IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA OIL AND GAS ASSOCIATION, *et al.*, Plaintiffs, v. SALLY JEWELL, *et al.*, Defendants.	Case No. 3:11-cv-0025-RRB
STATE OF ALASKA, Plaintiff, v. SALLY JEWELL, *et al.*, Defendants.	Case No. 3:11-cv-0036-RRB
ARCTIC SLOPE REGIONAL CORPORATION, *et al.*, Plaintiffs, v. SALLY JEWELL, *et al.*, Defendants.	Case No. 3:11-cv-0106-RRB Order Denying Defendants' and Defendant-Intervenors' Motions To Alter Or Amend Judgment

Before the Court are two motions to alter or amend the order entered on January 11, 2013, at Docket 96 wherein the Court vacated and remanded the final rule designating critical habitat for the polar bear ("Final Rule") which Final Rule was issued by the U.S. Fish and Wildlife Service ("Service") pursuant to the Endangered Species Act ("Act") and set forth in United Sates, 75 Fed Reg, 76,086 (Dec. 7, 2010).

The Federal Defendants ("Government") filed their motion at Docket 102. Defendant-Intervenors, Center for Biological Diversity, Defenders of Wildlife Inc., and Greenpeace, Inc. ("Intervenors") filed their motion at Docket 104. Plaintiffs, Alaska Oil and Gas Association, Arctic Slope Regional Corporation, ("ASRC"), and the State of Alaska, oppose at Dockets 108, 109, and 110 respectively. The Court will treat the Government's and the Intervenors' motions as a single motion and, when utilizing Docket Numbers, references the lead case herein, 3-11-cv-0025.

The Government argues that "the Court erred when it found - on a ground not advanced in Plaintiffs' briefs - that the administrative record lacked evidence that Unit 3 (the barrier islands unit) contains the required physical and biological features of the barrier island habitat primary constituent element ("PCE")."[1] Regarding Unit 2 (the denning unit), the Government opines that the Court "erred when it found - on grounds not advanced by Plaintiffs during notice and comment - that designation of the unit was not supported by the record."[2]

The Government further claims that vacating the Final Rule (vacatur) is an unjust remedy because the Court found that Unit 1 (the sea-ice unit), which comprises ninety-six percent of the

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[1]Docket No. 102 at 2; Docket No. 104 at 2.

[2]*Id.*

designation, did not violate the ESA or the Administrative Procedure Act ("APA"), and because vacatur "is unnecessary to address the legal errors identified by the Court in Units 2 and 3."[3] The Government additionally contends that "the Court erred in granting summary judgment to ASRC because it ruled against them on all issues briefed in their motion."[4] Intervenors agree with the Government and argue that the critical habitat designation should be left in place while the Service cures any deficiencies and republishes the Final Rule in order "to prevent 'undesirable consequences which we cannot now predict' when invalidating regulations during remand."[5]

Plaintiffs Alaska Oil and Gas Association, the American Petroleum Institute, ASRC, and the State of Alaska argue that they "plainly commented, alleged, and argued that 'The Final Rule Unlawfully Includes Areas That Do No Contain PCEs.'"[6] Plaintiffs assert that the Government's Motion fails the high reconsideration standard of Federal Rule of Civil Procedure 59(e) because the Government "seeks to reargue matters previously briefed and lost, and to improperly introduce new arguments for the first time in post-judgment briefing."[7] Plaintiffs also claim that it was not error for the Court to grant summary judgment in favor of ASRC because the Court treated the three summary judgment motions filed by the Plaintiffs as a single motion, because Plaintiffs consolidated their cases and attempted to condense and simplify their respective presentations in order to avoid duplicative briefing, and because ASRC generally requested that

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[3] *Id.*

[4] *Id.*

[5] Docket No. 105 at 3-4 (quoting *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980)).

[6] Docket No. 108 at 3 (emphasis omitted) (quoting Docket No. 77 at 6).

[7] *Id.*

the Court overturn the habitat designation as arbitrary and capricious.[8] Plaintiffs further argue that the Service's failure to provide written justification to the State of Alaska was not harmless[9] and that vacatur is the appropriate remedy for the Final Rule because "[m]ere disagreement with the Court's carefully considered and discretionary remedy choice does not come close to the type of clear error required" by Rule 59(e).[10]

Inasmuch as the Court concludes that the Government's and Intervenors' Motions To Alter Or Amend Judgment fall short of the requirements of Rule 59(e), and for the reasons set forth below, the two motions to alter or amend must be denied. The Final Rule is vacated and remanded.[11]

I. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 59(e), a party may move to have the court amend its judgment on four basic grounds:

> (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law .[12]

"A court considering a Rule 59(e) motion is not limited merely to these four situations, however[,] . . . under unusual circumstances an amendment outside the listed situations may be

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[8]Docket No. 109 at 4-5.

[9]Docket No. 110 at 7.

[10]Docket No. 109 at 10 (internal quotations omitted).

[11]The Court adopts the background summery at Docket Number 96 at 5.

[12]*Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111-12 (9th Cir. 2011) (citing *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc) (per curiam)) .

appropriate."[13] A "motion to reconsider would be appropriate where, for example, the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension."[14] "'Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion.'"[15] "To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision."[16]

"But amending a judgment after its entry remains 'an extraordinary remedy which should be used sparingly.'"[17] "'[A] motion for reconsideration should not be granted, absent highly unusual circumstances . . . .'"[18] "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation."[19] Rule 59(e) also cannot be used to rehash arguments already made in parties' principal briefs.[20] "A party seeking reconsideration must show more than a disagreement with

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[13]*Id.*

[14]*Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995).

[15]*Allstate Ins. Co.*, 634 F.3d at 1111-12 (quoting *McDowell*, 197 F.3d at 1255 n. 1).

[16]*Arteaga v. Asset Acceptance, LLC*, 733 F.Supp.2d 1218, 1236 (E.D. Cal. 2010) (citing *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).

[17]*Allstate Ins. Co.*, 634 F.3d at 1111-12 (quoting *McDowell*, 197 F.3d at 1255 n. 1).

[18]*Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

[19]*Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citing *Kona Enterprises, Inc.*, 229 F.3d at 890).

[20]*Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

the Court's decision."[21] Reconsideration is not justified on the basis of new evidence which could have been discovered prior to the court's ruling, nor do "'after thoughts' or 'shifting of ground' constitute an appropriate basis for reconsideration."[22] "A motion for reconsideration should not be used to ask a court 'to rethink what the court had already thought through—rightly or wrongly.'"[23] "Arguments that a court was in error on the issues it considered should be directed to the court of appeals."[24]

II. DISCUSSION

A. Not Error for Court to use absence of PCE features in Units 2 and 3 as basis for Final Rule vacatur.

The Government argues that it was error for the Court to vacate the Final Rule based on the novel argument that Units 2 and 3 do not contain the requisite PCE features when Plaintiffs never raised such argument in their comments or their briefing.[25] But under 16 U.S.C. § 1532(5)(A)(i)(I), critical habitat for a threatened species *must* contain *those physical or biological features* essential to the conservation of the species.[26] Thus, habitat that does not contain such features fails to meet the statutory minimum and cannot be designated as critical

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[21] *Arteaga*, 733 F.Supp.2d at 1236 (quoting *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001)).

[22] *Westlands Water Dist.*, 134 F.Supp.2d at 1130 (quoting *United States v. Navarro*, 972 F.Supp. 1296, 1299 (E.D. Cal. 1997)).

[23] *Defenders of Wildlife*, 909 F.Supp. at 1351 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101. (E.D. Va. 1983)).

[24] *Id.*

[25] Docket No. 102 at 2.

[26] Emphasis added.

habitat under the ESA. Regardless of what arguments the parties make, if a court determines that certain areas in a designation do not contain such features,[27] the court cannot allow such designation to stand.[28] It is the Service's primary responsibility to ensure that it complies with the *entirety* of the ESA, not just those parts mentioned by the parties.[29] Here, the Court reviewed the administrative record and found that it lacked evidence of PCE features in each specific area that comprises Units 2 and 3. The Service simply failed to comply with a legal duty under the ESA.

Furthermore, although it is the Court's obligation to evaluate the propriety of the Final Rule to ensure that each unit of the critical habitat designation contained its corresponding PCE features, **the Court's decision was not premised on new grounds.** Even assuming, *arguendo*, that the Court was restricted in its review of the Final Rule to relying solely on the issues raised by Plaintiffs, the lack of PCE features in Units 2 and 3 *was* raised by the Plaintiffs both in the comments and the briefing, and the Court reasonably relied upon the same. Moreover, parties do not have to "'incant [certain] magic words . . . in order to leave the courtroom door open to a

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[27] *Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1035 (9th Cir. 2007) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (A court must inquire whether "the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

[28] 5 U.S.C. § 706(2)(A), (C), (D) (1966) (After a court has finished reviewing the action, the "court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law . . . .").

[29] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004).

challenge.'"[30] "Accordingly, alerting the agency in *general terms* will be enough if the agency has been given 'a chance to bring its expertise to bear to resolve [the] claim.'"[31] "If we required each participant in a notice-and-comment proceeding to raise every issue or be barred from seeking judicial review of the agency's action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency. That would serve neither the agency nor the parties."[32]

Furthermore, an agency's "flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."[33] "This court has interpreted the 'so obvious' standard as requiring that the agency have independent knowledge of the issues that concern petitioners."[34]

Here, one of Plaintiffs' chief arguments was that the Service designated areas that lacked the physical or biological features essential to the conservation of the polar bear.[35] Plaintiffs' arguments were adequate to put the Service on notice that the existence of PCE features in Units

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[30]*Id.* at 1133 (quoting *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002)).

[31]*Id.* (emphasis added) (quoting *Native Ecosystems Council*, 304 F.3d at 900).

[32]*Portland Gen. Elec. Co.*, 501 F.3d at 1024 n. 13.

[33]*See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004).

[34]*Barnes*, 655 F.3d at 1132 (citing *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006)).

[35](1) AOGA Docket No. 19 at 11-12; Docket No. 51 at 28; Docket No. 58 at 10, 50; Docket No. 77 at 12-13;(2) ASRC Complaint at 26, Arctic Slope Reg'l Corp. v. Jewel, No. 3:11-CV-00106-RRB (D. Alaska May 5, 2011), ECF No. 1; Docket No. 56 at 18; (3) Alaska Complaint at 23, State of Alaska v. Jewel, No. 3:11-CV-00036-RRB (D. Alaska March 9, 2011), ECF No. 1; and Docket No. 79 at 27-28, 30.

2 and 3 was being challenged. Plaintiffs' comments also alerted the Service to the potential challenges.[36] Additionally, the Service had independent knowledge of the potential challenges through the Joint Status Report[37] and the Government's Response to Plaintiffs' Summary Judgment Motions.[38] Because all areas listed in the Final Rule *had to* contain PCE features in order to be so designated, the absence of such features should have been obvious to the Service.

The Service was on notice of the potential challenges to the PCE features of Units 2 and 3 and was neither surprised nor prejudiced by the Court invalidating the Final Rule because of a lack of evidence of such features in the record. Thus, it was not clear error or manifest injustice for the Court to find that the record lacked evidence of PCE features in each of the areas comprising Units 2 and 3.

B. Court's Unit 3 PCE component interpretation not error.

The Government alleges that "the Court appears to have misunderstood what physical features the Service found are essential to conservation for the barrier island unit."[39] The Government argues that the Barrier Island Habitat PCE features are the barrier islands themselves, the associated spits, and the no-disturbance zone, not the features used by the Court: denning, refuge from human disturbance, and movements along the coast to access maternal den and optimal feeding habitat.[40] However, the Government's *post hoc* explanation is incongruent

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[36] *E.g.*, Administrative Record Index ("ARI") PBCH0054088.

[37] Docket No. 32 at 2-3.

[38] Docket No. 64 at 61-62.

[39] Docket No. 102 at 2.

[40] *Id.* at 3.

with the Service's prior explanation and use of the Unit 3 PCE features and with the Final Rule's unambiguous definition of such features. Thus, the Court did not err in relying on the Final Rule during its review of the Barrier Island Habitat PCE .

A court must "defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[41] However, "deference is warranted only when the language of the regulation is ambiguous."[42] Where a regulation is unambiguous, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation."[43]

Here, the portion of the Final Rule that outlines the Unit 3 PCE features is not ambiguous. The Final Rule clearly describes the three units of the critical habitat designation and their corresponding features or components.[44] For example, the Barrier Island Habitat PCE is defined as "Barrier island habitat used for denning, refuge from human disturbance, and movements along the coast to access maternal den and optimal feeding habitat."[45] The Final Rule goes on to explain where these features can *generally* be found within Unit 3: the barrier

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[41] *Chase Bank USA, N.A. v. McCoy*, _ U.S. _, 131 S.Ct. 871, 880 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

[42] *Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000).

[43] *Id.*

[44] ARI PBCH0045510.

[45] *Id.*

islands themselves, the associated spits, and the no-disturbance zone.[46] However, the Final Rule fails to establish the *specific area* in Unit 3 where the third feature is located.[47]

The Government reiterated the Final Rule's PCE components definition:

> Each of the three PCEs is composed of a number of components. For example, the terrestrial denning habitat is composed of four components: areas with specific topographic features for constructing dens; unobstructed, undisturbed access between den sites and the coast; proximity to sea ice; and absence of disturbance from humans and human activities.[48]

The Government went on to explain that

> each area within the designation *does not have to include all components of the PCE*. Just as not all of the *terrestrial denning habitat* contains the appropriate topographic features needed for *creating a den, but instead provides access to dens, or freedom from disturbance*, not all of the *barrier island habitat* contains areas for *creating dens, but instead provides refuge from human disturbance or access to feeding habitat*.[49]

Thus, in its Opposition at Docket Number 64, the Government understood the Barrier Island Habitat PCE to contain the three features outlined in the Final Rule: den creation, refuge from human disturbance, and access to feeding habitat. The Government cannot now contend that the Court was mistaken when it employed the same Unit 3 PCE definition in the Final Rule review, especially when the Government explicitly listed "refuge from human disturbance" as one of the features of the Barrier Island Habitat PCE.[50]

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[46] *Id.*

[47] Docket No. 96 at 44-45 (third feature is access along the coast to maternal den sites and optimal feeding habitat).

[48] Docket No. 64 at 51 (quoting ARI PBCH0045510).

[49] *Id.* at 61 (emphasis added) (citing ARI PBCH0045494).

[50] *Id.* at 62.

The Court's Unit 3 PCE component definition was also used by the State of Alaska in its Summary Judgment Motion; yet, it is only after the Court found that the record was lacking concerning Unit 3 PCE evidence that the Government challenged the definition.[51] Furthermore, the Service conceded that some portions of Unit 3 are unsuitable for denning, but may provide refuge from human disturbance or access to feeding habitat.[52] Thus, by describing the features of the Barrier Island Habitat PCE that are used by the polar bears, the Service described the Unit's PCE features. However, by defining the areas comprising Unit 3 as the PCE features themselves, the Government is attempting to change its interpretation and avoid specifying which essential parts of Unit 3 actually serve polar bear conservation. The Government's newly crafted interpretation is illogical and plainly erroneous. The Court's Final Rule review involving the Barrier Island Habitat PCE components was not error.

C. Arguments and previously known and available evidence cannot be raised for the first time in post-judgment briefing.

The Government, throughout its Rule 59(e) Motion, attempts to introduce arguments that it failed to make in its principal briefing based on previously-available evidence. In reviewing agency action under the APA, a court "shall review the whole record or *those parts of it cited by a party*."[53] "A motion for reconsideration 'may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the

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[51]Docket No. 58 at 50.

[52]ARI PBCH0045494.

[53]5 U.S.C. § 706 (emphasis added).

litigation.'"[54] In the present motion, the Government's grounds-not-raised-in-comments-and-briefing arguments regarding Units 2 and 3 are raised for the first time on reconsideration. Additionally, the exhibits attached to the Government's current briefing could have been brought to the Court's attention during summary judgment briefing, but they were not.[55] Out of the hundreds of pages contained within the administrative record, the Court focused its efforts on those many parts cited by the parties. The Court declines to consider new arguments based on previously-available evidence.

D. Parties cannot rehash arguments made in their principal briefs.

The Government alleges that all of Unit 2 (Denning Habitat PCE) contains the PCE component for movement from sea ice to den sites, and that the Service cannot predict the precise path that the polar bears take from their dens to the sea.[56] The Government also opines that the Court was mistaken when it found absent the freedom-from-human-activity component in Unit 2 because "all land in this unit that is more than one mile away from human activity contains this PCE component."[57] Both of the Government's contentions go to the merits of the

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[54]*Marlyn Nutraceuticals, Inc.*, 571 F.3d at 880 (quoting *Kona Enters., Inc.*, 229 F.3d at 890).

[55]The maps presented by the Government still do not specify the location of PCE features in the Units. Exhibit 1 does not show the location of the polar bear access along the coast. Exhibits 2 and 3 only show some of the barrier islands and Unit 2 (eastern portion), but not west of the Colville River and no specific locations of Unit 2 and 3 PCE components. Exhibits 4, 5, and 6 are general descriptions of *possible* polar bear movements and habitats, but fail to provide specific locations of PCE features. Exhibit 7 contains den date previously cited by the Government at Docket No. 64 at 59 and by the Service at ARI PBCH0007523.

[56]Docket No. 102 at 6.

[57]*Id.* at 7.

summary judgment briefing and were previously addressed in the Court's Order at Docket Number 96.

Reconsideration is not "to be used to ask the court to rethink what it has already thought."[58] Nevertheless, even if the Unit 2 terrain is suitable for possible den sites, areas in the designation must contain *actual* den sites. Critical habitat includes areas essential for a threatened species, not just the lands that *potentially* could serve as habitat.[59] With respect to the freedom-from-human-activity component, the areas must be designated specifically, not set aside generally in a large swath of land. Regarding the areas around Deadhorse, the Government's claims still do not specify which of the features are found there. Reconsideration is denied.

E. Summary judgment in favor of ASRC was appropriate.

The Government claims that because the Court ruled against ASRC on all the points ASRC made in its Summary Judgment Motion, granting such motion was error.[60] The Court disagrees.

All of Plaintiffs' Summary Judgment Motions were closely related and treated by the Court as a single motion. Thus, granting one of Plaintiffs' Motions meant granting all of them. The Court instructed the parties at Docket Number 38 to condense their respective presentations in the consolidated cases, and Plaintiffs, including ASRC, coordinated their briefing in order to avoid duplicative briefing on the same issues. The Court will not penalize ASRC for complying

[58] *Arteaga*, 733 F.Supp.2d at 1236.

[59] *See* 16 U.S.C. § 1532(5)(A)(i) (1988).

[60] Docket No. 102 at 8.

with the Court's directive and relying on fellow plaintiffs to bring issues before the Court.[61] It was not error for the Court to grant ASRC's Motion For Summary Judgment.

F. Vacatur and remand are proper remedy for the failings of the Final Rule.

The Government and Intervenors opine that the Court's vacatur and remand of the Final Rule is manifestly unjust.[62] Both parties contend that vacating the entire designation when the Court found nothing wrong with Unit 1, comprising ninety-six percent of the designation, is a waste of resources and that vacatur removes all habitat protections provided to the polar bear.[63]

Intervenors state that the Court failed to properly apply the two-part vacatur-appropriateness test found in *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012).[64] Next, Intervenors argue that equities tip in favor of (and the ESA's purpose requires) no vacatur because the protection of the polar bear depends on the preservation of its habitat.[65] Then, Intervenors explain that Plaintiffs will not be prejudiced by leaving the designation in place because Plaintiffs have not suffered any injury during the two years of designation, and because the nature and magnitude of the Service's errors are not that bad.[66] Finally, Intervenors allege that the Unit 2 and Unit 3 errors that the Court found are only failures to explain and support the basis for designation, so the Final Rule should stay in place because

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[61]Examples of Plaintiff briefing coordination: Docket No. 56 at 7; Docket No. 58 at 9; and Docket No. 51 at 22 n. 23.

[62]Docket No. 102 at 8 (Government); Docket No. 105 at 3 (Intervenors).

[63]Docket No. 102 at 8-9; Docket No. 105 at 3-9.

[64]Docket No. 105 at 4.

[65]*Id.* at 4-6.

[66]*Id.* at 6-9.

the Service could remedy the errors through further explanation.[67] Additionally, the Government and Intervenors argue for partial vacatur, leaving Unit 1 in place while vacating Units 2 and 3.[68] Although many of the Government's and Intervenors' arguments restate previous arguments from their summary judgment briefing, the Court will address them briefly.

"[F]ederal courts should aim to ensure 'the framing of relief no broader than required by the precise facts.'"[69] "A flawed rule need not be vacated. Indeed, 'when equity demands, the regulation can be left in place while the agency follows the necessary procedures' to correct its action."[70] "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"[71] Yet, "we have only ordered remand without vacatur in limited circumstances . . . ."[72] When a court determines that an agency's action failed to follow Congress's clear mandate or where a regulation is promulgated in violation of the APA and the violation is not harmless, the appropriate remedy is to vacate that action.[73]

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[67]*Id.* at 8-9.

[68]Docket No. 102 at 10; Docket No. 105 at 3-9.

[69]*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 193 (2000)

[70]*Cal. Comtys. Against Toxics*, 688 F.3d at 992 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

[71]*Id.*(quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

[72]*Id.* at 994.

[73]*Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011).

In its determination of a proper remedy for the Service's errors in the Final Rule, the Court applied the framework from *California Communities Against Toxics*, and balanced the seriousness of the Service's mistakes with the disruptive consequences of a change in the designation.[74] Concerning the consequences to the polar bear from vacating the Final Rule, the scale tips in favor of vacatur. Polar bears are presently abundant, continue to occupy the entirety of their historical range and face no immediate or precipitous decline.[75] The primary threat to the polar bear and its habitat is climate change, which is beyond the scope of the ESA and not reached by the critical habitat designation.[76] Finally, it appears unlikely that polar bears are highly imperiled or that polar bears will lose all of their protections until the designation is reinstated because "[g]iven the current conservation measures under section 7 of the Act and the Marine Mammal Protection Act (MMPA)" the Service is unable to foresee a scenario in which the designation of critical habitat results in changes to polar bear conservation requirements.[77] In sum, there exist no circumstances that militate in favor of keeping the Final Rule in place.

Although Plaintiffs were not required to, they have shown that they would be prejudiced or injured by leaving the designation in place.[78] Furthermore, equity cuts in favor of vacatur. Plaintiffs represent the broad spectrum of individuals that will be affected by the polar bear

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[74]Docket No. 96 at 49.

[75]Docket No. 110-3 at 3-4.

[76]ARI PBCH0045510-11.

[77]ARI PBCH0045488; *accord* ARI PBCH0021814; ARI PBCH0025642; ARI PBCH0041501; ARI PBCH0041627; ARI PBCH0046244.

[78]*E.g.,* ARI PBCH0044661-62; ARI PBCH0041549-58; ARI PBCH0045502; ARI PBCH0045516.

critical habitat designation: those who own, live on, and work on the property within the designation. It is these individuals who will have to comply with the federal laws that mandate special procedures and considerations concerning actions within the critical habitat designation.[79] Public and private interests are at stake.

Contrary to the Government's and Intervenors arguments, the Service's errors cannot be cured by further explanation or justification from the record. The Service needs to redraft its decision and thus vacatur will serve the goals of the ESA by requiring the Service to designate only those areas essential to the polar bear.[80] The Final Rule's flaws go to the very heart of the ESA and will take time and resources to correct. In addition, the Service will have another opportunity to foster a positive relationship with Alaska Native villages and corporations, and the future designation will be improved through renewed input from Plaintiffs. Therefore, vacating and remanding the Final Rule is not manifestly unjust.

The Government and Intervenors further claim that vacatur is improper because the only mistake that applies to the entire designation is the minor and harmless procedural error concerning notifying the State of Alaska of the comments and suggestions not incorporated into the Final Rule.[81]

However, the Service's notification failure was not harmless. Violation of ESA procedure by failing to report to or involve the State of Alaska prevented necessary and affected

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[79] *See Natural Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F.Supp.2d 1136, 1154 n. 36 (C.D. Cal. 2002) ("If these critical habitat designations add no meaningful species protections yet impose a cost on land owners and society, then there is no point in designating the critical habitats for these species beyond blind compliance with the statutory dictates.").

[80] *See* 16 U.S.C. § 1532(5)(A)(I).

[81] Docket No. 102 at 11; Docket No. 105 at 8.

state agencies from participating in the decision-making process. Because there is no way to know what the Service decision would have been had it followed ESA procedure, the Court cannot in good conscience conclude that the Service's procedure failure had no bearing on the ultimate decision.

G. Remand deadline is not necessary.

Intervenors opine, for the first time here, that a time line is necessary for the re-designation of the polar bear critical habitat.[82] The Court disagrees, and concludes that the Service should have as much time as is reasonably necessary to ensure that the polar bear critical habitat designation comports with every facet of both the ESA and APA; something that the Service previously lacked.[83] Moreover, there has been no showing of special urgency that would warrant a re-designation deadline. Timing for the re-designation will be left to the discretion of the Service. Given the protections currently in place and the need for careful and thorough consideration of the issues raised, the Court will not place a time constraint on the Service.

III. CONCLUSION

The issues before the Court, both substantive and procedural, are complex and technical. However, the Court wishes to be clear. There is no dispute regarding the need to protect the polar bear. And, importantly, there is no question that the polar bear will be protected under current laws regardless of the critical habitat designation. The concern expressed by Plaintiffs in this litigation is that the vast expanse of land designated as critical habitat by the Government is far greater than reasonably necessary to protect the polar bear. Plaintiffs contend that the land

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[82]Docket No. 105 at 10.

[83]*See, e.g.,* ARI PBCH000661; ARI PBCH0008824; ARI PBCH0008905; ARI PBCH0009486; ARI PBCH0032562.

designated as critical habitat is excessive and is unsupported by the record. They contend that this designation is unduly burdensome on the people of the region, on the State of Alaska, and on other interested parties. These concerns are legitimate. While great effort was expended to study the relevant issues, the final decision to designate a land mass larger than many states does appear excessive and is not justified by the record before the Court. The Court has, therefore, vacated the designation as unsupported by the record. Moreover, the Court concludes that vacatur should apply to all units involved. A second look and serious consideration of input from the state of Alaska may impact all of the Units.

For the foregoing reasons, the Motions To Alter Or Amend Judgment at **Docket Numbers 102** and **104** are hereby **DENIED**. Furthermore, because oral argument is not needed, the Government's request for oral argument at **Docket Number 113** is hereby **DENIED**, and the scheduled argument is **VACATED**. Additionally, because the Court finds the Government's Motion at **Docket Number 107** to be moot, it is hereby **DENIED**.

It is so ordered.

Dated this 15th day of May, 2013.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE