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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

BERNHARDT, et al.,

Defendants,

STATE OF ALABAMA, et al.

Defendant-Intervenors.

CASE NO. 4:19-cv-06013-JST

Related Cases: No. 4:19-cv-05206-JST
No. 4:19-cv-06812-JST

INDUSTRY DEFENDANT-INTERVENORS' RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND

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

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INTRODUCTION

Completion of the merits briefing would confirm that Plaintiffs' challenges to the 2019 ESA Rules lack merit. However, for the sake of judicial efficiency and economy, Industry Intervenors do not oppose the Government's motion for voluntary remand without vacatur (ECF No. 146[1]), given the ongoing rulemaking process the outcome of which may narrow or moot this litigation. But if the Court is inclined to consider a possible remand with vacatur as proposed by Plaintiffs, Industry Intervenors respectfully ask that the Court set a schedule to allow for orderly briefing of the merits and the associated raft of highly technical issues necessarily presented by application of the *Allied-Signal* two-factor test to this important case.

In evaluating whether to grant this motion and remand without vacatur, Industry Intervenors highlight the following:

1. Plaintiffs only challenge a subset of the 2019 ESA rules and the law presumes that agency action is lawful. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014).
2. Despite Plaintiffs' current claim that an emergency exists, Plaintiffs never sought preliminary injunctive relief, which is telling because nothing has changed.
3. Plaintiffs' various claims lack legal support. For example, Plaintiffs challenge the revisions to the Section 4(d) Rule adopted by the U.S. Fish and Wildlife Service. But the Ninth Circuit has already rejected that very claim – concluding that determining whether to extend take protections to threatened species can occur on a case-by-case basis. *See Trout Unlimited v. Lohn*, 559 F.3d 946, 962 (9th Cir. 2009).
4. Since adoption of the 2019 ESA Rules, the Government has in fact extended take protection to every newly listed threatened species, undermining any claim that there is an emergency that could justify setting aside the entirety of three major and important

[1] On December 10, 2021, Federal Defendants filed an identical Motion for Voluntary Remand in the three related cases. In this Response, Industry Intervenors will cite to the ECF document number (ECF No.) in the low-numbered case, *Center for Biological Diversity et al v. Haaland*, No. 4:19-cv-05206-JST, unless otherwise noted. Industry Intervenors will file the identical Response in each of the three related cases.

rulemakings. *See* Second Declaration of Gary D. Frazer at ¶ 9 (ECF No. 132-1). As explained more fully below, the Court should reject any contention by Plaintiffs that a remand with vacatur is warranted.

BACKGROUND

A. The 2019 ESA Rules

This case concerns three rulemakings finalized by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (together, the Services) in August 2019 that revised their regulations for implementing important aspects of Sections 4 and 7 of the Endangered Species Act (ESA or Act). Section 4 provides the process for either Service to determine whether to list a species under the Act as threatened or endangered. Section 7, titled "Interagency Cooperation," requires each federal agency to engage in "consultation" with the appropriate Service to ensure that any action it authorizes, funds or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of its "critical habitat." Along with the Section 9 "take" prohibition, these sections form the core of the ESA.

The 2019 ESA Rules were, to put it plainly, a big deal. Before that, the regulations to implement Section 4 and 7 of the Act had not been materially revised in more than 30 years. *See* ECF No. 149 at 19. Over that period, reform of the ESA, and those sections in particular, has been a recurring topic for Congressional hearings and the advocacy efforts of environmental and industry groups and state governments. The Services proposed the Section 4(d), Section 4 and Section 7 Rules in July 2018.

The rulemaking process for the 2019 ESA Rules was transparent, labor-intensive and robust. The parties to this litigation submitted extensive comments on the proposed rules. The rulemaking dockets are, in a word, enormous, as is, of course, the Administrative Record in this case. Indeed, each of the Services' certified indices to the Administrative Record submitted by the Federal Defendants on July 23, 2020, was over 4,500 pages long. *See* ECF No. 116. The regulatory revisions made by the 2019 ESA Rules had been contemplated and discussed for

decades.

B. The Procedural Posture of This Case and Plaintiffs' Request for Vacatur

The current procedural posture of this case is unusual and presents the serious risk that the issues presented by Plaintiffs' challenge to the 2019 ESA Rules will not be accorded the consideration that a case of such national importance deserves. It would be highly prejudicial to the Intervenor-Defendants and make a mockery of the notice-and-comment rulemaking process if the 2019 ESA Rules were vacated in the case's current procedural posture, where the merits have not been briefed.

This litigation has been pending for more than two years. Nevertheless, recognizing that the changes made by the 2019 ESA Rules do not present an emergency or imminent risk of harm, Plaintiffs struggled to even show that they had standing to sue. *See* ECF No. 87 (Order granting Government's Motion to Dismiss for Lack of Jurisdiction with leave to amend). Plaintiffs understandably did not seek preliminary injunctive relief. In summer 2020, the Federal Defendants filed an Answer denying Plaintiffs' claims. ECF No. 93. Thereafter, the schedule for summary judgment briefing was altered multiple times. Plaintiffs filed their Motions for Summary Judgment on January 19, 2021. ECF No. 116. The day after the new administration assumed power, the parties agreed to stay the proceedings, which the Court ordered and continued several times, so the new administration could review and develop its position on the 2019 ESA Rules. In summer 2021, Plaintiffs declined to continue to stipulate to stay the litigation, and the Government filed a Motion to Stay (ECF No. 132), which the Court denied on October 7, 2021. ECF No. 138. The parties reached agreement on a briefing schedule for summary judgment motions, which the Court approved on October 15, 2021. ECF No. 141. On December 10, 2021, the Government, rather than oppose Plaintiffs' Motions for Summary Judgment on the merits, filed its Motion for Voluntary Remand (ECF No. 146), to which this brief responds.

Even though Plaintiffs had not sought a preliminary injunction in the more than two (2) years this litigation has been pending, on December 23, 2021, they filed a brief opposing the Government's remand motion. ECF No. 149. Plaintiffs argue that the Court should vacate the 2019 ESA Rules now, prior to the completion of summary judgment briefing and a merits

determination, because there is an urgent need for the Services to complete their new rulemakings reconsidering the 2019 ESA Rules, and those agencies cannot be trusted to do so "in a timely way on remand." ECF No. 149 at 2-3.

What is actually going on is this: The Services have delayed their ongoing rulemaking (reasonably or not) and the Plaintiffs are apparently worried those agencies may not complete the new rulemaking to revise the 2019 ESA Rules prior to January 2023, when a new Congress could use the Congressional Review Act to thwart revisions to the Rules, or even prior to January 2025, when a new (or even the same) administration could decide to move in a different policy direction and terminate ongoing rulemaking. These are, of course, completely legitimate policy concerns for Plaintiffs, but they are not considerations appropriately advanced to this Court.

Plaintiffs would reap a windfall if the Court vacates the 2019 ESA Rules. As explained below, Plaintiffs did not challenge all of the regulatory provisions of the 2019 ESA Rules in their Motions for Summary Judgment, and the Services have indicated they intend to rescind or revise only a handful of the regulatory provisions Plaintiffs have challenged in those motions on remand. Defendant-Intervenors, their members, and the millions of people and businesses they represent, in contrast, would suffer great prejudice, losing in one fell swoop all of the regulatory reforms for which they advocated during the long and robust rulemaking process for the 2019 ESA Rules. According to Plaintiffs, this would be an appropriate outcome even absent a determination by this Court on the merits that those regulatory provisions of the 2019 ESA Rules they challenge on summary judgment are unlawful. Plaintiffs are shooting for the stars.

Once again it bears mention that Plaintiffs did not seek a preliminary injunction at any time over the more than two years this case has been pending. To even be eligible for that extraordinary remedy, Plaintiffs would have needed to establish they would likely succeed on the merits and suffer irreparable harm in the absence of an injunction. At the same time, Plaintiffs have yet to show a likelihood of harm of the degree necessary to support what can only be described as the similarly extraordinary remedy (at least in the absence of a merits determination) of vacatur. The "possible" harm found by the Court in denying the Government's Motion for Stay (ECF No. 138) does not approach the showing of a likelihood of irreparable harm prerequisite to the issuance of

a preliminary injunction. Plaintiffs have not provided evidence of such irreparable harm in support of their opposition. ECF No. 149.

C. Plaintiffs Challenge Thirteen (13) Regulatory Provisions from the 2019 ESA Rules in Their Summary Judgment Motions.

The Section 4(d) Rule addresses one regulatory provision – reversing the prior "Blanket 4(d) Rule." The Section 4 and the Section 7 Rules, in contrast, each cover numerous regulatory provisions implementing Sections 4 and 7 of the ESA, respectively. The table below sets forth those regulatory provisions that Plaintiffs specifically challenge as contrary to the ESA and/or otherwise arbitrary and capricious in their Motions for Summary Judgment.[2] (Many of the regulatory provisions encompassed by the 2019 Rules are not similarly challenged by Plaintiffs in their Motions for Summary Judgment.) The table also shows, for each of the regulatory provisions challenged by Plaintiffs, whether the Government has indicated it will reconsider the provision on remand and, if so, where this is stated in the its Motion for Voluntary Remand papers – its latest word on the matter. ECF Nos. 146 (Motion), 146-1 (Third Declaration of Gary D. Frazer), 146-2 (Fourth Declaration of Samuel D. Rauch III).

#	Regulatory Reform Challenged on Summary Judgment	Plaintiff(s)'s Summary Judgment Claim/Argument	Government's Position in Motion for Voluntary Remand and Declarations
Section 4(d) Rule – 84 Fed. Reg. 44,753 (Aug. 27, 2019)			
1	Eliminated Blanket 4(d) Rule	Contrary to ESA (APA) *States 21-22; CBD 17-19; ALDF 16-17* Arbitrary and capricious (APA) *States 34-35; CBD 16-17; ALDF 17-21*	Motion 23-24 Third Frazier Decl. ¶ 5

[2] Plaintiffs also argue on summary judgment that the Unoccupied Critical Habitat regulation is not a "logical outgrowth" of the proposed Section 4 Rule and, therefore, violates the APA. CBD 26-29; States 35-37; ALDF 38-40. In addition, Plaintiffs argue in their summary judgment briefs that all three of the Rules violate the National Environmental Policy Act (NEPA). CBD 29-36; States 37-40; ALDF 35-38. CBD (at pages 36-39) alone challenges all three Rules as deficient because the Services did not conduct "internal consultation" pursuant to Section 7 of the Act to "insure [adoption of the Rules] is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. §1536(a)(2).

#	Regulatory Reform Challenged on Summary Judgment	Plaintiff(s)'s Summary Judgment Claim/Argument	Government's Position in Motion for Voluntary Remand and Declarations
Section 4 (Listing) Rule – 84 Fed. Reg. 45,020 (Aug. 27, 2019)			
2	Removed phrase "without reference to possible economic or other impacts of such determination"	Contrary to ESA (APA) *States 9; CBD 5; ALDF 22-23* Arbitrary and capricious (APA) *States 25-26; CBD 6; ALDF 23-24*	Motion 6-7, 23 Third Frazier Decl. ¶ 6 Fourth Rauch Decl. ¶ 7
3	Defined "Foreseeable future"	Contrary to ESA (APA) *States 10; CBD 7-9; ALDF 24-25* Arbitrary and capricious (APA) *States 26-27; ALDF 25*	None
4	Removed language regarding recovery as a basis for delisting	Contrary to ESA (APA) *States 10-11; CBD 9-10; ALDF 25* Arbitrary and capricious (APA) *States 28; ALDF 26*	None
5	Clarified when it is "not prudent" to designate critical habitat	Contrary to ESA (APA) *States 11-13; CBD 11; ALDF 26-28* Arbitrary and capricious (APA) *States 28-29; CBD 11-12; ALDF 30*	Motion 24 Third Frazier Decl. ¶ 7 Fourth Rauch Decl. ¶ 7
6	Clarified "unoccupied critical habitat" designation	Contrary to ESA (APA) *States 13-14; CBD 13-15; ALDF 28-30* Arbitrary and Capricious (APA) *States 29-30; ALDF 30*	Motion 24 Third Frazier Decl. ¶ 8
Section 7 (Consultation) Rule – 84 Fed. Reg. 44,976 (Aug. 27, 2019)			
7	Clarified "destruction or adverse modification"	Contrary to ESA (APA) *States 14-15; CBD 20; ALDF 31-32* Arbitrary and capricious (APA) *States 30-31; ALDF 32*	None
8	Clarified "environmental baseline"	Contrary to ESA (APA) *States 18-19; CBD 23-25; ALDF 33* Arbitrary and capricious (APA) *States 32-33; CBD 25*	None
9	Clarified "effects of the action"	Contrary to ESA (APA) *States 15-18; CBD 21-23; ALDF 32-33* Arbitrary and capricious (APA) *States 31-32*	Motion 24 Third Frazier Decl. ¶ 9 Fourth Rauch Decl. ¶ 7
10	Provided new expedited formal consultation process	Contrary to ESA (APA) *States 33; ALDF 34*	None
11	Clarified demonstration that plan is binding unnecessary for mitigation	Contrary to ESA (APA) *States 19* Arbitrary and capricious (APA) *States 33*	None
12	Provided for adopting outside agencies' initiation package	Contrary to ESA (APA) *States 20; CBD 25; ALDF 34* Arbitrary and capricious (APA)	None

#	Regulatory Reform Challenged on Summary Judgment	Plaintiff(s)'s Summary Judgment Claim/Argument	Government's Position in Motion for Voluntary Remand and Declarations
		CBD 25-26; ALDF 35	
13	Added Land Management Plans to reinitiation of Consultation Exemptions	Contrary to ESA (APA) *States 20-21* Arbitrary and capricious (APA) *States 45*	None

ARGUMENT

A. The Government Requests Voluntary Remand to Reconsider Five (5) of the Thirteen (13) Regulatory Provisions Plaintiffs Challenge in Their Summary Judgment Motions for Policy Reasons

The Government sets forth what it terms "substantial concerns" about the five (5) regulatory provisions it wishes to reconsider on remand in its Motion for Voluntary Remand and accompanying declarations. ECF No. 146, 146-1, and 146-2. To a one, these asserted "substantial concerns" reflect the Services' policy concerns. These concerns arise, naturally enough, from differences between the policies and priorities of the Biden Administration, which assumed power in January 2021, and the Trump Administration, which promulgated the three ESA Rules in August 2019. The Services identified these concerns following review of the 2019 ESA Rules pursuant to Executive Order 13990, 86 Fed. Reg. 7,037 (Jan. 20, 2021), officially titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which President Biden signed shortly after his inauguration on January 20, 2021. Executive Order 13990 instructed federal agencies, including the Services, to review the prior administration's regulations for consistency with a list of the new administration's policy priorities for the environment. *See* 86 Fed. Reg. 7,037. Indeed, Section 1 of Executive Order 13990 is simply titled "*Policy*." *Id.* The Services' asserted "substantial concerns" do not represent their considered views that the regulatory provisions run afoul of the ESA or are otherwise unlawful. Instead, they represent the outcome of the Services' review of the 2019 ESA Rules for consistency with the new administration's policy priorities. Following is an inventory of the regulatory provisions the Government says it will reconsider on remand, and the "substantial concern" said to be animating

such reconsideration:

- **Section 4(d) Rule (eliminated USFWS' "Blanket 4(d) Rule").** According to USFWS, "the 2019 rule provides less flexibility and may require additional resources at the time of listing as compared to the blanket rule." Third Frazer Decl. ¶ 5 (ECF No. 146-1).

- **Section 4 Rule (eliminated phrase that listing decisions be made "without reference to possible economic or other impacts of such determination").** According to USFWS, "[r]emoval of this phrase through the 2019 rule, as well as statements made in the proposed rule [about its removal], caused confusion regarding the Services' intentions" about collecting and using economic information, and "creates a risk that economic information may influence – or may be perceived as having influenced – the listing determination." Third Frazer Decl. ¶ 6 (ECF No. 146-1). For its part, NMFS expressed concern the regulatory provision may be inconsistent with the new administration's policy goals, as set forth in Executive Order 13990. *See* Fourth Rauch Decl. ¶ 7 (ECF No. 146-2).[3]

- **Section 4 Rule (clarified when it is "not prudent" to designate critical habitat).** According to USFWS, the revision "created confusion for the public by suggesting the intent of the language was to allow the Services to regularly decline to designate critical habitat for species threatened by climate change" and "suggests that the only conservation benefits of a critical habitat designation result from the section 7 process, which is incorrect." Third Frazer Decl. ¶ 7 (ECF No. 146-1).

- **Section 4 Rule (clarified "unoccupied critical habitat" designation).** According to USFWS: "DOI also has concerns about the following revisions related to designation of unoccupied critical habitat[:] (1) the requirement that the Services must determine that a designation limited to currently occupied areas would be inadequate for species conservation before designating unoccupied areas; and (2) the requirement for 'reasonable certainty' that the area will contribute to the conservation of the species. 50 C.F.R. § 424.12(b)(2). DOI is concerned that the revisions may go beyond their intended purpose of ensuring that areas designated as unoccupied critical habitat actually contribute to the conservation of the species and wants to reevaluate the standard that the regulatory language adopts for designation of unoccupied areas." Third Frazer Decl. ¶ 8 (ECF 146-1).

- **Section 7 Rule (clarified "effects of the action").** According to USFWS: "DOI is concerned that the changes related to 'effects of the action' could be erroneously interpreted by other agencies or the public to narrow the type and/or extent of effects of a proposed federal agency action the Services will consider during the consultation process. This potential confusion may result in allocation of resources that could detract from the Services' effective implementation of Section 7." Third Frazer Decl. ¶ 9 (ECF No. 146-1). For its part, NMFS expressed concern the regulatory provision may be inconsistent with the new administration's policy goals, as set forth in Executive Order 13990. *See* Fourth Rauch Decl. ¶ 7 (ECF No. 146-2).[4]

[3] Although NMFS states amorphously that it is "concerned" about the "consistency" of regulatory provisions with the "goals and purposes of the ESA and EO 13990," the way this concern is couched—in terms of consistency with the policy-oriented executive order and the agency's interpretation of the ESA's "goals" – suggest that this, too, is a policy concern, rather than a concern with the legality of the regulations. Fourth Rauch Decl. ¶ 7 (ECF No. 146-2).

[4] Although NMFS once again states amorphously that it is "concerned" about the "consistency"

The takeaway is clear: the Services' newfound concerns with the regulations are policy-based. Not a single one of the identified regulatory provisions has been tabbed by the Services for reconsideration because of a concern it is contrary to the ESA and/or otherwise arbitrary and capricious or unlawful for some other reason. Indeed, as already noted, the Government filed an Answer denying Plaintiffs' claims. ECF No. 93. And the Government not only does not concede any of the 2019 ESA Rules' regulatory provisions are legally erroneous (ECF No. 146 at 25), it identifies no provisions as presenting serious legal concerns. Instead, all of the Services' concerns are policy concerns.

With respect to NEPA, the Government says: "The Services also have substantial concerns related to the NEPA documents they prepared when promulgating the 2019 ESA Rules." ECF No. 146 at 25. USFWS is "concerned" that "some aspects of the rationale for invoking the categorical exclusions may not be adequately supported by the record," while NMFS is concerned that those "could be better supported by the record." Third Frazer Decl. ¶ 10; Fourth Rauch Decl. ¶ 8. Again, it is noteworthy that neither agency says it is "concerned" that the use of categorical exclusions *is not* supported by the record. And, as is to be expected, the Services (which have their own NEPA regulations and guidance and policy documents) may have different NEPA review emphases and focuses – policies and approaches -- in different administrations.[5]

B. Vacatur Would Be Inappropriate Because the Merits Have Yet to Be Adjudicated

While the Industry Intervenors take no position on the Government's request for remand of the 2019 ESA Rules, they believe it would be an abuse of discretion for the Court to vacate those Rules, as Plaintiffs request.

As set forth above, Plaintiffs' Summary Judgment Motions challenge thirteen (13) regulatory provisions from the three 2019 ESA Rules – regulations that were years in the making,

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of regulatory provisions with the "goals and purposes of the ESA and EO 13990" (Fourth Rauch Decl. ¶ 7 (ECF No. 146-2), this should be viewed as a policy concern, rather than a concern with the legality of the regulations, for the reasons stated in footnote 4, above.

[5] The Government does not raise as a "concern" the Services' not having conducted Section 7 internal consultation on their promulgation of the 2019 ESA Rules.

and resulted from robust and transparent notice and comment rulemaking processes, as reflected, inter alia, by the massive administrative records for the rulemakings. The merits have not been determined; only Plaintiffs have filed summary judgment papers that address the merits. Indeed, the merits of those challenges to the ESA Rule have yet to even be "peeked" at, because the Plaintiffs have not sought a preliminary injunction or other preliminary relief in this long-running litigation. And the Government does not confess error. ECF No. 146 at 25.

If the Court vacates the 2019 ESA Rules in deciding the Government's Motion for Voluntary Remand, the Services' prior regulations will take effect. That would make things easier for Plaintiffs – they will have achieved all that they seek in this litigation and more – and will not have to trouble themselves with participating in notice-and-comment rulemaking proceedings conducted by the Services to reconsider the 2019 ESA Rules.

Given the distortions that vacatur would cause to the rulemaking process, it should not be surprising that, under the circumstances of this case – including the fact that there has been no merits determination (even a preliminary one) – vacatur would run afoul of the Administrative Procedure Act (APA), which authorizes district courts to "set aside agency action" when the action is "found to be" unlawful. 5 U.S.C. § 706(2). It would also gut the APA's requirement that agencies comply with its procedures for adopting, amending or repealing a regulation, including providing for public notice and comment. 5 U.S.C. § 553(b), (c); 5 U.S.C. 551(5); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015)(agencies are required to "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"). These are black letter requirements of the APA. *Cf. Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) ("[G]ranting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits.").

For the same reasons, it has long been the norm in the 9th Circuit (and in other circuits) for a court to reach the merits of a challenge to a regulation before vacating it. *See, e.g.*, *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)(applying *Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). The 9th Circuit uses the

Allied-Signal two-part test for whether a regulation found to be unlawful should be vacated: (1) the seriousness of the regulation's legal errors; and (2) the disruptive consequences of vacatur. *See Pollinator Stewardship Council*, 806 F.3d at 532. For the first factor, courts "look to 'whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency's decisions make it unlikely that the same rule would be adopted on remand." *Nat'l Family Farm Coal. v. United States*, 966 F.3d 893, 929 (9th Cir. 2020) (quoting *Pollinator Stewardship Council*, 806 F.3d at 532). Analysis under the second factor, as might be imagined, is highly fact-specific, with courts analyzing "the disruptive consequences of an interim change that may itself be changed" by the agency's rulemaking on remand. *Id.* at 929 (citation omitted).

Industry Intervenors are aware that another court in this District recently ordered vacatur of a regulation governing water quality "certification" under Section 401 of the Clean Water Act (33 U.S.C. § 1341) promulgated by the Trump Administration Environmental Protection Agency. See *In re Clean Water Act Rulemaking*, No. C 20-04636 WHA, 2021 WL 4924844 (N.D. Cal. Oct. 21, 2021) (vacating rule on motion for voluntary remand). Industry Intervenors respectfully believe that decision, which has been appealed, was erroneous, and that the better approach to requests for voluntary remand is reflected in the decision of yet another court in this District presiding over challenges to the EPA's rulemaking for defining and determining "waters of the United States" (WOTUS) under the Clean Water Act. *See State of California v. Regan*, No. 20-cv-03005-RS, 2021 WL 4221583 (N.D. Cal. Sept. 16, 2021); *Waterkeeper All., Inc. v. United States. Env'tl Prot. Agency*, No. 18-cv-03521-RS, 2021 WL 4221585 (N.D. Cal. Sept. 16, 2021). But whether the former Court's ruling was erroneous or not does not matter for this Court's resolution of the Government's Motion for Voluntary Remand because, as detailed below, it is easily distinguished in all material respects.

C. The Allied-Signal Factors Weigh Heavily Against Vacatur

In the event the Court believes it is appropriate to consider whether the ESA Rules should be vacated, *Allied-Signal* (which, again, involved consideration of the remedy following adjudication of the unlawfulness of the challenged regulation) requires the Court to assess: (1) the

seriousness of the regulation's legal deficiencies; and (2) the disruptive consequences of vacatur. *Allied-Signal*, 988 F.2d at 150-51.

1. The Services Have Not Identified Any *Legal* Deficiencies in the 2019 ESA Rules

Far from it. As set forth above, Plaintiffs challenge thirteen (13) regulatory provisions in the 2019 ESA Rules. The Services offer statements about their "substantial concerns" with five (5) of those regulatory provisions based on policy concerns ranging from flexibility to resource demands to avoiding confusion about the operation of the ESA. Motion for Voluntary Remand (ECF No. 146) at 20-25; Third Declaration of Gary D. Frazer (ECF No. 146-1)); Fourth Declaration of Samuel D. Rauch III (ECF No. 146-2)). None of these amounts to a legal deficiency, or even a concern about a potential legal deficiency, let alone one that is serious. Indeed, the Services expressly deny having committed error. ECF No. 146 at 25.

None of the regulatory provisions challenged by Plaintiffs in their Motions for Summary Judgment stand out as ones that are obviously erroneous. And, therefore, it is not apparent that the Services could not adopt the same regulatory provisions on remand. To the contrary, as explained by the State Intervenors in their Response to the Government's Motion for Voluntary Remand, even a cursory review shows the regulatory provisions challenged by Plaintiffs are ones that are not contrary to the ESA. *See* State Intervenors' Response to Federal Defendants' Motion for Voluntary Remand without Vacatur (ECF No. 151) at 5-15. This, of course, is consistent with policy reasons provided by the Services for wanting to reconsider a handful of the challenged regulatory provisions.

This is a radically different situation than that presented to Judge Alsup in the *In re Clean Water Act Rulemaking Litigation*, Case 3:30-cv-04636-WHA. That case involved revisions to EPA's regulations implementing water quality certification pursuant to Section 401 of the Clean Water Act. 33 U.S.C. § 1341. In vacating the rulemaking, the Court found that its central regulatory revision, which narrowed the scope of state authority to impose conditions on a project when making a water quality certification, ran head-long into the Clean Water Act's statutory text and a Supreme Court decision interpreting it to provide states the authority to impose precisely the

conditions that the regulatory provision took away. *In re Clean Water Act Rulemaking*, 2021 WL 4924844 at *7 (citing *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711 (1994)). The Court also found that EPA expressed "substantial concerns" about "eleven aspects of the certification rule" that "address nearly every substantive change introduced in the current rule such that "the scope of potential revisions … demonstrate[s] that it will not or could not adopt the same rule upon remand." *Id*. at *8. On these bases, the Court concluded that "[t]he first *Allied-Signal* factor supports vacatur of the certification rule" because "the lack of reasoned decisionmaking and apparent errors in the rule's scope of certification, the indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled it could not or will not adopt the same rule upon remand, significant doubt exists that EPA correctly promulgated the rule." *Id.*

In the present case, the Services have identified no serious legal deficiencies in any of the regulatory provisions contained in the 2019 ESA Rules, let alone those of the sort presented by the 401 Certification Rule. To the contrary, in this case the Government has been straight up in acknowledging that the policy priorities and concerns of a new administration are, not surprisingly, motivating its efforts to reconsider a handful of those regulatory provisions. And the Plaintiffs cannot point to a single regulatory provision of the 2019 ESA Rules that presents a "glaring deficiency," let alone one akin to what Judge Alsup found presented by the scope of certification provision of the 401 Certification Rule. *In re Clean Water Act Rulemaking*, 2021 WL 4924844 at *7. The Court found that provision to be the centerpiece or keystone of the entire 401 Certification Rule, explaining that "severance is not required here because, as explained below, this order finds serious deficiencies in an aspect to the certification rule that, in EPA's words, 'is the foundation of the final rule and [] informs all other provisions of the final rule.' 85 Fed. Reg. at 42, 256." *Id*. at *6.[6]

[6] Industry Intervenors will not separately brief the necessity of severing the regulatory provisions of the 2019 ESA Rules challenged by Plaintiffs' in their Summary Judgment Motions. None of those regulatory provisions presents the sort of "glaring deficiency" Judge Alsup found in the 401 Certification Rule's scope of certification provision to constitute. Moreover, none of the challenged regulatory provisions of the 2019 ESA Rules "is the foundation of the final rule and informs all other provisions of the final rule," as EPA itself said of the scope of certification regulatory provision relative to the 401 Certification Rule and its other regulatory provisions. *In*

2. Vacatur Would Be Disruptive to the Industry Intervenors, But Not the Plaintiffs Who In More Than Two Years of Litigation Have Not Sought Preliminary Injunctive Relief

In the Introduction to this Response, Industry Intervenors tried to zoom out and frame up how this case assumed the odd procedural posture in which it now sits, and why. Upon a necessarily cursory review of Plaintiffs' Joint Response (filed December 23), one comes away with the impression that an apocalypse for species and their habitats is imminent if the 2019 ESA Rules are not vacated, or the Services do not complete their rulemaking reconsidering them, in short order. With a due appreciation for advocacy, Industry Intervenors respectfully believe such claims of imminent, grave harm are fantastical. In any event, as explained below, Plaintiffs have failed to put forward competent evidence of harm sufficient to support the relief they seek, especially after having not sought a preliminary injunction in the more than two years the case has been pending. Industry Intervenors, by contrast, will suffer serious injury if, as Plaintiffs request, the 2019 ESA Rules are vacated.

D. The Section 4(d) Rule

The Section 4(d) Rule adopted by USFWS in 2019 brought that Service's approach to providing protections for species when listing them as threatened into line with that of NMFS. Before then, USFWS and NMFS exercised this authority in different ways. Since 1978, NMFS has issued species-specific "special rules" that provide take prohibitions tailored to the unique needs of each threatened species. In contrast, USFWS' "Blanket 4(d) Rule" automatically extended the full scope of Section 9's take prohibition to threatened species it listed, without regard to whether the conservation of the species actually required such prohibitions, while reserving authority to adopt species-specific rules that the agency exercised only infrequently. *See* 50 C.F.R. §§ 17.31(a) (2018) (wildlife); 17.71(a) (2018) (plants).

As the Government explains in its Motion for Voluntary Remand, in contrast to the Blanket 4(d) Rule, species-specific "4(d) rules tailor the level of protections to the particular circumstances, which in many cases fosters better conservation of the threatened species by providing certain incentives to interested parties." ECF No. 146 at 11 (citing 70 Fed. Reg. 37160, 37195 (June 28,

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re Clean Water Act Rulemaking, 2021 WL 4924844 at *6.

2005)); *cf., e.g.,* Determination of Endangered Status for the Taylor's Checkerspot Butterfly and Threatened Status for the Streaked Horned Lark, 78 Fed. Reg. 61,452 (Oct. 3, 2013) (establishing special rule to tailor take prohibitions on streaked horned lark to encourage agricultural activities under best management practices). As the Government notes, USFWS "proposed this revision because it had gained experience in developing species-specific rules resulting in benefits, 'including removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of limited personnel and fiscal resources ….'" ECF No. 146 at 11 (citing 83 Fed. Reg. 35174, 35175 (Aug. 27, 2019)).

Under the 2019 4(d) Rule, USFWS brought its practices into line with NMFS, pledged to issue special rules for each new species it lists as threatened (see 84 Fed. Reg. 44,753, 44,753-54 (Aug. 27, 2019) (revising 50 C.F.R. § 17.31 (wildlife); § 17.71 (plants)), and, in fact, has done so "with each listing of a species as threatened since [it] finalized the Section 4(d) [R]ule" in August 2019. Second Declaration of Gary D. Frazer. ECF No. 132-1 at ¶ 9. Consequently, when USFWS lists new species as threatened, it will "tailor protections to the needs of the threatened species," which "remov[es] redundant permitting requirements" for private parties. *Id.* at 44,756-57.

The Government also observes, correctly, that "NMFS' different approach and interpretation of Section 4(d) also has been upheld by the courts." ECF No. 146 at 11 (citing *Trout Unlimited v. Lohn*, 559 F.3d 946, 962 (9th Cir. 2009)). In other words, from the Government's perspective, USFWS at the very least had the discretion to repeal the Blanket 4(d) Rule (even if the Government believes species-specific 4(d) rules are not required by the ESA itself). And as much is stated in the Declaration of USFWS's Gary Frazer, who says: "We believe that either approach to applying protections to threatened species, whether through individualized rules or through a blanket rule, is a reasonable interpretation of our discretion under section 4(d)." ECF No. 146-1 at ¶ 5. As previously noted, Mr. Frazer's "concern" with the 2019 Section 4(d) Rule is that it "provides less flexibility and may require additional resources at the time of listing as compared to the blanket rule." ECF No. 146-1 at ¶ 5. These are policy concerns, not concerns about whether USFWS has the authority to eliminate the Blanket 4(d) Rule. It is difficult to see how there could be serious issues concerning the legality of the 2019 Section 4(d) Rule.

Because the Blanket 4(d) Rule imposed substantial compliance costs, requiring members of the regulated community to either alter their routine practices or request a permit that would allow for incidental take, and also frustrated implementation of beneficial conservation actions by private entities, the Industry Intervenors supported rescinding the Blanket 4(d) Rule and submitted comments in favor of the revised 4(d) Rule during notice and comment. *See* Yates/AFBF Decl. at ¶¶ 11, 13 (ECF No. 36-3); Joseph/AFRC Decl. at ¶ 9 (ECF No. 36-4); Meadows/API Decl. at ¶¶ 9-10 (ECF No. 36-5); Murray/NAFO Decl. at ¶¶ 8-9 (ECF No. 36-7); Ward/NAHB Decl. at ¶¶ 10-12 (ECF No. 36-8); Hart/NCBA Decl. at ¶¶ 3-4 (ECF No. 36-9); Beymer/PLC Decl. at ¶¶ 3-4 (ECF No. 36-10). When crafting special rules in the past, USFWS has narrowed the scope of private conduct it regulates to permit incidental take resulting from routine commercial activities that will not significantly affect the species. For example, it has allowed incidental take resulting from "routine ranching activities" and "forest management activities" in appropriate cases. 50 C.F.R. §§ 17.43(c)(3); 17.42(h)(2)(iii). Such rules are of obvious benefit to the Industry Intervenors' members. But when USFWS declined to require itself to issue species-specific rules as a matter of course and instead defaulted to the full suite of Section 9 prohibitions under the Blanket 4(d) Rule, it eschewed its statutory responsibility to impose only those prohibitions it "deems necessary and advisable to provide for the conservation of the species" (16 U.S.C. § 1533(d)), and often imposed unnecessary costs on the regulated community without any benefit to listed species. *See* Ward/NAHB Decl. at ¶ 8 (ECF No. 36-8) (noting burdens on private landowners).

Chief among those costs, members of the regulated community had to alter their practices to avoid violating prohibitions against incidental take, which in some cases were overbroad. For example, the Blanket 4(d) Rule often required AFBF, NCBA, and PLC's members to alter their routine farming and ranching practices at significant expense—and under the threat of litigation. *See* Yates/AFBF Decl. at ¶ 10 (ECF No. 36-3); Hart/NCBA Decl. at ¶ 4 (ECF No. 36-9); Beymer/PLC Decl. at ¶ 3 (ECF No. 36-10). Because API's members' normal oil and gas operations could result in incidental take of threatened species, they faced possible complete prohibitions on oil and gas development activity in and around designated critical habitat. *See*

Meadows/API Decl. at ¶ 5 (ECF No. 36-5). In total, the result of the Blanket 4(d) Rule was that members of the Industry Intervenors engaged in fewer productive activities at higher costs—whether that be farming, ranching, home-building, or oil and gas development.

But under the 2019 Section 4(d) Rule, when it has listed a species as "threatened," USFWS has imposed prohibitions in accordance with the needs of the threatened species through species-specific rules (*see* Second Declaration of Gary D. Frazer. ECF No. 132-1 at ¶ 9), avoiding the many unnecessary costs and burdens on businesses and landowners set forth above, while still protecting threatened species.

E. The Section 4 Rule

In the 2019 Section 4 Rule, the Services revised and clarified the criteria for listing species as threatened or endangered and designating critical habitat. See 84 Fed. Reg. 45,020, at 45,052 (Aug. 27, 2019). The Section 4 Rule has two primary effects. One is to avoid the listing of a species as threatened if the perceived threat and the species' responses to it are unduly speculative. The other is to avoid overbroad or imprudent designations of critical habitat. Below, Industry Intervenors touch on each of the Section 4 Rule revisions challenged by Plaintiffs in their Motions for Summary Judgment in the order set forth in the Table in Background Section C, above, for the convenience of the Court.

The Services amended their general requirement that they list, reclassify, or delist species as endangered or threatened "solely on the basis of the best available scientific and commercial information regarding a species' status," to remove the phrase "without reference to possible economic or other impacts of such determination." *See* 84 Fed. Reg. at 45,052 (amending 50 C.F.R. § 424.11(b)). However, the regulation—consistent with the ESA itself—still requires the decision to be made "solely on the basis of the best available scientific and commercial information." *Id.* As with USFWS's "concerns" with the 2019 Section 4(d) Rule, the Services' concerns here are policy concerns, and certainly not "serious questions" about the lawfulness of the revision. Third Frazer Decl. ¶ 6 ("the ESA does not clearly prohibit FWS from compiling economic information"); Fourth Rauch Decl. ¶ 7 ("substantial concerns about whether [revision] is consistent with the goals and purposes of the ESA and EO 13990" and "as to whether []

revision[] met the stated goal of the 2019 Joint ESA Rules to clarify the … Section 4 factors for listing, de-listing, or reclassifying species"). Nor could there be. Although this is not the time and place to argue the merits, it is hard to see how gathering information on the economic or other impacts of a listing decision, thereby providing more transparency in the listing process, could raise serious legal questions.

As to the propriety of listing a species as threatened, the Services' regulations have long required them to consider "whether the species is likely to become an endangered species within the foreseeable future." 50 C.F.R. § 424.11(d). The regulatory provision defined "foreseeable future" (the meaning of which had previously been defined on a case-by-case basis) to extend "so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." 84 Fed. Reg. 45,020, at 45,052. The Services may take "into account considerations such as the species' life-history characteristics, threat projection timeframes, and environmental variability." *Id.* The Services have expressed no "concerns" with this regulatory provision.

In addition to their duty to list species, the Services also have the authority to "delist" species when they are no longer threatened or endangered. Generally, this can happen as a result of extinction, initial misclassification, or recovery of the species. *See id.* The 2019 Section 4 Rule does not alter these criteria, instead replacing the term "recover" with the more straightforward, but otherwise identical, ground that the "species does not meet the definition of an endangered species or a threatened species." *See id.* at 45,035 ("Although we are removing the word 'recovery' from this section, the language will continue to include species that have recovered, because recovered species would no longer meet the definition of either an 'endangered species' or a 'threatened species.'"). The Services have expressed no "concerns" with this regulatory provision.

As to critical habitat designation, the 2019 Rule specifies further instances where such action would not be prudent: when the threat to the species' habitat "stem[s] solely from causes" the Services "cannot [] address" or affects "[a]reas within" the United States that "provide no more than negligible conservation value . . . for a species occurring primarily outside" of the United

States. *Id.* at 45,053 (revising 50 C.F.R. § 424.12(a)(1)). Once again, the Services' "concerns" with this regulatory provision are policy concerns, not legal concerns. *See* Third Frazer Decl. ¶ 7; Fourth Rauch Decl. ¶ 7. And, again, it is difficult to see how there could be serious questions about the legality of this regulatory provision.

The 2019 Rule also provides that unoccupied habitat should only be designated critical habitat if occupied critical habitat is "inadequate to ensure conservation of the species" and that unoccupied habitat is "reasonably certain" to "contribute to the conservation of the species" and "contains one or more of those physical or biological features essential to the conservation of the species." 84 Fed. Reg. 84,020, at 45,053 (revising 50 C.F.R. § 424.12(b)(2)). Essential "physical or biological features" must "occur in specific areas," and can include "water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features." *Id.* at 45,052 (revising 50 C.F.R. § 424.02). Once again, the Services' "concerns" with this regulatory provision are policy concerns, not legal concerns. *See* Third Frazer Decl. ¶ 8; Fourth Rauch Decl. ¶ 7. And, again, it is difficult to see how there could be serious questions about the legality of this regulatory provision.

The Industry Intervenors supported the 2019 Section 4 Rule, either wholly or with suggested modifications, and submitted comments in favor of it during notice and comment. *See* Yates/AFBF Decl. at ¶¶ 11, 13 (ECF No. 36-3); Joseph/AFRC Decl. at ¶ 9 (ECF No. 36-4); Meadows/API Decl. at ¶¶ 9-10 (ECF No. 36-5); Murray/NAFO Decl. at ¶¶ 8-9 (ECF No. 36-7); Ward/NAHB Decl. at ¶¶ 10-12 (ECF No. 36-8); Hart/NCBA Decl. at ¶¶ 3-4 (ECF No. 36-9); Beymer/PLC Decl. at ¶¶ 3-4 (ECF No. 36-10).

The 2019 Section 4 Rule provides greater transparency to the Industry Intervenors' members whose land may be subject to the ESA and will consequently help limit unwarranted listings and overbroad critical habitat designations—which do not promote species conservation, place unnecessary burdens on regulated industry, and stymy private conservation efforts. Listing new species as threatened or endangered imposes regulatory costs on those who seek to comply with the ESA, especially when a threatened species is subject to the full scope of take prohibitions, as was true under the Blanket 4(d) Rule. Similarly, designating critical habitats imposes regulatory

burdens and can reduce the property values of private landowners. *See* Murray/NAFO Decl. at ¶ 5 (ECF No. 36-7); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,* 139 S. Ct. 361, 368 n.1 (2018)(noting that property designated as critical habitat loses market value). When those decisions are made according to statutory standards and regulate only as much private conduct as is necessary to ensure conservation of the species and its habitat, then the Services properly advance the ESA's core concern of conservation while also taking into account another one of the ESA's "explicit" concerns—"economic consequences." *See Bennett v. Spear,* 520 U.S. 154, 176-77 (1997). On the other hand, unwarranted listing and overbroad designation decisions necessarily sweep in too much private conduct, and impose unnecessary costs on regulated industry.

For example, AFRC and FFRC members have seen their timber contracts suspended, slowed, or cancelled because of overbroad critical habitat designations, negatively affecting their economic interests. *See* Joseph/AFRC Decl. at ¶ 5 (ECF No. 36-4); Imbergamo/FFRC Decl. at ¶¶ 4, 6 (ECF No. 36-6). Moreover, overbroad critical habitat designations impede forest management projects and harm AFRC's members' general interests in forest health, federal timber supply, and private forest land. *See* Joseph/AFRC Decl. ¶ 6 (ECF No. 36-4). NAFO members have likewise faced disruptions to their timber sales resulting from the listing of a new species, ranging from delays in sales to outright restrictions on the timber they may harvest. *See* Murray/NAFO Decl. at ¶ 7 (ECF No. 36-7). Similarly, designated habitats can impede API members' access to their oil and gas lease sites and increase permitting requirements and delays, all driving up the costs of their operations and impeding their ability to provide energy to the country. *See* Meadows/API Decl. at ¶¶ 5-6 (ECF No. 36-5). In addition to the effect on core business activities, overly burdensome restrictions can reduce incentives to engage in voluntary conservation efforts. *See* Murray/NAFO Decl. at ¶ 5 (ECF No. 36-7).

Under the 2019 Section 4 Rule, however, FWS and NMFS have taken steps to ensure that listing decisions will be well-founded. Moreover, the Rule will ensure that critical habitat designations will not be overbroad, thereby taking the ESA's concerns about economic consequences into account when designating critical habitat. The result is that Industry Intervenors' members face less uncertainty about whether their land will be subject to a critical

habitat designation, and are less likely to have their land unnecessarily designated as critical habitat.

F. The Section 7 Rule

Section 7 of the ESA requires federal "action" agencies to consult with the relevant Service to ensure that actions they authorize, fund, or carry out are "not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification" of designated critical habitat. *See* 16 U.S.C. § 1536(a)(2). This consultation requirement includes "the granting of licenses, contracts, leases, easements, rights-of- way, permits, or grants-in-aid." 50 C.F.R. § 402.02(c); *see also* 16 U.S.C. § 1536(a)(3).

Consultation requirements begin with the action agency's evaluation of the likely effects of its own action, which in turn may trigger informal and formal consultation requirements with USFWS or NMFS. 16 U.S.C. § 1536(c). Under formal consultations, USFWS or NMFS must prepare a biological opinion that determines whether the action is likely to cause jeopardy to a listed species or result in the destruction or adverse modification of its critical habitat by judging the "effects of the [agency's proposed] action" against the "current status and environmental baseline of the listed species or critical habitat." 50 C.F.R. § 402.14(g)(2)-(4).

The 2019 Section 7 Rule has clarified these interagency cooperation requirements in several respects. Below, Industry Intervenors touch on each of the Section 7 Rule revisions challenged by Plaintiffs in their Motions for Summary Judgment in the order set forth in the Table in Background Section C, above, for the convenience of the Court.

In the 2019 Section 7 Rule, the Services addressed how to evaluate proposed agency actions by clarifying how to assess "destruction or adverse modification" of a species' critical habitat "as a whole," determine the "environmental baseline" against which the agency's action will be measured, and measure the "effects of the action" the agency will be taking. *See* 84 Fed. Reg. 44,976, at 45,016-18 (Aug. 27, 2019). The Services have expressed no "concerns" about these regulatory revisions, save for that clarifying the definition of "effects of the action." And once more, the Services' "concerns" with this regulatory provision are policy concerns, not legal

concerns. *See* Third Frazer Decl. ¶ 9; Fourth Rauch Decl. ¶ 7. And, again, it is difficult to see how there could be serious questions about the legality of this regulatory provision.

The 2019 Section 7 Rule made a number of changes to the Services' regulations governing formal consultations. *See* 84 Fed. Reg. 44, 976, at 45,016-17. For one, it streamlined the consultation process and makes it more efficient by creating an option for agencies to request "expedited" formal consultation in appropriate circumstances. *Id.* at 45,017 (promulgating 50 C.F.R. § 402.14(l)). It also added a regulatory provision clarifying how the Services are to evaluate mitigation measures "included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action." *Id.* at 45,017 (promulgating addition to 50 C.F.R. § 402.14(g)(8)). The Rule also amended the Services' formal consultation regulations to authorize them to adopt another agencies' consultation initiation package for their biological opinions (*id.* at 45,017 (promulgating revision to 50 C.F.R. § 402.14(h)(3)). And it revised the regulation governing reinitiation of consultation to exempt the Bureau of Land Management or the U.S. Forest Service from having to reinitate consultation on a land management plan upon the listing of a new species or designation of new critical habitat, provided that authorized actions that may affect either "will be addressed through a separate action-specific consultation." *Id.* at 45,017-18 (promulgating revision to 50 C.F.R. § 402.16). The Services have expressed no "concerns" about any of these regulatory provisions. And, once again, it is difficult to see how there could be serious questions about the legality of these regulatory provisions.

The Proposed Intervenors supported the Section 7 Rule, either wholly or with suggested modifications, and submitted comments in support of it during notice and comment. *See* Yates/AFBF Decl. at ¶¶ 11, 13 (ECF No. 36-3); Joseph/AFRC Decl. at ¶ 9 (ECF No. 36-4); Meadows/API Decl. at ¶¶ 9-10 (ECF No. 36-5); Murray/NAFO Decl. at ¶¶ 8-9 (ECF No. 36-7); Ward/NAHB Decl. at ¶¶ 10-12 (ECF No. 36-8); Hart/NCBA Decl. at ¶ 4 (ECF No. 36-9); Beymer/PLC Decl. at ¶ 4 (ECF No. 36-10).

Those members of Industry Intervenors who rely on federal permits, licenses, leases, or contracts for their operations benefit from a streamlined and more transparent Section 7

consultation process. The consultation process is often time-consuming and can result in burdensome requirements on operations. *See* Meadows/API Decl. at ¶ 7 (ECF No. 36-5); Ward/NAHB Decl. at ¶ 9 (ECF No. 36-8). In fact, the consultation process can be so costly that one member of a regulated industry accepted a costly conservation measure that "provided no measurable benefit to a species and its habitat" because, if "the negotiations had continued, the project proponents would have been forced to wait an additional four months . . . to begin construction—at significant cost." ESA Cross-Industry Coalition's Comment on Proposed Revisions to Regulations 37 n.13 (Sept. 24, 2018), Docket Nos. FWS-HQ-ES-2018-0006-55576, 0007-61590, 0009-55540, available at https://www.regulations.gov/comment/FWS-HQ-ES-2018-0006-55576.

Members of the Industry Intervenors rely on myriad and expanding federal agency actions and authorizations to conduct their business activities, and thus have an interest in a well-functioning interagency consultation process. *See* Yates/AFBF Decl. at ¶ 8 (ECF No. 36-3); Ward/NAHB Decl. at ¶ 9 (ECF No. 36-8). For example, members of the Industry Intervenors depend on federal livestock grazing permits, federal timber contracts, and federal oil and gas leases to operate. *See* Joseph/AFRC Decl. at ¶ 5 (ECF No. 36-4); Meadows/API Decl. at ¶ 7 (ECF No. 36-5); Imbergamo/FFRC Decl. at ¶ 4 (ECF No. 36-6); Beymer/PLC Decl. at ¶ 2 (ECF No. 36-10).

The Section 7 Rule clarifies the bounds of the Services' analysis, and expedites the consultation process. Specifically, the Services have clarified what federal actions will require mitigation measures. *See* 84 Fed. Reg. 44,976, at 45,017-18. This will result in fewer unnecessary restrictions on members' operations. In addition, members (1) can seek expedited formal consultation, (2) have the benefit of a transparent 60-day timeline for informal consultations, and (3) will benefit from the time savings of programmatic consultations. *See id.* at 45,016-18.[7] In total, the changes made to the Section 7 consultation process by the 2019 Rule reduce uncertainty and make more efficient the operations of members of the regulated community who rely on federal authorizations for their operations.

[7] Plaintiffs do not challenge regulatory provisions for the 60-day timeline for information consultations and for programmatic consultations in their Motions for Summary Judgment.

CONCLUSION

For the reasons set forth above, Industry Intervenors do not oppose the Government's motion for voluntary remand without vacatur. If the Court is inclined to consider a possible remand with vacatur as proposed by Plaintiffs, Industry Intervenors respectfully ask that the Court set a schedule to allow for orderly briefing of the merits and the application of the *Allied-Signal* factors to this important case.

DATED: December 27, 2021

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