

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KLAMATH-SISKIYOU WILDLANDS
CENTER, CENTER FOR BIOLOGICAL
DIVERSITY, and KLAMATH FOREST
ALLIANCE,

Plaintiffs,

v.

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES
SERVICE, and UNITED STATES FISH
AND WILDLIFE SERVICE,

Defendants,

and

FRUIT GROWERS SUPPLY
COMPANY,

Defendant-Intervenor.

Case No. [13-cv-03717-NC](#)

**ORDER VACATING INCIDENTAL
TAKE PERMITS, BIOLOGICAL
OPINION, AND ENVIRONMENTAL
IMPACT STATEMENT; AND
DENYING MOTION FOR
INJUNCTION**

Re: Dkt. No. 78

Having determined that the defendant agencies improperly issued incidental take permits for two threatened species, the Court now considers the appropriate remedy. Vacatur is the standard remedy for unlawful agency decisions. To be sure, the Ninth Circuit does not mandate that district courts mechanically vacate an agency's action after a finding that it violates the Administrative Procedure Act. Yet courts within this circuit rarely remand without vacatur. Here, the key issue is whether or not this Court should vacate incidental take permits that violate the Endangered Species Act, when vacatur
Case No.: [13-cv-03717-NC](#)

1 would also result in temporarily putting an end to permits for conservation efforts that
2 benefit the threatened species.

3 At summary judgment, plaintiffs Klamath-Siskiyou Wildlands Center, Center for
4 Biological Diversity, and Klamath Forest Alliance (collectively “KS Wild”) alleged that
5 defendants U.S. Fish and Wildlife Service and National Marine Fisheries Service
6 (collectively “the Services”) improperly issued 50-year incidental take permits to
7 defendant-intervenor Fruit Growers Supply Company to take two “threatened” species: the
8 northern spotted owl and the Southern Oregon/Northern California Coast coho salmon
9 (“coho salmon”).¹ KS Wild also alleged multiple violations of the Endangered Species
10 Act and the National Environmental Policy Act.

11 On April 3, 2015, this Court granted in part KS Wild’s motion for summary
12 judgment against the Services and Fruit Growers. It held that the Services acted arbitrarily
13 and capriciously, in violation of the Administrative Procedure Act, by issuing two deficient
14 incidental take permits, failing to make a valid no-jeopardy finding in one of the biological
15 opinions, and insufficiently analyzing the cumulative impacts of its proposed action in the
16 Final Environmental Impact Statement. *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic*
17 *& Atmospheric Admin.*, No. 13-cv-03717 NC, 2015 WL 1738309, at *27 (N.D. Cal. Apr.
18 3, 2015) (summary judgment order).

19 KS Wild now moves the Court to vacate the incidental take permits, the NMFS
20 biological opinion, the NMFS incidental take statement, the Final Environmental Impact
21 Statement, and the records of decision on remand. Dkt. No. 78. In addition, KS Wild
22 seeks to enjoin Fruit Growers from logging under state-approved harvesting plans. *Id.* at
23 16-19.

24 For the reasons explained below, the Court GRANTS KS Wild’s motion to vacate
25

26 ¹ NMFS determined that the Southern Oregon/Northern California Coast Evolutionarily
27 Significant Unit (ESU) of coho salmon (*Oncorhynchus kisutch*) is a “species” under the
28 ESA. 62 Fed.Reg. 24588 (May 6, 1997). An ESU is a “distinct population segment.” 62
Fed.Reg. at 24588. There are many distinct population segments of coho salmon. But for
the purposes of this Order, the term “coho salmon” will refer only to the Southern
Oregon/Northern California Coast ESU of coho salmon.

1 the incidental take permits, the NMFS biological opinion, the NMFS incidental take
2 statement, and the Final Environmental Impact Statement, finding that the defendants'
3 assertions of disruptive consequences and harm to the threatened species do not outweigh
4 the seriousness of the agency's errors that this Court found. But the Court DENIES KS
5 Wild's motion to vacate the records of decision. The Court also DENIES KS Wild's
6 request for an injunction against the Services and Fruit Growers. Finally, the Court
7 DISMISSES KS Wild's third claim for relief because of its failure to brief the issue at
8 summary judgment.

9 **I. BACKGROUND**

10 In 2009, Fruit Growers submitted an application to FWS for authorization under
11 ESA § 10 to take northern spotted owls on the company's lands in connection with timber
12 harvest operations. *Klamath-Siskiyou Wildlands Ctr.*, 2015 WL 1738309, at *5. Fruit
13 Growers also submitted an incidental take permit application to NMFS for authorization to
14 take coho salmon. *Id.* FWS and NMFS eventually issued incidental take permits to Fruit
15 Growers, allowing the company to take northern spotted owls and coho salmon during the
16 course of its timber harvest activities. The permits last for 50 years. *Id.* Because Fruit
17 Growers intended to take the northern spotted owl and the coho salmon, it developed a
18 Habitat Conservation Plan that presented separate strategies on how to conserve each
19 species.

20 To further evaluate the Plan and the incidental take permit application, Fruit
21 Growers and the Services prepared a Draft Environmental Impact Statement as required by
22 NEPA. *Id.* at *6 (citing 42 U.S.C. § 4321 *et seq.*). The Services subsequently published
23 the Final Environmental Impact Statement. *Id.* During this time, both FWS and NMFS
24 assessed whether issuing an incidental take permit to Fruit Growers would likely
25 jeopardize the continued existence of an endangered or threatened species, or destroy or
26 adversely modify designated critical habitat. *See* ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).
27 In making this determination, FWS and NMFS issued biological opinions. Both concluded
28 that the proposed permit would not jeopardize the northern spotted owl or coho salmon or

1 adversely modify the species' critical habitat. *Klamath-Siskiyou Wildlands Ctr.*, 2015 WL
2 1738309, at *7.

3 KS Wild challenged the incidental take permits, the associated biological opinions,
4 and the Final Environmental Impact Statement. This Court agreed in part with KS Wild
5 that the Services violated the Administrative Procedure Act, the Endangered Species Act,
6 and the National Environmental Policy Act. It granted KS Wild's summary judgment
7 motion and invalidated the incidental take permits issued by the Services, the biological
8 opinion issued by NMFS, and the Final Environmental Impact Statement. *Id.* at *27. The
9 Court also invalidated the NMFS incidental take statement concerning coho salmon. *Id.* at
10 *20 ("[T]he Court invalidates NMFS's biological opinion as well as the accompanying
11 incidental take statement.").

12 In response to the Court's order for additional briefing as to potential remedies, KS
13 Wild now asks the Court to vacate the incidental take permits, the NMFS biological
14 opinion, the Final Environmental Impact Statement, and the records of decision on
15 remand. Dkt. No. 78. Additionally, KS Wild seeks to enjoin Fruit Growers from logging
16 under any state agency-approved harvesting plans. KS Wild also seeks an order directing
17 the Services to determine how much take has occurred under the now-invalid permits and
18 whether Fruit Growers must provide post-termination mitigation to offset impacts of that
19 take. *Id.* at 16-19.

20 The Services and Fruit Growers oppose KS Wild's requested remedies.
21 Specifically, defendants argue that the Court should remand the Services' actions to the
22 agencies without vacatur because the disruptive consequences of vacatur outweigh the
23 seriousness of the errors the Court identified at summary judgment. Dkt. Nos. 81, 84.
24 Finally, KS Wild and defendants disagree over whether KS Wild waived claim 3 of its
25 complaint because of KS Wild's failure to brief the issue at summary judgment. Both
26 sides request a favorable summary judgment order as to this claim.

27 This Court has jurisdiction under 28 U.S.C. § 1331. Plaintiffs, defendants, and
28 defendant-intervenors consented to the jurisdiction of a magistrate judge under 28 U.S.C.

1 § 636(c). Dkt. Nos. 10, 18, 28.

2 **II. DISCUSSION**

3 **A. Vacatur**

4 When a court finds an agency's decision unlawful under the Administrative
 5 Procedures Act, vacatur is the standard remedy. *See* 5 U.S.C. § 706(2)(A) ("The
 6 reviewing court shall . . . set aside agency action, findings, and conclusions found to be . . .
 7 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]");
 8 *Se. Alaska Conserv. Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir.
 9 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside'
 10 the action. In other words, a court should vacate the agency's action and remand to the
 11 agency to act in compliance with its statutory obligations.") (internal quotation marks and
 12 citation omitted), *rev'd on other grounds sub nom. Coeur Alaska v. Se. Alaska Conserv.*
 13 *Council*, 557 U.S. 261 (2009); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405
 14 (9th Cir. 1995) ("Ordinarily when a regulation is not promulgated in compliance with the
 15 APA, the regulation is invalid."); *accord Am. Bioscience, Inc. v. Thompson*, 269 F.3d
 16 1077, 1084 (D.C. Cir. 2001) (relief for APA error "normally will be a vacatur of the
 17 agency's order"); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010) ("default
 18 remedy is to set aside [agency] action" taken in violation of NEPA).

19 The Ninth Circuit, however, does not mandate vacatur. *Cal. Communities Against*
 20 *Toxics v. U.S. Env'tl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) ("A
 21 flawed rule need not be vacated."). Indeed, "[w]hen equity demands, [a flawed action] can
 22 be left in place while the agency follows the necessary procedures to correct its action."
 23 *Id.* (quoting *Idaho Farm*, 58 F.3d at 1405 (internal quotation marks omitted)).

24 In these instances, to determine whether it should vacate an agency decision, a court
 25 must look at two factors: (1) the seriousness of an agency's errors and (2) the disruptive
 26 consequences that would result from vacatur. *Cal. Communities Against Toxics*, 688 F.3d
 27 at 992 ("Whether agency action should be vacated depends on how serious the agency's
 28 errors are and the disruptive consequences of an interim change that may itself be

1 changed.”) (internal quotation marks omitted) (quoting *Allied-Signal, Inc. v. U.S. Nuclear*
2 *Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Put differently, “courts may
3 decline to vacate agency decisions when vacatur would cause serious and irremediable
4 harms that significantly outweigh the magnitude of the agency’s error.” *League of*
5 *Wilderness Defenders/Blue Mts. Biodiversity Project v. U.S. Forest Serv.*, 2012 U.S. Dist.
6 LEXIS 190899, at *6 (D. Or. Dec. 10, 2012). In balancing these factors in ESA cases,
7 courts will tip the scales in favor of the endangered species under the “institutionalized
8 caution” mandate. *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (citation
9 and quotation omitted); *see also Native Fish Soc’y & McKenzie Flyfishers v. Nat’l Marine*
10 *Fisheries Serv.*, 2014 U.S. Dist. LEXIS 33365, at *8 (D. Or. Mar. 14, 2014) (noting
11 “institutionalized caution” mandate in weighing *Allied-Signal* factors).

12 But courts in the Ninth Circuit decline vacatur only in rare circumstances. *See*
13 *Humane Soc’y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (“In rare circumstances,
14 when we deem it advisable that the agency action remain in force until the action can be
15 reconsidered or replaced, we will remand without vacating the agency’s action.”); *Ctr. for*
16 *Food Safety v. Vilsack*, No. 08-cv-00484 JSW, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010)
17 (“[T]he Ninth Circuit has only found remand without vacatur warranted by equity concerns
18 in limited circumstances, namely serious irreparable environmental injury.”).

19 In *California Communities Against Toxics*, for example, the Ninth Circuit found
20 that the Environmental Protection Agency violated the APA’s notice-and-comment
21 requirements during the rule-making process when it failed to disclose certain documents
22 in the electronic docket concerning a soon-to-be completed power plant. *Cal.*
23 *Communities Against Toxics*, 688 F.3d at 993. Nevertheless, the court found the technical
24 error harmless. *Id.* And while it also did find substantive errors, the court balanced these
25 errors with the “significant public harms” that would result from vacatur: community
26 blackouts, efforts on the part of the California legislature to pass a new bill, and economic
27 disaster from stopping construction of a “billion-dollar venture employing 350 workers.”
28 *Id.* at 994. Applying the *Allied-Signal* standard, the Ninth Circuit declined to vacate the

1 agency decision and permitted the plant's construction to continue while the EPA made
2 corrections on remand. *Id.*

3 The *Allied-Signal* approach also accords with earlier Ninth Circuit cases involving
4 remand without vacatur. *Idaho Farm*, for instance, involved FWS's proposal listing the
5 Bruneau Hot Springs Snail, a rare snail species in southwest Idaho, as an endangered
6 species under the ESA. 58 F.3d at 1395. Yet FWS failed to provide the public with an
7 opportunity to review a provisional report concerning the snails before the comment
8 period's close. *Id.* at 1402-04. Even though the Ninth Circuit recognized the procedural
9 error, it held that the district court erred in vacating the rule listing the snail as endangered:
10 vacatur risked contributing to "the potential extinction of an animal species." *Id.* at 1405.
11 Moreover, the agency's error was unlikely to alter the agency's final decision. *Id.* at 1405-
12 06.

13 Such cases highlight the "significant disparity between the agencies' relatively
14 minor errors, on the one hand, and the damage that vacatur could cause the very purpose of
15 the underlying statutes, on the other." *League of Wilderness Defenders*, 2012 U.S. Dist.
16 LEXIS 190899, at *9.

17 Here, KS Wild contends that this Court should apply the default vacatur remedy.
18 The Services and Fruit Growers disagree. In particular, defendants argue that vacating the
19 FWS incidental take permit, the NMFS incidental take permit, the NMFS biological
20 opinion, the NMFS incidental take statement, and the Final Environmental Impact
21 Statement would disrupt conservation efforts and negate any benefits that would accrue to
22 the northern spotted owl and the coho salmon under the Habitat Conservation Plan.

23 In determining whether to vacate the above documents, the Court applies the two-
24 part *Allied-Signal* test.

25 1. Seriousness of Agency's Errors

26 According to the Services, the errors this Court identified in its summary judgment
27 order are "not so serious that reworked incidental take permits and associated documents
28 are 'unlikely' following remand." Dkt. No. 84 at 3 (quoting *Fox Television Stations, Inc.*

1 v. *F.C.C.*, 280 F.3d 1027, 1049 (D.C. Cir.) (vacatur inappropriate where court “cannot say
2 it is unlikely the [agency] will be able to justify a future decision”). In particular, the
3 Services highlight this Court’s criticism of the way the Services calculated the owl circles’
4 conservation values. See *Klamath-Siskiyou Wildlands Ctr.*, 2015 WL 1738309, at *13
5 (“[T]he record leaves open the possibility that the conservation values for the highest value
6 owl circles are what they are regardless of whether Conservation Support Areas are ever
7 created in those circles by Fruit Growers.”). The Services contend that on remand, FWS
8 could show that it reached the conservation values for the highest value owl circles “only
9 because Fruit Growers is preserving nearby conservation support areas.” Dkt. No. 84 at 4.

10 As to coho salmon, the Services also state that NMFS’s failure to perform a short-
11 term-impact analysis should not lead the Court to conclude that “these documents are
12 flawed beyond repair,” *id.*; rather, because NFMS “may be able readily to cure [the] defect
13 in its explanation of a decision” the Court should weigh the first *Allied-Signal* factor in
14 NMFS’s favor, *id.* (quoting *Heartland Reg’l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198
15 (D.C. Cir. 2009)).

16 Likewise, Fruit Growers states that “all the errors identified by the Court can be
17 corrected during remand” and stressed its commitment to remedy the legal deficiencies.
18 Dkt. No. 81 at 4.

19 Despite this commitment, the Court does not find defendants’ views persuasive.
20 The Court’s summary judgment order details the flaws in the incidental take permits, the
21 NMFS biological opinion and accompanying incidental take statement, and the Final
22 Environmental Impact Statement; therefore, the Court need not repeat its analysis here.
23 Nonetheless, the Court underscores three examples that demonstrate the seriousness of the
24 Services’ errors.

25 First, FWS violated the ESA by factoring the conservation efforts of non-permit-
26 applicant U.S. Forest Service into its § 10 analysis of applicant Fruit Growers’ mitigation
27 efforts. ESA § 10(a)(2)(B)(ii), 16 U.S.C. 1539(a)(2)(B)(ii) (“*the applicant will ...*
28 *minimize and mitigate the impacts of such taking*”) (emphasis added). Specifically, the

1 Court examined the conservation values of high value owl circles and found that “[f]or 17
2 of the 24 owl circles supported by Conservation Support Areas, Fruit Growers’
3 Conservation Support Areas make up less than 15 percent of the total owl circle.”
4 *Klamath-Siskiyou Wildlands Ctr.*, 2015 WL 1738309, at *13. Yet FWS attributed the
5 conservation value of these 3400-acre owl circles—the majority acreage of which are
6 owned by the Forest Service—to Fruit Growers. *Id.*

7 Second, NMFS arbitrarily and capriciously issued an incidental take permit to Fruit
8 Growers to take coho salmon. NMFS found Fruit Growers could adequately minimize and
9 mitigate the impacts likely to result from take and concluded that the benefits of Fruit
10 Growers’ mitigation efforts would occur over the permit’s 50-year term. But NMFS failed
11 to evaluate the proposed action’s short-term impacts to coho salmon, which have only a
12 three-year life cycle. *See Pac. Coast Fed’n v. BOR*, 426 F.3d 1082, 1094 (9th Cir. 2005)
13 (rejecting agency’s no-jeopardy conclusion for failure to provide adequate analysis of
14 short-term impacts on endangered coho salmon) (citing *Pac. Coast Fed’n v. NMFS*, 265
15 F.3d 1028, 1037-38 (9th Cir. 2001)); *see also Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917,
16 934-35 (9th Cir. 2008) (finding biological opinion “did not adequately demonstrate that
17 [the impacts of the planned mitigation] would not affect the fishes’ survival and recovery,
18 in light of their short life-cycles and current extremely poor habitat conditions”). Thus, the
19 Court invalidated the NMFS incidental take permit, the NMFS biological opinion, and the
20 NMFS incidental take statement. *Klamath-Siskiyou Wildlands Ctr.*, 2015 WL 1738309, at
21 *19-20.

22 Third, the Services failed to conduct a cumulative effects analysis as to Fruit
23 Growers’ timber harvest projects, use of herbicides, and water withdrawal projects.
24 *Klamath-Siskiyou Wildlands Ctr.*, 2015 WL 1738309, at *21 (“Under this statute, agencies
25 considering ‘major Federal actions significantly affecting the quality of the human
26 environment’ must prepare and issue an environmental impact statement.”) (citing 42
27 U.S.C. § 4332(2)(C); *Nw. Env’tl. Advocates v. NMFS*, 460 F.3d 1125, 1133 (9th Cir.2006)).
28 “This failure to sufficiently catalog past, present, and future projects or actions related to

1 these three areas and how they impact the environment renders the Final Environmental
2 Impact Statement invalid.” *Id.* at *27.

3 These errors involve more than mere technical or procedural formalities that the
4 Services can easily cure. Instead, the substantive errors under the ESA include, among
5 others, the very factors FWS chose to use as the basis for its conservation-value
6 calculations for 82 owl circles. *Cf., e.g., Cal. Communities Against Toxics*, 688 F.3d at
7 993 (finding procedural error harmless); *Idaho Farm*, 58 F.3d at 1402-04 (finding
8 procedural error involved failure to provide public review of a report). And the Court
9 cannot simply accept defendants’ reassurances that they can readily cure these errors.
10 *League of Wilderness Defenders*, 2012 U.S. Dist. LEXIS 190899, at *9 (“The [agency]
11 cannot use declarations before this Court to relitigate the summary judgment motions or to
12 substitute for the missing analysis in the [flawed agency action].”). As to the NEPA
13 issues, the Services failed to perform a cumulative impacts analysis—an integral part of
14 fulfilling NEPA’s purpose—of its proposed actions in three different areas. “[A] failure to
15 analyze cumulative impacts will rarely—if ever—be so minor an error as to satisfy this
16 first Allied-Signal factor.” *Id.* at *10.

17 In light of the above, the Court finds that the first *Allied-Signal* factor tips towards
18 vacatur.

19 **2. Disruptive Consequences**

20 The Services and Fruit Growers identify a series of harms to the northern spotted
21 owl and coho salmon that would result from vacatur. Ultimately, according to the
22 Services, “it is vacatur, not the incidental take permits, which threatens conservation of
23 protected species.” Dkt. No. 84 at 8. Specifically, as to the northern spotted owl, the
24 Services argue that vacatur would “effectively nullify the underlying [Habitat
25 Conservation Plan], handicapping local and regional efforts to conserve the species.” *Id.* at
26 5. Among the benefits to the northern spotted owl under the Plan that would “vanish,” the
27 Services point to the Plan’s requirement that Fruit Growers preserve 24 Conservation
28 Support Areas, preserve vegetation standards, and help develop a barred owl control study.

1 *Id.* at 5-6 (citing Williams Decl.).

2 But these assertions of disruptive consequences, even if taken as true, do not
3 outweigh the seriousness of FWS’s errors. For instance, the Services emphasize Fruit
4 Growers’ efforts to preserve 24 Conservation Support Areas. But as explained in the
5 summary judgment order, it is not clear whether those efforts actually minimize and
6 mitigate the taking allowed under the permit to the maximum extent practicable. *Klamath-*
7 *Siskiyou Wildlands Ctr.*, 2015 WL 1738309, at *10-14. Indeed, according to the Services’
8 own evidence, 12 northern spotted owls—nearly 15 percent of the number of owls FWS
9 allowed Fruit Growers to take—were assumed to have already been taken as a result of
10 covered activities under a now invalid incidental take permit. *See* Dkt. Nos. 85-1 at 3
11 (identifying 6 takes in 2014 monitoring report); 85-2 at 2 (identifying 6 takes in 2015
12 monitoring report); *see also* AR 40109 (incidental take permit allowing take of 83
13 individual northern spotted owls). Balancing the harm that would result from vacatur with
14 the harm that would result from covered activities under a permit that does not satisfy ESA
15 § 10, the Court finds that the scales tip in favor of vacatur.

16 Additionally, the Services’ own evidence refutes its assertions that vacatur would
17 disrupt conservation efforts. For instance, on the one hand, the Services argue that “Fruit
18 Growers has agreed to remove barred owls . . . after locating barred owls through surveys
19 which have already begun.” *Id.* at 6 (citing Williams Decl.) On the other, they present
20 two annual monitoring reports stating that Fruit Growers did not complete barred owl
21 surveys in 2013 and 2014. Dkt. Nos. 85-1 at 3 (March 31, 2014 report); 85-2 at 2 (March
22 31, 2015 report); *see also* AR 40109 (incidental take permit stating date effective as
23 November 27, 2012). No disruption can come to a process that has either not started or
24 has just barely begun. *Cf. Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97
25 (D.C. Cir. 2002) (remanding without vacatur because “the egg has been scrambled and
26 there is no apparent way to restore the status quo ante”).

27 As to the coho salmon, the Court acknowledges that the Plan includes actions that
28 benefit the species. For instance, the Plan does include efforts to implement road

1 management measures to prevent and control erosion production and sediment delivery to
2 streams. *Klamath-Siskiyou Wildlands Ctr.*, 2015 WL 1738309, at *21. But the
3 consequences of ceasing these beneficial conservation efforts does not outweigh the
4 seriousness of NMFS’s error—its failure to consider coho salmon’s three-year life cycle in
5 its § 10 finding. The fact remains that NMFS has yet to make a valid finding that Fruit
6 Growers’ actions are “not likely to jeopardize the continued existence of the listed fish or
7 result in destruction or adverse modification of critical habitat.” *Ctr. for Biological*, 698
8 F.3d at 1127 (citing ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2)). At this stage, the Court simply
9 cannot predict whether Fruit Growers’ long-term beneficial conservation efforts will
10 effectively mitigate the taking of coho salmon allowed under the 50-year incidental take
11 permit.

12 Aside from harm to the two species, defendants also assert that vacatur would create
13 economic harms to Fruit Growers and the greater Siskiyou region. For example, Fruit
14 Growers discusses a recent fire that consumed 13,500 acres of Fruit Growers’ property
15 located within land covered by the Habitat Conservation Plan. Dkt. No. 81 at 5. Fruit
16 Growers asserts that the Court would jeopardize Fruit Growers’ efforts to reforest and
17 restore the damaged land—using a technique known as salvage harvest—if it vacated the
18 FWS incidental take permit, and result in millions of dollars in economic loss to the
19 company. *Id.* at 8. This assertion, however, is undermined by Fruit Growers’ own
20 assertion that without the Plan’s incentives, Fruit Growers would immediately schedule for
21 timber harvest many Conservation Support Areas “because they are economically valuable
22 and would be legally available” under state law. *Id.* at 7.

23 Still, Fruit Growers also asserts that the Siskiyou County economy would suffer just
24 as much from vacatur. For instance, Fruit Growers states that “[c]eased salvage operations
25 . . . would result in substantial impacts to Fruit Growers’ customers (e.g. mills) . . . [as well
26 as to] logging contractors and trucking companies” that depend on Fruit Growers’
27 operations. *Id.* at 8. Yet Fruit Growers’ assertion does not rise to the concrete, foreseeable
28 economic harm like that found in *California Communities Against Toxics*, where vacatur

1 meant halting construction of a power plant that would lead to 350 layoffs, blackouts to the
2 community, and additional action from the California legislature. 688 F.3d at 994.

3 In short, the Court finds that despite the asserted disruptive consequences, the scale
4 still tips in favor of vacatur in light of the seriousness of the errors the Services committed.
5 Hitting the pause button on the Plan while the Services correct their errors may lead to
6 harms; but the Court does not find that these harms constitute “serious and irremediable
7 harms that significantly outweigh the magnitude of the agency’s error.” *See League of*
8 *Wilderness Defenders*, 2012 U.S. Dist. LEXIS 190899, at *6. And while Fruit Growers
9 emphasizes that vacatur would provide it with an economic incentive to harvest timber in
10 certain areas with northern spotted owls, the Court believes vacatur would also provide
11 strong incentives to Fruit Growers and the Services to quickly correct the errors the Court
12 identified at summary judgment.

13 Accordingly, the Court VACATES the Services’ two incidental take permits, the
14 NMFS biological opinion, the NMFS incidental take statement, and the Final
15 Environmental Impact Statement.

16 As to the records of decision, the Court will not vacate those documents. KS Wild
17 cites *League of Wilderness Defenders v. Pena*, 2015 WL 1567444, at *4 (D. Or. April 6,
18 2015) for the proposition that “[a]bsent a lawful [environmental impact statement], the
19 Services’ decisionmaking [sic] in the records of decision lacks a rational basis and is
20 inherently arbitrary and capricious.” Dkt. No. 78 at 14. The *Pena* decision, however,
21 involved a prior summary judgment order finding that the Forest Services acted arbitrarily
22 and capriciously in issuing both the record of decision and environmental impact
23 statement. *Pena*, 2015 WL 1567444, at *1. Conversely, in this case, while the Court did
24 find the Final Environmental Impact Statement invalid, the Court made no such finding as
25 to the records of decision. In fact, none of the parties made an issue of the records of
26 decision at summary judgment. Because this Court has not found the Services’ issuing of
27 the records of decision arbitrary and capricious, the Court will DENY KS Wild’s request
28 to vacate those documents.

1 **B. Injunctive Relief**

2 A court’s decision to issue an injunction constitutes an unwarranted “extraordinary
3 remedy” if a less drastic remedy, such as vacatur, could sufficiently redress plaintiff’s
4 injury. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). Thus, under
5 the traditional test, “[a] plaintiff seeking a preliminary injunction must establish that he is
6 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
7 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
8 the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *see also Alliance for the Wild*
9 *Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (finding plaintiff need not
10 establish likelihood of success on the merits if plaintiff can demonstrate “serious
11 questions” going to the merits combined with a balance of hardships that tips strongly in
12 their favor). Where injury to the environment, however, is “sufficiently likely . . . the
13 balance of harms will usually favor the issuance of an injunction to protect the
14 environment.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

15 And in cases involving the ESA, the balance of hardships tilts in favor of injunctive
16 relief even further than in other matters involving environmental harm. *Nat’l Wildlife*
17 *Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994). Indeed, “[i]n
18 cases involving the ESA, Congress removed from the courts their traditional equitable
19 discretion in injunction proceedings of balancing the parties’ competing interests.” *Id.* at
20 1511(citations omitted). “In Congress’s view, projects that jeopardize the continued
21 existence of endangered species threaten incalculable harm; accordingly, it decided that the
22 balance of hardships and the public interest tip heavily in favor of endangered species” and
23 this court “may not use equity’s scales to strike a different balance.” *Sierra Club*, 816 F.2d
24 at 1383.

25 Here, KS Wild seeks to enjoin Fruit Growers from logging under any Timber
26 Harvesting Plan approved on the basis of the incidental take permits this Court invalidated.
27 Dkt. No. 78 at 18. Fruit Growers submitted these Timber Harvest Plans to California’s
28 Department of Forestry and Fire Protection. Dkt. No. 79-1. According to defendants, KS

1 Wild fails to demonstrate that irreparable harm would result from logging under these
2 plans absent an injunction. Dkt. No. 81 at 10. Without establishing the likelihood of
3 irreparable harm, the Court will not issue an injunction. *Becker v. Wells Fargo Bank, NA,*
4 *Inc.*, 2012 U.S. Dist. LEXIS 152369, at *12-15 (E.D. Cal. Oct. 22, 2012) (analyzing only
5 irreparable-harm factor in recommending district court deny injunction motion), *adopted*
6 *by Becker v. Wells Fargo Bank, NA, Inc.*, 2013 U.S. Dist. LEXIS 4177, at *2 (E.D. Cal.
7 Jan. 10, 2013)).

8 The Court agrees with defendants. To begin with, the Court notes that it upheld
9 FWS's no-jeopardy finding as to the northern spotted owl. *See Klamath-Siskiyou*
10 *Wildlands Ctr.*, 2015 WL 1738309, at *17; *cf. Sierra Club*, 816 F.2d at 1383 (“projects
11 that jeopardize the continued existence of endangered species threaten incalculable harm”).
12 Thus, while defendants' evidence show logging resulted in the taking of 12 owls, KS Wild
13 has not established that logging under the Timber Harvest Plans would jeopardize the
14 northern spotted owl's continued existence. Moreover, “[n]o court has held that as a
15 matter of law, the taking of a single animal or egg, no matter the circumstance, constitutes
16 irreparable harm.” *Wild Equity Inst. v. City & Cnty. of San Francisco*, No. 11-cv-00958
17 SI, 2011 WL 5975029, at *7 (N.D. Cal. Nov. 29, 2011) (citations omitted); *see also*
18 *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1209 (D. Mont. 2009) (“[T]o
19 consider any taking of a listed species as irreparable harm would produce an irrational
20 result” because the ESA allows for incidental take permits.). To be sure, this Court did
21 find NMFS's no-jeopardy finding invalid as to coho salmon. *Klamath-Siskiyou Wildlands*
22 *Ctr.*, 2015 WL 1738309, at *20. Nonetheless, KS Wild has not shown how logging
23 specifically under the state-approved Timber Harvest Plans would jeopardize the coho
24 salmon's continued existence.

25 In addition to seeking to enjoin logging by Fruit Growers under the Timber Harvest
26 Plans, KS Wild also seeks injunctive relief “ordering the Services to determine how much
27 take of northern spotted owls and coho salmon has occurred under the unlawfully issued
28 permits, and to determine whether [Fruit Growers] must provide post-termination

1 mitigation to offset the impacts of that take.” Dkt. No. 78 at 18-19. Yet other than two
2 sections of Wildlife and Fisheries regulations that say nothing about post-termination
3 mitigation pending a court’s remand of a habitat conservation plan, *id.* (citing 50 C.F.R.
4 § 17.32 (“Permits—General”), 50 C.F.R. § 222.301 (“General requirements”)), KS Wild
5 offers no other supporting authority that would convince this Court to grant its distinct
6 request.

7 Accordingly, the Court DENIES KS Wild’s motion for injunctive relief.

8 **C. Claim 3 Waiver**

9 In their cross-motion for summary judgment, the Services contend that KS Wild
10 waived claim 3 of their complaint by failing to brief that claim at summary judgment. Dkt.
11 No. 63 at 50. According to KS Wild’s third claim, FWS violated ESA § 7 by failing to
12 prepare a legally sufficient incidental take statement. Dkt. No. 1 at 28. The Services,
13 however, did not address the actual merits of the incidental take statements’ validity at
14 summary judgment; rather, the Services stated that KS Wild’s failure to brief the issue was
15 sufficient for the Court to grant summary judgment for the Services as to the third claim.
16 *Id.* In their remedy brief, the Services continue to argue that KS Wild’s waiver is
17 “equivalent to a grant of summary judgment for Defendants, since a waived claim, by
18 definition, cannot satisfy the APA’s demanding burden” imposed on KS Wild to
19 demonstrate that the FWS’s action was arbitrary and capricious. Dkt. No. 84 at 15.

20 In response, KS Wild argues that because of the “legal infirmities that are plain on
21 the face of the incidental take statement,” the Court should enter summary judgment on KS
22 Wild’s third claim. Dkt. No. 78 at 20. According to KS Wild, FWS’s reliance on an
23 arbitrary and capricious incidental take permit and Habitat Conservation Plan makes the
24 incidental take statement that it issued “necessarily arbitrary and capricious” as well. *Id.*
25 Furthermore, KS Wild points out that the Court would err in entering summary judgment
26 for FWS; the Services failed to establish that the incidental take statement is valid as a
27 matter of law with “one cursory paragraph” that does not discuss claim 3’s merits. *Id.*

28 The Court finds that KS Wild’s failure to raise the third claim on their summary

1 judgment motion constitutes a waiver. *See, e.g., USA Petroleum Co. v. Atl. Richfield Co.*,
2 13 F.3d 1276, 1284 (9th Cir. 1994) (“It is a general rule that a party cannot revisit theories
3 that it raises but abandons at summary judgment.”). Still, KS Wild’s waiver does not
4 absolve defendants of their obligation to “articulate a rational connection between the facts
5 found and the conclusions made” that resulted in FWS’s issuing an incidental take
6 statement. *See Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (citing
7 *U.S. v. Louisiana-Pac. Corp.*, 967 F.2d 1372, 1376 (9th Cir. 1992));

8 Thus, while this Court will not grant summary judgment to the Services as to KS
9 Wild’s third claim, it DISMISSES KS Wild’s third claim for failure to prosecute. Fed. R.
10 Civ. P. 41(b); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 689 (9th Cir.
11 2005) (“the consensus among our sister circuits, with which we agree, is that courts may
12 dismiss under Rule 41(b) sua sponte”) (citing *Olsen v. Mapes*, 333 F.3d 1199, 1204 n. 3
13 (10th Cir. 2003) (“[T]he Rule has long been interpreted to permit courts to dismiss actions
14 sua sponte for a plaintiff’s failure to prosecute or comply with the rules of civil procedure
15 or court’s orders.”)); *see also* Rutter Group Cal Prac. Guide Fed. Civ. Pro. Before Trial Ch.
16 16-H (“Although Rule 41 nominally requires a motion by defendant, the court possesses
17 inherent power to dismiss sua sponte, without notice or hearing, “to achieve the orderly
18 and expeditious disposition of cases.”) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-
19 632 (1962)).

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United States District Court
Northern District of California

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III. CONCLUSION

Based on the discussion above, the Court VACATES the northern-spotted-owl incidental take permit issued by FWS, the coho-salmon incidental take permit issued by NMFS, the coho-salmon biological opinion issued by NMFS, the coho-salmon incidental take statement issued by NMFS, and the Final Environmental Impact Statement issued by both FWS and NMFS. The Court finds that the seriousness of the Services' errors significantly outweighs the asserted disruptive consequences that would result from vacatur. This case is therefore REMANDED to the Fish and Wildlife Service and the National Marine Fisheries Service for further proceedings consistent with this Order.

The Court, however, DENIES KS Wild's motion to vacate the records of decision. The Court also DENIES KS Wild's request for an injunction against the Services and Fruit Growers; in particular, KS Wild has not satisfied the irreparable-harm requirement. Finally, the Court DISMISSES KS Wild's third claim because of its failure to brief the issue at summary judgment.

IT IS SO ORDERED.

Dated: May 29, 2015



NATHANAEL M. COUSINS
United States Magistrate Judge