

1 TODD KIM  
 Assistant Attorney General  
 2 SETH M. BARSKY, Section Chief  
 MEREDITH L. FLAX, Assistant Section Chief  
 3 COBY HOWELL, Senior Trial Attorney  
 MICHAEL R. EITEL, Senior Trial Attorney  
 4 U.S. Department of Justice  
 Environment & Natural Resources Division  
 5 Wildlife & Marine Resources Section  
 1000 S.W. Third Avenue  
 6 Portland, OR 97204  
 Phone: (503) 727-1023  
 7 Fax: (503) 727-1117  
 Email: [coby.howell@usdoj.gov](mailto:coby.howell@usdoj.gov)

8 Attorneys for Federal Defendants

9  
10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA (Oakland)

12  
13 STATE OF CALIFORNIA, ET AL.,

14 Plaintiffs,

15 vs.

16 HAALAND, ET AL.,

17 Federal Defendants.

Case. No. 4:19-cv-06013-JST

**REPLY IN SUPPORT OF  
FEDERAL DEFENDANTS'  
MOTION FOR VOLUNTARY  
REMAND**

Date: TBD<sup>1</sup>

Time: TBD

Place: Courtroom 6, 2nd Floor

Judge: The Honorable Jon S. Tigar

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22  
 23 <sup>1</sup> The Court has suspended the summary judgment briefing schedule while it  
 24 considers the motion to remand and has indicated that it will issue an order on the  
 motion to remand in February 2022 without oral argument. ECF 171.

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## INTRODUCTION

1  
2 The Court should grant the Federal Defendants’ motion for an order  
3 remanding, without vacatur, the Endangered Species Act (“ESA”) rules  
4 promulgated by the U.S. Fish and Wildlife Service (“FWS”) and the National  
5 Marine Fisheries Service (“NMFS”) (collectively, “Services”) in 2019. 84 Fed. Reg.  
6 45020 (“Section 4 Rule”); 84 Fed. Reg. 44753 (“Section 4(d) Rule”); 84 Fed. Reg.  
7 44976 (“Section 7(a)(2) Rule”) (collectively, “2019 ESA Rules”). ECF 165.<sup>2</sup> In  
8 support of this request for voluntary remand, the Services provided the Third  
9 Declaration of Gary Frazer (“Third Frazer Decl.”) (ECF 165-1) and the Fourth  
10 Declaration of Samuel Rauch (“Fourth Rauch Decl.”) (ECF 165-2). These  
11 declarations identified legitimate and serious concerns with certain provisions of  
12 the 2019 ESA Rules, as well as with the adequacy of the record supporting the  
13 Services’ National Environmental Policy Act (“NEPA”) determinations. This  
14 request for voluntary remand was neither frivolous nor made in bad faith, and so it  
15 should be granted under prevailing precedent.

16  
17 Seventeen States, the District of Columbia, and the City of New York (“State  
18 Plaintiffs”), the Center for Biological Diversity and other non-governmental  
19 organizations (“CBD Plaintiffs”), and the Animal Legal Defense Fund (“ALDF”)  
20 (collectively, “Plaintiffs”) acknowledge that Federal Defendants have identified

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23 <sup>2</sup> Federal Defendants are filing an identical reply brief in all three related cases but  
24 will use the ECF numbers in *California v. Haaland*, 19-cv-6013 (N.D. Cal. 2019)  
unless otherwise noted.

1 substantial concerns with the 2019 ESA Rules and do not argue that the request for  
2 voluntary remand was frivolous or made in bad faith. ECF 170. Plaintiffs,  
3 however, oppose Federal Defendants’ motion on the basis that the Court should  
4 vacate the 2019 ESA Rules.

5         The State Intervenors and Industry Intervenors similarly acknowledge that  
6 Federal Defendants’ request meets the standard for voluntary remand and do not  
7 oppose the motion. ECF 172 at 7; ECF 174 at 5. The Landowner Intervenors do not  
8 argue that Federal Defendants’ request for voluntary remand was frivolous or made  
9 in bad faith, but they oppose remand of the Section 4(d) Rule and a provision they  
10 term “Rule for Designating Unoccupied Areas” because the Services allegedly lack  
11 “discretion” to revise these regulatory provisions on remand. ECF 173 at 7-8. All of  
12 the Intervenors urge this Court not to vacate the 2019 ESA Rules.

13         Combined, no party disputes that the Services have shown substantial  
14 concerns with the 2019 ESA Rules, thereby meeting the standard for voluntary  
15 remand. The more pressing issue for this Court is whether it can or should vacate  
16 the 2019 ESA Rules. As explained in Federal Defendants’ motion, the Court should  
17 not vacate the 2019 ESA Rules because the Services are well-equipped and best-  
18 positioned to address their substantial concerns with the rules on remand, vacatur  
19 would be disruptive and potentially confusing to the public, and Plaintiffs present  
20 no evidence of real and tangible harm likely to occur during the remand period.  
21

22         In contrast, remand without vacatur will allow the Services to address  
23 specific regulatory provisions through notice and comment rulemaking under the  
24

1 Administrative Procedure Act (“APA”), just as Congress envisioned. Accordingly,  
2 the Court should grant Federal Defendants’ motion for remand without vacatur and  
3 deny Plaintiffs’ motions for summary judgment.

4 **ARGUMENT**

5 **I. THE COURT SHOULD REMAND THE 2019 ESA RULES WITHOUT**  
6 **VACATUR.**

7 **A. Remand is Appropriate.**

8 There is significant consensus among the parties that remand is appropriate  
9 under the circumstances here. Plaintiffs, while preserving their objection regarding  
10 vacatur, do not ultimately oppose remand. ECF 170 at 8 (“Plaintiffs consequently  
11 ask the Court to deny the Services’ remand motion, and instead remand with  
12 vacatur . . .”). State Intervenors are even more inclined towards remand: “Given  
13 the lenient standard for voluntary remand in this circuit, the State Defendant-  
14 Intervenors do not oppose the Federal Defendants’ motion for voluntary remand  
15 without vacatur.” ECF 172 at 7. Industry Intervenors similarly do not oppose.  
16 ECF 174 at 5 (“[F]or the sake of judicial efficiency and economy, Industry  
17 Intervenors do not oppose the Government’s motion for voluntary remand without  
18 vacatur . . . given the ongoing rulemaking process the outcome of which may narrow  
19 or moot this litigation.”). And although the Landowner Intervenors raise two  
20 concerns, they take “no position” on whether the Court should remand most of the  
21 2019 ESA Rules. ECF 173 at 7 (“Given the limited nature of their intervention, the  
22  
23  
24

1 Private Landowners take no position on the remainder of the Federal Defendants’  
2 request for voluntary remand.”).<sup>3</sup>

3 This consensus is unsurprising given that the Services have provided  
4 evidence of legitimate and substantial concerns with the 2019 ESA Rules. Third  
5 Frazer Decl. ¶ 4-10; Fourth Rauch Decl. ¶ 7-8.<sup>4</sup> The Services’ request is neither  
6 frivolous, nor made in bad faith. It thus meets the standard for voluntary remand  
7 in this Circuit. *See Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir.  
8  
9

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10 <sup>3</sup> There is no merit to Landowner Intervenors’ argument that the Services lack  
11 discretion to engage in future rulemaking for the Section 4(d) Rule and what they  
12 call “Rule for Designating Unoccupied Areas” on remand. ECF 173 at 21. The  
13 agencies have discretion to arrive at a different result on remand because no court  
14 has foreclosed the agencies’ discretion by finding the relevant statutory provisions  
15 unambiguous. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S.  
16 967, 984 (2005) (agency interpretations are foreclosed only if the courts find the  
17 statute is unambiguous); *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*,  
18 1 F.3d 1, 8 (D.C. Cir. 1993) (finding the relevant statutory provision to be  
19 ambiguous). The Supreme Court in *Weyerhaeuser Co. v. FWS*, 139 S. Ct. 361  
20 (2018), in fact, declined to pre-ordain the precise regulatory criteria for the  
21 designation of unoccupied critical habitat. *Id.* at 365-66. In any event, limits on  
22 agency discretion need not foreclose rulemaking. An agency, after all, can issue  
23 rules that comport with those limits, as the Services here could following a remand.  
24 *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

18 <sup>4</sup> Industry Intervenors argue that Plaintiffs have only challenged certain regulatory  
19 provisions, while the Services intend to address only specific regulatory provisions  
20 highlighted in the Third Frazer and Fourth Rauch Declarations on remand. ECF  
21 174 at 9-11. This argument misconstrues the Services’ declarations. The examples  
22 were provided to support the request for voluntary remand, but the agencies also  
23 have publicly stated that other potential revisions are under discussion, and they  
24 would accept public comment on the entirety of all three 2019 ESA Rules. Second  
Frazer Decl. ¶ 12 (ECF 150-1); Third Rauch Decl. ¶ 10 (ECF 150-2). Industry  
Intervenors’ point thus illustrates why remand without vacatur is appropriate—it  
would allow the Services to address all facets of the 2019 ESA Rules through APA  
notice and comment rather than potentially severing certain regulatory provisions  
through partial vacatur.



1 2012). In light of the Services' concerns and the relative agreement among the  
2 parties, the Court should remand the 2019 ESA Rules.

3 **B. Vacatur of the 2019 ESA Rules is Not Warranted.**

4 Once the Court addresses the question of remand, it must then decide  
5 whether vacatur is warranted. Under these circumstances, it is not. Federal  
6 Defendants previously explained that vacatur of the 2019 ESA Rules is not  
7 warranted because the Services could substantiate their decisions on remand,  
8 vacatur would disrupt implementation of the ESA, and Plaintiffs demonstrated no  
9 real harm warranting vacatur during the remand. ECF 165 at 33-37.

10 The first two points are supported by the Services' evidence:

11 Vacatur by the Court would be disruptive of ongoing and future  
12 implementation of ESA consultations and listing actions. It would  
13 cause confusion among the public, other agencies, and stakeholders,  
14 and impede the efficiency of ESA implementation, by abruptly altering  
15 the applicable regulatory framework and creating uncertainty about  
16 which standards to apply. In contrast, remand would establish an  
17 orderly process in which the Services would have the opportunity to  
18 present a proposed rule, explain the rationale for proposed changes,  
19 take public comment, and then, in a final rule, explain to the public  
20 and stakeholders which changes were adopted and provide further  
21 explanation on their interpretation and application.

22 Fourth Rauch Decl. ¶ 12; *see also* Second Frazer Decl. ¶ 12. Plaintiffs do not  
23 meaningfully contest that vacatur would be disruptive and potentially  
24 confusing as these regulations have been in effect for over two years, and  
vacatur could abruptly alter implementation, thereby creating uncertainty  
about which standards to apply pending final resolution of the litigation. *Id.*

1 As for Federal Defendants’ third point, Plaintiffs still have not  
2 established any real or tangible harm from implementation of the 2019 ESA  
3 Rules. Once again, Plaintiffs revert to their now-familiar examples  
4 speculating about uncertain outcomes of ESA implementation. ECF 170 at  
5 19-22. But these examples merely suggest a possibility of harm, at most,  
6 rather than real or tangible harm that warrants vacatur.

7 As explained previously in Federal Defendants’ briefing on the motion  
8 to stay, Plaintiffs’ two critical habitat references—involving the Mount  
9 Rainier white-tailed Ptarmigan and Texas hornshell mussel—are both at the  
10 proposed rule stage. ECF 170 at 19-20; *but see* ECF 156 at 14-16. Until  
11 there are final rules, it is entirely unclear whether the Services will continue  
12 their reliance on these regulatory provisions. Similarly inapposite, the cited  
13 case involving the Willow project in the western Arctic was a challenge to the  
14 Incidental Take Statement (“ITS”) and, while the new regulations were  
15 discussed in that opinion, the outcome did not turn on the new regulations as  
16 they do not address ITSs. *See Sovereign Inupiat for a Living Arctic v.*  
17 *Bureau of Land Mgmt.*, No. 3:20-cv-00290-SLG, 2021 WL 3667986, at \*41 (D.  
18 Alaska Aug. 18, 2021) (“the new regulations do not eliminate the requirement  
19 in the ESA and the regulations that the ITS ‘[s]pecifies [ ] measures that are  
20 necessary to comply with [the Marine Mammal Protection Act],’ . . .”).

22 Plaintiffs’ reference to the Columbia River litigation remains self-  
23 defeating. ECF 170 at 21; ECF 156 at 15. The same contested issue  
24

1 Plaintiffs highlight—analysis of the environmental baseline—was present  
2 under the prior regulations as well. *Id.* (citing *Nat'l Wildlife Fed'n v. Nat'l*  
3 *Marine Fisheries Serv.*, No. 01-00640-RE, 2005 WL 1278878, at \*9-11 (D. Or.  
4 2005)). And Plaintiffs still cannot muster one example of how the Section  
5 4(d) Rule harms their interests, as each threatened listing has included a  
6 species-specific 4(d) rule. *See* 84 Fed. Reg. 44753. Although the agencies  
7 have been implementing these regulations for over two years, Plaintiffs have  
8 not identified one clear example in which application of the 2019 ESA Rules  
9 harmed their interests in some real or tangible way.<sup>5</sup> Vacatur must be based  
10 on something more than the mere possibility of harm, especially when it will  
11 frustrate the Services' effective implementation of the ESA. Third Rauch  
12 Decl. ¶ 14.

13  
14 Likewise, Plaintiffs' concern that the 2019 ESA Rules would languish  
15 "indefinitely" on remand is not well-founded. ECF 170 at 23. The Services  
16 previously prioritized efforts to engage in rulemaking to address their  
17 concerns with the regulations, precisely as should occur under the APA.  
18 Plaintiffs now lament the Services' decision to pause the rulemaking given  
19 uncertainties raised by this litigation and argue the rulemaking pause is a  
20 reason to vacate the rules. ECF 170 at 7. But the Services' rulemaking

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21 <sup>5</sup> The lack of any concrete harm from application of the 2019 ESA Rules applies  
22 equally to Intervenor-Defendants. *Town of Chester, N.Y. v. Laroe Ests.*, 137 S. Ct.  
23 1645, 1651 (2017) ("[A]n intervenor of right must have Article III standing in order  
24 to pursue relief that is different from that which is sought by a party with  
standing.").

1 pause is both reasoned and understandable. If the Court were to vacate the  
2 rules or adjudicate the merits, the agencies would have to revise or redo any  
3 proposed rule previously developed or published. It makes little sense to  
4 divert finite and scarce government resources from other priority ESA  
5 implementation activities to develop a proposed rule that may become  
6 obsolete—a point Plaintiffs notably do not confront. The agencies, moreover,  
7 have made clear that if the Court grants the remand without vacatur they  
8 “would again make the rulemaking revisions a high priority, and rulemaking  
9 would once again proceed expeditiously.” Fourth Rauch Decl. ¶ 11; Third  
10 Frazer Decl. ¶ 14. Plaintiffs provide no evidence that casts doubt on these  
11 representations. The Services can complete this remand in a timely manner,  
12 if given the chance, and they are prepared to resume their rulemaking  
13 processes expeditiously upon remand. *Id.*

14  
15 Plaintiffs also suggest that, because the Services have identified  
16 substantial concerns with the 2019 ESA Rules, continued implementation  
17 would force the application of “unlawful” regulations and “insulate the 2019  
18 Rules from judicial review, locking in years’ worth of harm to imperiled  
19 species and their critical habitat with no legal recourse.” ECF 170 at 23, 28.  
20 This argument is overstated. The Services’ identification of substantial  
21 concerns is different from a legal confession of error. Instead, the Services  
22 identify these concerns to substantiate how they would like to revisit some of  
23 the prior decisions on remand, which is well within their authority. *FCC v.*  
24

1 *Fox Television Stations*, 556 U.S. 502, 515 (2009). Continued implementation  
2 is thus not unlawful. Moreover, if Plaintiffs truly believed that the Services  
3 were implementing the rules in an unlawful manner, their recourse lies with  
4 an as-applied challenge.

5 It is against this backdrop the Services request the opportunity in the  
6 first instance to bring their ESA expertise to bear on remand. The Services  
7 here are doing exactly what they should do. When faced with concerns over  
8 existing rules, the law charts the appropriate path forward—notice and  
9 comment rulemaking adhering to the requirements of the APA. Allowing the  
10 Services to engage in rulemaking in accordance with the APA benefits the  
11 entire public, including Plaintiffs. Vacatur, in contrast, would disturb this  
12 orderly approach. When the disruptive consequences and potential for  
13 confusion are balanced against the lack of any real harm to Plaintiffs,  
14 vacatur is not warranted. *See* Fourth Rauch Decl. ¶ 14.

15  
16 **C. The Court Should Deny Plaintiffs’ Alternative Request to  
Adjudicate the Merits.**

17 Plaintiffs argue in the alternative that if the Court is inclined to leave  
18 the rules in place, it should deny Federal Defendants’ motion for voluntary  
19 remand and then adjudicate the merits of their claims. ECF 170 at 28. The  
20 Court should deny this alternative request as well.

21 The statutory provisions at issue confer substantial discretion to the  
22 Services. These broad statutory mandates leave considerable room for the  
23 Services’ interpretations of the ESA. *See* 16 U.S.C. §§ 1533, 1536(a)(2).  
24

1 While Plaintiffs believe that the Services “will benefit from the Court’s  
2 reasoning when they proceed with any new rulemakings” if Plaintiffs’  
3 challenges are upheld, ECF 170 at 29, such an outcome is far from clear.  
4 Moreover, proceeding to the merits would unnecessarily heighten the chances  
5 of protracted litigation and appeals on a rule that may be substantially  
6 altered through the normal rulemaking process.

7       The expenditure of additional litigation resources is unnecessary.  
8 Granting Federal Defendants’ motion would provide Plaintiffs with all the  
9 relief they would be entitled to if they succeeded on the merits of their claims.  
10 The remand would result in a rulemaking that provides an opportunity for  
11 public comment on the entirety of the 2019 ESA Rules and for this  
12 Administration to bring its expertise to bear on the ESA regulations. This  
13 remedy is reasoned and narrowly tailored, and equitably resolves Plaintiffs’  
14 claims. Because the Services are willing to consider whether to rescind or  
15 revise the 2019 ESA Rules on remand, continuing to adjudicate Plaintiffs’  
16 claims does not serve any useful purpose besides perpetuating litigation and  
17 would enmesh the court in issues that should be resolved in the first instance  
18 by the expert agencies.

19       Finally, both Plaintiffs and Intervenors recognize the split in  
20 authorities in this District over whether a court must adjudicate the merits of  
21 Plaintiffs’ claims before vacating challenged regulations. *See, e.g.*, ECF 170  
22 at 27; ECF 174 at 15 (citing *In re Clean Water Act Rulemaking*, No. C 20-  
23

24

1 04636 WHA, 2021 WL 4924844, at \*4 (N.D. Cal. Oct. 21, 2021), *appeals*  
2 *docketed*, *Am. Rivers v. Am. Petroleum*, No. 21-16958, *Am. Rivers v.*  
3 *Arkansas*, No. 21-16961 (9th Cir. Nov. 22, 2021); *Pascua Yaqui Tribe v.*  
4 *United States Env't Prot. Agency*, No. CV-20-00266-TUC-RM, 2021 WL  
5 3855977, at \*4 (D. Ariz. Aug. 30, 2021), *appeal docketed*, No. 21-16791 (9th  
6 Cir. Oct. 26, 2021); *State of California v. Regan*, No. 20-cv-03005-RS, 2021  
7 WL 4221583 (N.D. Cal. Sept. 16, 2021); *Waterkeeper All., Inc. v. United*  
8 *States Env'tl Prot. Agency*, No. 18-cv-03521-RS, 2021 WL 4221585 (N.D. Cal.  
9 Sept. 16, 2021). The Court, however, need not reach this issue as it is well  
10 within the Court's equitable discretion to remand without vacatur.

## 11 CONCLUSION

12 Plaintiffs and Intervenors' oppositions present a stark contrast.  
13 Plaintiffs argue that the 2019 ESA Rules should be vacated in their entirety,  
14 while Intervenors largely contend that the Services will have no choice on  
15 remand but to repromulgate the 2019 ESA Rules. The Services seek a more  
16 modest solution. If given the chance on remand, the Services will bring their  
17 expertise to bear on all of the regulatory provisions addressed in the 2019  
18 ESA Rules. And they will do so using the APA's rulemaking procedures,  
19 which will allow the public to participate and provide comments on any  
20 regulatory changes. Vacatur, by contrast, would disrupt this more orderly  
21 approach; it would stifle rulemaking on important issues and continue to  
22 divert scarce resources to litigation. This is unnecessary given the Services  
23

1 willingness to engage in rulemakings on remand. The Court should grant  
2 Federal Defendants' motion, remand the 2019 ESA Rules without vacatur,  
3 and deny Plaintiffs' motions for summary judgment.

4  
5 DATED: January 3, 2022.

6  
7 TODD KIM  
Assistant Attorney General  
8 SETH M. BARSKY, Chief  
MEREDITH L. FLAX, Assistant Chief

9 */s/ Coby Howell.*

10 COBY HOWELL, Senior Trial Attorney  
U.S. Department of Justice  
11 Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
12 MICHAEL R. EITEL, Senior Trial Attorney  
U.S. Department of Justice  
13 Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
14 1000 S.W. Third Avenue  
Portland, OR 97204  
15 Phone: (503) 727-1023  
16 Fax: (503) 727-1117  
Email: [coby.howell@usdoj.gov](mailto:coby.howell@usdoj.gov)

17 *Attorneys for Federal Defendants*



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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

*/s/ Coby Howell*  
COBY HOWELL, Senior Attorney