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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DAKOTA RURAL ACTION, et al., Plaintiffs, v. **UNITED STATES DEPARTMENT OF AGRICULTURE**, et al., Defendants.	Case No.: 1:18-cv-02852-CKK **FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND**

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Introduction

Federal Defendants move to remand a portion of a final rule published on August 3, 2016 titled "Environmental Policies and Procedures; Compliance With the National Environmental Policy Act and Related Authorities," 81 Fed. Reg. 51,274-96, to address deficiencies in the stated justification for a categorical exclusion ("CatEx"). The categorical exclusion, which is the subject of this lawsuit, applies to loan actions pertaining to medium concentrated animal feeding operations ("Medium CAFOs") as part of agency programs that benefit hundreds of farmers each year, the consumers that purchase their products, and the local economies that benefit from their operations. *See* Am. Compl. ¶ 1, ECF No. 24. Federal Defendants' motion for remand is limited to section 799.32 of the final rule as it applies to loan actions pertaining to Medium CAFOs.[1] So that the deficiencies in the final rule can be addressed in a manner that avoids significant disruption to the entities and persons affected by the Rule in the interim, Federal Defendants respectfully request that the Court order remand without vacating any part of the current rule.

I. FACTUAL BACKGROUND

A. The Farm Loan Programs

The mission of the U.S. Department of Agriculture's Farm Service Agency (FSA) is to serve all farmers, ranchers, and agricultural partners by delivering effective and efficient agricultural programs for all Americans. One way FSA accomplishes its mission is by

[1] Section 799.32 lists proposed actions to which a CatEx applies. 7 C.F.R. § 799.32. Loan actions for Medium CAFOs are not listed in this provision, and the final rule does not otherwise expressly provide a CatEx for Medium CAFOs. However, loan actions for Medium CAFOs are subject to the CatEx by implication because they are not listed in the relevant regulation governing loan actions for CAFOs for which an environmental assessment ("EA") is required. *See* 7 C.F.R. § 799.41(a) (requiring an EA for "[c]onstruction or major expansion of a *large* CAFO" and "[r]efinancing of a newly constructed *large* CAFO") (emphasis added). Plaintiffs' challenge to the final rule is limited to only the portion of the final rule that allows for a categorical exclusion for loan actions for Medium CAFOs. *See* Am. Compl. ¶ 1, ECF No. 24.

administering the Farm Loan Programs under the Consolidated Farm and Rural Development Act, which aims to provide "effective credit services to farmers." 7 U.S.C. § 1921. The Farm Loan Programs provide financial assistance to family farmers and ranchers in an economically and environmentally sound manner. FSA's Programs help to ensure an abundant, safe, and affordable food supply while sustaining agricultural communities. *See generally* 7 C.F.R. § 761.1(c).

FSA is also committed to assisting potential farmers who come from historically underrepresented and disadvantaged communities. FSA designates funds specifically for assisting underserved farmers, including women and beginning farmers who would otherwise face numerous barriers to operating their own farm. 7 C.F.R. § 761.208(d) (women farmers); 7 C.F.R. § 761.209 (beginning farmers).

B. FSA's Proposed Rule on NEPA Regulations

On September 3, 2014, FSA issued a proposed rule to consolidate, update, and amend FSA's existing regulations, which had been in place since 1980, under the National Environmental Policy Act (NEPA). 79 Fed. Reg. 52,239. Significant changes to the structure of FSA and the scope of FSA's programs required changes in FSA's regulations. *Id*. The proposed changes were designed to better align FSA's NEPA regulations with regulations and guidance provided by the Council on Environmental Quality (CEQ) and to improve the clarity and consistency of FSA's regulations. *Id.* The proposed changes included additions to the existing list of categorical exclusions as well as expansion and clarification of the list of actions for which an environmental assessment would be required. *Id.*

Subpart D of the proposed rule addresses categorical exclusions, *i.e.* "categories of actions . . . [that] do not normally individually or cumulatively have a significant effect on the

human environment and do not threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health . . ." *Id.* at 52,254 (proposed § 799.30). The proposed rule categorical exclusions include loan actions and lists examples of such actions that "are eligible for categorical exclusion after completion of an environmental screening worksheet to document that an action does not involve any of the extraordinary circumstances specified in § 799.33." *Id.* at 52,255 (proposed § 799.32(a)). If, in completing the environmental screening worksheet, FSA were to determine that extraordinary circumstances were present, an environmental assessment or environmental impact statement (EIS) would be prepared. *Id.* (proposed § 799.33(c)).

Subpart E of the proposed rule addresses environmental assessments. Under the proposed rule, FSA would prepare an EA "to determine whether a proposed action would significantly affect the environment and to consider the potential impact of reasonable alternatives and the potential mitigation measures to the alternatives and the proposed action." *Id.* at 52,257 (proposed § 799.40). The proposed rule requires the preparation of an EA for "[c]onstruction or expansion of a CAFO, regardless of the type of manure handling system or water system," *id.* (proposed § 799.41(a)(9)), and "[r]efinancing of a newly constructed CAFO, including medium CAFOs, as defined in 40 C.F.R. 122.23 . . ." *id.* (proposed § 799.41(a)(10)).

C. EPA's Regulatory Requirements for CAFOs Under the Clean Water Act

Large and Medium CAFOs are defined in the Environmental Protection Agency's (EPA) Clean Water Act regulations and are distinguished from each other by the number of animals that are stabled or confined and fed at a facility for 45 days or more in any 12-month period. 40 C.F.R. § 122.23(b). For example, a facility with 1,000 or more cattle, 2,500 or more swine weighing 55 pounds or more, or 125,000 chickens or more over a 12-month period is a Large

CAFO. *Id.* § 122.23(b)(4). A facility with 300 to 999 cattle, 750 to 2,499 swine weighing 55 pounds or more, or 37,500 to 124,999 chickens over a 12-month period is a Medium CAFO. *Id.* § 122.23(b)(6). A CAFO with fewer animals is a Small CAFO.[2] *See id.* § 122.23(b)(9).

In 2003, the EPA issued rules revising and clarifying regulatory requirements under the Clean Water Act pertaining to CAFOs. 68 Fed. Reg. 7176 (Feb. 12, 2003). The 2003 EPA rule established a mandatory duty for all CAFOs to apply for a National Pollution Discharge Elimination System (NPDES) permit and to develop a nutrient management plan. *Id.* The required nutrient management plans identify "site-specific actions to be taken by the CAFO to ensure proper and effective manure and wastewater management, including compliance with . . . Effluent Limitation Guidelines." *Id.* EPA's 2003 rule "is an important component of the overall effort to ensure effective management of manure." *Id.* at 7179.

"Small and Medium CAFOs are not subject to the [Effluent Limitation Guidelines]" established by the EPA and so the 2003 rule establishing new Effluent Limitation Guidelines "applies primarily to the largest CAFOs." *Id.* at 7207, 7179. Instead, the permits for Small and Medium CAFOs are based on best practices judgment to establish technology-based requirements that address the CAFOs' production and land application areas. *Id.* at 7226. The permit conditions for Small and Medium CAFOs are "tailored to and more directly address the site-specific conditions that led to the facility being defined or designated as a CAFO." *Id.* Only in some instances, Small and Medium CAFOs may be subject to "water quality-based effluent limits." *Id.*

D. FSA's Final Rule on NEPA Regulations

During the public comment process on FSA's proposed NEPA rules, some commenters

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[2] Plaintiffs do not challenge FSA's treatment of Small CAFOs in this action. *See* Am. Compl. ¶ 1.

indicated that the requirement to prepare an EA before providing financial assistance to medium CAFOs "is unrealistic and more restrictive than most state environmental agencies as well as US EPA CAFO regulations which currently only mandate permits [for] CAFOs with more than 1000 animal units." Exhibit 1 (comments of Missouri Soybean Association) at AR 1439. Those commenters observed that "EPA and delegated state environmental agencies have primary authority to oversee and promulgate rules and standards to ensure protection of human health and the environment." *Id.* The commenters stated that the proposed rule "require[s] additional measures, beyond what EPA and states environmental agencies have found necessary." *Id.* In addition, FSA's Missouri State Executive Director objected to the requirement that financial assistance for Medium CAFOs would trigger an environmental assessment, stating that it would impose an undue hardship on loan applicants and "ultimately take[] additional time with significant costs." Exhibit 2 at AR 1444 (comments of Executive Director, Missouri State FSA Office). Concerns with the proposed requirement to prepare an EA for all loans and loan guarantees for Medium CAFOs were echoed by a lender, which indicated that the rule "could result in a significant increase in the number of EAs that FSA must conduct each year" and "would be an onerous impediment to obtaining financing for operations that will often include Young and/or Beginning Farmers/Ranchers." Exhibit 3 at AR 1471 (comments of FCS Financial).

On August 3, 2016, FSA issued the final rule on its NEPA procedures. 81 Fed. Reg. 51,274. The preamble to the final rule notes that commenters indicated that under the proposed rule, "the provisions for medium CAFOs would be an onerous impediment to obtaining financing for operations that will often include young or beginning farmers." *Id.* at 51,281. To address this concern, FSA "revised the provisions to clarify that EAs will only be required for

large CAFOs." *Id.*

Subpart E of the final rule addresses environmental assessments. Under the final rule, FSA prepares an EA for "[c]onstruction or major expansion of a large CAFO . . . regardless of the type of manure handling system or water system" and "[r]efinancing of a newly constructed large CAFO . . . ." 7 C.F.R. § 799.41(a)(9), (10). Subpart D of the final rule addresses categorical exclusions. Under it, "proposed actions with ground disturbance," including "loan actions" "may be categorically excluded after completion of a review with an [environmental screening worksheet] to document that [the] proposed action does not involve extraordinary circumstances . . ." 7 C.F.R. § 799.32(a), (e). By amending Subpart E in response to comments, the final rule treats Medium CAFOs as subject to Subpart D's categorical exclusion rules rather than Subpart E's environmental assessment rules.

Before promulgating the new NEPA procedures, FSA consulted with the CEQ. To support the addition of new categorical exclusions, FSA submitted to the CEQ supporting documentation in August 2013. *See* Exhibit 4 at AR 308 (supporting documentation). FSA's supporting documentation explains that FSA tasked an interdisciplinary team with analyzing environmental reviews for previous actions. *Id.* at AR 318. The interdisciplinary team's results, among other things, led to FSA finding that the categories of actions listed in the proposed rule did not "individually or cumulatively have significant environmental effects on the human environment. *Id.* at AR 324.

E. FSA's Prior NEPA Regulations

Prior to the August 2016 final rule, FSA's NEPA regulations provided for two types of EAs: Class I and Class II. Exhibit 5 (prior NEPA regulations) at AR 17-21 (7 C.F.R. §§ 1940.311, 312 (2015)). Class I EAs "involve[d] small-scale projects" that generally had "limited

environmental impacts" but at least had "the potential to create a significant impact." *Id.* at AR 17 (§ 1940.311). Under the prior regulations, proposed actions involving financial assistance to Medium CAFOs were analyzed under the rules pertaining to Class I EAs. *See id.* at AR 19 (§ 1940.311(c)(8)).

Class I EAs served two purposes: (1) to review "actions with normally minimal impacts" so that FSA could document a finding of no significant impact; and (2) "to serve as a screening tool for identifying those Class I actions which have more than minimal impacts and which, therefore, require a more detailed environmental review." *Id.* at AR 31 (§ 1940.319(a)). The prior regulations required FSA to use Form 1940-21 to document a Class I EA. *Id.* (§ 1940.319(b)); Exhibit 7 (Form 1940-21). FSA also used Form 1940-21 to review for extraordinary circumstances of categorically excluded actions. *See* Ex. 5 at AR 25 (§ 1940.317(a)) ("Extraordinary circumstances may causes an application to lose its categorical exclusion . . . An environmental assessment for a Class I action must then be initiated. This assessment serves the purposes of providing for the extraordinary circumstance by analyzing the degree of potential impact and the need for further study.").

In addition to completing Form 1940-21, FSA was required to document any steps taken as part of a "special Federal consultation or coordination requirement." *Id.* at AR 31 § 1940.319(e). FSA was also required to incorporate any "comments of State, regional, and local agencies obtained through applicable permit reviews." *Id.* (§ 1940.319(g)). However, the prior regulations required no other documentation for Class I EAs. And FSA was not required to provide the public with notice of a finding of no significant impact for Class I EAs. *Id.* at AR 32 (§ 1940.319(j)).

"Class II actions [were] basically those which exceed[ed] the thresholds established for

Class I actions and, consequently, ha[d] the potential for resulting in more varied and substantial environmental impacts." *Id.* at AR 20 (§ 1940.312). A Class II EA was a "more detailed assessment" than a Class I EA. *See id.* at AR 32 (§ 1940.319(i)). Financial assistance for Large CAFOs required a Class II EA. *See id.* at AR 21 (§ 1940.312(c)(9)).

F. Plaintiffs' Complaint

More than two years after the final rule was adopted, Plaintiffs brought suit under NEPA and the Administrative Procedure Act (APA) challenging FSA's rule, insofar as it establishes a categorical exclusion for decisions to provide financial assistance in support of Medium CAFOs. Compl., ECF No. 1.[3] They claim that by subjecting the financing of Medium CAFOs to the analysis applicable to categorical exclusions, FSA funds the operation of such facilities without public notice or the opportunity to comment that would accompany an EA. *See id.* ¶¶ 1-12. They contend that subjecting Medium CAFO financial assistance to the categorical exclusion provisions violates NEPA and the APA because FSA did not provide sufficient information to the CEQ to establish that Medium CAFOs "do not individually or cumulatively have a significant effect on the human environment" as required by CEQ regulations, *id.* ¶¶ 206-233 (Counts 1-3) (citation omitted), and that in introducing the categorical exclusion in the final rule, FSA violated the APA procedural requirements regarding notice and public comment. *Id.* ¶¶ 234-240 (Count 4).

II. LEGAL STANDARD

A. Voluntary Remand

"Administrative agencies have the inherent power to reconsider their own decisions

[3] The original complaint, which was filed on December 5, 2018, was brought by eight environmental organizations. On May 22, 2019, Plaintiffs amended the complaint, adding an additional environmental organization as a plaintiff. Am. Compl., ECF No. 24.

through a voluntary remand." *Code v. McHugh*, 139 F. Supp. 3d 465, 468 (D.D.C. 2015). The decision whether to grant an agency's request to remand is left to the discretion of the court. *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). A court may grant the remand request when (1) "new evidence becomes available after an agency's original decision was rendered," (2) "intervening events outside of the agency's control may affect the validity of an agency's actions," *id.*; *see SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001), or (3) an "agency . . . requests a remand (without confessing error) . . . to reconsider its previous position," or "believes that its original decision is incorrect on the merits and wishes to change the result." *Id.* at 1029. Voluntary remand is appropriate if the agency expresses a "substantial and legitimate" concern about its earlier decision. *Id.* "[A]gency reconsideration of the action under review is part and parcel of a voluntary remand." *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 386-87 (D.C. Cir. 2017). A voluntary remand "preserves scarce judicial resources by allowing agencies 'to cure their own mistakes.'" *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)).

B. Remand Without Vacatur

"An inadequately supported rule . . . need not necessarily be vacated." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Rather, the question of whether to vacate "is one of degree." *Fox Television Stations*, *Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002). The decision to vacate depends on two factors. *First*, courts consider "the likelihood that 'deficiencies' . . . can be redressed on remand, even if the agency reaches the same result." *City of Oberlin v. FERC*, __ F.3d __, 2019 WL 4229074 at *9 (D.C. Cir. Sept. 6, 2019) (quoting *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir.

2013)). In making that determination, remand without vacatur is appropriate in cases where "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied Signal,* 988 F.2d at 151; *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Servs.*, 288 F. Supp. 2d 7, 12 (D.D.C. 2003). *Second*, courts consider "the 'disruptive consequences' of vacatur." *City of Oberlin*, 2019 WL 4229074 at *9 (citation omitted). Those disruptive consequences include the possibility of "an interim change that may itself be changed.'" *Allied-Signal,* 988 F.2d at 150-51 (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). There is no requirement that "the proponent or opponent of vacatur to prevail on both factors." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 250, 270 (D.D.C. 2015).

C. Adding Categorical Exclusions to Agency Regulations

The Council on Environmental Quality administers NEPA and promulgates regulations related to NEPA that are binding on federal agencies. *See* 42 U.S.C. §§ 4342, 4344(3); 40 C.F.R. §§ 1501-1508. The CEQ regulations include rules requiring agencies to establish implementing procedures that facilitate evaluation of management decisions and environmental effects. For example, agencies should identify actions that normally require an EIS, 40 C.F.R. § 1501.4(a)(1). Agencies may also establish categorical exclusions for categories of actions "which do not individually or cumulatively have a significant effect on the human environment." *Id.* § 1508.4. To establish a categorical exclusion, the CEQ regulations require that the relevant categories "have been found to have no [significant] effect in procedures adopted by a Federal agency." *Id.* An EA or EIS is not required prior to the adoption of categorical exclusions. *Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962, 974 (S.D. Ill. 1999).

III. ARGUMENT

Federal Defendants request a voluntary remand so that FSA can reexamine its decision in its NEPA regulations to treat financial assistance for loan applications for Medium CAFOs presumptively as categorical exclusions rather than environmental assessments. *See* Declaration of Nell Fuller ¶ 7. The decision to treat loan applications pertaining to Medium CAFOs as a categorical exclusion was made in the final rule after public comments on the proposed rule raised concerns about subjecting those applications to an environmental assessment, based on a perceived discrepancy between the Rule's treatment of those facilities and their treatment under State and EPA regulations. *See id.* ¶ 4. The supporting documentation that was provided to the CEQ discussed FSA's process for determining that the CatExs in the proposed rule had no significant impact, but it did so without reference to the size of the facilities at issue. *See* Ex. 4 at AR 315-20. Federal Defendants recognize that a more targeted explanation of the change from subjecting Medium CAFO loan applications to an environmental assessment—as contemplated by the proposed rules—to subjecting Medium CAFO loan applications to a categorical exclusion—as contemplated by the final rule—is in order. A voluntary remand will allow FSA to engage in an additional examination, and if it concludes the evidence substantiates the current treatment of Medium CAFO financial assistance, to provide that additional explanation. *See id.* ¶¶ 7-8. Federal Defendants do not confess error believe that remand without vacatur is appropriate.

A. Voluntary remand is appropriate here.

Upon reviewing the final rule's treatment of financial assistance to support Medium CAFOs, the agency has determined that it needs to revisit that portion of the rule. The agency is concerned that neither the proposed rule nor the final rule contains a specific finding that

Medium CAFOs have no significant effect on the human environment. *See* 40 C.F.R. § 1508.4. Although there is evidence in the record that the agency analyzed circumstances bearing on this CatEx (*see, e.g.,* Ex. 4 at AR 332-35, discussing "construction in previously disturbed areas"), including FSA's review of its own past actions and listing other agencies that use this as a criterion for CatExs, and that it analyzed documentation for 50,000 past actions of 72 different types (some of which presumably were medium CAFO financial assistance), *id.* at AR 325, the agency did not enumerate the size of the facilities for which past NEPA documents were considered. The agency has concluded that additional findings are required to substantiate categorical exclusion for Medium CAFOs. *See* Fuller Decl. ¶ 7/

Under these circumstances, voluntary remand to the agency is appropriate. Here, the agency is requesting a remand without confessing error so that it can reconsider its previous action with respect to medium CAFO financial assistance. *See Limnia, Inc.*, 857 F.3d at 386-87; *SKF USA Inc.*, 254 F.3d at 1028. The agency's concern with respect to the Medium CAFO categorical exclusion's consistency with CEQ regulations is "substantial and legitimate" and remand is appropriate as it is likely to preserve judicial resources and allow the agency to "cure its own mistakes."' *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)); *see also Pennsylvania. v. Interstate Commerce Comm'n*, 590 F.2d 1187, 1194 (D.C. Cir. 1978) ("Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts."). Remand will allow the agency to examine whether the record supports a conclusion that loan guarantees for medium CAFOs, individually or cumulatively, do not have a significant effect on the human environment. 40 C.F.R. § 1508.4.

"When an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons." *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015) (quoting *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004)); *see also Edward W. Sparrow Hosp. Ass'n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C. 2011) ("[W]here an agency has not considered all of the relevant factors, 'the proper course . . . is to remand to the agency for additional investigation or explanation.'" (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985))).

Plaintiffs will not be prejudiced by a voluntary remand to allow the agency to reconsider the Medium CAFO categorical exclusion. Indeed, remand will allow the agency to address concerns that Plaintiffs themselves raise in the complaint. And while the parties disagree as to whether the current rule should be vacated, they both agree that remand is appropriate. Joint Status Report (August 30, 2019) ¶ 10, ECF No. 29 ("Plaintiffs do not oppose voluntary remand with vacatur and have made clear in communications with Defendants that they would not oppose remand with vacatur.").

In sum, Federal Defendants have identified substantial and legitimate concerns about the challenged rule and have recognized the need to address those concerns on remand. Remand will conserve the Court's and the parties' time and resources and will not prejudice Plaintiffs. For these reasons, the challenged rule should be remanded to the agency.

B. Remand should be without vacatur.

District courts have discretion to remand a challenged agency action without vacating the action. The decision to do so turns on the likelihood that deficiencies identified by the agency can be redressed on remand and the extent to which vacatur is likely to have disruptive

consequences during the pendency of the remand. *Allied-Signal*, 988 F.2d at 150-51. Because there is a serious possibility that that the agency will be able to substantiate its decision on remand and because vacatur would likely have significantly disruptive consequences, remand without vacatur is appropriate here.

The first consideration of the *Allied-Signal* test is met here because there is a serious possibility that FSA will be able to substantiate its decision on remand. The deficiency that the agency has identified is a procedural one. The final rule does not contain a specific finding that Medium CAFOs, individually and cumulatively, have no significant effect on the human environment. That procedural deficiency can be remediated on remand after the agency reexamines the actions it has taken in previous NEPA analyses, which are in the administrative record, and supplements that analysis by reviewing additional agency actions pertaining to Medium CAFO that it has taken in the three years that the 2016 rule has been operative. *See* Fuller Decl. ¶ 7 ("FSA intends to conduct an additional review of categorical exclusions applied to loans involving Medium CAFOs in the two calendar year (2017-2018) period following issuance of the 2016 rule). In addition, FSA intends to reexamine scientific articles and data that are in the administrative record as well as other peer-reviewed scientific data following publication of the2016 rule. *Id.*

Under the regulatory regime that was in effect prior to the 2016 rule, FSA treated Medium CAFOs differently than Large CAFOs for purposes of NEPA. *See* Ex. 5 at AR 19 (7 C.F.R. §§ 1940.311(c)(8)) (requiring Class I EA); *id.* at AR 21 (1940.312(c)(9)) (requiring Class II EA). Although the proposed rule proposed to treat Medium CAFOs the same as Large CAFOs, it did so without any explanation to justify this change.

In preparing the 2016 rule, the agency reviewed numerous CatEx determinations and

EAs. *See generally* Ex. 4; *see also* Fuller Decl. ¶ 7. Those reviews showed that Medium CAFOs under the prior rule rarely had impacts that should have met NEPA's threshold for an EA. *See* Ex. 4 at AR 318; Fuller Decl. ¶ 7. The prior treatment of Medium CAFOs, analysis of that treatment in conjunction with the 2016 rule, and continued monitoring all together suggest that the data before the agency will support a finding that Medium CAFOs as a category do not have a significant impact on the human environment individually or cumulatively, and thus provide a justification for a categorical exclusion. Fuller Decl. ¶ 8. For this reason, the CatEx for financial assistance for Medium CAFOs in the 2016 rule should not be vacated. *See Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (declining to vacate agency action when "plausible that [the agency] can redress its failure of explanation on remand while reaching the same result."); *see also Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when "significant possibility that the [agency] may find an adequate explanation for its actions.").

Indeed, the D.C. Circuit has applied the standard for remand without vacatur leniently. *See Susquehanna Int'l Grp., LLP v. SEC.*, 866 F.3d 442, 451 (D.C. Cir. 2017) (remanding without vacatur where agency "*may* be able to approve the Plan once again, after conducting a proper analysis on remand" (emphasis added)); *Sugar Cane Growers Coop. of Fla. v. Veneman,* 289 F.3d 89, 97-98 (D.C. Cir. 2002) (remanding without vacatur where "it is at least possible" that agency could justify its original decision on remand); *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 342 (D.D.C. 2016) (finding that the "fair likelihood that the agency will be able to make use of its expertise to justify its reliance on data and information" counsels in favor of remand without vacatur). Thus, under the first prong of *Allied-Signal*, remand without vacatur is appropriate.

Even if it were less likely that FSA would reach the same outcome, remand without vacatur is appropriate to allow the agency to address the procedural deficiency of failing to provide the requisite finding to support the Medium CAFO financial assistance categorical exclusion in the final rule. An agency may seek remand when "it wishes to consider further the governing statute [or regulations] or the procedures that were followed." *SKF USA*, 254 F.3d at 1029. And it can reconsider a previous position '"without confessing error . . . ." *Id.*; *Code*, 139 F. Supp. 3d at 468. That is what FSA intends to do here. The agency should have the opportunity to reconsider the procedures it employed in conducting the 2016 rule without that rule being vacated while it does so.

The second *Allied Signal* factor—disruptive consequences resulting from vacatur—also weighs against vacatur of the Medium CAFO financial assistance categorical exclusion. Were the Court to vacate the categorical exclusion, that decision would have significant "disruptive consequences." As commenters noted, the EA requirement for Medium CAFOs that was included in the proposed rule would have ushered in an increased level of environmental analysis for Medium CAFOs that was not present under the prior rules, and which commenters believe to be disproportionate to the treatment of such facilities under state and EPA regimes. Commenters stated that the proposed rule was "unrealistic," and "more restrictive than most state environmental agencies as well as US EPA CAFO regulations"; that it would have required "additional measures, beyond what EPA and states environmental agencies have found necessary," Ex. 1 at AR 1439; and that it "could result in a significant increase in the number of EAs that FSA must conduct each year" and "would be an onerous impediment to obtaining financing." Ex. 3 at AR 1471. In its final rule, FSA acknowledged these concerns, and decided to subject Medium CAFOs to a categorical exclusion, which is more consistent with the prior

rules and therefore less disruptive to the expectations of the borrowers and lenders affected by the rule.

Vacating the rule would likely cause significant disruption to the parties affected by the rule in several ways. It would cause a delay of two months or more in FSA's decision on an estimated 2,942 loan applications each year resulting in a loss of real estate purchase opportunities. Declaration of Steven Peterson ¶ 8(a). In addition, family farmers, who are unable to obtain commercial credit because of limited financial means, would be required to bear an expense between $120 and $600 for newspaper publication soliciting public comments on the loan application. *Id.* ¶ 8(b). The additional time required to obtain the loan would potentially hurt applicants' ability to lock in loan terms such as interest rates, as well as delay the applicant's ability to enter into contracts with integrators or livestock purchasers. *Id.* ¶ 8(c). As a result of the delay in loan application approvals and the additional financial burden on family farmers, FSA anticipates it would see a decrease in applications and lender participation. *Id.* ¶ 8(d). Moreover, if fewer family farms apply for FSA farm loans, there would likely be further consolidation in the industry in large producers, which are more likely to self-fund or obtain credit from commercial lenders whose lending is not subject to NEPA review. *Id.* ¶ 8(f).

Vacating the Medium CAFO CatEx would also create uncertainty and confusion by subjecting applications for financial assistance for Medium CAFOs to the 1980 rule, while financial assistance to Small and Large CAFOs continue to be regulated by the 2016 rule. FSA would also incur significant administrative burdens and cost in training agency staff to conduct a significantly higher number of environmental assessments. *Id.* ¶ 8(e). The uncertainty, confusion, and delay would only be compounded by the fact that if FSA, on remand, marshals record support that Medium CAFOs do not, individually or cumulatively, have a substantial

impact on the human environment, thus substantiating the categorical exclusion for Medium CAFOs, that would cause the rule to change twice during the remand. *See Allied-Signal,* 988 F.2d at 150-51 (noting possibility of "an interim change that may itself be changed."). To avoid disruption to the persons and entities impacted by the rule, the Court should remand to the agency without vacating the rule.

IV. CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court remand the challenged rule without vacatur so that the agency may reconsider it.

Respectfully submitted,

DATED: September 19, 2019

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