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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ANIMAL LEGAL DEFENSE FUND,

Plaintiffs,

v.

DEB HAALAND, U.S. Secretary of the Interior, et al.,

Defendants,

STATE OF ALABAMA, et al.

Defendant-Intervenors.

CASE NO. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-05206-JST
No. 4:19-cv-06013-JST

INDUSTRY DEFENDANT-INTERVENORS' SUPPLEMENTAL BRIEF RE DEFENDANTS' MOTION FOR VOLUNTARY REMAND

Date: TBD
Time: TBD
Courtroom: 6, 2nd Floor
Judge: Hon. Jon S. Tigar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION[1]

This case is at a highly unusual procedural juncture. Plaintiffs commenced this action in fall 2019. After initially struggling to even show that they had standing to sue, *see* ECF No. 87, Plaintiffs filed motions for summary judgment on January 19, 2021, the day before the Presidential transition. Acting on the requests of the parties, the Court stayed the case several times so the Federal Defendants could review and develop their positions on the rules Plaintiffs challenge in this case (the Final Rules). In October 2021, the Court lifted the stay and entered a stipulated briefing schedule for summary judgment motions. Instead of filing their oppositions, however, the Federal Defendants filed a motion for voluntary remand, short-circuiting merits briefing.

Though this litigation has been pending for over two years, Plaintiffs never sought a preliminary injunction. Yet Plaintiffs now argue that an emergency exists which requires vacatur of the Final Rules on remand. To be clear, nothing has changed since the commencement of this litigation in fall 2019. The threat of harm Plaintiffs claim to face remains the same. The only reasonable explanation for the sudden "emergency" is that Plaintiffs smell an opportunity: if the Court agrees with them and vacates the Services' Final Rules, they will have achieved a reinstatement of the prior rules implementing key portions of the Endangered Species Act (ESA) without having to go through notice-and-comment under the Administrative Procedure Act (APA).

With that context in mind, we turn now to the two questions presented by the Court's Order. First, the Services complied with the National Environmental Policy Act (NEPA) by properly invoking categorical exclusions, and compiling a robust record that explained their decisions in detail. Review of agency decisions to rely on categorical exclusions is deferential. The Services' determinations must be upheld because nothing about them was plainly erroneous.

Second, vacatur would not be the proper remedy for a NEPA violation here. *Allied-Signal* only counsels vacatur in instances where the underlying rule *actually contains error*. Only the parties advocating for vacatur have had the opportunity to argue the merits, which they did in voluminous summary judgment briefs.[2] Vacatur at this juncture would therefore be improper, not

[1] In this Supplemental Brief, Industry Intervenors will cite to the ECF document number in the low-numbered case, *CBD et al v. Haaland*, No. 4:19-cv-05206-JST, unless otherwise noted.
[2] Based on the structure of the briefing schedule established by the Court, Industry Intervenors will

least because it would be fundamentally unfair and short-circuit the administrative process.

Even if the Court were inclined to apply the *Allied-Signal* test, however, vacatur would still not be proper because any NEPA violations that do exist (again, there are none) would be relatively minor procedural errors. Given the serious and concrete impacts vacatur would have on the Industry Intervenors, and the relative lack of harm the Plaintiffs have managed to establish they would suffer if the Final Rules were permitted to stand, the Court should remand without vacatur.

ARGUMENT

A. The Federal Defendants Complied with NEPA by Properly Applying Two Categorical Exclusions

Agencies' compliance with NEPA is reviewed under the APA's "arbitrary and capricious" standard, *Cal. ex rel. Lockyer v. United States Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009), which "is 'highly deferential' and presumes that agency action is valid if 'a reasonable basis exists' for the agency's decision." *Friends of Animals v. United States Fish & Wildlife Service*, -- F.4th --, 2022 WL 628565, at *6 (9th Cir. 2022) (quoting *Ranchers Cattlemen Action Legal Fund v. United States Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007)). Accordingly, "[a]n 'agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation.'" *Id.* (quoting *Alaska Ctr. For the Env't v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999)). "Once the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Alaska*, 189 F.3d at 859.

"Application of a categorical exclusion is not an exemption from NEPA; rather, it is a form of NEPA compliance." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013). Even "a brief statement that a categorical exclusion is being invoked will suffice." *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002). The record need only show that the agency actually considered whether the categorical exclusion applied. *Id.* at 1175-77.

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not have the opportunity to review or respond to NEPA arguments made by Plaintiffs in their Supplemental Briefs. Industry Intervenors would request an opportunity to respond to those arguments if the Court is inclined to conclude that vacatur is permissible and appropriate.

1. The Services Properly Invoked the Categorical Exclusion for Rules that Are Administrative, Legal, Technical, and Procedural in Nature

Here, FWS prepared a 44-page "Environmental Action Statement" (which NMFS adopted by reference) that shows each change made by the three Final Rules, an explanation of the change, and an analysis of why the categorical exclusion for regulations of an "administrative . . . legal, technical, or procedural nature" applies, 43 C.F.R. § 46.210(i) (FWS CE); Companion Manual for NAO 216-6A, Appendix E, page E-14 (NOAA CE), applies, via user-friendly crosswalk tables. ESA000128-132; ESA000138-154; ESA000160-166; ESA000006.

This easily meets the Ninth Circuit's low bar for explaining reliance on a particular categorical exclusion in an administrative decision. *See Norton*, 311 F.3d at 1176. For instance, with respect to the revision to the Section 4(d) Rule, FWS explained that the new regulatory language would alter the "Blanket 4(d)" Rule by requiring FWS to finalize a species-specific 4(d) rule containing protections or prohibitions tailored to the species being listed as threatened, rather than automatically extending the "take" prohibition to each such species. ESA000128-29. FWS explained that this change altered its internal deliberative process, rather than the content of species-specific regulations for threatened species. *Id.* With or without the 2019 4(d) Rule, FWS is required by the terms of the ESA to issue such protective regulations. 16 U.S.C. § 1533(d).

Likewise, FWS explained that the changes to the Section 7 Rule qualified because they clarified existing regulatory definitions to hew more closely to the language of the ESA and, in many cases, to simplify them. ESA000138-154. The changes to the definition of "destruction or adverse modification" provide a good example. The Services added the phrase "as a whole" to clarify that destruction or adverse modification means an alteration that "appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." ESA000138 (emphasis in original). Because this interpretation reflected the Services' longstanding practice and would not result in any operational changes for the Services or action agencies in future consultations, FWS explained that it constituted a technical change aimed at improving transparency and clarity. *Id.*; ESA000026. The Services also removed a sentence specifying that the definition encompasses modifications that "alter the physical or biological features essential to

the conservation of the species or that preclude or significantly delay development of such features." *Id.* As FWS explained, this was also a technical change aimed at removing unnecessary language, as the statutory definition of critical habitat already encompasses such features. *Id.*; *see also* 16 U.S.C. § 1532(5)(A) ("critical habitat" includes areas with "those physical or biological features (i) essential to the conservation of the species . . . ."). The remainder of the changes the Services made to other provisions in the Section 7 Rule, as well as changes they made to the Section 4 Rule, were similarly technical and clarifying. *See* ESA000138-154.

Finally, the Services explained that many of their changes to the Section 4 Rule were administrative or procedural. ESA000160-167. As one example, the Services removed the phrase "without reference to possible economic or other impacts" from the Section 4 listing regulations. *Id.* This change is procedural because it does not fundamentally alter the substantive criteria upon which the Services may rely when making a listing decision—they are still limited by the terms of the ESA to making listing determinations "*solely* on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A) (emphasis added); 50 C.F.R. § 424.11(b) (same). The Services merely intended to clarify what has always been true under the statute—that they could compile or publish information on economic or other impacts to inform the public.

In sum, the Services' explanations were entirely reasonable and well within the terms of the categorical exclusion. That alone counsels against a finding of error on judicial review. *See Friends of Animals*, -- F.4th --, 2022 WL 628565, at *6. Beyond just that, however, the reasonableness of the Services' explanations is further demonstrated by their alignment with prior agency practice. *See, e.g.*, *Lockyer*, 575 F.3d at 1017 n.16 (noting that clarifications of Forest Service's appraisal procedures for determining fair market value of timber was "clearly" a "routine and procedural" matter). In 2016, for example, NMFS promulgated a rule (the Experimental Populations Rule) setting forth criteria and procedures to (i) identify experimental populations, (ii) determine whether those are "essential" or "nonessential," and (iii) promulgate appropriate protective measures for experimental populations as authorized by the Section 10(j)(1) of the ESA. 81 Fed. Reg. 33,416 (May 26, 2016). In other words, NMFS's Experimental Populations Rule established regulatory definitions and agency procedures for making future substantive

determinations (i.e., whether a species' population qualified as an experimental population and what protective measures for it would be appropriate), but did not dictate the substance or outcome of those future determinations. *Id.* at 33,421-22. NMFS appropriately determined that it need not prepare an EA or EIS because the rule fell within the categorical exclusion for regulations of an "administrative, financial, legal, technical or procedural nature." *Id.* The Final Rules are similar in that regard.

It is also worth noting what this case is not. This is not a case like *Shearwater v. Ashe*, where this Court held that FWS erred in relying on the administrative or procedural categorical exclusion for a rule extending the maximum duration of programmatic permits to take bald and golden eagles from five years to thirty years (the so-called "Thirty Year Rule"). No. 14-CV-02830-LHK, 2015 WL 4747881, at *15 (N.D. Cal. Aug. 11, 2015). The Thirty Year Rule made substantive changes to the Service's prior regulations, in addition to extending the duration of the permit six-fold, by "shift[ing] the burden" from the permittee to FWS determine whether any changes to the permits are necessary. *Id.* at 17. The Rule's self-proclaimed primary purpose was to encourage substantive outcomes, such as "facilitat[ing] the responsible development of renewable energy and other projects designed to operate for decades." *Id.* By contrast, the Final Rules here do not impose substantive changes or purport to achieve substantive outcomes. Indeed, the Final Rules are explicit in stating that they are aimed at clarifying existing regulatory language and streamlining procedures associated with implementation of the ESA. *See, e.g.*, 83 Fed. Reg. 35,198; 84 Fed. Reg. 45,017.[3]

Plaintiffs also attempt to analogize this case to *Lockyer*, but to no avail.[4] There, the Ninth

[3] It is also noteworthy that the record in *Shearwater* was replete with instances of FWS officials the Court termed the Service's "NEPA experts" sounding the alarm bells because of the lack of NEPA compliance, where the Service had only a few years earlier prepared an EA for regulations authorizing the much shorter duration 5-year permits. *See Shearwater*, 2015 WL 4747881, at **6-7, 18-19, 23. Nothing remotely of the kind happened in the case of the Final Rules and, as the Federal Defendants made clear in their Supplemental Briefing, there is no similar trove of agency "NEPA expert" alarm bell documents in the administrative record informing the Services' stated desires to perhaps provide further explanation on remand. ECF No. 156 at 3-8; Fifth Rauch Decl. ¶ 3 (ECF No. 156-2); Fourth Frazer Decl. ¶ 3 (ECF No. 156-1). While Plaintiffs pluck a few emails out of a gargantuan administrative record and point to them as evidence of impropriety in the rulemaking process, upon closer inspection, these emails are completely mundane and innocuous. *See* ESA2_0025908; ESA2_0016876.

[4] All references to Plaintiffs arguments are to their motions for summary judgment and supporting

Circuit held that the U.S. Forest Service erred in invoking a categorical exclusion for procedural rules when it replaced the "Roadless Rule" (providing protections for roadless areas in National Forests) with the "State Petitions Rule." *Lockyer*, 575 F.3d at 1008-09. The latter regulation established a process for a state to request specific consideration of the need for roadless areas in it and provided an 18-month window in which to petition for roadless area protections. *Id.* Focusing on the fact that the State Petitions Rule would "permanently remove[] the Roadless Rule's substantive protections" for roadless areas, the Ninth Circuit rejected the Forest Service's argument that the State Petitions Rule represented a procedural rule and instead held that the new rule required an EA/EIS because it may affect listed species and their critical habitats. *Id.* at 1019.

The Final Rules, by contrast, will not result in any similar removal of substantive environmental protections for species. The Services' revisions to the Section 4(d) Rule here will not alter the requirement that the Services promulgate species-specific protective regulations upon listing, and, as the Services explained, the possibility of species-specific exemptions are expected to enhance and expedite species conservation, as "landowners would be incentivized to take actions that would improve the status of endangered species with the possibility of downlisting the species to threatened and potentially receiving regulatory relief in the resulting 4(d) rule." ESA000013; *see, e.g.*, 87 Fed. Reg. 6,118, 6,126 (Feb. 3, 2022) (proposing special 4(d) rule under 2019 4(d) regime that would enhance conservation of the red-cockaded woodpecker by encouraging private landowners to engage in voluntary forest management practices (i.e., prescribed burning and herbicide applications) essential for maintenance of habitat); 78 Fed. Reg. 61,452 (Oct. 3, 2013) (establishing special rule to tailor take prohibitions on streaked horned lark to encourage agricultural activities under best management practices). The revision to the Section 4(d) Rule is nothing like the rule at issue in *Lockyer*. *See* 575 F.3d at 1008-09.

The Services' revisions to the Section 4 and Section 7 Rules are also very different. These revisions promote transparency in listing decisions, prevent unwarranted and overbroad critical habitat designations (which can stymie private conservation efforts), and streamline the (often arduous) consultation process, which is ultimately aimed at ensuring agency actions do not

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papers, unless otherwise indicated. ECF Nos. 86, 116, 130.

jeopardize the continued existence of species. ECF No. 153 at 17-23. They simply do not roll back or strip away any environmental protections.[5] *See Lockyer*, 575 F.3d at 1008-09.

Accordingly, the Services' reliance on the categorical exclusions for administrative, technical, legal, or procedural rules was neither "plainly erroneous" nor "inconsistent with the terms" of the exclusion and, as such, is entitled to deference. *See Lockyer*, 575 F.3d at 1011. The Court should therefore hold that the Services satisfied their NEPA obligations. *See id.*

2. The Services Also Properly Invoked the Categorical Exclusion for Rules Whose Environmental Effects Are Too Broad or Speculative, and Will Later Be Subject to the NEPA Process

43 C.F.R. § 46.210(i) also contains a categorical exclusion for rules "whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." Here too, the Services' revisions plainly fall within the text of the categorical exclusion.

The Services' revisions to the Section 4(d) Rule will affect FWS' internal process for each listing decision it makes going forward. ESA0000128-129. Given the number of species potentially subject to a future listing decision by FWS, the environmental effects of the Section 4(d) Rule are plainly "too broad, speculative, or conjectural" to conduct an EA or EIS, and the Plaintiffs have not suggested how the Services could conduct one. So too for the revisions made to the Section 7 and Section 4 Rules, which the Services explained will merely impact the process by which they conduct future consultations and designate critical habitat. ESA000138-167. Attempting to analyze the environmental effects of the regulatory changes at this time would be

[5] The other precedents cited by Plaintiffs also have no bearing on whether the Services properly invoked the categorical exclusion for administrative, technical, legal or procedural rules here. *Western Watersheds Project v. Kraayenbrink*, for instance, involved Bureau of Land Management (BLM) changes to regulations governing grazing permits which were unquestionably substantive. 632 F.3d 472, 480-81 (9th Cir. 2011). The prior rulemakings Plaintiffs point to in which the Services produced an EA or EIS are also very different from the rulemakings here. Take the Services' 2004 revisions to their Section 7 Consultation Regulations. In a challenge to those revisions, the district court ultimately held that the Services erred by preparing an EA instead of an EIS. The revisions allowed EPA to make certain final determinations regarding the likelihood of adverse effects of issuing a license for certain pesticides. *Wash. Toxics Coal. v. United States Dep't of the Interior*, 457 F. Supp. 2d 1158, 1164-65 (W.D. Wash. 2006). In stark contrast to the Final Rules, those revisions made substantive changes by establishing EPA's determinations as the "functional equivalent" of findings by the Services under Section 7. *Id.*

ineffectual, unduly burdensome, and, at bottom, purely speculative—after all, future consultations, listing decisions, or even species that will be effected cannot at this time be known. *Id.*

The environmental effects of the Final Rules can only be assessed when the Rules are applied to specific species or agency actions in the future. To that end, species-specific 4(d) regulations will be subject to FWS' or NMFS' NEPA analysis. *See In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 235 (D.D.C. 2011) (holding that EA/EIS required for Special 4(d) rule issuance for polar bear); *see also* 71 Fed. Reg. 5178, 5179 (Feb. 1, 2006) (preparing EA for special 4(d) rule to threatened upper Columbia Riverhead steelhead). And the Services' revisions to the Section 7 regulations will be subject to NEPA review during consultations. 16 U.S.C. § 1536(a)(2). Because "[t]he standards for 'major federal action' under NEPA [42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18(a)] and 'agency action' under the ESA are much the same," *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996), as a practical matter, whenever an agency engages in consultation under Section 7, its obligations under NEPA will be triggered. *See also* 16 U.S.C. § 1536(c)(1).

The Industry Intervenors acknowledge that listing decisions are not subject to NEPA and that Ninth Circuit case law will not require the Services to conduct NEPA analyses of future critical habitat designations. *See Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1507-08 (9th Cir. 1995). In *Douglas County*, the Ninth Circuit held that NEPA could not apply to designations of critical habitat because actions aimed at preserving the environment (including critical habitat designations) should not be considered major federal actions having a "significant effect" on the environment. *Id.* at 1505-07. Given that controlling Ninth Circuit precedent has already effectively deemed downstream applications of the Section 4 Rule not to have any significant effects on the environment for NEPA purposes, it follows that the Services' changes to the Section 4 Rule will not have any significant effects on the environment either, and NEPA documentation is not required.[6] *See id.*

[6] The Tenth Circuit, by contrast, has held that NEPA does apply to critical habitat designations. *Catron Cnty. Bd. of Comm'rs, New Mexico v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996). Other courts have also followed the Tenth Circuit's lead. *See Cape Hatteras Access Preservation All. v. United States Dep't of Interior*, 344 F. Supp. 2d 108, 134-36 (D.D.C. 2004). Critical habitat designations in these jurisdictions will also be subject to

In sum, the Services' explanations support their conclusion that the Final Rules "are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process." 43 C.F.R. § 46.210(i). The Court must therefore defer to their interpretation of the applicability of this categorical exclusion and find that the Services properly invoked the exclusion in lieu of preparing an EA/EIS. *See Norton*, 311 F.3d at 1176.

3. The Services Adequately Explained That No Extraordinary Circumstances Are Present Here

DOI has promulgated regulations that define a number of "extraordinary circumstances" which, if present, warrant further NEPA documentation despite the applicability of a categorical exclusion. 43 C.F.R. § 46.215. As relevant here, DOI has indicated that "extraordinary circumstances" exist if the action would (1) "have significant impacts" on natural resources, public lands, historic or cultural resources, or species listed (or proposed to be listed) as endangered or threatened, or (2) would have "highly controversial" or "highly uncertain and potentially significant" environmental effects. *Id.* NOAA lists substantially similar "extraordinary circumstances" in its NAO 216-6A Companion Manual. Here, the Services explained that none of revisions made by the Final Rules implicated any of those extraordinary circumstances. ESA000006; ESA000127. Revision by revision, FWS explained that each edit to the Final Rules was administrative, technical, legal, or procedural in nature. *See* ESA 000128-67. Because these changes merely clarified existing regulations, made them more consistent with statutory language and Congressional intent, and did nothing to dictate the substantive outcome of future decisions, the Services concluded that they would not have significant or controversial environmental effects or impacts on species or other natural/cultural resources. *See* 43 C.F.R. § 46.215; Companion Manual to NAO 216-6A (a)-(e).

The Services' explanations easily satisfy their burden for invoking a categorical exclusion, which, again, is minimal. *See Norton*, 311 F.3d at 1176. While it is true that "[w]here there is substantial evidence in the record that exceptions to the categorical exclusion may apply . . . the agency must at the very least explain why the action does not fall within one of the exceptions,"

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downstream NEPA review.

Norton, 311 F.3d at 1177, no such evidence is present in the record here.

The CBD Plaintiffs argue that the changes to the Section 4(d) Rule will "likely" result in threatened species receiving fewer protections. ECF No. 116 at 18. But they do not cite to any record evidence. *Id.* Likewise, the State Plaintiffs assert that the Services' changes to the regulations governing designation of "unoccupied critical habitat" will "stringent[ly]" limit the Services' ability to designate such habitat, but point to no specific record evidence. ECF No. 130 at 29. Such speculation does not constitute the sort of "evidence" necessary to trigger extended explanation from the agency regarding the absence of extraordinary circumstances. *See Oregon Nat. Desert Ass'n v. Cain*, 17 F. Supp. 3d 1037, 1058 (D. Or. 2014) (rejecting plaintiff's argument that extraordinary circumstances were present due to potential impact on sage grouse habitat and holding agency determination to be "reasonable in light of the information in the record").

Plaintiffs, apparently cognizant of their burden, have endeavored to point to some record evidence by repeatedly quoting language in their summary judgment briefing from a few internal agency emails to the effect that "we are going to state that these regulations will likely be controversial." ESA2_0016876 (FWS), ESA2_0025908-09 (NMFS).

Two points. First, Plaintiffs misconstrue the meaning of the term "controversial" as used in DOI's regulations. Courts interpreting 43 C.F.R. § 46.215(c) have held that "controversial" refers to disputes about "the size, nature, or effect of the major Federal action rather than the existence of opposition to a use." *Oregon*, 17 F. Supp. 3d at 1057 (quoting *Anderson v. Evans*, 371 F.3d 475, 489 (9th Cir. 2004); *accord N.W. Env'tl Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997). Plaintiffs sing the same tune regarding the number of public comments submitted during the rulemaking process, but this figure simply is not relevant to the question of whether extraordinary circumstances are present. ECF No. 86 at 9, No. 130 at 39.

Second, compare these emails with the trove of FWS "NEPA expert" alarm bell documents in the *Shearwater* case. *See supra* n.3. While they may reflect concern over the controversial nature of the regulations in a colloquial sense (i.e., that the revisions would receive a lot of attention), this does not mean that the revisions are controversial in the regulatory sense (i.e., that there is a wide range of opinions as to the impacts the regulations will have on the environment).

See Shearwater, 2015 WL 4747881, at **21-23 (finding 30-Year Rule to be "highly controversial" where evidence in the record showed that wind turbines would kill substantial numbers of bald and golden eagles, FWS had previously "expressed concern" about the impacts of wind power on eagle populations, and other federal agencies (e.g., NPS) opposed the action).

Nor does the lack of controversy regarding the Final Rules' environmental impacts derogate from the finding that their impacts are too speculative to assess under NEPA. *See* 43 C.F.R. § 46.210(i). While the exact contours of the effects of the Final Rules are difficult to estimate at this time (e.g., determining which species will be listed and thus impacted by the changes, or which future major federal actions will require consultation), whether the adoption of the Final Rules will have *significant* impacts is a separate question, and one which can already be answered in the negative, given their administrative, legal, technical and procedural nature. Plaintiffs do not point to any substantial record evidence contradicting the Services' findings that the regulations will not have a significant effect on the environment or calling into question the applicability of the categorical exclusions. This is not surprising because, as the Federal Defendants have repeatedly pointed out, Plaintiffs have had great difficulty throughout this litigation articulating what harm is caused by the Final Rules. The extraordinary circumstance of a "controversial" regulation is therefore not present either.

Accordingly, the Services properly concluded that no extraordinary circumstances are present that would require them to prepare an EA/EIS. The Services therefore complied with NEPA by invoking the categorical exclusions codified at 43 C.F.R. § 46.210(i).

B. Vacatur Is Not an Appropriate Remedy for a NEPA Violation Here

Industry Intervenors do not take a position on the Government's request for remand. ECF 153 at 9. Remanding *with vacatur*, however, would be an abuse of discretion because the Court has not squarely addressed the merits of the case. *Id.* at 9-11. Only the Plaintiffs have filed summary judgment papers. The Government also has not confessed error as to any of Plaintiffs' claims, including their NEPA claims. Fifth Rauch Decl. ¶ 4; Fourth Frazer Decl. ¶ 5; ECF No. 156 at 12. Nor could it, for the reasons set forth above and in the briefing on the motion for voluntary remand.

To the extent the Court is nevertheless inclined to consider vacating the Final Rules at this juncture, vacatur would not be the proper remedy for a NEPA violation under *Allied-Signal* because the disruptive consequences of vacatur outweigh the seriousness of any NEPA error..

1. Any Purported NEPA Violations Are Not Serious

Under *Allied-Signal*, the Court must first consider the seriousness of the agency's errors. *Cal. Communities Against Toxics v. United States Env't Protec. Agency* [*CCAT*], 688 F.3d 989, 992 (9th Cir. 2012) (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993)). Courts in this circuit generally consider substantive errors, rather than procedural ones, to be more serious, and thus more likely to commend vacating a rule on remand because they present "fundamental flaws" that would prevent the agency from issuing the same rule on remand. *See, e.g.*, *Pascua Yaqui Tribe v. United States Env't Protec. Agency*, -- F. Supp. 3d --, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021) ("The concerns identified by Plaintiffs . . . are not mere procedural errors or problems that could be remedied through further explanation. Rather, they involve fundamental, substantive flaws . . . ."); *Pac. Rivers Council v. United States Forest Serv.*, 942 F. Supp. 2d 1014, 1021 (E.D. Cal. 2013) ("the absence of new analysis—while a violation of NEPA—is not a serious deficiency warranting vacatur").

Here, any purported violation of NEPA in promulgating the Final Rules would necessarily be a procedural error, because "NEPA is a procedural statute." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005). NEPA "does not dictate the substantive results of agency decision making." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). In *Sierra Forest Legacy v. Sherman*, the district court held that the Forest Service's failure to include certain information in a Supplemental EIS was a "relatively minor" error because it did not meaningfully impact the ability of the plaintiffs or the agency to evaluate the environmental impacts of the agency action. 951 F. Supp. 2d 1100, 1109 (E.D. Cal. 2013). The court distinguished this error from one which would warrant vacatur by noting: "This is not a case where the governmental decisionmakers made up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment." *Id.*

Likewise here, the Services did not "ma[k]e up their minds" without having adequate

environmental analysis before them or public comments on the content of the proposed rules. *See Sierra Forest*, 951 F. Supp. 2d at 1109; *see also CCAT*, 688 F.3d at 993 (finding procedural error harmless when it did not impair Plaintiffs' ability to comment meaningfully on the documents for which vacatur was sought). As Plaintiffs point out, the Services received over 200,000 comments on the proposed rules, including from Plaintiffs. ECF No. 130 at 39. Plaintiffs' comments on the whole were extensive. ESA0091280, 0073602, 0054603, 0164955. Yet they provided only a cursory analysis of the NEPA issue, and did not explain how reliance on categorical exclusions precluded commenting on the Final Rules' potential environmental effects. *Id.*

Nor is this a case where the Federal Defendants have confessed error or have indicated that the Services "will not or could not adopt the same rule on remand." *See In re Clean Water Act Rulemaking*, No. C 20-04636 WHA, 2021 WL 4924844, at *8 (N.D. Cal. Oct. 21, 2021). The Federal Defendants have only indicated they intend to revisit five of the regulatory provisions promulgated in the challenged Final Rules. ECF No. 153 at 5-7. And they have clarified that these revisions are not being driven by a concern that their NEPA analysis was unlawful—rather, they simply want to add to their explanations to make them more thorough. *See* Fifth Rauch Decl. ¶ 4; Fourth Frazer Decl. ¶ 5. The Services' wish to provide on remand additional information—for transparency or public education purposes, or any other policy reason—beyond the minimum required by law is far from a confession of legal error and does not support vacatur. *See Norton*, 311 F.3d at 1176. And even if it were error, it could easily be remedied on remand without affecting the substance of the underlying rules, because NEPA does not dictate substantive outcomes. *Weldon*, 697 F.3d at 1051.

In short, this is a far cry from the wholesale rewrite the Government stated it intended to undertake in *In re Clean Water Act Rulemaking*. *See* 2021 WL 4924844, at *8 (noting that proposed revisions on remand "address nearly every substantive change introduced in the current rule"). It also bears no resemblance to the Government's renouncement of the challenged "Navigable Waters Protection Rule" (NWPR) in *Pascua Yaqui Tribe*, 2021 WL 3855977, at *3 (noting Government's intention to return to pre-2015 regulations). This is a case of, at the very most, a relatively minor procedural error (if one occurred at all), and the Services would be able

to promulgate the same substantive rules on remand. The seriousness of the error factor therefore counsels against vacatur.

2. The Disruptive Effects of Vacatur Outweigh the Minimal Impacts of Leaving the Final Rules in Place

The second *Allied-Signal* factor requires the Court to consider "the disruptive consequences" of vacatur. *CCAT*, 688 F.3d at 992. Industry Intervenors have previously explained the disruptive impacts of vacatur will largely fall on them, with minimal (if any) effects being felt by the Plaintiffs (ECF No. 153 at 14-23), and so will only highlight some key points.

Respectfully, any claim by Plaintiffs in this matter of imminent harm to species and their habitats is fantastical. Plaintiffs have simply not put forward competent evidence of harm to support the relief they seek. *See, e.g.*, *Pascua Yaqui Tribe*, 2021 WL 3855977, at *5 (noting that the NWPR had resulted in 333 projects that no longer required permits under Clean Water Act, and over 1,500 streams where agencies declined to exercise jurisdiction); *Navajo Nation v. Regan*, -- F. Supp. 3d --, 2021 WL 4430466, at *3 (D.N.M. Sep. 27, 2021) (listing same consequences of leaving NWPR in place). And it bears repeating that Plaintiffs have not sought a preliminary injunction for more than two years—only now that the prospect of effectively achieving a judicial repeal of the regulations is on the table are they arguing imminent irreparable harm.

By contrast, the Industry Intervenors will suffer a number of distinct and tangible harms if the Final Rules are vacated. When the Blanket 4(d) Rule was replaced with the 2019 Section 4(d) Rule, Industry Intervenors, including members of AFBF, NCBA, and PLC, no longer had to alter their routine farming and ranching practices at significant expense, and API's members no longer faced possible complete prohibitions on oil and gas development activity in and around designated critical habitat. ECF No. 153 at 14-17. Vacatur of the 2019 Section 4(d) Rule would also wipe out the benefits realized by species through the promulgation of special 4(d) rules.

The case of the red-cockaded woodpecker, set forth above, is an excellent example. Another good example is provided by the June sucker. In January 2021, FWS downlisted the fish, and issued a special 4(d) rule which kept in place the "take" prohibition in most instances, but allowed for incidental take (with FWS approval) for certain activities "intended to increase

management flexibility and encourage support for the conservation and habitat improvement" of the species (e.g., reducing nonnative species or conducting habitat restoration projects). 86 Fed. Reg. 192, 208 (Jan. 4, 2021). *Id.* at 209. These types of benefits would not be available under the Blanket 4(d) Rule, absent individuals obtaining costly Section 10 incidental take permits.

Similarly, vacatur of the 2019 Section 4 Rule will deprive Industry Intervenors of the benefits of preventing unwarranted listing and overbroad designation decisions, such as reducing suspension and cancellation of AFRC and FFRC timber contracts, facilitating forest management projects, and improving access to API members' oil and gas lease sites, which reduces operational costs and improves the ability to provide energy to the country. *See* ECF No. 153 at 18-21. Finally, vacatur of the 2019 Section 7 Rule will wipe out the benefits and cost-savings which have inured to the Industry Intervenors due to the streamlining of the Section 7 consultation process. *See id.* at 21-23.

These sorts of economic harms have been held to constitute disruptive consequences that counsel against vacatur on remand. *See N. Coast Rivers All. v. United States Dep't of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 8673038, at **9-10 (E.D. Cal. Dec. 16, 2016) (declining to vacate interim water supply contracts because it would cause increased use of more expensive groundwater, fallowing of farmland , changes in crop mix, and lost jobs and lost revenue). The harm to Industry Intervenors outweighs the seriousness of any purported NEPA errors by the Services, and the elusive and relatively slight interim harm Plaintiffs would purportedly suffer by leaving the Final Rules in place. Vacatur based on a purported error that received scant mention in Plaintiffs' comments and summary judgment briefs would be grossly disproportionate.

CONCLUSION

Industry Intervenors continue to take no position on the Federal Defendants' request for voluntary remand. If the Court is inclined to remand, we simply request that the Court remand without vacatur. Whether the Federal Defendants complied with NEPA does not alter this request.

Respectfully submitted,

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AMERICAN FARM BUREAU FEDERATION; AMERICAN FOREST RESOURCE COUNCIL; AMERICAN PETROLEUM INSTITUTE; FEDERAL FOREST RESOURCE COALITION; NATIONAL ALLIANCE OF FOREST OWNERS; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL CATTLEMEN'S BEEF ASSOCIATION; and PUBLIC LANDS COUNCIL.