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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 **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR REMAND WITHOUT VACATUR AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

The Farm Service Agency ("FSA"), a subcomponent of the Department of Agriculture, serves farmers, ranchers, and agricultural partners by delivering effective and efficient agricultural programs for all Americans. One way it does so is through its Farm Loan Programs, which provide financial assistance to family farmers and ranchers. FSA assists potential farmers from underrepresented and disadvantaged communities, designating funds specifically aimed at farmers from underserved communities who face economic barriers to operating their own farms and who directly benefit from FSA's assistance. Some of these farmers maintain concentrated animal feeding operations ("CAFOs"), simply meaning that the farm animals are enclosed or confined.

In August 2016, FSA issued a rule updating its regulations under the National Environmental Policy Act (NEPA). Based on its experience, analysis, and consultation with other agencies, FSA categorically excludes certain loan actions from additional NEPA review absent a finding of extraordinary circumstances. Among the categorically excluded actions it takes are on FSA's financial assistance to farmers who operate medium-sized CAFOs.

Plaintiffs challenge FSA's 2016 rule to the extent it created a categorical exclusion for loan actions in support of medium-sized CAFOs. Defendants moved for remand without vacatur to cure a procedural defect. Defendants wish to remand so that FSA can determine whether it can specifically substantiate that medium-sized CAFOs do not have a significant effect on the environment, in addition to Defendants' previous general finding applicable to all of the categorically excluded proposed actions. Plaintiffs have moved for summary judgment, requesting that the Court vacate FSA's 2016 rule as applied to medium CAFO financial assistance. The Court should grant FSA's Motion for Remand without Vacatur because there is

a serious possibility that FSA can cure substantiate the CatEx and vacatur during the interim would be unduly disruptive to the family farmers who rely on FSA's financial assistance and to FSA's operations. The Court should also deny Plaintiffs' Motion for Summary Judgment because Plaintiffs fail to show that FSA acted arbitrarily or capriciously in promulgating the 2016 rule.

II. FACTUAL AND PROCEDURAL BACKGROUND

To receive FSA's financial assistance, farmers must be an "eligible" farmer of a "family farm" for the Farm Loans Program. *See* 7 C.F.R. § 761.1(c). An eligible farmer includes a "grower under contract with an integrator" who exercises control over the farm or the animal feeding operation. *See id.* § 761.2. The integrator provides the farmer with a reliable purchaser of the agricultural products, reducing economic risk and allowing a more efficient farming production. *See* AR 2024; AR 10534; AR 10539-42. A "family farm" is a business that produces agricultural commodities and which the majority of day-to-day operational and all strategic management decisions are made by, and a substantial amount of labor to operate the farm is provided by, the borrower and persons related to them in the case of an individual or members responsible for operating the farm in the case of an entity. 7 C.F.R. § 761.2(b).

A farmer's animal feeding operation may be deemed as a CAFO depending on its size, among other things. *See* 40 C.F.R. § 122.23. Large and medium-sized CAFOs are defined in the Environmental Protection Agency (EPA) Clean Water Act regulations by the number of animals that the farm maintains for 45 days or more in any 12-month period. *Id.* § 122.23(b)(1)(i). For example, a farm with more than 299 but fewer than 1,000 cattle over a 12-month period is a medium CAFO. *Id.* § 122.23(b)(6)(i)(C).

CAFOs are regulated by EPA and state environmental authorities. 68 Fed. Reg. 7176

(Feb. 12, 2003). EPA requires all CAFOs to apply for a National Pollution Discharge Elimination System permit and to develop a nutrient management plan. *Id*. The nutrient management plans identify "site-specific actions to be taken by the CAFO to ensure proper and effective manure and wastewater management." *Id.* EPA's CAFO regulation "is an important component of the overall effort to ensure effective management of manure." *Id.* at 7179. FSA's financial assistance for farmers who operate medium CAFOs is at issue in this lawsuit.

A. NEPA Review for Medium CAFO Financial Assistance

In 2014, FSA issued a proposed rule that comprehensively amended its NEPA regulations. 79 Fed. Reg. 52,239 (Sept. 3, 2014). Before doing so, FSA consulted with the Council on Environmental Quality (CEQ), which was "established by NEPA, has authority to interpret [NEPA], and has promulgated regulations to guide federal agencies in complying with [NEPA's] mandate." *See W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1237 (D.C. Cir. 2018). The proposed rule included a number of new categorical exclusions ("CatExs"). To support the addition of the new CatExs, FSA submitted supporting documentation to CEQ in August 2013. *See* AR 308 (supporting documentation). The supporting documentation explains that FSA tasked an interdisciplinary team with analyzing environmental analyses for previous actions. AR 318. In 2016, FSA issued a final rule amended its NEPA regulations (the "2016 rule") and based on the interdisciplinary team's results, concluded that the categories of actions listed in the rule as CatExs "do not individually or cumulatively have significant environmental effects on the human environment." AR 324. The 2016 rule's CatEx for financial assistance to medium CAFO farmers is at the heart of this dispute. *See* 7 C.F.R. §§ 799.31, 799.32.

Under the 2016 rule, FSA uses an environmental screening worksheet to determine whether proposed actions "involve extraordinary circumstances as specified in § 799.33." *Id.* §

799.32(a). Loan actions for "medium CAFOs" are not specifically listed as categorical exclusions. Instead, when FSA considers an application for financial assistance for a medium CAFO farm, it is guided by the types of loan actions that are categorically excluded as described in 7 C.F.R. §§ 799.31 and 799.32. *See* FSA Handbook for Environmental Quality Programs, relevant excerpts attached here as Ex. 1. Depending on the type of loan action, FSA uses the environmental screening worksheet to either record the action, 7 C.F.R. § 799.31(a), or review the action to determine whether extraordinary circumstances warrant additional environmental analysis. 7 C.F.R. §§ 799.32(a), 799.33. The environmental screening worksheet includes a variety of resources for FSA to consider in determining whether a proposed loan action has extraordinary circumstances. *See* Environmental Screening Worksheet, attached here as Ex. 3.

Before promulgation of the 2016 rule, FSA reviewed proposed loan actions for medium CAFOs under a 1980 rule and produced a "Class I" environmental assessment ("Class I EA"). *See* 7 C.F.R. § 1940.311(c)(8) (2015). Class I EAs were documented on a checklist (Form RD 1940-21), which is similar in most respects to the current environmental screening worksheet used for determining whether a proposed action involving a CatEx—including medium CAFO financial assistance—has extraordinary circumstances. *Id.* § 1940.319(b).[1] Like the 2016 CatExs, under the 1980 rule's procedures for Class I EAs, FSA was not required to provide public notice of a finding of no significant impact for those loan actions. *Id.* § 1940.319(j). FSA "expected that most of the actions that [] require[d] a Class I EA . . . would be categorically excluded" in the new rule. AR 303.

B. The Challenge to Medium CAFO Financial Assistance

Plaintiffs challenge the 2016 rule's establishment of a CatEx for decisions that provide

[1] A copy of Form 1940-21 is attached here as Ex. 2.

financial assistance for medium CAFOs. Am. Compl., ECF No. 24.[2] They contend that the CatEx violates NEPA and the Administrative Procedure Act (APA) because FSA did not provide sufficient information to CEQ to establish that loan actions to medium CAFO farmers "do not individually or cumulatively have a significant effect on the human environment," *id.* ¶¶ 206-233 (Counts 1-3) (citation omitted), and that introducing the CatEx in the 2016 final rule violates APA notice and comment procedures. *Id.* ¶¶ 234-240 (Count 4).

Defendants have requested a voluntary remand of the 2016 rule's provision as it applies to medium CAFO financial assistance, Defs.' Mot. for Remand without Vacatur ("Mot. for Remand"), ECF No. 31, to allow FSA to determine whether it can demonstrate that the challenged CatEx in particular does not "individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. CEQ regulations require this finding; although the 2016 rule expresses a finding for all CatExs, it does not specifically set forth this finding as to medium CAFO financial assistance, but there is a serious possibility that FSA can make this finding on remand if it isolates the most relevant data considered during rule promulgation and considers additional data as well. *See* Decl. of Nell Fuller ("Fuller Decl.") ¶ 8, ECF No. 31-1.

III. STATUTORY AND REGULATORY FRAMEWORK

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12, establishes a process by which federal agencies consider the environmental impacts of major federal actions. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978). NEPA imposes procedural rather than substantive requirements, and it is "well settled that NEPA itself does not mandate particular results but simply prescribes the necessary process." *Robertson v. Methow*

[2] 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 a ninth environmental organization as a plaintiff. Am. Compl., ECF No. 24.

Valley Citizens Council, 490 U.S. 332, 350 (1989). Regulations promulgated by CEQ, 40 C.F.R. §§ 1500−1508, provide guidance for implementation of NEPA. *Robertson*, 490 U.S. at 354.

Agency actions that directly affect the physical environment are generally subject to NEPA and—pursuant to regulations promulgated by the Department of Agriculture and CEQ—are analyzed in either an environmental impact statement ("EIS"), an environmental assessment ("EA"), or a CatEx. *See* 40 C.F.R. §§ 1500.1-1508.28; 7 C.F.R. § 799.1-799.59. Under NEPA, federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). To determine whether the impact of a proposed federal action will be significant enough to warrant an EIS, the agency may prepare an EA. 40 C.F.R. § 1501.4(b), (c); 40 C.F.R. § 1508.9. If, based on the EA, the agency concludes that the proposed action will not significantly impact the environment, it issues a Finding of No Significant Impact ("FONSI") in lieu of an EIS. 40 C.F.R. § 1508.13; *see generally Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-58 (2004).

CatExs are classes of actions that "do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency . . . . " 40 C.F.R. § 1508.4. "Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review." *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 735 (D.C. Cir. 2019). This type of NEPA review "achieve[s] enormous efficiencies in the review processes for classes of actions or undertakings anticipated to have minimal or no adverse cultural or environmental effects." *Id.* at 737. In establishing new CatExs, agencies may rely on CEQ's guidance in its Categorical Exclusion Memorandum ("CEQ Memo"), but they are not bound by it. *See* 75 Fed. Reg. 75,628, 75,631 n.7 (Dec. 6, 2010) ("[T]his document does not establish legally binding

requirements in and of itself.").

IV. ARGUMENT

Plaintiffs challenge the 2016 rule's treatment of medium CAFO financial assistance as a CatEx. Defendants have moved to remand this case without vacating any portion of the rule so that FSA can determine whether it can specifically substantiate the CatEx on remand. *See Checkosky v. SEC*, 23 F.3d 452, 462 (D.C. Cir. 1994) (allowing agency to remand without vacatur to "further elaborat[e]" the reasons for its findings and conclusions). Vacating the challenged CatEx in the interim would be unduly disruptive. The Court need not reach the merits of Plaintiffs' summary judgment motion because remand without vacatur is proper here. If the Court does consider Plaintiffs' claims on their merits, it should deny Plaintiffs' motion for the reasons discussed below in section IV.B.

A. The Court should remand without vacatur because there is a serious possibility that FSA can substantiate the CatEx and vacatur during the interim would be unduly disruptive.

Voluntary remand of an action to an agency may be appropriate where the agency requests a remand "to reconsider its previous position" and is usually appropriate if the agency expresses a "substantial and legitimate" concern about its earlier decision. *Code v. McHugh*, 139 F. Supp. 3d 465, 468 (D.D.C. 2015) (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)). "[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). In this Circuit, courts "commonly grant motions for voluntary remand, 'preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete.'" *Code*, 139 F. Supp. at 469 (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)); *see also Sierra Club v. Van Antwerp*, 560 F. Supp.2d 21, 23 (D.D.C. 2010); *Seminole Tribe of Fla. v.*

Azar, 376 F. Supp. 3d 100, 114 (D.D.C. 2019).

Whether to vacate a rule while it is on remand depends on two factors: (1) "the likelihood that deficiencies . . . can be redressed on remand, even if the agency reaches the same result, and [2] the disruptive consequences" of an interim change that may itself be changed. *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019) (internal quotations and citations omitted); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 12 (D.D.C. 2003); *see Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when there was a "significant possibility that the [agency] may find an adequate explanation for its actions"); *see also Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (acknowledging that while "vacatur is the normal remedy, we sometimes decline to vacate an agency's action" depending on "the seriousness of the order's deficiencies" and the likely "disruptive consequences" of vacatur (quoting *Allied-Signal*, 988 F.2d at 150-51)). There is "no rule requiring the proponent or opponent of vacatur to prevail on both factors." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 97 (D.D.C. 2017) (quoting *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015)).

Here, remand is appropriate to allow the agency to "cure [its] own mistake[.]" *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). That mistake is procedural in nature in that the agency did not make a specific finding that medium CAFO financial assistance does "not individually or cumulatively have a significant effect on the human environment," as required by CEQ regulations. 40 C.F.R. § 1508.4. Remand is also likely to preserve judicial resources by allowing the agency to make the requisite determination in the first instance. *Ethyl Corp.*, 989 F.2d at 524.

Remand without vacatur is appropriate because there is a serious possibility that FSA can cure the procedural deficiency and show that medium CAFO financial assistance does not have a significant effect on the human environment, thus substantiating the applicable CatEx. Moreover, vacatur of the CatEx would significantly disrupt the practices of family farmers who rely upon FSA for financial assistance as well as the operations of the agency itself.

Plaintiffs cite the Ninth Circuit's decision in *Sierra Club v. Bosworth* and a district court decision in *Heartwood, Inc. v. United States Forest Service* for the broadly stated proposition that vacatur is the "standard remedy for [] violations of the APA and NEPA . . . . " Pls.' Opp'n to Defs.' Mot. for Remand & Cross-Mot. for Summ. J. ("Pls.' Br.") 31-32, ECF Nos. 34, 35. Neither case is applicable because here no violation of the APA or NEPA has been established. Moreover, Plaintiffs both misconstrue these decisions and fail to recognize important differences between those cases and the present case.

In *Bosworth*, the Ninth Circuit considered a challenge to a Forest Service rule categorically excluding fuel reduction projects "up to 1,000 acres and prescribed burn projects up to 4,500 acres on all national forests in the United States" as applied to three Forest Service projects in the Eldorado National Forest. 510 F.3d 1016, 1018, 1021 (9th Cir. 2007). Though it found violations of NEPA and the APA as applied to those projects, the court in *Bosworth* never issued a sweeping declaration that vacatur is "the standard remedy for [] violations of the APA and NEPA" that Plaintiffs assert here. The issue in *Bosworth* was whether a project reliant upon a rule that a court found deficient should be enjoined. The issues raised in a facial challenge to a rule and the considerations that the D.C. Circuit and courts in this Circuit have considered on multiple occasions in the context of a facial challenge were not before the court in *Bosworth*.

In *Heartwood*, Plaintiffs challenged a Forest Service rule that categorically excluded

timber sales under 250,000 board feet and salvage timber sales under one million board feet. 73 F. Supp. 2d 962, 967-68 (S.D. Ill. 1999). Like the court in *Bosworth*, the district court in *Heartwood* nowhere issued any sweeping declaration that vacatur is "the standard remedy for violations of NEPA and the APA" as plaintiffs assert. Instead, the court in *Heartwood* found that the board feet limitations for timber sales and salvage timber were not justified under the APA and enjoined application of the challenged rule. *Id.* at 975, 980. The issue in *Heartwood* was not whether the agency rule could be substantiated on remand, as contemplated by *Allied-Signal* and its progeny, but instead whether an injunction of the challenged agency activity was appropriate. *Id.* at 977.[3] Like *Bosworth*, *Heartwood* never addressed the propriety of vacatur where an agency asserted that there was a serious possibility that it could substantiate a CatEx that was facially challenged.

1. There is a serious possibility that FSA can substantiate the CatEx for medium CAFO financial assistance.

In comprehensively revising its NEPA regulations, "FSA collected data for loans that required an environmental review . . . based on the [1980] regulation, and randomly sampled conservation plans for various other FSA programs." AR 318. FSA's interdisciplinary team reviewed over 50,000 actions over a ten-year period (2001 – 2011). *Id.* At the end of that environmental review, CEQ concluded that it "believes that the agency has given adequate consideration to the potential environmental impacts of the activities covered by these categorical exclusions, and thus has a basis for its determination that they may be excluded from

[3] To the extent the Ninth Circuit in *Bosworth* and the district court in *Heartwood* ordered nation-wide injunctive remedies, the application of which extended well-beyond the Forest Service projects challenged in those cases, Defendants note that Plaintiffs rely upon no case in this Circuit authorizing nationwide relief to challenge a federal agency project that was authorized by a generally applicable national rule. *See* Pls.' Br. 32-33.

further NEPA analysis and documentation unless extraordinary circumstances exist. . ." AR 1734 (July 15, 2016 Conformity Letter). "As with the categorical exclusions of all federal agencies, CEQ [took] no position on whether the actions to be excluded have the potential for having significant environmental impacts." *Id*. On remand, FSA intends to "conduct an additional review of categorical exclusions applied to loans involving medium CAFOs in the two calendar-year period (2017-2018) following issuance of the 2016" rule and to "reexamine the scientific articles and data that have been included in the Administrative Record in combination with analyzing other peer-reviewed scientific data following publication of the 2016 rule." Fuller Decl. ¶7. The agency will thus have a substantial body of data before it to examine in determining whether medium CAFO financial assistance has a significant effect on the environment.

The first factor of the *Allied-Signal* test is satisfied here because there is a serious possibility that FSA will substantiate its decision on remand. *Allied-Signal*, 988 F.2d at 151; *Haw. Longline*, 288 F. Supp. 2d at 12. In its 2016 rule, FSA "determined that the categories of proposed actions listed in §§ 799.31 and 799.32 do not normally individually or cumulatively have a significant effect on the human environment . . . ." 7 C.F.R. § 799.30(a). While the 2016 rule does not specifically reference medium CAFO financial assistance, the no significant effects finding encompasses it along with other CatExs. Remand will allow the agency to reexamine the actions it reviewed under the 1980 rule, as well as the actions it has taken under the 2016 rule, and make a specific finding that, if warranted, substantiates its conclusions as applied to medium CAFO financial assistance. The substantial data that FSA examined, CEQ's concurrence that FSA gave adequate consideration to the potential environmental effects of the activities covered by the CatExs, and the additional data that FSA will examine demonstrate that there is at least a

serious possibility that FSA will substantiate its decision, as applied to medium CAFO financial assistance on remand.

Plaintiffs rely on *National Parks Conservation Association v. Jewell* for the proposition that FSA will be unable to show that there is a serious possibility that it could substantiate its decision on remand. Pls.' Br. 33-34 (citing *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7 (D.D.C. 2014)). Plaintiffs' reliance on this case is misplaced. In *National Parks*, the Office of Surface Mining Reclamation and Enforcement of the U.S. Department of the Interior ("OSM") revised a stream protection rule without first consulting with the Fish and Wildlife Service ("FWS") as required by the Endangered Species Act, 16 U.S.C. § 1536(a)(2). *Nat'l Parks*, 62 F. Supp. 3d at 10-11. After suit was brought challenging the stream protection rule, the agency admitted that the failure to initiate consultation was legal error and asked the court to vacate the rule. *Id.* at 11. The record clearly supported that conclusion because "threatened and endangered species exist in areas where coal mining occurs," "mining operations affect the habitat and species residing in their paths" and the challenged rule adopted "different criteria than the [previous rule] for permitting mining activities in the stream buffer zone . . ." *Id.* at 15, 16. The court in *National Parks* thus concluded, as the agency had upon reconsideration, that the determination that the stream protection rule "would have no effect on threatened and endangered species" was incorrect and should be vacated.[4] *Id.* at 17-18.

The present case is different than *National Parks*. There, defendants agreed that the

[4] *National Parks* is also distinguishable on the basis that the court was specifically addressing the application of the rule to section 7 consultation under the Endangered Species Act. It stressed that the "Supreme Court has cautioned that 'Congress intended endangered species to be afforded the highest of priorities,'" *id.* at 21 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978)), and noted that "[a]bsent consultation with [FWS], there is no confirmation that the 2008 Rule would avoid jeopardizing threatened or endangered species or adversely modifying critical habitat." *Nat'l Parks*, 62 F. Supp. 3d at 21.

challenged rule was deficient and should be vacated. Here, there is a serious possibility that the CatEx for medium CAFO financial assistance can be substantiated on remand. By contrast, in *National Parks* there was "no 'serious possibility' that [the agency] would be able to develop a reasoned explanation on remand because [the agency] . . . confessed legal error." *Id.* at 21.

2. Vacating the medium CAFO CatEx would have disruptive consequences.

Vacatur of the medium CAFO CatEx while FSA revisits the rule on remand would be disruptive both to the family farmers who rely upon FSA for financial assistance and to the agency itself.

As Plaintiffs' acknowledge, were the Court to vacate the 2016 rule as it pertains to medium CAFO financial assistance, the ordinary rule is that the effect of invalidating the 2016 rule would be "to *reinstate* the rules previously in force," *i.e.* the 1980 rule. Pls.' Br. 36 n.23; *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (1987) (quoting *Action on Smoking & Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983)); *cf. Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545 (D.C. Cir. 1983) (vacating new rule without reinstating the old rule is appropriate where it would be irrational to reinstate a stricter standard than the one challenged in the new rule). However, reinstatement of those rules would provide Plaintiffs with none of the relief they seek in their Complaint.

Under the regulations that existed prior to the enactment of the 2016 rule (*i.e.* the 1980 rule), FSA reviewed loan actions for medium CAFOs using a Class I EA. *See* 7 C.F.R. § 1940.311(c)(8) (2015), ECF No. 31-7. Class I EAs were documented using a five-page checklist (Form 1940-21), which is analogous to the environmental screening worksheet that is presently used for categorically excluded loan actions.[5] *Id.* § 1940.319(b). Indeed, in most important

[5] A copy of Form 1940-21 is attached to Federal Defendants' Motion for Voluntary Remand.

respects, Class I EAs under the 1980 rule were treated the same as categorical exclusions are treated under the 2016 rule. Also similar to its current CatEx procedures, FSA was not required to provide the public with notice of a finding of no significant impact for Class I EAs. *Id.* § 1940.319(j).

The 2016 rule reshaped FSA's NEPA regulations, bringing them into conformity with NEPA and the CEQ regulations. Critically, the 2016 rule eliminated Class I and Class II EAs, and treats medium CAFO financial assistance as a CatEx rather a Class I EA, as it did under the 1980 rule. Under the 2016 rule, there are categorical exclusions, 7 C.F.R. §§ 799.30-34, environmental assessments, 7 C.F.R. §§ 799.40-45, and environmental impact statements, 7 C.F.R. §§ 799.50-59, but no additional classifications within the EA designation. This is consistent with CEQ regulations, which lay out a hierarchy comprising categorical exclusions, 40 C.F.R. § 1508.4, environmental assessments, 40 C.F.R. § 1508.9, and environmental impact statements 40 C.F.R. § 1508.11, but do not contemplate sub-classes within these terms. For the most part, under the 2016 rule, activities that were treated as Class I EAs under the prior rule are now treated as categorical exclusions that "require additional environmental review and consultation . . ." 7 C.F.R. § 799.32(b).

Reinstatement of the 1980 rule as it applies to medium CAFO financial assistance would not address Plaintiffs' concerns with notice and the level of analysis that they complain of under the 2016 rule. In their Complaint, Plaintiffs allege that the CatEx environmental screening worksheet under the 2016 rule "is insufficient" because "it fails to provide public notice of the potential federal funding and fails to account for a variety of potentially significant CAFO harms." Am. Compl. ¶ 60, ECF No. 24. But the worksheet that was previously used for Class I

ECF No. 31-9 and is attached here as Exhibit 3.

EAs under the 1980 rule did not provide public notice either. *See* 7 C.F.R. § 1940.311(j) (2015). Nor did it mandate a more rigorous environmental analysis than the current environmental screening worksheet. *Compare* Ex. 2 (Form RD 1940-21 for Class I EAs under 1980 rule) *with* Ex. 3 (Form FSA-850 for CatExs under 2016 rule). To return to the 1980 rule, FSA would need to swap the environmental screening worksheet, which it presently uses to analyze categorical exclusions under the 2016 rule, with the checklist in Form RD 1940-21, which it previously used to analyze Class I EAs under the 1980 rule. Thus, the process for analyzing medium CAFO financial assistance would be largely the same, but it would proceed under an obsolete distinction between classes of EAs. *See* AR 220 (describing proposed changes in the 2016 rule as "a substantive change in the regulation, but not in the current process.").[6]

Analyzing medium CAFO financial assistance as a Category I EA under the 1980 rule would be disruptive and confusing. Because Plaintiffs do not challenge how large or small CAFOs are analyzed, those categories would continue to be analyzed under the 2016 rule, with large CAFO financing being analyzed using an environmental assessment and small CAFO financing continuing to be analyzed as a CatEx using Form FSA-850. Were the 1980 rule to be reinstated for medium CAFOs, financial assistance for that category of loans would be analyzed as "Class I EAs" using Form RD 1940-21. As noted, CEQ regulations do not distinguish between classes of environmental assessments; nor does FSA's 2016 rule. Reinstating the 1980 rule as it applies to medium CAFOs would reintroduce the suspect "Class I EA" designation and

[6] Plaintiffs claim that FSA has "acknowledged that reinstatement is feasible" and explained how it would happen. Pls.' Br. 36 (citing Mot. for Remand 17 and a declaration appended to the July 31, Joint Status Report, ECF No. 27-1). This is incorrect. Defendants have not claimed that "reinstatement is feasible." While FSA considered reverting the analysis of medium CAFO financial assistance to the 1980 rule, after "further review of the NEPA Rule" FSA "determined not to proceed with the processes set forth in the [d]eclaration" to which Plaintiffs cite. August 30, 2019 Joint Status Report ¶ 3, ECF No. 29.

most likely invite additional litigation from plaintiffs challenging the use of this form of analysis under the 1980 rule. Reinstating the 1980 rule would also be disruptive in the immediate term as it would affect hundreds of pending direct and guaranteed loan applications and require FSA to reprocess those applications under the 1980 rule using Form RD 1940-21. *See* Decl. of Steven Peterson ("Peterson Decl.") ¶ 7, ECF No. 31-2 (noting the 81 direct loan applications and 64 guaranteed loan applications for medium CAFOs pending as of September 13, 2019); Am. Compl. ¶ 57 (requesting that the Court declare "all FSA funding approvals made pursuant to the Medium CAFO CatEx that are not yet completely implemented" to be "null and void").

While Plaintiffs complain of insufficient environmental analysis and insufficient notice, they do not ask that the Court require that medium CAFOs be analyzed as EAs, as the 2014 proposed rule provided. Pls.' Br. 36 n.23 ("Vacatur does not return the Medium CAFO CatEx to the regulations in the Proposed NEPA Rule . . . ."). Instead, they ask that the Court reinstate the 1980 rule. *But see Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 545 (D.C. Cir. 1983) (vacating new rule without reinstating old rule where it would be "irrational" to do so). However, even if the Court were to vacate the 2016 rule as applied to medium CAFO financial assistance and not reinstate the 1980 rule but instead require FSA to conduct an EA review of proposed loan actions to medium CAFO farmers, significant disruption would result.

Commenters recognized this potential disruption when they objected to the 2014 proposed rule, which would have subjected both medium and large CAFO financial assistance to EAs. *See* 79 Fed. Reg. at 52,257 (proposed 7 C.F.R. § 799.41(a)(9)(10)). Commenters objected to that proposal, as it applied to medium CAFO financial assistance, pointing out that it was "unrealistic," "more restrictive than most state environmental agencies as well as US EPA CAFO regulations," would have required "additional measures, beyond what EPA and states

environmental agencies have found necessary," "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." AR 1439; AR 1471. In its final rule, FSA recognized these concerns to the proposed change and decided to subject medium CAFOs to a categorical exclusion, which was be consistent with the level of analysis that the prior rule required and less disruptive to the expectations of the family farmers and lenders affected by the rule.[7]

Family farmers who operate medium CAFO farms submit approximately 1,100 direct and 1,800 guaranteed loan applications to FSA each year. Peterson Decl. ¶ 7. Those loans and loan guarantees are presently subject to the CatEx that is challenged in this case. If the rule were vacated and FSA required to initiate environmental assessments on those applications, that would result in at least a two month delay in FSA's decision on each loan application, which would in turn result in the loss of real estate purchase opportunities, potentially hurt the applicant's ability to lock into loan terms, and delay the applicant's ability to enter into contracts with integrators or livestock purchasers. *Id.* ¶¶ 8(a), (c). In addition, the family farmers who apply for such loans, who qualify because they are often unable to obtain commercial credit due to limited financial means, would be required to bear the additional expense of newspaper publication of the required Notice of Availability and solicitation for public comment, which ranges in amount between $120 and $600. *Id.* ¶ 8(b). FSA anticipates the resulting delay of loan applications and additional financial burden on family farmers would likely decrease

[7] Citing a February 24, 2011 Civil Rights Impact Analysis, Plaintiffs claim that an EA for medium CAFO financial assistance would impose minimal regulatory requirements on large and small farming businesses. Pls.' Br. 36 (citing AR 356). What Plaintiffs fail to acknowledge, however, is that the Civil Rights Impact Analysis that they quote was published three years prior to the proposed EA rule. In addition, the quoted language itself does not refer to any requirement for EAs for medium CAFO financial assistance.

participation in the financial programs it administers and result in a further consolidation of the agricultural industry by larger producers with greater ability to self-fund or to obtain credit from commercial markets. *Id*. ¶¶ 8(d), (f). These self-funded producers are not required to conduct any NEPA review. *Id.* ¶ 8(f). Vacatur would also significantly disrupt FSA's operations, as it would incur significant administrative burdens and costs in communicating the new requirements and training additional agency staff to conduct the higher number of environmental assessments. *Id.* ¶ 8(e).

In this case, requiring medium CAFO financial assistance to be analyzed as EAs would subject thousands of family farmers to a new and unfamiliar rule, cause delays in financing, and impose new compliance costs with which they are unfamiliar. Moreover, it is not only the family farmers whose lives and livelihoods would be disrupted by vacatur. FSA as well would incur significant disruption and costs as the agency is required to communicate the changes to the many field offices across the country. To avoid significant disruption to the persons and entities who rely upon FSA's financial assistance under the CatEx at issue, the Court should remand the rule to the agency without vacating the rule.

B. Plaintiffs' motion for summary judgment should be denied on the merits.

The Court need not reach the merits in this case because remand without vacatur is proper here. If the Court is inclined to consider Plaintiffs' claims on their merits, it should deny Plaintiffs' Motion for Summary Judgment for the reasons discussed below.

Judicial review of Plaintiffs' NEPA claims is governed by the APA, 5 U.S.C. §§ 702, 704; *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1297 (D.C. Cir. 2007), under which the Court determines whether the challenged agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Citizens to Pres.*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "[T]his standard of review is a highly deferential one, which presumes that the agency action is valid." *Common Cause v. Fed. Election Comm'n*, 676 F. Supp. 286, 288-89 (D.D.C. 1986) (citing *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981)).

The Court may not overturn an agency decision because it disagrees with the decision or the agency's conclusions about environmental impacts. *Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008) ("The NEPA process involves an almost endless series of judgment calls," and "[t]he line-drawing decisions necessitated by [the NEPA process] are vested in the agencies, not the courts."). Instead, Plaintiffs have the burden to prove that the agency's decision was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

In conducting review under the APA, this Court functions as a court of appeals—acting not as a finder of fact in the first instance but reviewing the decision made by the agency in light of the administrative record that was before the agency when it rendered its decision. *Powder River Basin Res. Council v. U.S. Bureau of Land Mgmt.*, 37 F. Supp. 3d 59, 71 (D.D.C. 2014) ("[T]he court is principally concerned with ensuring that [the Agency] has 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, that the Agency's decision was based on a consideration of the relevant factors, and that the Agency has made no clear error of judgment." (internal quotation marks omitted)); *Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 66 (D.D.C. 2000) ("[A] court should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.").

Plaintiffs claim that FSA admits to not complying with NEPA and the APA. Pls.' Br. 16, 21. This is incorrect. Defendants' request for remand to cure a procedural defect is not an admission of error. *See Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) ("[T]he agency may request a remand (*without confessing error*) in order to reconsider its previous position." (emphasis added)); *Limnia*, 857 F.3d at 387 ("That is not to say that an agency need confess error or impropriety in order to obtain a voluntary remand."). Instead, Defendants wish to remand so that FSA can determine whether it can specifically substantiate that medium-sized CAFOs do not have a significant effect on the environment, in addition to Defendants' previous general finding applicable to all of the categorically excluded proposed actions.

Plaintiffs claim that FSA violated the APA by failing to provide notice of, and an opportunity to comment on, the final rule. *See* Pls.' Br. 15-17. Plaintiffs also claim that FSA violated NEPA by failing to consider information relevant to medium CAFOs and by failing to substantiate the medium CAFO CatEx during the rulemaking process. *See id.* 19-25. Each of Plaintiffs' claims fail.[8]

1. FSA provided sufficient notice and opportunity to comment on the 2016 rule.

CEQ's NEPA implementing regulations require agencies to provide "an opportunity for public review" of proposed NEPA procedures. 40 C.F.R. § 1507.3(a). Likewise, the APA

[8] Plaintiffs also argue that medium CAFOs have "significant and harmful effects on the environment." Pls.' Br. 25-31. However, the Court is not tasked with determining whether medium CAFOs have a significant effect. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."). Rather, the Court is charged with "apply[ing] the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 599 (D.C. Cir. 2007).

requires that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register" and that an agency "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b), (c).

Notice and comment allows an agency to "reconsider, and sometimes change, its proposal based on the comments of affected persons." *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000). The notice requirement also provides affected parties "an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). As these opportunities for input contemplate, an agency is not required to issue a final rule that is "an exact replication of the proposed rule." *Ass'n of Battery Recyclers*, 208 F.3d at 1058. Otherwise, an agency would be "forced into perpetual cycles of new notice and comment periods." *Id.*; *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547 ("The notice requirement should not force an agency endlessly to repropose a rule because of minor changes, nor should a court vacate and remand an otherwise reasonable rule because of a minor procedural flaw.").

An agency satisfies the notice and comment requirement if its final rule is a "logical outgrowth of its notice." *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). An agency's final rule qualifies as the logical outgrowth of the proposed rule "if a new round of notice and comment would not provide commenters with 'their first occasion to offer new and different criticisms which the agency might find convincing.'" *Ass'n of Battery Recyclers*, 208 F.3d at 1059 (quoting *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991)); *see also Nat'l Exch. Carrier Ass'n, Inc. v. FCC*, 253 F.3d 1, 4 (D.C. Cir. 2001) ("Clearly, a new round of

notice and comment would not provide the [petitioner] its 'first opportunity . . . to offer comments' upon the order."). "In most cases, if the agency . . . alters its course in response to the comments it receives, little purpose would be served by a second round of comment." *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (quoting *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994)).

Defendants provided sufficient notice of the rules regarding financial assistance for CAFOs.[9] In the 2014 proposed rule, FSA proposed to prepare an EA for each loan action supporting medium and large CAFO farmers. 79 Fed. Reg. at 52,257. However, as commenters pointed out, requiring EAs for medium CAFO financial assistance would have been a substantive change in FSA's process because the Class I EA under the 1980 rule was in practice no different than a CatEx. The public, and Plaintiffs here, could have expected, among reasonably likely outcomes, that (1) FSA would decide to substantively change its process and require EAs for medium CAFO financial assistance; or (2) FSA would decide *not* to substantively change its process and instead categorically exclude medium CAFO financial assistance—similar to the review under the 1980 rule. *Cf. Ariz. Pub. Serv. Co.*, 211 F.3d at 1300 ("[A]ny reasonable party should have understood that [the agency] might reach the opposite conclusion after considering public comments.").

The comments show that the interested public was aware of what was at stake. In their comments, Plaintiffs raised concerns about "how the potential environmental impact associated with proposed new and expanded animal feeding operations will be thoroughly evaluated prior to approving any federal funding to support these efforts." AR 1486. They argued that "FSA

[9] Although the named Plaintiffs failed to comment on the proposed rule directly, *see* AR 372-75, at least two Plaintiffs "submitted comments on the 2014 proposed rule through the National Sustainable Agriculture Coalition." Am. Compl. ¶¶ 15-16.

should discontinue the practice of guaranteeing or making direct loans for new or expanded Concentrated Animal Feeding Operations (CAFOs)" without regard to the size of the CAFO. AR 1487. Plaintiffs also argued that FSA should be required to complete an EA when providing financial assistance to CAFO farmers. AR 1487. Notably, Plaintiffs asserted that "FSA should take into consideration the construction or expansion of any new or existing CAFOs and AFOs in the watershed, and the cumulative impacts that those operations have on the watershed[,]" AR 1488, just as they asserted in their summary judgment brief, Pls.' Br. ("The cumulative effects of FSA's CAFO funding actions should [] be considered with other production in integrators' sprawling networks."). Thus, had FSA provided an opportunity for another round of comments, Plaintiffs would have offered no "new and different criticisms which the agency might find convincing." *Ass'n of Battery Recyclers*, 208 F.3d at 1059.[10] Plaintiffs' claim on the sufficiency of notice therefore fails.

2. FSA considered relevant factors in issuing the final rule.

Plaintiffs charge that FSA "failed to consider important factors" and "relied on factors which Congress has not intended it to consider." Pls.' Br. 19. The "relevant factors" here are those necessary for FSA to determine that the categorically excluded proposed actions would not "individually and cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. More specifically, the potential environmental effects of funding medium CAFOs are the relevant factors.

[10] Other interested parties also submitted substantial comments on FSA's proposed rule. For example, the Center for Food Safety submitted comments through one of the counsel of record for Plaintiff Animal Legal Defense Fund. *See* AR 379. These comments presented some of the same arguments Plaintiffs now advance—*e.g.*, that FSA proposed to categorically exclude actions "without any documentation"—and attached 21 supporting documents that span over 1,000 pages. AR 391, AR 397–1435.

FSA considered ample information relevant to the effects of financially assisting medium CAFOs that have the potential to affect the environment. *See, e.g.*, AR 2040-42 (discussing public concerns about poultry operations); AR 2047-48 (explaining the beneficial health and environmental impacts of EPA's CAFO rule); AR 2113 (quantifying effects of EPA's CAFO rule on water pollution reduction). FSA also considered all of the standards for CAFOs imposed by the EPA and state regulatory entities, compliance with which is required as a precondition for FSA financial assistance. *Cf. Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1020 (S.D. Cal. 2003) (reasoning that since ambient air quality standards were designed to protect human health, agency's finding that proposed project did not violate those standards logically indicated that proposed project would not significantly impact public health).

Most notable, FSA reviewed several sources explaining the effects of agricultural waste management. *See, e.g.*, AR 2020 (identifying waste management as "a bigger issue when production is concentrated"); AR 10551-54 (explaining the link between poultry litter and phosphorous and the adverse effects of phosphorous but offering solutions such as "using the litter as fuel for energy generation"); AR 10570-79 ("The Environmental Impact of Poultry Litter Fertilizer on Watersheds"). FSA also considered other possible impacts of medium CAFOs and the best management practices that farmers implement to reduce the potential for their farms to affect the environment. *See, e.g.*, AR 2042 (describing measures to implement at poultry farms to mitigate water pollution such as not applying litter "on slopes with a grade of more than 15 percent or in any way that allows manure to enter water sources"); AR 2014 (explaining that the U.S. Department of Agriculture requires certain farms to implement the Hazard Analysis and Critical Points management system to reduce the transfer of pathogens); *see generally* AR 2032 (providing examples of practices to reduce poultry farms' environmental impacts).

In addition, FSA did not consider improper information. *See* Pls.' Br. 20-21. Plaintiffs contend that FSA is "[e]ncouraging industry growth" because commenters in support of farming operations pointed out that FSA's proposed rule imposed more burdensome requirements than the prior regulations. *Id.* It is true that FSA considered the commenters' concerns that the proposed rule posed a new impediment to young and beginning farmers in their efforts to obtain financing for farming operations. *See* AR 1528 (summarizing comments received and noting recommended responses). However, FSA did not limit its evaluation to the commenters' concerns because it also considered the relevant factors discussed above. Plaintiffs cite no authority for the proposition that an agency cannot consider comments on a proposed rule in conjunction with other relevant factors. Indeed, FSA *must* consider comments on the proposed rule and can be expected to change its position in response to those comments. *See Ariz. Pub. Serv. Co.*, 211 F.3d at 1300. Accordingly, Plaintiffs' claim fails.

3. FSA's decision to establish a CatEx for medium CAFO financial assistance was neither arbitrary nor capricious.

Plaintiffs rely on the CEQ Memo to argue that FSA failed to substantiate the CatEx for medium CAFO financing. *See* Pls.' Br. 21. FSA followed that guidance before issuing the 2016 rule even though the CEQ Memo is merely guidance for agencies and "does not establish legally binding requirements in and of itself." 75 Fed. Reg. at 75,631 n.7; *see* AR 315-20 (describing the steps that FSA took to follow CEQ's guidance). In addition, the correct standard here is the APA's arbitrary and capricious standard, which is "a highly deferential one [that] presumes [] the agency action is valid." *Common Cause v. Fed. Election Comm'n*, 676 F. Supp. 286, 288-89 (D.D.C. 1986).

Plaintiffs narrowly focus on the Supporting Documentation that FSA sent to CEQ in August 2013, before the proposed rule was published. *See* AR 203-362. Plaintiffs reason that

simply because the proposed rule did not include financing for medium CAFOs in FSA's list of categorically excluded actions, the August 2013 Supporting Documentation did not substantiate a categorical exclusion for these types of loan actions. *See* Pls.' Br. 22. However, Plaintiffs' argument ignores the entirety of the Administrative Record, which demonstrates on balance that FSA's final rule was neither arbitrary nor capricious. *See, e.g.*, AR 10546 (outlining the environmental impact-reducing requirements for a nutrient management plan, which FSA requires farmers to complete as a condition of the financial assistance); AR 10462-529 (explaining effects of EPA's rule regulating CAFOs). Plaintiffs also ignore the Comparability Analysis Table included in the August 2013 Supporting Documentation, which benchmarks other agencies' similar categorically excluded actions. AR 319; AR 328-52. Some of the very same types of loan actions proposed to be categorically excluded—and thus analyzed—are listed on this table and were ultimately included as part of the loan actions for medium CAFOs that are categorically excluded. *Compare* AR 328-30 (benchmarking loan actions categorically excluded in the 2014 proposed rule), *with* 7 C.F.R. §§ 799.31(b)(1), 799.32(d) (listing loan actions that are categorically excluded in the 2016 final rule).

Plaintiffs also argue that FSA should consider the cumulative effects of its "CAFO funding actions" with other farming operations, *see* Pls.' Br. 23-24, but they ignore FSA's analysis in the August 2013 Supporting Documentation. FSA "collected data for loans that required an environmental review" and analyzed over 50,000 actions. AR 318. Although "medium CAFOs" were not specifically identified in FSA's summary of its analysis, the record on balance demonstrates that FSA considered the potential environmental effects—including cumulative effects—of funding medium CAFOs. In fact, CEQ found that FSA "has given adequate consideration to the potential environmental impacts of the activities covered by these

categorical exclusions, and thus has a basis for its determination that they may be excluded from further NEPA analysis . . . ." AR 1734. Accordingly, FSA did not act arbitrarily or capriciously in promulgating the 2016 final rule. Plaintiffs' claim therefore fails.

C. Plaintiffs' reliance on extra-record materials of their creation is improper.

Plaintiffs never moved for leave to supplement the record or to have extra-record materials considered. Instead, Plaintiffs submitted their extra-record materials with their Motion for Summary Judgment, suggesting the Court should consider them because FSA allegedly failed to (1) examine all relevant factors here and (2) adequately explain the basis for its decision. *See* Pls.' Br. 6 n.3; 22 n.12.[11] Plaintiffs' attempt to rely on extra-record information fails because they have not satisfied any of the exceptions to the record review doctrine. *See Oceana, Inc.*, 674 F. Supp. 2d at 45 (articulating four exceptions for considering extra-record evidence).

Notwithstanding the APA's binding record review rule governing this case, Plaintiffs submitted 16 declarations with lengthy extra-record materials and relied extensively on that material in their summary judgment brief challenging Defendants' Motion for Remand without Vacatur. ECF Nos. 34-1 – 34-16. Plaintiffs proffer their extra-record materials in support of their allegations of impacts from medium CAFO farms. *See, e.g.*, Pls.' Br. 25 (citing Decl. of Tom Frantz to allege impacts on ambient air quality and relying on Decl. of Robert Martin to claim there are "[h]uman health concerns associated with industrial animal production").

[11] Plaintiffs also suggest that extra-record evidence can be submitted simply because a case arises under NEPA. *See* Pls.' Br. 6 n.3 (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)). *But see Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013) ("*Esch* has been given a limited interpretation since it was decided, and at most it may be invoked to challenge gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review."); *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 44-45 (D.D.C. 2009), (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997), to explain that the D.C. Circuit does not recognize a NEPA exception to the record review principle.).

Plaintiffs claim that FSA failed to consider this information in promulgating the new rule. However, the Administrative Record reflects FSA's consideration of the impacts of CAFOs, as discussed above.

Even if the Court finds that more information regarding the impacts of medium CAFOs is necessary, Plaintiffs' extra-record materials should not be considered. Instead, the Court should remand to FSA to provide the necessary information. *See Sw. Ctr. for Biological Diversity v. Babbitt*, 131 F. Supp. 2d 1, 8 (D.D.C. 2001) (holding that if the extra-record information "indicates a failure to consider all relevant factors, remand to the agency for consideration of that information may be in order; substitution of the court's determination for the agency's, based on the non-record information, is not."); *see also Fla. Power & Light*, 470 U.S. at 744 ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Safari Club Int'l v. Jewell*, 111 F. Supp. 3d 1, 8–9 (D.D.C. 2015) (rejecting extra-record evidence because it was "not necessary for effective judicial review" and even if the record were inadequate, "the Court would not . . . substitute its judgment for the judgment of the agency. Instead, it would remand the matter back to [the agency] for consideration."); *Checkosky*, 23 F.3d at 462 (allowing agency to remand without vacatur to "further elaborat[e]" the reasons for its findings and conclusions). Therefore, the Court should not consider Plaintiffs' extra-record evidence submitted through the 16 declarations supporting Plaintiffs' Motion for Summary Judgment.

V. CONCLUSION

Defendants respectfully request that the Court grant their Motion for Remand without Vacatur for at least two reasons. First, on remand there is a serious possibility that FSA can cure its procedural defect—namely, the failure to make a specific finding of no significant impact for

the CatEx for medium CAFO financial assistance. Second, vacating FSA's rule—insofar as it creates a categorical exclusion for medium CAFO financial assistance—while FSA revisits the rule will have disruptive consequences on the family farmers who rely on FSA's financial assistance and will cause undue disruption to FSA's operations. The Court should also deny Plaintiffs' Motion for Summary Judgment because Plaintiffs fail to demonstrate that they are entitled to summary judgment on any of their claims. Finally, the Court should not consider Plaintiffs' extra-record materials because they are not necessary for effective judicial review. Even if the Court finds that it requires more information in this case, FSA will on remand provide any information necessary to consider the relevant factors associated with FSA's loan actions for medium CAFO farms.

Respectfully submitted,

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