injunction must establish 'a significant change either in factual conditions or in law renders continued enforcement' inequitable." (quoting *Horne v. Flores*, 557 U.S. 433, 450 (2009))); *see also United States v. Miami Univ*., 294 F.3d 797, 820 n.21 (6th Cir. 2002) (noting that an enjoined defendant "may move the district court to lift the injunction" based on changes in governing law or relevant facts).

This difference illustrates how Plaintiffs' request for vacatur is not at all tantamount to a request for injunctive relief. Plaintiffs have not asked the Court to issue an injunction, nor have Plaintiffs requested that any such relief remain in place until and unless NNSA seeks—and obtains—a court-ordered dissolution of such relief. Rather, consistent with the default remedy of vacatur, Plaintiffs have merely requested that the Court vacate the 2016 AROD (and now the 2019 AROD through enforcement of the Court's Judgment) until NNSA has actually completed the new NEPA analysis that this Court held is required by federal law. This is precisely the

[7] Plaintiffs' request for declaratory relief explaining that any future decision to revive the same decision the Court vacated would be inconsistent with the Court's ruling does not convert Plaintiffs' Motion into a request for injunctive relief. Instead, the requested declaratory relief would merely reflect the fundamental legal principle that when a court vacates a decision as unlawful, the agency may not implement that same decision until it undertakes the court-required analysis in an effort to come into compliance with the law.

outcome that Congress intended when it adopted vacatur as the default statutory remedy for violations of NEPA and similar statutes.

Indeed, the fact that Congress specified that vacatur is the presumptive remedy for unlawful agency action, 5 U.S.C. § 706(2), illustrates another critical difference between vacatur and injunctions. An injunction is an equitable remedy that a plaintiff can request in any type of civil litigation, whether administrative or otherwise. And where a plaintiff seeks that traditional, equitable remedy, the conventional equitable analysis clearly applies. However, in administrative law cases, Congress has already determined that vacatur is the presumptively appropriate remedy for unlawful agency action—precisely the remedy Plaintiffs have sought. *See, e.g.*, *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("[B]oth the Supreme Court and the D.C. Circuit have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA.").

Defendants' argument that by seeking to effectuate the Court's order of vacatur—the appropriate, ordinary remedy Congress specified for unlawful agency action—Plaintiffs' Motion somehow seeks an "extraordinary" injunctive remedy not only reflects disrespect for the Court's thoroughly reasoned ruling, but also threatens to deprive Congress's choice of the appropriate remedy of any meaningful practical import. Defendants essentially argue that even where a court vacates an agency's action, granting the remedy specified by the APA, unless a plaintiff seeks the "extraordinary remedy" of an injunction, an agency is free to immediately resume the very same activities that a court has found unlawful, and to do so without correcting the legal violations the court identified. *See* Opposition at 6 ("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"). Defendants' extremely limited view of the practical utility of vacatur, if countenanced,

would do extreme violence to the statutory scheme Congress devised in the APA. If agencies are free to simply resume unlawful activities under vacated decisions, Congress's chosen remedy has no practical effect whatsoever. This is not what Congress intended, and Defendants provide no reason for the Court to disregard Congress's intent in a manner that is inconsistent with the APA and decades of vacatur case law in the federal court system.

C. Defendants' Arguments About Injunctions are Premised on a Fundamental Misrepresentation of Case Law

Defendants' attempt to portray Plaintiffs' request for vacatur as a request for injunctive relief is premised on a fundamental misreading of *Monsanto v. Geertson Seed Farms*, 561 U.S. 139 (2010). As discussed below, *Monsanto* is largely irrelevant to this Motion because it concerned the proper scope of injunctive relief, which Plaintiffs simply have not requested. However, to the extent *Monsanto* has any bearing here, it actually supports Plaintiffs' request for vacatur. Indeed, in *Monsanto* the Supreme Court expressly stated that because "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course … [i]f a less drastic remedy (such as partial or complete vacatur of [the challenged agency] decision) [i]s sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted." *Id.* at 166. Accordingly, *Monsanto* supports Plaintiffs' request for the "less drastic" remedy of vacatur, rather than injunctive relief.

Monsanto plainly does not support Defendants here. First, *Monsanto* is inapplicable because in that case the "main issue [] in dispute concern[ed] the breadth" of "permanent injunctive relief." *Id.* at 144. Here, Plaintiffs have not requested injunctive relief and the Court has not issued any, so the Supreme Court's guidance as to the proper scope of permanent injunctive relief, or the standards for granting that relief, is not applicable. *See High Country Conservation Advocates v. U.S. Forest Serv*., 67 F. Supp. 3d 1262, 1264 n.1 (D. Colo. 2014)

(rejecting an agency's reliance on *Monsanto* because "[w]hile *Monsanto* undoubtedly controls where a plaintiff is "seeking a permanent injunction," the case "is largely inapplicable" where "plaintiffs do not ask for any" remedy beyond vacatur, and finding it appropriate to "hew to the narrow remedy of vacating each offending action").

Second, the actual holding of *Monsanto* is inapposite. *Monsanto* concerned an agency's decision to deregulate and thus allow the sale of Roundup Ready Alfalfa ("RRA"), a decision the district court vacated due to the agency's failure to comply with NEPA. 561 U.S. at 144–49. In addition to vacating the challenged decision, the district court also enjoined the agency from issuing *any* new decision to deregulate RRA *even partially* until the agency completed an EIS. *Id.* The Supreme Court reviewed the district court's injunctive relief, but *not* the grant of vacatur. *Id.* at 156. The Court found that the district court erred by "enjoining a partial deregulation of any kind pending APHIS's preparation of an EIS," because it was possible that the agency could adequately support a *partial* deregulation decision—a narrower decision than the one challenged in that case—if it was accompanied by a new, lawful environmental analysis. *Id.* at 164. This holding has no bearing here, because the 2019 AROD that Plaintiffs have asked the Court to vacate (not enjoin) is not at all akin to a partial deregulation. Instead, as explained above, the 2019 AROD reflects precisely the same decision as the 2016 AROD the Court already vacated; it allows the same construction activities on the same buildings under the same contracts, with effects that will last for the same prolonged period. While *Monsanto* might provide some support for the proposition that agencies have discretion after vacatur to make a *different, narrower* decision (presuming they utilize a lawful process), nothing in *Monsanto* countenances an agency simply resurrecting *the same* decision a court vacated as unlawful without first correcting the legal defects the court identified. Indeed, *Monsanto* rejects that approach by recognizing that any

new decision would have to be supported by a new, lawful environmental analysis. *Id.* at 159 (recognizing that if the agency wished to "pursue a *partial* deregulation," it would have to do so "on the basis of a new EA").

Third, because *Monsanto* concerned the "breadth" of actual "permanent injunctive relief" that had been issued, 561 U.S. at 144, the Supreme Court did not hold, as Defendants erroneously suggest, that courts should construe a request for the ordinary remedy of vacatur as a request for injunctive relief. To the extent Defendants express concern that vacatur and injunctions may have some overlapping practical effect, that is a concern the Supreme Court plainly did not share. Instead, the Supreme Court was untroubled by the proposition that in some circumstances, an injunction may "not have any meaningful practical effect independent of [] vacatur." *Monsanto*, 561 U.S. at 166. The Supreme Court's only concern was that, in such circumstances, courts should not issue an unnecessary injunction where vacatur will suffice—as here. Indeed, to the extent vacatur and injunctions may in some circumstances have similar "meaningful practical effect," *id.*, that overlap represents the will of Congress in specifying the appropriate statutory remedy for unlawful agency action. *See* 5 U.S.C. § 706(2)(A).

Finally, far from suggesting, as Defendants do, that courts should balk at granting the remedy of vacatur that Congress specified because it may share some practical effect with injunctive relief, *Monsanto* actually acknowledged that—as Plaintiffs have explained—an agency may not simply reinstate the same decision that a court has vacated without first correcting the legal errors that led to vacatur—which is exactly what NNSA has done here. Indeed, in *Monsanto* the Supreme Court recognized that, although the injunction against any future *partial* deregulation of RRA was improper, "the vacatur of APHIS's deregulation decision means that virtually no RRA can be grown or sold until such time as a new deregulation decision

is in place." *Id.* at 164. Moreover, the Supreme Court also recognized that any new deregulation decision, whether total or partial, would have to comply with NEPA by furnishing a new environmental analysis. *See id.* at 159 (recognizing that if the agency wished to "pursue a *partial* deregulation," it must to do so "on the basis of a new EA"); *see also id.* at 161 (holding that an injunction against a partial deregulation was inappropriate because "there was no need to stop the agency from effecting a partial deregulation *in accordance with the procedures established by law*" (emphasis added)). As such, the Supreme Court acknowledged the basic legal principle that once an agency decision has been vacated as a result of a NEPA violation, an agency may not simply resurrect that same decision without first complying with NEPA's requirements.

Subsequent case law confirms the elementary proposition that "[o]bviously, the effect of vacatur is to stop the[] activities" authorized under decisions "the Court has found wanting." *Pub. Emps. for Envtl. Responsibility*, 189 F. Supp. 3d at 4[8]; *see also Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 948, 954–55 (N.D. Cal. 2010) (discussing *Monsanto* to find that vacatur, rather than an injunction, was an appropriate and effective means of nullifying the challenged agency deregulation of genetically modified beets and holding that "[b]ased on this vacatur, genetically engineered sugar beets are once again regulated articles" that could not be sold absent a new, lawful agency decision); *High Country Conservation Advocates*, 67 F. Supp. 3d at 1264 n.1 (concluding that *Monsanto* is inapposite where vacatur is a sufficient remedy); *Nat'l Trust for Historic Pres. v. Suazo*, No. CV–13–01973–PHX–DGC, 2015 WL 3613850, at *3 (D. Ariz.

[8] Defendants attempt to discredit this case by suggesting that it inappropriately conflated vacatur and injunctions. However, in light of the Supreme Court's recognition that vacatur and injunctions may on occasion have the same "meaningful practical effect," *Monsanto*, 561 U.S. at 166, Defendants' stated concern is overblown. Additionally, the government did not actually dispute that case's outcome, as it voluntarily withdrew an appeal of that decision. *Pub. Employees for Envtl. Responsibility v. United States Fish & Wildlife Serv.,* No. 16-5224, 2016 WL 6915561, at *1 (D.C. Cir. Oct. 31, 2016).

June 9, 2015) ("The effect of the Court's vacatur, therefore, was to reinstate the previous practice" in place before the court found the agency decision unlawful). Fundamentally, because a vacated decision is "set aside," 5 U.S.C. § 706(2), it has no legal force and an agency may not simply undertake the action authorized under that vacated decision without first complying with the requirements of federal law. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Pena*, No. 3:12–cv–02271–HZ, 2015 WL 1567444, at *8 (D. Or. Apr. 6, 2015) (noting that in the wake of the vacatur of a ROD the agency "must comply with the law moving forward and the Court assumes it will do so").

Accordingly, Defendants' attempt to misrepresent Plaintiffs' Motion as seeking injunctive relief is premised on a severe misreading of relevant case law. Because Plaintiffs did not seek injunctive relief, the Court should reject Defendants' arguments.

IV. Defendants Inexplicably and Inequitably Failed to Utilize Available Procedures for Seeking this Court's Approval for the 2019 AROD.

As Plaintiffs' Motion explained, Defendants failed to avail themselves of readily available options under the Federal Rules of Civil Procedure and relevant case law to achieve the outcome desired in the 2019 AROD. Motion, ECF No. 67, at 8 n.3. Most notably, Defendants could have filed a motion under Rule 59 of the Federal Rules of Civil Procedure requesting that the Court amend its judgment to remand the case to NNSA for additional seismic review without vacating its 2016 AROD. However, Defendants failed to do so. And despite Plaintiffs' Motion noting that this route was open to Defendants upon the Court's entry of judgment, Defendants' Opposition fails to explain why they chose not to do so. Instead, by issuing the 2019 AROD, which as explained above merely resurrects the same decision as the vacated 2016 AROD,

Defendants sought an outcome not countenanced by any statute or case law, effectively advocating for remand without vacatur without asking the Court to issue that relief.[9]

Remand without vacatur is an extraordinary remedy that departs from the ordinary statutory remedy of vacatur under the APA, which a federal agency may request (within the appropriate time limits) when a court finds that an agency has acted unlawfully. Under the appropriate circumstances, where an agency shows that the defects in its decision were not serious and that disruptive consequences would flow from vacatur, a court may remand an unlawful decision to the agency for it to correct its legal violations without vacating the challenged decision. *See Pub. Emps. for Envtl. Responsibility*, 189 F. Supp. 3d at 2 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). However, contrary to Defendants' suggestion that it is somehow Plaintiffs' burden to address these matters, Opposition, ECF No. 68, at 16, because this remedy represents a departure from the statutory scheme, courts have routinely made clear that defendants bear the burden of demonstrating that a departure from the ordinary remedy is appropriate. *See Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) (vacatur places "the burden where it should be—on the losing agency" to convince the court to stay or modify its vacatur order); *Public Employees. for Envtl. Responsibility*, 189 F. Supp. 3d at 3-5 (vacating decision based on agency failure to "make a strong showing" or "compelling case" for remand without vacatur); *Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at

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[9] In a remarkable exercise of the pot calling the kettle black, Defendants fault Plaintiffs for ostensibly failing to file a motion under Rule 59. Opposition, ECF No. 68, at 18–19. However, Plaintiffs were the only party to file *any* motion within the time-frame contemplated by the Federal Rules. *See* Fed. R. Civ. P. 59(e) (providing 28 days from judgment to file a motion).

*13 (N.D. Cal. June 20, 2016) ("[G]iven that vacatur is the presumptive remedy for a procedural violation such as this, it is Defendants' burden to show that vacatur is unwarranted.").

Under the circumstances of this case, when NNSA determined (on the same day the Court issued its ruling) that it wished to continue the activities previously authorized under the vacated 2016 AROD while preparing the Court-ordered analysis of seismic risks, the proper course was for the agency to file a motion with the Court requesting that it amend its judgment to remand the case without vacating the 2016 AROD. Although agencies generally should raise this issue during merits briefing to avoid waiving the argument, the agency could have filed a motion under Rule 59 requesting that the Court alter or amend its judgment. Defendants had 28 days to do so. Fed. R. Civ. P. 59(e). Defendants failed to do so, and thus have waived this issue (and have failed to offer any reason for not seeking the relief they desired).[10]

Defendants' failure to ask this Court for remand without vacatur is totally unexplained, and their arguments come too late. Although Defendants point to ostensible costs associated with delaying construction while preparing the Court-ordered seismic analysis, these are arguments regarding ostensibly "disruptive consequences" that might flow from vacatur, which should have been advanced as part of Defendants' merits briefing or, at the very latest, as part of a Rule 59 motion for remand without vacatur. Having failed to timely raise these arguments, Defendants have waived their ability to raise these purported concerns.

Moreover, any delay associated with the review of seismic data is entirely of Defendants'

[10] Defendants were unquestionably aware that Plaintiffs were concerned with their plan to proceed with activities authorized under the vacated 2016 AROD and had an opportunity to file an appropriate motion. On September 25, 2019, counsel for Plaintiffs contacted counsel for Defendants about NNSA's statements to the media that "construction will continue." Moreover, Plaintiffs filed this Motion on the 27th day after the Court ruled, clearly stating that Defendants could have requested remand without vacatur. Motion, ECF No. 67, at 8 n.3. Yet, despite the clear opportunity to file a timely motion for remand without vacatur, Defendants failed to do so.

own making. The United States Geological Survey ("USGS") seismic hazard maps at issue in this litigation have been available since 2014, and as this Court noted, Plaintiffs have consistently been requesting that NNSA consider that new information since that time. *See* Opinion, ECF No. 63, at 92. Moreover, NNSA stated that it was preparing a new analysis of this information when it issued the now-vacated 2018 SA in May 2018—over a year before the Court issued its ruling. Given that NNSA now states it can produce this analysis within "six to twelve months," Opposition, ECF No. 68, at 5, Defendants have had ample opportunity—over five years—to prepare the analysis that Plaintiffs have long explained NEPA requires, and that the Court has now ordered. Under these circumstances, Defendants' purported equitable arguments about the consequences of a delay in construction must fail, because these injuries are entirely self-inflicted. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (reasoning that no party "can be heard to complain about damage inflicted by its own hand").

CONCLUSION

NNSA's chosen course of resurrecting precisely the same decision that this Court vacated flouts this Court's decision and is unlawful. As an analogy, if the Court of Appeals were to vacate and remand one of this Court's rulings, Plaintiffs are confident that this Court would not simply re-issue the same ruling three days later without correcting errors the appellate court identified. Yet that is exactly what NNSA has done here. For all the reasons described in Plaintiffs' Motion and this reply, the Court should grant Plaintiffs' requested relief.[11]

[11] Although Plaintiffs have not, at this time, sought sanctions, in light of Defendants' disregard for this Court's ruling and misrepresentation of Plaintiffs' Motion and legal principles, sanctions or contempt would be well within the Court's authority. *See Elec. Workers Pension Trust Fund of Local Union 58, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003) ("When a court seeks to enforce its order or supervise its judgment, one weapon in its arsenal is contempt of court.").

Respectfully submitted,

/s/ William N. Lawton
William N. Lawton
D.C. Bar No. 1046604 (admitted *pro hac vice*)
Eubanks & Associates, LLC
1509 16th St. NW
Washington, DC 20036
(202) 556-1243
nick@eubankslegal.com

Counsel for Plaintiffs Oak Ridge Environmental Peace Alliance, Nuclear Watch New Mexico, Ralph Hutchison, Ed Sullivan, Jack Carl Hoefer, and Linda Ewald

Geoffrey H. Fettus
D.C. Bar No. 454076
Natural Resources Defense Council
1152 15th St. NW, Suite 300
Washington, D.C. 20005
(202) 289-2371
gfettus@nrdc.org

Counsel for Plaintiff NRDC