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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

DEB HAALAND, U.S. Secretary of the Interior, *et al.*,

Defendants,

and

STATE OF ALABAMA, *et al.*,

Defendant-Intervenors.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-05206-JST
No. 4:19-cv-06013-JST

STATE INTERVENORS' SUPPLEMENTAL BRIEF RE: FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

TABLE OF AUTHORITIES

CASES

REGULATIONS

The Court has ordered supplemental briefing addressing "whether the Services properly invoked the categorical exclusions under NEPA when they promulgated the challenged regulations and whether, under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993), vacatur is the proper remedy for a violation of NEPA." ECF 155 at 2.[1] The answers are four-fold.

First, the Court's question assumes that the Services' compliance with NEPA is before it for a determination on the merits. But only the Plaintiffs have addressed the merits at this stage. In lieu of responding substantively to Plaintiffs' summary judgment motions, the Federal Defendants moved for voluntary remand without vacatur, drastically altering the immediate question before the Court. The parties thus briefed the remand issue and (at Defendant-Intervenors' request) the Court suspended summary judgment briefing. ECF 150. This was proper given that courts often defer to agencies and grant remand without vacatur in the absence of frivolousness or bad faith.

Things became more complicated when Plaintiffs then asked for remand *with* vacatur. *See* Pls' Resp., ECF 149. As the State Intervenors explained at the time (echoing the State Plaintiffs in a different case), vacatur would be improper without a determination on the merits in Plaintiffs' favor. *See* State Intervenors' Resp., ECF 151 at 7. Yet not only would such a determination be legally wrong, it would also be premature because only the Plaintiffs have briefed the merits. Indeed, there has not even been a *preliminary* determination on the merits because Plaintiffs have not sought a preliminary injunction in the two-and-a-half years they have been litigating this case.

Vacatur in this procedural posture would also violate the APA, allowing "the Federal [D]efendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits." *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 4, (D.D.C. 2009); *see California v. Regan*, No. 20-CV-03005-RS,

[1] On December 10, 2021, Federal Defendants filed an identical motion for voluntary remand in the three related cases. This supplemental brief cites to the ECF number in the lowest-numbered case, *Center for Biological Diversity v. Haaland*, No. 4:19-cv-05206, unless otherwise noted.

2021 WL 4221583, at *1 (N.D. Cal. Sept. 16, 2021) ("While it is within [federal] defendants' discretion to modify their policies and regulatory approaches, and it may ultimately resolve some or all of plaintiffs' objections to the current rule, there has been no evaluation of the merits—or concession by defendants—that would support a finding that the rule should be vacated."); State Intervenors' Br., ECF 151 at 2-4. Indeed, just a few weeks ago, several Justices expressed similar concerns with the federal government's efforts to rescind another final rule—DHS's Public Charge Rule—by judicial maneuvering rather than following the APA's notice-and-comment requirement. *See* Tr. of Oral Argument, *Arizona v. City & County of San Francisco*, No. 20-1775 (U.S. Feb. 23, 2022), at 68:7-9 (Chief Justice Roberts commenting that the federal government's strategy "avoid[s] notice-and-comment … rulemaking on the repeal of the rule"); *id.* at 45:21-24 (Justice Alito noting that the federal government's "strategy" allowed it "to sidestep notice-and-comment rulemaking"); *id.* at 47:25-48:1 (Justice Kagan: "The real issue to me is the evasion of notice-and-comment."). While this case differs in the details, both factual and procedural, the concerns expressed by the Justices apply just the same to Plaintiffs' position here. Vacatur is improper without a merits determination, and a merits determination is improper at this point in the proceedings. If the Court does not grant remand without vacatur, it should restart summary judgment briefing.

Second, the Services' determination that a categorical exclusion applied, and that an extraordinary circumstance did not, was not arbitrary and capricious. Under this deferential standard, the Court "must determine whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Friends of Animals v. U.S. Fish & Wildlife Serv.*, -- F. 4th --, 2022 WL 628565 (9th Cir. Mar. 4, 2022) (citation omitted). This is a "highly deferential" review that "presumes that the agency action is valid if a reasonable basis exists for the agency's decision." *Id.* (quotation marks and citation omitted).

Because the purpose of categorical exclusions is to avoid the time, effort, delay, and paperwork that conducting an unnecessary environmental impact statement or environmental

assessment would incur, the Council for Environmental Quality has "strongly discourage[d]" agencies from adopting "procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded." Council on Environmental Quality, 40 Fed. Reg. 34263, 34265 (Jul. 28, 1983); *see Wong v. Bush*, 542 F.3d 732, 737 (9th Cir. 2008) (noting that "where agency action falls under a categorical exclusion, it need not comply with the requirements for preparation of an EIS"). For this reason, the Ninth Circuit has recognized that, "[i]n many instances, a brief statement that a categorical exclusion is being invoked will suffice," so long as the justification is made in "contemporaneous documentation" that "show[s] that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision." *California v. Norton*, 311 F.3d 1162, 176 (9th Cir. 2002). Requiring anything more than this "would defeat the very purpose of the categorical exclusion." *Utah Env't Congress v. Bosworth*, 443 F.3d 732, 750 (10th Cir. 2006); *see Wilderness Watch & Pub. Emps. for Env't Resp. v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004) ("Documentation of reliance on a categorical exclusion need not be detailed or lengthy. It need only be long enough to indicate to a reviewing court that the agency indeed considered whether or not a categorical exclusion applied and concluded that it did.").

Here, the Services provided extensive documentation and reasoning to support their conclusion that the final rules were categorically excluded from the NEPA documentation process because the rules are fundamentally administrative, legal, technical, or procedural in nature. *See* 43 C.F.R. § 46.210(i); Companion Manual for NAO 216-6A, Appendix E, page E-14; ESA0000156-67; ESA0000008-10; ESA0000134-54; ESA0000005-7; ESA0000124-32; *see also* ESA0000112-23 (Effects Data for Listing Rule); ESA0000096-109 (Effects Data for 4(d) Rule). The FWS environmental action statement even goes line by line through the regulations, explaining why each component part meets the relevant categorical exclusion. Clearly, the Services "considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision." *Norton*, 311 F.3d at 176. That the Services now suggest that they "could have been more thorough" when it came to their

"extraordinary circumstances reviews," Fed. Ds' Supp. Br., ECF 156 at 10-11, does not change that.

The Industry Intervenors examine the Services' reasoning in detail in their supplemental brief and ably explain why this case is not like the ones Plaintiffs have pointed to. *See* Br. of Def. Industry Intervenors, ECF 157 at 2-11. Rather than repeating this analysis, the State Intervenors point the Court to the Industry Intervenors' supplemental brief. But there is one overarching point that bears emphasizing here: Contra Plaintiffs' insinuations, the administrative record reveals an utterly normal deliberative process for the rules at issue in this case. The Services invited public comment specifically on whether a categorical exclusion applied to the proposed rules and indicated that the Services "anticipate[d]" that at least two of the rules would meet the categorical exclusion for policy directives "of an administrative, financial, legal, technical, or procedural nature would apply." *See* 83 Fed. Reg. 35193, 35200 (Jul. 25, 2018) (Listing Rule); 83 Fed. Reg. 35174, 35177 (Jul. 25, 2018) (Section 4(d) Rule); *see also* 83 Fed. Reg. 35178, 35191 (Jul. 25, 2018) (Interagency Consultation Rule). Then the Services reviewed the comments; circulated memoranda analyzing the categorical exclusion issue (or so it appears from the document titles in the privilege log); crafted the detailed environmental action statement and categorical exclusion memorandum for each rule; and responded to the comments and justified their decisions to invoke the categorical exclusion in the final rule. *See* 84 Fed. Reg. 45020, 45048, 45051-52 (Aug. 27, 2019) (Listing Rule); 84 Fed. Reg. 44753, 44759 (Aug. 27, 2019) (4(d) Rule); 84 Fed. Reg. 44976, 45015 (Aug. 27, 2019) (Interagency Consultation Rule).

In attempting to show administrative irregularity, the Center for Biological Diversity points to two emails from January and March 2018 to suggest that "the Service's staff understood the significant and controversial nature of the regulations." CBD Mot., ECF 142 at 45-46. The record does not support Plaintiffs' inference. As an initial matter, the emails simply summarized two of the not-yet-proposed rules and stated that the proposals were "expected to be controversial." ESA2_0025908; *see also* ESA2_0016876 (similar). It is unclear whether "controversial" was used in a colloquial sense (meaning that public opposition was expected) or

in a regulatory sense (meaning that there was "substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use," *Anderson v. Evans*, 371 F.3d 475, 489 (9th Cir. 2004) (alteration in original) (citation omitted)). But even if the author of the emails meant "controversial" in the regulatory sense, an internal email circulated months before the proposed rules were published and a year-and-a-half before the final rules were promulgated did not bind the Services. Thus, even assuming Plaintiffs' inference is valid, at worst all it shows is that the Services then invited public comment on the exclusion issue, examined the issues more closely, responded to comments, and explained their ultimate decision in nearly 50 pages of detailed analysis. Plaintiffs have not shown that the Services' determination was arbitrary and capricious.

Third, even if the Court finds that vacatur is on the table in this procedural posture (which it should not), and even if it determines that the Services violated NEPA in their categorical exclusion analyses (which it should not), vacatur is inappropriate under the first *Allied-Signal* factor because the Services' procedural errors, if any, are not serious. *See* 988 F.2d at 150-51.

Vacatur is not automatic for NEPA violations. *See Nat'l Fam. Farm Coal. v. EPA*, 966 F.3d 893, 929 (9th Cir. 2020); *Inst. for Fisheries Res. v. U.S. Food & Drug Admin.*, 499 F. Supp. 3d 657, 670 (N.D. Cal. 2020), *appeal dismissed sub nom. Inst. for Fisheries Res. v. Becerra*, No. 21-15640, 2021 WL 4807198 (9th Cir. Apr. 22, 2021); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013); *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1021 (E.D. Cal. 2013). Rather, under the first *Allied-Signal* factor, vacatur "depends on how serious the agency's errors are." *Nat'l Fam. Farm Coal*, 966 F.3d at 929 (quoting *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012)). Courts "also 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 decision make it unlikely that the same rule would be adopted on remand.'" *Id.* (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

The NEPA violation here, if any, was minor, insofar as the Services *did* contemporaneously and extensively defend their categorical exclusion determinations. And to the extent the Services failed to adequately explain why a categorical exclusion applied, or why an extraordinary circumstance did not, these failures can easily be remedied on remand without vacatur. The Services have not confessed error, and they agree that their conclusions concerning the categorical exclusions were correct, even if they could have provided a "fuller explanation." *See* Frazer Decl., ECF 156-1 at 3; Rauch Decl., ECF 156-2 at 3. There is no reason to think that the Services could not provide this "fuller explanation" and remedy any NEPA deficiency that exists. Vacatur is not warranted under this prong.

Fourth, vacatur is unwarranted under the second *Allied-Signal* factor: the harm vacatur would cause. For one, vacating the *existing* rules to resurrect the *old* rules only to have *new* rules shortly promulgated would cause whiplash and great confusion for all regulated parties. Worse still, the rules the Court would resurrect were themselves unlawful and the subject of an earlier lawsuit brought by many of the State Intervenors; that lawsuit settled only when the Federal Defendants promised to reconsider the rules. *See* State Intervenors' Resp., ECF 151 at 21-22. Resurrecting rules with serious, substantive legal problems to "remedy" a minor procedural violation makes no sense.

Vacatur would also cause significant harm to the Intervenor States, who have the "primary authority and responsibility for protection and management of fish, wildlife, and plants and their habitats." 81 Fed. Reg. 8663, 8663 (Feb. 22, 2016). The 2019 Rules were enacted at least in part to respond to the needs of States to work with stakeholders in ways that allowed landowners to view the presence of threatened or endangered species as assets, not liabilities. Vacatur would make it harder for State Intervenors to manage their species and lands, and would impose unnecessary costs without attendant benefits to the species. *See* Resp. of State Intervenors, ECF 151 at 22-24; *see also* Decl. of Jim DeVos, ECF 47-5 at 3 (explaining how the distinction between threatened and endangered species has benefitted the Apache trout and Gila trout in Arizona through managed sport fishing); Decl. of James N. Douglas, ECF 47-9 at 5

(noting that the 4(d) rule "allow[s] a more nuanced development of restrictions that do not conflict with [Nebraska's] ongoing management programs to improve wetland habitat for other species if the eastern black rail is ultimately listed as a threatened species," as the Services have proposed); Decl. of Angela Bruce, ECF 47-11 at 4 (attesting that vacatur would harm Wyoming's "interest[] in exercising the full extent of its state law and regulatory authority to successfully manage wildlife and related natural resources within its jurisdiction, and to maintain its sovereign interests"); Decl. of Douglas Vincent-Lang, ECF 47-4 at 8 (stating that vacatur would "create an environment of regulatory unpredictability" in Alaska that "will ultimately result in revenue losses and associated impacts to Alaska and its citizens").

* * *

In sum, vacatur would be improper at this stage of the proceedings. There has been no merits determination. The Services did not violate NEPA. Even if they did, their violation was not serious. And vacatur would cause immense harm and confusion, while retaining the current rules, either while the Services consider new rules on remand or while this litigation proceeds, would promote stability. The Court should either grant remand without vacatur or deny the Federal Defendants' motion and restart summary judgment briefing.

Respectfully submitted this 12th day of March, 2022.[2]

[2] In compliance with Local Rule 5-1, the filer of this document attests that all signatories listed have concurred in the filing of this document.

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DECLARATION OF TECHNICAL FAILURE

Pursuant to Local Rule 5-1(d)(5), I attest that this supplemental brief was not filed on the day it was due solely because of technical failure with the CM/ECF system. I attempted to file this document electronically at 2:00 p.m. and 6:30 p.m. on Friday, March 11, but was unable to do so because the PACER/ECF systems were down.

DATED: March 12, 2022

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