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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 STATE OF CALIFORNIA, *et al.*,

13 Plaintiffs,

14 v.

15
16 MICHAEL REGAN¹, as the Administrator of
17 the United States Environmental Protection
18 Agency, *et al.*,

19 Defendants,

20 and

21 STATE OF GEORGIA, *et al.*,

22 Defendant-Intervenors.
23

Case No. 3:20-cv-03005-RS

**DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR VOLUNTARY
REMAND WITHOUT VACATUR**

Date: September 9, 2021
Time: 1:30 pm
Dept: San Francisco Courthouse,
Courtroom 3 – 17th Floor
Judge: Honorable Richard Seeborg

Action Filed: May 1, 2020

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26

27 ¹ EPA Administrator Michael Regan is automatically substituted for Andrew Wheeler, and Jaime
28 Pinkham is automatically substituted for R.D. James, pursuant to Rule 25(d) of the Federal Rules
of Civil Procedure.

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1 **NOTICE OF MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR**

2 **TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that on September 9, 2021, at 1:30 pm, or soon as it may be
4 heard, Defendants United States Environmental Protection Agency (“EPA”), EPA Administrator
5 Michael Regan, United States Army Corps of Engineers (“Corps”), and Acting Assistant
6 Secretary of the Army for Civil Works Jaime Pinkham (“Defendants” or “Agencies”)² will, and
7 hereby do, respectfully move the Court to remand without vacatur the Navigable Waters
8 Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21,
9 2020) (the “NWPR”) to the Agencies and to dismiss Plaintiffs’³ claims against the NWPR. This
10 motion is being made pursuant to Local Rules 7-1 and 7-2 and before the Honorable Judge
11 Richard Seeborg, San Francisco Courthouse, Courtroom 3 – 17th Floor, 450 Golden Gate
12 Avenue, San Francisco, CA 94102.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 Pursuant to Local Rule 7-4, the Agencies hereby offer the following memorandum of
15 points and authorities in support of their motion to remand the NWPR to the Agencies and to
16 dismiss Plaintiffs’ claims against the NWPR. As explained more fully herein, remand is
17 appropriate because the Agencies have completed their review of the NWPR and have decided
18 to commence a new rulemaking to revise or replace the rule. A remand would avoid potentially
19 unnecessary litigation in this Court over aspects of the NWPR that will be reconsidered in a new
20 rulemaking, would conserve the parties’ limited resources, and would best serve the interest of
21 judicial economy. In addition, remand would avoid requiring the Agencies to take positions on

22 _____
23 ² EPA Administrator Michael Regan is automatically substituted for Andrew Wheeler, and Jaime
24 Pinkham is automatically substituted for R.D. James pursuant to Rule 25(d) of the Federal Rules
25 of Civil Procedure.

26 ³ Plaintiffs are the States of California, New York, Connecticut, Illinois, Maine, Maryland,
27 Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont,
28 Washington, and Wisconsin, the Commonwealths of Massachusetts and Virginia, the North
Carolina Department of Environmental Quality, the District of Columbia, and the City of New
York.

1 merits questions that might appear to pre-judge issues that will be reconsidered through notice-
 2 and-comment rulemaking. Through the Agencies’ administrative rulemaking process, all
 3 members of the public, including the parties to this case, will have the opportunity to submit
 4 comments and recommendations. Therefore, the Agencies’ new final rule may resolve or moot
 5 some or all of the claims presented in this litigation. And, if a new rule does not resolve the
 6 parties’ concerns, that new rule could itself be challenged. If a challenge occurs, the parties and
 7 reviewing courts would benefit from reviewing the Agencies’ new final action and new
 8 administrative record, rather than continuing to litigate the NWPR on a record that may be
 9 rendered moot and out of date.

10 The Agencies have conferred with the parties regarding this motion. Plaintiffs have
 11 indicated they will reserve right to oppose the motion in whole or in part, once they have a
 12 chance to review the motion. State Intervenor-Defendants intend to oppose the motion.⁴

13 BACKGROUND

14 I. Statutory and Regulatory Overview

15 The Federal Water Pollution Control Act, commonly known as the Clean Water Act
 16 (“CWA”), seeks “to restore and maintain the chemical, physical, and biological integrity of the
 17 Nation’s waters.” 33 U.S.C. §§ 1251–1388. Among other provisions, the CWA prohibits “the
 18 discharge of any pollutant by any person” without a permit or other authorization, 33 U.S.C.
 19 § 1311(a), to “navigable waters,” defined as “the waters of the United States,” *id.* at § 1362(7).

20 The Corps first promulgated regulations defining “waters of the United States” in the
 21 1970s. Covered waters included only those waters subject to the ebb and flow of the tide or used
 22 “for purposes of interstate or foreign commerce.” 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974).
 23 Thereafter, the Corps broadened its interpretation of the phrase. *See, e.g.*, 42 Fed. Reg. 37,122,
 24 37,144 (July 19, 1977). In the 1980s, the Agencies adopted regulatory definitions substantially
 25

26
 27 ⁴ State Intervenor-Defendants are the States of Georgia, West Virginia, Alabama, Alaska,
 28 Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana,
 Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas,
 Utah, and Wyoming.

1 similar to the 1977 definition; those regulations remained in effect until 2015. *See* 33 C.F.R.
 2 § 328.3(a) (1987) (Corps); 40 C.F.R. § 232.2(q) (1988) (EPA) (collectively, the “1986
 3 Regulations”). Over time, the Agencies refined their application of the 1986 Regulations, as
 4 informed by three Supreme Court decisions. *See, e.g., United States v. Riverside Bayview*
 5 *Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of*
 6 *Eng’rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

7 In 2015, the Agencies revised the regulatory definition of “waters of the United States.”
 8 Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29,
 9 2015) (the “2015 Rule”). In 2019, the Agencies repealed the 2015 Rule and reinstated the prior
 10 regulatory framework. 84 Fed. Reg. 56,626 (Oct. 22, 2019) (“Repeal Rule”). Then, in 2020, the
 11 Agencies again revised the definition of “waters of the United States” with the NWPR.

12 II. The NWPR

13 The NWPR establishes four categories of jurisdictional waters: “(1) The territorial seas
 14 and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and
 15 impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters
 16 (other than waters that are themselves wetlands).” 40 C.F.R. § 120.2 (EPA); 33 C.F.R. § 328.3
 17 (Corps); *see also* 85 Fed. Reg. at 22,273. The NWPR also establishes exclusions and defines the
 18 operative terms used in the regulatory text. 85 Fed. Reg. at 22,270; *see also id.* at 22,340–41
 19 (regulatory text). The NWPR includes “perennial” tributaries that “flow[] continuously year-
 20 round” and “intermittent” tributaries that “flow[] continuously during certain times of the year
 21 and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is
 22 elevated or when snowpack melts).” *Id.* at 22,338. Ephemeral waters (waters that flow in direct
 23 response to precipitation) are categorically excluded from jurisdiction under the NWPR. *Id.* at
 24 22,275-76.

25 The NWPR also includes “adjacent wetlands” as subject to CWA jurisdiction if they
 26 directly abut a jurisdictional water, are “inundated by flooding” from a jurisdictional water
 27 during “a typical year,” are separated from a jurisdictional water “only by a natural berm, bank,
 28 dune, or similar natural feature,” or are separated from a jurisdictional water “only by an

1 artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct
 2 hydrologic surface connection” between the wetlands and the jurisdictional water in a “typical
 3 year.” *Id.* at 22,251. Multiple parties have challenged the NWPR in various district courts.⁵ And
 4 the Agencies have filed motions to remand the NWPR in a number of these matters as well. In
 5 fact, in *S.C. Coastal Conservation League v. Wheeler*, 2:20-cv-01687-BHH (D.S.C.), the Court
 6 recently granted the Agencies’ motion for remand without vacatur while dismissing the
 7 plaintiffs’ claims against the NWPR. *See id.* at ECF No. 147 (July 15, 2021 Order granting the
 8 Agencies’ motion to remand the NWPR without vacatur and further dismissing plaintiffs’
 9 claims) (attached hereto as Ex. 1).

10 III. This Litigation

11 On May 1, 2020, Plaintiffs filed this lawsuit challenging the NWPR. *See* ECF No. 1. On
 12 May 18, 2020, Plaintiffs filed a motion to preliminarily enjoin the NWPR. ECF No. 30. After a
 13 hearing on Plaintiffs’ fully briefed motion for preliminary injunction, the motion was denied on
 14 June 19, 2020. ECF No. 171.

15 On November 23, 2020, Plaintiffs filed their motion for summary judgment, seeking to
 16 vacate the NWPR for alleged violations under the Administrative Procedure Act and Clean
 17 Water Act. ECF No. 214. The Agencies filed an opposition/cross-motion for summary judgment
 18

19 ⁵ *See Conservation L. Found. v. EPA*, No. 1:20-cv-10820-DPW, ECF No. 1 (D. Mass. Apr. 29,
 20 2020); *Waterkeeper All., Inc. v. Wheeler*, No. 3:18-cv-03521-RS, ECF No. 93 (N.D. Cal. Dec.
 21 23, 2020); *Chesapeake Bay Found., Inc. v. Wheeler*, 1:20-cv-01064-RDB, ECF No. 1 (D. Md.
 22 Apr. 27, 2020); *N.M. Cattle Growers’ Ass’n v. EPA*, 1:19-cv-00988-RB-SCY, ECF No. 26
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 24 May 1, 2020); *Wash. Cattlemen’s Ass’n v. EPA*, 2:19-cv-00569-JCC, ECF No. 72 (W.D. Wash.
 25 May 4, 2020); *Murray v. Wheeler*, 1:19-cv-01498-LEK-TWD, ECF No. 17 (N.D.N.Y. May 11,
 26 2020); *Colorado v. EPA*, 1:20-cv-01461-WJM-NRN, ECF No. 1 (D. Colo. May 22, 2020);
 27 *Pasqua Yaqui Tribe v. EPA*, 4:20-cv-00266-RM, ECF No. 1 (D. Ariz. June 22, 2020); *Navajo*
 28 *Nation v. Wheeler*, 2:20-cv-00602-MV-GJF, ECF No. 1 (D.N.M. June 22, 2020); *Puget*
Soundkeeper All. v. EPA, 2:20-cv-00950-JCC, ECF No. 1 (W.D. Wash. June 22, 2020); *Env’t*
Integrity Project v. Wheeler, 1:20-cv-01734-KBJ, ECF No. 1 (D.D.C. June 25, 2020); *S.C.*
Coastal Conservation League v. Wheeler, 2:20-cv-01687-BHH, ECF No. 1 (D.S.C. Apr. 29,
 2020); *Pueblo of Laguna v. Regan*, No. 21-cv-00277-WJ-KK, ECF No. 1 (D.N.M. Mar. 26,
 2021).

1 on January 19, 2021. ECF No. 215. State Intervenor-Defendants filed their opposition/cross-
2 motion for summary judgment on January 22, 2021. ECF No. 220.

3 On January 20, 2021, President Biden issued an Executive Order entitled “Executive
4 Order on Protecting Public Health and the Environment and Restoring Science to Tackle the
5 Climate Crisis.” 86 Fed. Reg. 7,037 (Jan. 25, 2021) (“EO 13990”). In conformance with the
6 Executive Order, the Agencies began reviewing a number of regulations promulgated in the last
7 four years, including the NWPR. In light of this directive, on February 10, 2021, the Agencies
8 filed a motion to stay the proceeding by 60 days and to continue all existing calendared
9 deadlines by approximately 75 days. ECF No. 221. While Plaintiffs filed a response without
10 opposing the motion, the State Intervenor-Defendants filed an opposition to this motion. ECF
11 Nos. 222, 223. Ultimately, on February 17, 2021, the Court granted the motion and stayed the
12 proceeding for 60 days while extending all calendared deadlines by approximately 75 days.
13 ECF No. 229.

14 On April 9, 2021, the Agencies again moved to extend the stay in the proceeding by
15 another 60 days. ECF No. 237. Again, while Plaintiffs did not oppose the motion, State
16 Intervenor-Defendants filed an opposition to the motion. ECF Nos. 238, 239. The Court granted
17 the motion on April 16, 2021. ECF No. 241.

18 On June 10, 2021, the Agencies notified the Court that they had completed their review
19 of the NWPR pursuant to EO 13990 and planned to file a motion to remand the NWPR back to
20 the Agencies without vacatur by no later than July 16, 2021. ECF No. 244. Then on June 14,
21 2021, the Agencies filed a motion to vacate all calendared deadlines and to stay the proceeding
22 (except to resolve the Agencies’ forthcoming motion for remand). ECF No. 245. The Court
23 granted the motion on June 16, 2021. ECF No. 247.

24 **IV. The Agencies’ Review of the NWPR and Decision to Initiate New Rulemaking.**

25 The Agencies promulgated the NWPR to define the phrase “waters of the United
26 States,” which appears in Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7). On
27 January 20, 2021, following the presidential transition, President Biden issued EO 13990. In
28 relevant part, EO 13990 states that it is the policy of the new administration:

1 to listen to the science; to improve public health and protect our environment; to
 2 ensure access to clean air and water; to limit exposure to dangerous chemicals
 3 and pesticides; to hold polluters accountable, including those who
 4 disproportionately harm communities of color and low-income communities; to
 5 reduce greenhouse gas emissions; to bolster resilience to the impacts of climate
 6 change; to restore and expand our national treasures and monuments; and to
 7 prioritize both environmental justice and the creation of the well-paying union
 8 jobs necessary to deliver on these goals.

9 86 Fed. Reg. at 7037. EO 13990 further directed federal agencies to “immediately review and,
 10 as appropriate and consistent with applicable law, take action to address the promulgation of
 11 Federal regulations and other actions during the last 4 years that conflict with these important
 12 national objectives, and to immediately commence work to confront the climate crisis.” *Id.*

13 Over the past few months, the Agencies have been reviewing the NWPR pursuant to EO
 14 13990. As explained in the attached declarations, the Agencies have now reviewed the NWPR
 15 and have decided to initiate new rulemaking to revise the definition of “waters of the United
 16 States.” Ex. 2, Declaration of Radhika Fox (“Fox Decl.”) ¶¶ 7–10; Ex. 3, Declaration of Jaime
 17 Pinkham (“Pinkham Decl.”) ¶¶ 7–10.⁶

18 STANDARD OF REVIEW

19 Agencies have inherent authority to reconsider past decisions and to revise, replace, or
 20 repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC*
 21 *v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass’n v. State*
 22 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Further, an agency’s interpretation of a
 23 statute it administers is not “carved in stone” but must be evaluated “on a continuing basis,” for
 24 example, “in response to . . . a change in administrations.” *Nat’l Cable & Telecomms. Ass’n v.*
 25 *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations
 26 omitted). Voluntary remand is proper where an agency requests a “ ‘remand (without confessing
 27 error) in order to reconsider its previous position.’ ” *United States v. Gonzales & Gonzales*

28 ⁶ The declarations of Radhika Fox and Jaime Pinkham were filed as exhibits in support of the
 Agencies’ motion to remand the NWPR without vacatur filed on June 9, 2021 in *Conservation L.*
Found. v. EPA, No. 1:20-cv-10820-DPW, ECF. Nos. 113-1 and 113-2 (D. Mass. June 9, 2021).
 They are attached hereto as Exs. 2 and 3.

1 *Bonds & Ins. Agency, Inc.*, No. C-09-4029 EMC, 2011 WL 3607790, at *3 (N.D. Cal. Aug. 16,
 2 2011) (quoting *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)); *see also*
 3 *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (“A federal agency may
 4 request remand in order to reconsider its initial action.”).

5 “Voluntary remand is consistent with the principle that “[a]dministrative agencies have
 6 an inherent authority to reconsider their own decisions, since the power to decide in the first
 7 instance carries with it the power to reconsider.” *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of*
 8 *Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002) (citing *Trujillo v. Gen. Elec. Co.*, 621
 9 F.2d 1084, 1086 (10th Cir. 1980)). Voluntary remand also “promotes judicial economy” by
 10 allowing agencies to reconsider prior decisions “without further expenditure of judicial
 11 resources.” *Nat. Res. Def. Council, Inc.*, 275 F. Supp. 2d at 1141 (citing *Ethyl Corp. v. Browner*,
 12 989 F.2d 522, 524 (D.C. Cir. 1993)).

13 In the Ninth Circuit, “[g]enerally, courts only refuse voluntarily requested remand when
 14 the agency’s request is frivolous or made in bad faith.” *Cal. Cmty.*, 688 F.3d at 992. “[I]f the
 15 agency’s concern is substantial and legitimate, a remand is usually appropriate.” *Neighbors*
 16 *Against Bison Slaughter v. Nat’l Park Serv.*, No. CV 19-128-BLG-SPW, 2021 WL 717094, at
 17 *2 (D. Mont. Feb. 5, 2021) (quoting *SKF*, 254 F.3d at 1029); *see also Limnia, Inc. v. Dep’t of*
 18 *Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017) (holding that remand should be granted so long as
 19 “the agency intends to take further action with respect to the original agency decision on
 20 review”). In exercising its discretion to grant remand, a court may consider whether any party
 21 opposing remand would be unduly prejudiced. *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73
 22 (D.D.C. 2015).

23 ARGUMENT

24 Remand is proper in this case because the Agencies have completed their review of the
 25 NWPR and have decided to initiate new rulemaking to define “waters of the United States.” Fox
 26 Decl. ¶¶ 7–10; Pinkham Decl. ¶¶ 7–10. Through this review process, they have identified good
 27 faith, “substantial and legitimate” concerns regarding the NWPR. Moreover, remand would also
 28 conserve judicial resources and would not unduly prejudice the parties.

1 **I. The Agencies Have Legitimate and Good Faith Grounds for Seeking Voluntary**
2 **Remand.**

3 An agency may seek remand because it wishes to revisit its interpretation of the
4 governing statute, the procedures it followed in reaching its decision, or the decision’s
5 relationship to other agency policies. *SKF*, 254 F.3d at 1028–29. The Agencies seek remand for
6 these exact reasons. The Agencies conducted a review of the NWPR. Fox Decl. ¶ 10; Pinkham
7 Decl. ¶ 10. Through that review, the Agencies “have identified substantial concerns with the
8 NWPR and have determined that additional consideration should be given to certain aspects of
9 the NWPR through notice-and-comment rulemaking[.]” *Id.*

10 Voluntary remand is appropriate because the Agencies have identified good faith,
11 “substantial and legitimate concerns” with the NWPR and intend to embark upon a rulemaking
12 process to replace the rule. *SKF*, 254 F.3d at 1029 (“[I]f the agency’s concern [with the
13 challenged action] is substantial and legitimate, a remand is usually appropriate.”). “Generally,
14 courts only refuse voluntarily requested remand when the agency’s request is frivolous or made
15 in bad faith.” *Cal. Cmty. Serv. v. Nat. Res. Def. Council*, 688 F.3d at 992. Here, the Agencies have explained that they have
16 substantial concerns about certain aspects of the NWPR and the effects of the NWPR on the
17 nation’s waters, including whether the NWPR adequately considered the CWA’s statutory
18 objective in determining the scope of “waters of the United States” and, as a result, whether the
19 process adequately considered the effects of the NWPR on the integrity of the nation’s waters.
20 Fox Decl. ¶¶ 10, 12; Pinkham Decl. ¶¶ 10, 12. For example, the Agencies have identified
21 concerns about whether sufficient consideration was given to the impact of the NWPR’s
22 categorical exclusion of ephemeral waters. Fox Decl. ¶ 14; Pinkham Decl. ¶ 14. In addition, the
23 Agencies have noted on-the-ground effects of the NWPR since the rule went into effect, which
24 reinforces their conclusion that a new rulemaking in which the Agencies will reconsider issues
25 of concern with the NWPR and its impacts is warranted. Fox Decl. ¶¶ 15–20; Pinkham Decl.
26 ¶¶ 15–20. Remand would give the Agencies an opportunity to fully explore and address these
27 issues and the concerns of Plaintiffs and other stakeholders through the administrative
28 rulemaking process. Fox Decl. ¶ 14; Pinkham Decl. ¶ 14.

1 Remand would also allow the Agencies to develop a new administrative record, which
2 would benefit the Court and the parties if a new rule were to be litigated. “[T]his kind of
3 reevaluation is well within an agency’s discretion,” *Nat’l Ass’n of Home Builders v. EPA*, 682
4 F.3d 1032, 1038 (D.C. Cir. 2012) (citing *Fox Television Stations, Inc.*, 556 U.S. at 514–15), and
5 courts should allow it. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C.
6 Cir. 2018).

7 Moreover, deferring to the Agencies’ new rulemaking process also promotes important
8 jurisprudential interests. “In the context of agency decision making, letting the administrative
9 process run its course before binding parties to a judicial decision prevents courts from
10 ‘entangling themselves in abstract disagreements over administrative policies, and . . . protect[s]
11 the agencies from judicial interference’ in an ongoing decision-making process.” *Am. Petroleum*
12 *Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012) (citation omitted). Allowing the administrative
13 process to run its course here will let the Agencies “crystalliz[e] [their] policy before that policy
14 is subjected to judicial review,” *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49
15 (D.C. Cir. 1999), and avoid “inefficient” and unnecessary “piecemeal review.” *Pub. Citizen*
16 *Health Rsch. Grp. v. Comm’r, Food & Drug Admin.*, 740 F.2d 21, 30 (D.C. Cir. 1984) (citation
17 and internal quotation marks omitted).

18 As stated above, one Court has already granted the Agencies’ request to remand the
19 NWPR without vacatur while dismissing plaintiffs’ claims against the NWPR. *See S.C. Coastal*
20 *Conservation League v. Wheeler*, 2:20-cv-01687-BHH (D.S.C.), ECF No. 147 (July 15, 2021),
21 Ex. 1. Moreover, courts have granted remand in similar situations. In *SKF USA Inc.*, the Federal
22 Circuit found a remand to the Department of Commerce appropriate in light of the agency’s
23 change in policy. 254 F.3d at 1025, 1030. Likewise, in *FBME Bank Ltd.*, the District Court for
24 the District of Columbia remanded a rule to the Department of the Treasury to allow the agency
25 to address “serious ‘procedural concerns,’ ” including “potential inadequacies in the notice-and-
26 comment process as well as [the agency’s] seeming failure to consider significant, obvious, and
27 viable alternatives.” 142 F. Supp. 3d at 73.

1 The Agencies are not requesting vacatur of the NWPR during the remand. Courts have
2 the discretion to remand an agency decision without vacatur. *Cal. Cmty.*, 688 F.3d at 992.
3 Factors that a court can consider include the seriousness of the rule’s deficiencies (and thus the
4 extent of doubt whether the agency chose correctly) and the disruptive consequences of granting
5 vacatur when an interim change may itself be changed. *Id.* (citing *Allied–Signal, Inc. v. U.S.*
6 *Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). In light of the Agencies’
7 stated intent to address their substantial concerns with the NWPR through a new rulemaking,
8 the Agencies request that the Court order a remand and are not including a request for vacatur.

9 II. Granting Remand Conserves Judicial Resources.

10 Granting remand here promotes judicial economy and conserves the parties’ and the
11 Court’s resources. Courts “have recognized that ‘[a]dministrative reconsideration is a more
12 expeditious and efficient means of achieving an adjustment of agency policy than is resort to the
13 federal courts.’ ” *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting
14 *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). Indeed, courts
15 acknowledge that voluntary remand “promotes judicial economy” by allowing the agency to re-
16 consider its own decision “without further expenditure of judicial resources.” *Nat. Res. Def.*
17 *Council*, 275 F. Supp. 2d at 1141 (citing *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir.
18 1993)). Allowing the Agencies to proceed with a new rulemaking allows them to address
19 concerns with the NWPR through the administrative process. The Agencies might resolve the
20 Plaintiffs’ concerns through that process, potentially rendering unnecessary future litigation that
21 could strain the Court’s and parties’ resources. Remand would preserve those resources.

22 In addition, continuing to litigate this case wastes the parties’ resources in the present,
23 resources that could be better spent on the rulemaking process. Because many of the issues
24 presently before the Court will be re-evaluated in the Agencies’ new rulemaking, remand to the
25 Agencies will allow the Agencies to focus their resources on the new rulemaking with input
26 from Plaintiffs and other interested stakeholders. Fox Decl. ¶ 14; Pinkham Decl. ¶ 14. In
27 particular, ongoing litigation could interfere with the Agencies’ rulemaking, as the Agencies
28 would have to prioritize pending litigation deadlines. *See Am. Forest Res. Council v. Ashe*, 946

1 F. Supp. 2d 1, 43 (D.D.C. 2013) (because agency did “not wish to defend” the action, “forcing it
2 to litigate the merits would needlessly waste not only the agency’s resources but also time that
3 could instead be spent correcting the rule’s deficiencies”).

4 Although merits briefing is ongoing, the Court need not resolve the competing summary
5 judgment motions nor consider the many proposed *amicus curiae* briefs before it, ECF Nos.
6 214–15, 220, 224–25, and 228, as the Agencies’ new rulemaking may render some or all of the
7 various disputes moot. The Agencies’ new rulemaking may fully address and resolve Plaintiffs’
8 concerns or, at least, narrow the issues if Plaintiffs were to challenge a new rule arising out of
9 the new rulemaking. Even if remand does not resolve all of the claims presented by Plaintiffs,
10 subsequent judicial review will likely turn on a new and different record that will necessarily
11 alter the nature of this Court’s review. Therefore, continuing to litigate the very same issues that
12 the Agencies may resolve through a new rulemaking “would be inefficient,” *FBME Bank*, 142
13 F. Supp. 3d at 74, and a waste of judicial resources.

14 **III. Remand Would Not Prejudice the Parties.**

15 Remand would not prejudice any party. The Agencies intend to consider and evaluate
16 issues raised in the various legal challenges to the NWPR during the rulemaking process,
17 including arguments made by the Plaintiffs in this case. Fox Decl. ¶¶ 8–10; Pinkham Decl.
18 ¶¶ 8–10. As addressed above, the Agencies may revise or replace the NWPR in a way that
19 resolves Plaintiffs’ claims. For example, Plaintiffs claim that the NWPR did not adequately
20 consider the CWA’s statutory goals and objective and arbitrarily excluded ephemeral waters
21 and certain wetlands as non-jurisdictional under the CWA. *See* ECF No. 1 (Plaintiffs’
22 complaint) at ¶¶ 98-110. The Agencies intend to consider these very issues on remand. Fox
23 Decl. ¶ 13; Pinkham Decl. ¶ 13. Through their rulemaking process, the Agencies will consider
24 the policies set forth in EO 13990 and intend to ensure that “waters of the United States” is
25 defined in a manner consistent with the CWA’s statutory objective. In addition, Plaintiffs will
26 have the opportunity to participate through the notice and comment process by submitting
27 comments on any new proposed rule. Fox Decl. ¶ 10; Pinkham Decl. ¶ 10.

1 **CONCLUSION**

2 The Agencies have identified numerous concerns with the NWPR, many of which have
3 been raised by Plaintiffs in this case, and intend to evaluate those concerns through a new
4 notice-and-comment rulemaking. Fox Decl. ¶¶ 9–20; Pinkham Decl. ¶¶ 9–20. Where, as here,
5 the Agencies have committed to reconsidering the challenged action, the proper course is
6 remand to allow the Agencies to address their concerns through the administrative process. The
7 Agencies respectfully ask the Court to remand the NWPR, without vacatur, and to dismiss this
8 case, rather than requiring the Agencies to litigate a rule that may be replaced.

9 Dated: July 16, 2021

Respectfully submitted,

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