UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS et al.,

Plaintiffs,

v.

DAVID BERNHARDT in his official capacity as Secretary of the Interior, et al.,

Federal Defendants,

and

AMERICAN PETROLEUM INSTITUTE, STATE OF WYOMING, and WESTERN ENERGY ALLIANCE,

Defendant-Intervenors.

Case No. 1:20-cv-056-RC
The Honorable Rudolph Contreras

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

Plaintiffs oppose Federal Defendants' remand motion only insofar as it requests remand *without vacatur*. But Plaintiffs never show that they are entitled to vacatur, let alone move the Court to impose such a remedy. Plaintiffs instead incorrectly claim that "BLM has conceded that the environmental analyses underlying a subset of the leasing decisions challenged here do not comport with the Court's determination of what constitutes a legally adequate NEPA analysis." Pls.' Resp. to Fed. Defs.' Mot. for Voluntary Remand 8, ECF No. 42 (Pls.' Resp.). As this Court recognized in related litigation, and "[c]ontrary to Plaintiffs' allegations, BLM has not admitted that the [subset of] EAs, FONSIs, and DNAs are necessarily deficient. Rather, BLM requested voluntary remand for 'further analysis under NEPA."' Mem. Op., at 5, *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 121 (July 19, 2019); *see also* Fed. Defs. Mot. for Voluntary Remand Without Vacatur & Mem. in Supp. 4, ECF No. 41 ("BLM now concludes that voluntary remand for further analysis under NEPA is appropriate"). "[T]hat the agency intends to reevaluate its decision" does "not concede that the [decision] is invalid." *Vanda Pharms., Inc. v. Food & Drug Admin.*, No. CV 19-301 (JDB), 2019 WL 1198703, at *2 (D.D.C. Mar. 14, 2019).

Aside from conjuring an unmade concession, Plaintiffs' only remaining argument for vacatur consists of unjustified aspersions cast on remand analysis that Federal Defendants have yet to do. *See* Pls.' Resp. 4 ("The speed with which BLM has completed supplemental NEPA analysis for the Wyoming leases, with limited opportunity for public engagement, show that BLM considers remand as merely an exercise in filling out paperwork to reaffirm decisions the agency has already made."). As Federal Defendants explained in the related litigation, the supplemental analysis for the Wyoming

leases fully complied with the Court's order and NEPA. Fed. Defs.' Mem. in Supp. of Their Cross-Mot. for Summ. J., *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 148-1 (Mar. 9, 2020).

Even if the Wyoming analysis were somehow flawed, however, that would have no bearing here, by Plaintiffs' own reasoning. Tellingly, Plaintiffs focus on the timing of the Wyoming supplemental analysis in the prior litigation—for which BLM had not sought voluntary remand—rather than the supplemental analyses for the Colorado and Utah decisions, which BLM prepared on voluntary remand. After the Court granted voluntary remand in May 2019, BLM took over six months to complete supplemental analysis for the Colorado leases, and more than fifteen months to complete supplemental analysis for the Utah leases.[1] Thus, to the extent timing is any indication of the seriousness with which BLM will conduct further NEPA analysis, Plaintiffs have failed to show that BLM's voluntary remand analysis is likely to be "merely an exercise in filling out paperwork." Pls.' Resp. 4. In any event, as in the prior litigation, the Court should decline Plaintiffs' invitation "to speculate about BLM's analysis on remand before assessing BLM's EAs and FONSIs[.]" Mem. Op. 6 ("this Court must assume that BLM will take its obligations seriously on remand, barring contrary briefing on the merits"). Plaintiffs have shown no reason for this Court to depart from the approach taken in similar circumstances of the prior litigation.

Because Plaintiffs have failed to establish that any of the challenged leasing decisions are deficient on the merits, they have curtailed the Court's ability to vacate

[1] Notice of Completion, *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 140 (Dec. 6, 2019); Notice of Completion, *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 171 (Sept. 21, 2020).

those decisions. The judicial power of vacatur arises from the Administrative Procedure Act (APA), which authorizes courts to "set aside agency action . . . found to be" deficient. 5 U.S.C. § 706(2). Absent a finding of deficiency on the merits, courts have no power to "set aside agency action." *Id.*; *see also Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 136 (D.D.C. 2010) ("The Court, therefore, concludes that it lacks the authority to grant [a] request for vacatur without a determination of the merits."). Plaintiffs incorrectly claim that *Carpenters Industrial* is limited to efforts by federal agencies to circumvent notice-and-comment obligations in revising rules. Pls.' Resp. 7–8. To the contrary, that holding is constrained neither to rulemaking revisions nor to agency requests for vacatur. *See Vanda Pharm.*, 2019 WL 1198703, at *2 (rejecting private plaintiff's request to impose vacatur as a condition on voluntary remand of an agency order) (citing *Carpenters Indus.*, 734 F. Supp. 2d 126). At this early stage of the litigation, Plaintiffs have simply failed to do the work necessary to enable the Court to exercise the power of vacatur. *Compare id.* (doubting judicial "authority to vacate an agency action before issue has been joined, without an administrative record, and in the absence of a request for emergency relief"), *with Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 14 (D.D.C. 2014) (finding the power to vacate because with "the full administrative record, as well as fully briefed cross-motions for summary judgment," the court was "able to undertake a determination of the merits").[2]

[2] Plaintiffs incorrectly suggest that the Court may lack the "ability to remand an agency decision without vacatur," following *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). *See* Pls.' Resp. 6–7. Rather than limit judicial authority in APA cases, *Regents* confirmed that "a court may remand for the agency to . . . . offer a fuller explanation of the agency's reasoning *at the time of the agency action*," without requiring the agency to "tak[e] *new* agency action." 140 S. Ct. at 1907–08 (internal citations and quotation omitted). *Regents* thus reaffirmed the long-established practice of remand without vacatur.

Plaintiffs' requests that the Court enjoin development approvals or suspend the leases should be denied for similar reasons. Because "Plaintiffs have not filed a motion for preliminary injunction . . . and articulated why 'irreparable injury is likely in the absence of an injunction,'" or suspension, they are not entitled to their requested relief. Mem. Op. 6 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). An opposition brief is simply "the wrong procedural vehicle through which" to seek an injunction. *See id.* Moreover, the remedy that Federal Defendants identified in their motion—Plaintiffs' ability to challenge future decisions concerning the leases—applies equally to any development authorization (such as approval of a drilling permit) that BLM might conceivably issue. Plaintiffs fail to explain why this ordinary recourse is so inadequate as to warrant an injunction of agency decision-making in the form of an order requiring lease suspension or prohibiting development approval.

Finally, Plaintiffs' request that the Court "retain jurisdiction over this matter throughout the remand process" should be rejected. *See* Pls. Resp. 10. Plaintiffs made a similar request in the prior litigation. Pls.' Mot. to Amend J. & Mem. in Supp. 8–9, *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 108 (June 4, 2019) (asking the Court to "retain jurisdiction over the remand" that BLM had voluntarily sought). But the Court rejected that request, explaining that it had not yet found the voluntarily remanded actions "deficient based on a full briefing on the merits." Mem. Op. 5. Similarly here, it makes little sense to retain jurisdiction over NEPA analyses that BLM wants to revisit. "To the extent that Plaintiffs wish to challenge the adequacy of BLM's new NEPA analysis," that may issue on remand, "they must supplement their complaint to raise these new claims." *Id.* at 8.

For all these reasons, the Court should exercise its inherent authority to manage its docket and its equitable power to grant remand, without any determination on the merits. Voluntary remand is a vital tool in APA litigation that "preserves scarce judicial resources by allowing agencies 'to cure their own mistakes.'" *Carpenters Indus.*, 734 F. Supp. 2d at 132 (citation omitted). Plaintiffs' requests for vacatur or various injunctive relief would force the Court—without the benefit of an administrative record or briefing—to expend resources reaching a determination on the merits, or undertaking "rigorous application of the controlling legal standard for injunctive relief." Mem. Op. 6. There is no reason for the Court to do so at this point when the parties' disputes may well be resolved upon remand and further study. In the meantime, BLM remains committed to ensuring that appropriate analysis of GHG emissions has been completed before making further decisions concerning these leases.

Respectfully submitted this 21st day of September, 2020.

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