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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

BERNHARDT, *et al.*,

Defendants,

and

STATE OF ALABAMA, *et al.*,

Defendant-Intervenors.

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

Related Cases: No. 4:19-cv-05206-JST
No. 4:19-cv-06812-JST

PLAINTIFFS' JOINT SUPPLEMENTAL BRIEF RE: MOTION FOR REMAND WITHOUT VACATUR

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INTRODUCTION[1]

Defendants' tepid response to this Court's order requiring supplemental briefing confirms a significant violation of the National Environmental Policy Act ("NEPA") warranting vacatur. The U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (together, the "Services") now admit that they "could have provided a fuller explanation of their decision to invoke categorical exclusions under NEPA and why certain extraordinary circumstances factors may not apply here." ECF 156 ("Fed. Suppl. Br.") at 1; ECF 156-1 ("Fourth Frazer Decl."), ¶¶ 4–5; ECF 156-2 ("Fifth Rauch Decl."), ¶¶ 3–4.[2] They further admit that their rationale for invoking the categorical exclusions "may not be adequately supported by the record." Fourth Frazer Decl., ¶ 3; *see* Fifth Rauch Decl., ¶ 3 ("rationales … could be better supported by the record"). In fact, in each of the three Final Rules, the Services' so-called "rationale" was nothing more than a conclusory restatement of the regulatory categorical exclusion language that the rules are "of an administrative, legal, or technical nature," without further explanation. *See, e.g.*, ESA0000124, ESA0000134, ESA0000156. The Services nowhere explain how sweeping, nationwide rules that reduce regulatory constraints on listing, critical habitat designation, and interagency consultation actions for all species under sections 4 and 7 of the Endangered Species Act ("ESA") could possibly qualify for a categorical exclusion from NEPA review.[3]

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[1] Plaintiffs in each of the three related cases are filing the same joint supplemental brief.

[2] Unless otherwise noted, all ECF references are to numbers from the earliest filed case, *Center for Biological Diversity et al. v. Haaland*, Case No. 19- 05206-JST (N.D. Cal. filed Aug. 19, 2019).

[3] It is worth reiterating that the Services identified a number of other substantive concerns with the Final Rules under both the ESA and NEPA in their declarations in support of their motion to remand. *See* ECF 146-1, Third Frazier Decl., ¶¶ 4–10 (identifying concerns regarding Final Rule revisions that may be inconsistent with the ESA or broader than their intended purpose, create public confusion, require additional resources for implementation, and other issues); ECF 146-2, Fourth Rauch Decl., ¶ 7 ("NOAA has substantial concerns about whether portions of the 2019 Joint ESA Rules are consistent with the goals and purposes of the ESA"). The Services initially requested a remand so that they could re-evaluate and rescind or substantively revise the Final Rules in light of these concerns. Third Frazier Decl., ¶ 11–13; Fourth Rauch Decl., ¶¶ 9–10, 12.

Plaintiffs ask the Court to find that the Services violated NEPA in promulgating the Final Rules and, accordingly, to vacate and remand the Final Rules in their entirety. The Services violated NEPA by improperly invoking an inapplicable categorical exclusion to avoid analyzing the significant environmental effects of major substantive changes in their longstanding regulations, by unlawfully ignoring extraordinary circumstances mandating full environmental review in an environmental impact statement ("EIS"), and by failing to provide any reasoned explanation to justify their actions. Those fundamental NEPA violations—particularly on nationwide regulations that cause significant harm to imperiled species and their habitat—compel the Court to vacate and remand the Final Rules.

DISCUSSION

I. THE SERVICES VIOLATED NEPA.

A. The Services' Supplemental Brief Fails to Explain Their Decision to Forgo NEPA Review.

As the Services all but concede, Fed. Suppl. Br. at 3–6, they failed to justify the invocation of categorical exclusions or to grapple with the extraordinary effects of promulgating the Final Rules. That explanation is not merely of "less than ideal clarity," Fed. Suppl. Br. at 5; it is patently inadequate, unreasonable, and in violation of NEPA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–59. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011–12 (9th Cir. 2009) ("*Cal. v. USDA II*") (agency's threshold determination that its action is not subject to NEPA is reviewed for reasonableness under the APA).

A federal agency may only find that an agency action is "categorically excluded" from NEPA review where the action "do[es] not individually or cumulatively have a significant effect on the human environment and … ha[s] been found to have no such effect." 40 C.F.R. § 1508.4;[4] *see Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007) ("Categorical

[4] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its existing regulations implementing NEPA, which became effective on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. pt. 1500). CEQ's prior regulations, promulgated in 1978 with minor amendments in 1986 and 2005, govern the Final Rules and are cited here. *See* 85 Fed. Reg. at 43,372.

exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment."). In addition, before relying on a categorical exclusion, an agency also must affirmatively determine that no "extraordinary circumstances"—i.e., those "in which a normally excluded action may have a significant environmental effect," *id.*—exist. *See Cal. v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002). Further, where, as here, "there is substantial evidence in the record that exceptions to the categorical exclusion are applicable," there is a "heightened" need for adequate justification. *Id*. at 1176.

The Services' primary "rationale" for invoking the categorical exclusions here merely parrots language in the Services' own implementing NEPA regulations, 43 C.F.R. § 46.210(i), that the rule changes are "of an administrative, legal, or technical nature." *See, e.g.*, ESA0000124, ESA0000134, ESA0000156. And the Services provided no meaningful analysis to conclude that no extraordinary circumstances are present despite the Final Rules' far-ranging impacts to imperiled species and their habitat, in either the categorical exclusion findings themselves or any other record documents. *See* Fed. Suppl. Br. at 9 (citing ESA000005–7, ESA000008–10, ESA00000124–33, ESA00000134–55, ESA0000156–67).

For example, the File Memos accompanying the Final Rules only generally assert, without support, that many of the revisions do not alter current agency practices, even where the new rules on their face substantially and substantively modify the prior regulations, as the Services themselves admitted in their declarations in support of their motion to remand. *See, e.g.*, ESA0000128, ESA0000138, ESA0000160; Third Frazier Decl. ¶¶ 4–9; Fourth Rauch Decl., ¶¶ 6–7. And in other places, the Services' stated reasoning defies both case law and common sense. *See, e.g.,* ECF 142, Conservation Plfs.' Mot. for Summ. J. at 4–25.

The Services now cite the recent Ninth Circuit decisions in *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667 (9th Cir. 2022), and *Los Padres ForestWatch v. U.S. Forest Service*, 25 F.4th 649 (9th Cir. 2022), as support for their application of categorical exclusions here. Fed. Suppl. Br. at 1, 5, 8. But those cases are inapposite. *Mountain Communities*

addressed a "straightforward" question regarding application of a U.S. Forest Service categorical exclusion to a narrow rule governing timber thinning. *Id.* at 672; *see also id.* at 674 ("This case centers on interpretation of a single regulation: Does CE-6 permit thinning larger commercially viable trees?"). Additionally, unlike the instant case, the Forest Service in that case had analyzed "each of the[] resource conditions" related to the proposed action as part of its extraordinary circumstances review. *Id.* at 680; *cf.* ESA0000124 (FWS conclusion, without explanation or analysis, that the "action does not trigger an Extraordinary Circumstance to the categorical exclusion"); ESA 0000134 (same); ESA 0000156 (NMFS assertion, without explanation or analysis, that "these regulations are unlikely to result in any effects on listed species or their habitats and, even if they were to result in such effects, the effects would be negligible or discountable and therefore not significant"); ESA0000005 (NMFS identifying but not addressing extraordinary circumstances); ESA0000008 (same).

Los Padres ForestWatch likewise is unhelpful to the Services because the Ninth Circuit explicitly adopted the analysis in the related *Mountain Communities* case as to application of the thinning categorical exclusion. 25 F.4th at 661. The appellate court then addressed "the sole remaining question" as to "whether the Forest Service's decision to apply CE-6 to the Project was arbitrary and capricious because it failed to analyze fuelbreak efficacy as a potential 'extraordinary circumstance,'"—an issue not present here. *Id.* at 661, 662–64.

The Services' failure to conduct NEPA review also was unreasonable because it departed from their longstanding practice, with virtually no explanation. When altering its policies, an agency must "display awareness that it is changing position," show that the new policy is "permissible under the statute," and provide "good reasons" to support the change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015). Here, however, the Services fail even to acknowledge their past practice of conducting NEPA review when substantively amending ESA regulations. For example, as early as 1975, FWS reviewed changes to ESA section 4 regulations under

NEPA, *see* Reclassification of American Alligator and Other Amendments, 40 Fed. Reg. at 44,412 (Sept. 26, 1975), and in 2004, the Services undertook a NEPA analysis—albeit an inadequate one[5]—before promulgating changes to the ESA section 7 regulations, *see* Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 69 Fed. Reg. 47,732 (Aug. 5, 2004). Similarly, in 2008, the Services again undertook NEPA review prior to finalizing revisions to the section 7 regulations (which later were withdrawn when challenged). 73 Fed. Reg. 76,272, 76,286 (Dec. 16, 2008); 73 Fed. Reg. 63,667–68 (Oct. 27, 2008). The Services' wholesale failures to explain their invocation of a facially inapplicable categorical exclusion, to provide any extraordinary circumstances review, or even to acknowledge—let alone explain—their departure from longstanding practice was unreasonable and arbitrary and capricious in violation of NEPA and the APA.

B. Promulgation of the Final Rules Required Preparation of an EIS.

Congress enacted NEPA "to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives ... *before* the government launches any major federal action." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011) (cleaned up; emphasis added). To that end, NEPA requires that federal agencies prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Final Rules indisputably so qualify.

First, the Final Rules, as "new or revised agency rules [and] regulations," are plainly "major federal actions" triggering NEPA review. 40 C.F.R. § 1508.18(a). As the D.C. Circuit has explained, "the term 'actions' refers not only to construction of particular facilities, but includes ... *regulations,* policy statements, or expansion or revision of ongoing programs." *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (cleaned up; emphasis added).

[5] *See Wash. Toxics Coal. v. U.S. Dep't of Interior,* 457 F. Supp. 2d. 1158, 1197 (W.D. Wash. 2006) (concluding Services were required to produce a full EIS rather than a less exhaustive Environmental Assessment ("EA")).

Second, the Final Rules "significantly affect the quality of the human environment." 42 U.S.C. § 4332(2)(C). That "low standard," *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014), is met if "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor," *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998), *overruled on other grounds by The Lands Council v. McNair,* 537 F.3d 981, 997 (9th Cir. 2008), including when the action may adversely affect a listed species or designated critical habitat or may have highly controversial effects. The presence of any one of these factors may be sufficient to require preparation of an EIS, *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2004); but here, multiple factors are present, as the Final Rules govern virtually every aspect of implementation of one of our nation's bedrock environmental laws and were specifically aimed at reducing substantive protections under the ESA for listed species, particularly threatened species, and their critical habitat. *See, e.g.,* ESA2_0017358 (Final Rules significant under deregulatory Executive Order).

The Services were required to take a "hard look"[6]at these significant environmental impacts before "taking substantive environmental protections off the books." *Cal. v. USDA II*, 575 F.3d at 1014–16 (NEPA violation for invocation of categorical exclusion for rescission of nationwide regulation protecting national forest roadless areas); *Cal. v. Bernhardt*, 472 F. Supp. 3d 573, 618–30 (N.D. Cal. 2020) (NEPA violation for failure to prepare EIS for nationwide regulatory procedures regarding methane waste from federal oil and gas development); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 632 F. Supp. 2d 968, 981 (N.D. Cal. 2009) (NEPA violation for failure to "actually discuss the environmental consequences of eliminating the specific protections that are provided in the previous … [nationwide] rules").

C. The Services Unlawfully Invoked a Categorical Exclusion to Evade NEPA Review.

Despite the Final Rules' sweeping effect, the Services inexplicably invoked a narrow categorical exclusion for rules of a "legal, technical, or procedural nature," concluding that any

[6] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

potential impacts were too broad, speculative, and conjectural for meaningful analysis, *see, e.g.*, 43 C.F.R. § 46.210(i), and finding no overriding extraordinary circumstances mandating NEPA review.[7] But the Final Rules are plainly substantive and present extraordinary circumstances.

1. The Final Rules are substantive, not administrative or procedural.

As noted below and in Plaintiffs' motions for summary judgment, the Final Rules wrought significant changes across virtually every aspect of the Services' species Section 4 listing and critical habitat designation, and Section 7 interagency consultation programs. These are not merely "legal," "technical" or "procedural" revisions; indeed, there is nothing administrative about a wholesale revision to ESA regulations. *See Bosworth*, 510 F.3d at 1027 ("Categorical exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment").

This Court has held as much in reviewing similarly impactful rules. For example, in *California ex rel. Lockyer v. U.S. Department of Agriculture* ("*Cal. v. USDA I*"), 459 F. Supp. 2d 874 (N.D. Cal. 2006), *aff'd* 575 F.3d 999 (9th Cir. 2009), this Court rejected the Forest Service's contention that its rule repealing nationwide national roadless area protections was "purely procedural" and covered by a categorical exclusion for "routine administrative procedures" similar to the one invoked here. *Id.* at 894. The repealing rule, the Court concluded, constituted a "new regime," altered the "environmental status quo," and accordingly constituted a major federal action requiring further NEPA review under 40 C.F.R. § 1508.18. *Id.* at 894, 899. The Court also rejected the Forest Service's argument that later site-specific NEPA analyses could substitute for analyzing the regulation as a whole under NEPA. *Id.* at 895–96. And in another case, this Court held that FWS improperly invoked the same categorical

[7] *See* 84 Fed. Reg. at 44,759 (4(d) Rule); 84 Fed. Reg. at 45,051–52 (Section 4); 84 Fed. Reg. at 45,015 (Section 7); File Memo, NEPA Categorical Exclusion for Section 4 Rule, ESA0000156 (finding all changes to Section 4 Rule "administrative, technical, and/or procedural"); File Memo, NEPA Categorical Exclusion for Section 4(d) Rule, ESA0000124 (find elimination of Blanket 4(d) Rule "procedural in nature"); File Memo, NEPA Categorical Exclusion for Section 7 Rule, ESA0000134 (finding all changes to Section 7 Rule "administrative, technical, and/or procedural").

exclusion cited here and violated NEPA, when it promulgated nationwide regulatory procedures governing "take" (i.e., harm) of raptors under the Bald and Golden Eagle Protection Act. *Shearwater v. Ashe*, 2015 WL 4747881, slip op. at *14–24 (N.D. Cal. Aug. 11, 2015) (vacating and remanding rule).

Here, as in *Cal. v. USDA I* and *Shearwater*, the Services' cited categorical exclusion is inapplicable, and an EIS is required, because the Services have replaced a more protective environmental regime with a significantly less protective one. FWS's removal of the Blanket 4(d) rule is perhaps the most obvious example, as threatened species now no longer automatically receive ESA section 9 protections from take. ECF 142 at 15–19. The new Section 4 Rule also limits the circumstances under which species can be listed as "threatened" in the future and fundamentally alters the Services' approach to designating critical habitat, giving the Services virtually unfettered discretion to exempt habitat that is important for species recovery. *Id.* at 4–15. And under the new Section 7 Rule, the Services added requirements and definitions that will reduce the number and scope of, and alternatives and mitigation for, Section 7 consultations on federal agency actions to protect listed species and critical habitat. *Id.* at 19–26. These broad regulatory changes to the "environmental status quo" may not be categorically excluded from NEPA review. *Cal. v. USDA I*, 459 F. Supp. 2d at 895.

Nor should the court credit the assertion in the Final Rules (not even argued here) that NEPA review would be too speculative at this time and should be undertaken instead on an as-applied basis. As the Ninth Circuit has explained, "[b]ecause speculation is implicit in NEPA, [a court] must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (quotations and alterations omitted); *see also Cal. v. USDA I*, 459 F. Supp. 2d at 901, 908 (future site-specific NEPA analysis does not "excuse [ ] the failure to comply with NEPA where a nationwide Rule has been repealed and replaced with a less environmentally protective scheme"); *Kern v. BLM*,

284 F.3d 1062, 1072 (9th Cir. 2002) (rejecting agency's attempt to defer analysis to later site-specific proposals). The Services cannot lawfully exempt the Final Rules from NEPA review through the cited categorical exclusion.

2. Extraordinary circumstances require NEPA compliance.

Even assuming, arguendo, that the Final Rules could be covered by a categorical exclusion (which they cannot), extraordinary circumstances require an EIS. *See* 40 C.F.R. § 1508.4 (agencies must conduct NEPA review where "extraordinary circumstances in which a normally excluded action may have a significant environmental effect"). In particular, the far-reaching Final Rules involve, among other things:

(1) Significant impacts on natural resources and unique geographic characteristics including refuges, wilderness areas, wild and scenic rivers, wetlands, migratory birds, and other ecologically significant or critical areas, 43 C.F.R. § 46.215(b);

(2) Highly controversial environmental effects or involve unresolved conflicts, 43 C.F.R. § 46.215(c);

(3) Highly uncertain and potentially significant environmental effects, or involve unique or unknown environmental risks, 43 C.F.R. § 46.215(d); and

(4) Significant impacts on listed species, species proposed to be listed, and designated critical habitat under the ESA, 43 C.F.R. § 46.215(h).

Finally, because the Final Rules control the Services' future actions, they also establish a precedent and represent a decision in principle about future actions with potentially significant environmental effects, 43 C.F.R. § 46.215(e).

Indeed, the administrative record shows that the Services' staff understood the significant and controversial nature of the regulations. *See* ESA2_0016876 (1/26/2018 email from NMFS Office of Protected Resources noting that "[w]e are going to state that these regulations will likely be controversial"); ESA2_0025908–09 (3/19/2018 email from DOC Chief Counsel re Proposed ESA Rules: "This action is expected to be controversial. Since it is also considered significant, this rule requires OMB and interagency review"); ESA2_0027076 (same, NOAA counsel); ESA2_0029170 (same, sender redacted). And the Services received over 200,000

public comments on the Proposed Rules (ESA0003356–394071), with many stakeholders opposing the proposed rules' significant environmental impacts and disputing the Services' failure to consider those impacts, including thousands of individual concerned citizens, non-governmental organizations, municipal and regional agencies, industry groups, twenty states, and numerous members of Congress.[8] The Final Rules, accordingly, trigger the extraordinary circumstances exception and require NEPA review, even if a categorical exclusion were otherwise applicable.

II. THE COURT SHOULD VACATE AND REMAND THE FINAL RULES.

The Court should vacate and remand the Final Rules based on the Services' significant violations of NEPA and the APA. "[W]here," as here, "a regulation is promulgated in violation of the APA and the violation is not harmless, the remedy is to invalidate the regulation." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011); *see also Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1185 (9th Cir. 2004) ("[v]acatur of an unlawful agency rule normally accompanies a remand"); 5 U.S.C. § 706(2) ("reviewing court shall … hold unlawful and set aside agency action" found to be arbitrary and capricious or otherwise not in accordance with law). Remand *without* vacatur, by contrast, is an unusual and disfavored remedy, ordered only in "rare circumstances" when the balance of equities requires that the rules remain in place pending reconsideration, such as serious environmental harm resulting from vacating the rules. *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *see also Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) ("We order remand without vacatur only 'in limited circumstances'" and "only 'when equity demands' that we do so") (quoting *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012), and *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995)); *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("[T]he Ninth Circuit has only

[8] *See, e.g.*, ESA0000545 (105 members of Congress), ESA0000706 (Ranking Members of the Senate Committee on Environment and Public Works and House Committee on Natural Resources); ESA0095767 (thousands of scientists); ESA0100639 (East Bay Municipal Utility District); ESA0194384 (Association of Zoos and Aquariums).

found remand without vacatur warranted by equity concerns in limited circumstances, namely serious irreparable environmental injury").

When weighing the equities of leaving a challenged rule in place while an agency reconsiders it, courts in the Ninth Circuit apply the two-part test described in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993).[9] The *Allied-Signal* test evaluates both: (1) the seriousness of the agency's errors, and (2) the potential disruptive consequences of vacatur. *Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (citing *Allied-Signal*, 988 F.2d at 150–51). In analyzing the first factor, courts assess "whether the agency ... could adopt the same rule on remand, or whether [the] fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Pollinator Stewardship Council*, 806 F.3d at 532. As to the second factor, "courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) (internal quotations and citations omitted).

Courts in this and other Circuits regularly vacate and remand nationwide regulations for failure to comply with NEPA. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184–85 (9th Cir. 2011) ("We have directed or upheld setting aside agency action pending NEPA compliance on numerous occasions. … If courts could not stop the federal government from applying a substantive rule promulgated without adherence to required procedures, regardless of the equities, both NEPA and the APA would be toothless"). For example, in *Cal. v. USDA II*, 575 F.3d at 1020–21, the Ninth Circuit upheld the district court's decision to vacate the Forest Service's revision to a prior rule governing national roadless areas and to reinstate the prior rule providing greater protection to such areas because the Forest Service had improperly relied on a

[9] "Courts faced with a motion for voluntary remand employ the same equitable analysis" that "courts use to decide whether to vacate agency action after a rul[ing] on the merits." *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016) (quotations omitted).

categorical exclusion for the new rule.[10] The court held that vacatur was appropriate because "[t]he promulgation of the State Petitions Rule had the effect of permanently repealing uniform, nationwide, substantive protections that were afforded to inventoried roadless areas, and replacing them with a regime of the type the agency had rejected as inadequate a few years earlier. Such a substantial regulatory change is neither routine nor merely procedural." *Id*. at 1021. And in *California v. Bernhardt*, 472 F. Supp. 3d at 630–31, this Court found that vacatur was appropriate because of "the seriousness of [the agency's] APA and NEPA violations," and the fact that leaving the rule "in place is more likely to result in environmental harm than vacating it."

Similarly, the court in *California v. BLM*, 277 F. Supp. 3d 1106, 1126–27 (N.D. Cal. 2017), held that vacatur of a BLM rule postponing compliance deadlines for a prior natural gas waste reduction rule, and reinstatement of the prior rule, was an appropriate remedy for a violation of the APA. The court held that the BLM's failure to circulate the postponement rule for notice and comment was a serious violation of the APA and that the prior waste reduction rule was more environmentally protective. *Id.* at 1126. And the court so held even though the agencies had "informed the Court that they intend to propose another round of rulemaking to revise or rescind the [postponement] Rule." *Id.*

The same result should be reached here. Contrary to the Services' claim, Fed. Suppl. Br. at 8–10, the Services' NEPA violations are plainly "serious" under the first *Allied-Signal* factor; indeed, they strike at the heart of NEPA. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) ("application of [the *Allied-Signal*] factors suggests that NEPA violations are serious notwithstanding an agency's argument that it might ultimately be able to justify the challenged action."). Vacatur is the standard remedy for a NEPA violation because the fundamental "point of NEPA is to require an adequate EIS *before* a project

[10] As mentioned, the Forest Service in that case had relied on a categorical exclusion, very similar to the one the Services relied on here, for "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'" *Id*. at 1008 (citing Forest Service Handbook, 1909.15, § 31.1b; 57 Fed. Reg. 43,208 (Sept. 18, 1992)).

goes forward, so that construction does not begin without knowledge of" impacts. *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018) (emphasis added); *see Standing Rock Sioux Tribe*, 985 F.3d at 1050–53 (vacating oil pipeline easement for failure to prepare EIS). In addition, NEPA review must "not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5; *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). For that reason, NEPA's implementing regulations specifically *prohibit* federal actions from proceeding prior to completion of NEPA review, with certain exceptions not applicable here. 40 C.F.R. § 1506.1(a). And for regulations, "the draft environmental impact statement shall normally accompany the *proposed* rule." 40 C.F.R. § 1502.5(d) (emphasis added).

Here, as described above, the Services clearly violated NEPA by failing to justify invocation of categorical exclusions or to grapple with the Final Rules' extraordinary effects, and by fundamentally failing to consider and disclose the significant environmental impacts of the Final Rules through an EIS. Indeed, the Services themselves leave open the "possibility" that they will decide to undertake further NEPA review of the rules on remand. *See* Fed. Suppl. Br. at 8–9. The Services' serious NEPA violations mandate vacatur here.

The second *Allied-Signal* factor likewise supports vacatur because vacatur would *prevent*—not cause— "serious and irremediable harms" arising from the agency's error. *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1242. Specifically, vacatur of the Final Rules will result in the reinstatement of the prior, more environmentally protective ESA regulations, while leaving the Final Rules in place would cause significant, irreversible damage to imperiled species and their habitat. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force"); *Cal. v. USDA II,* 575 F.3d at 1020 (vacatur and reinstatement of prior rule were appropriate remedies for violations of NEPA and ESA); *Cal. v. BLM*, 277 F. Supp. 3d at 1126 (vacatur and reinstatement of prior rule were appropriate remedies for violation of the APA). The Services' requested remand *without* vacatur would ensure that the unlawful Final Rules remain in place for months

more, if not years, without any court ruling on the merits. Indeed, as the Services informed the Court in their motion for voluntary remand, they have ceased work on all new rulemakings, ECF 146-1, Third Frazer Decl. ¶¶ 12–13; ECF 146-2, Fourth Rauch Decl. ¶¶ 9–10, despite their "substantial and legitimate" problems with the Final Rules, and have not proposed a schedule for revised rulemakings. ECF 146 at 22–23.

The Services' claims that "vacatur would be disruptive, potentially cause public confusion, and impede efficient implementation of the ESA" ring hollow. Fed. Suppl. Br. at 10. As Plaintiffs have already explained, the prior, more protective ESA rules were in place for several decades and engendered long-established reliance interests upended by promulgation of the Final Rules. ECF 142 at 12–21. In contrast, vacatur of the Final Rules, which were challenged in court immediately upon their promulgation in the fall of 2019, would not cause disruption or public confusion and could not have engendered any substantial or reasonable reliance by the regulated public. *Id.* at 18–21; *see, e.g.*, *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) (vacatur appropriate where changes to national forest plan "will result in the loss of several binding standards under the existing forest plan"); *Cal. v. Bernhardt*, 472 F. Supp. 3d at 630–31 (vacatur appropriate for NEPA violation where leaving rule in place will result in greater environmental harm); *Cal. v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1179 (N.D. Cal. 2019) (rejecting federal defendants' position that vacatur would be "unduly disruptive" due to return to prior regulatory regime). Indeed, the Services have conceded that the Final Rules are themselves causing confusion—confusion that would be eliminated upon vacatur. ECF 146-1, Third Frazier Decl. ¶ 6 (change to listing process "caused confusion regarding the Services' intentions"), ¶ 7 (change to critical habitat designation "created confusion for the public"), ¶ 9 (acknowledging "potential confusion).

The cases cited by the Services are readily distinguishable. In those cases, unlike here, the violations were technical in nature—not serious—and were readily addressed on remand, while the consequences of vacatur would have been disruptive or even more environmentally

harmful than leaving the challenged agency action in place. *See Nat'l Fam. Farm Coal. v. EPA*, 966 F.3d 893, 929–30 (9th Cir. 2020) (vacatur not warranted due to "technical nature" of error that would likely be cured on remand); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1106–09 (E.D. Cal. 2013) (vacatur not warranted for "relatively minor" NEPA defect requiring supplemental analysis); *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1017–22 (E.D. Cal. 2013) (same). In short, vacatur and reinstatement of the prior regulatory regime is the appropriate remedy here.[11]

CONCLUSION

For the reasons discussed above and in Plaintiffs' motions for summary judgment, Plaintiffs ask the Court to find that the Services violated NEPA and the APA in promulgating the Final Rules and vacate and remand the Final Rules in their entirety to remedy that significant substantive and procedural violation of law.

Respectfully submitted this 11th day of March, 2022.

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[11] With no work currently being done to revise or rescind the Final Rules, Plaintiffs reiterate their request that the Court either promptly vacate and remand the rules or re-establish an expeditious summary judgment briefing and hearing schedule.

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* In compliance with Civil Local Rule 5-1(h)(3), the filer of this document attests that all signatories listed have concurred in the filing of this document.

DECLARATION RE TECHNICAL FAILURE

Pursuant to Local Rule 5-1(d)(5), I attest that this joint supplemental brief was not filed on the day that it was due solely because of technical failure with the CM/ECF system. On March 11, 2022, I attempted to file this document electronically at 3:00 p.m., 5:00 p.m., and 9:00 p.m., but was unable to do so because the CM/ECF system was down.

Dated: March 12, 2022

/s/ George Torgun
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