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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. U.S. FISH & WILDLIFE SERVICE, et al., Defendants.	CASE NO. 1:21-cv-00791-TJK **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Code of Federal Regulations

Federal Register

TABLE OF ACRONYMS

ABB	American burying beetle
APA	Administrative Procedure Act
DDT	Dichloro-diphenyl-trichloroethane
ESA	Endangered Species Act
FWS	U.S. Fish & Wildlife Service
SPR	Significant portion of its range
SSA	Species Status Assessment

INTRODUCTION

In October 2020, the U.S. Fish and Wildlife Service ("FWS") reclassified the American burying beetle (*Nicrophorus americanus*) ("ABB") as a threatened species under the Endangered Species Act ("ESA"). Reclassification of the American Burying Beetle from Endangered to Threatened with a Section 4(d) Rule, 85 Fed. Reg. 65,241 (Oct. 15, 2020). After originally listing the ABB as endangered in 1989, FWS determined based on new information about the threats currently faced by the ABB and the ABB's abundance and range that the species no longer warranted an endangered status, but that future threats from climate change and land-use changes made a threatened listing appropriate. In addition to the reclassification decision, FWS concurrently issued a rule pursuant to ESA Section 4(d) to put in place necessary and advisable measures that provide for the conservation of the ABB in the various geographic areas it inhabits in the United States. When viewed together, the reclassification decision and 4(d) rule reflect a more fulsome and accurate understanding of the current and future status of the ABB than previously articulated by FWS: they illustrate that the species is currently more abundant and wide-spread than previously thought, but faces serious threats in the foreseeable future for which conservation measures under the ESA are required.

Plaintiff raises various arguments based on stale information in an attempt to exaggerate the threats currently faced by the ABB, conflate the ESA's definitions of "endangered" and "threatened," and mischaracterize the 4(d) rule's impact and analysis. Plaintiff also raises several arguments that try to undermine the procedures used to promulgate the reclassification decision. At their core, these arguments represent nothing more than the Plaintiff's disagreement with FWS's reasoned weighing of the available evidence. Plaintiff does not point to any evidence superior to that considered by FWS. Instead, Plaintiff asks this Court to substitute the weight it

gives to older evidence for that of FWS's more fulsome analysis. While Plaintiff clearly would have preferred a different outcome, Congress has charged FWS—the expert agency responsible for making listing decisions under the ESA—with weighing the available evidence and making reasonable determinations based on that evidence. A reviewing court is not empowered to substitute Plaintiff's preferred conclusion for that reached by FWS. Because Plaintiff has fallen far short of showing that FWS's determination and 4(d) rule lack a rational basis, this Court should uphold the reclassification decision and 4(d) rule, and grant summary judgment to Defendants.

BACKGROUND[1]

I. Legal Background

Congress enacted the ESA, 16 U.S.C. § 1531 et seq., in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species[.]" Id. § 1531(b). The ESA directs the Secretary[2] to determine which species should be listed as threatened or endangered. Id. § 1533(a)(1). An endangered species is one that is "in danger of extinction throughout all or a significant portion of its range," while a threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(6), (20).

A species may be listed as an endangered species or threatened species under the ESA in

[1] This brief references the ECF-generated page numbers for court filings.

[2] The ESA divides the responsibility for listing species between the United States Secretary of the Interior, who is generally responsible for terrestrial and inland fish species, and the United States Secretary of Commerce, who is generally responsible for marine and anadromous species. See 16 U.S.C. §§ 1532(15), 1533(a)(2). The Secretary of the Interior and the Secretary of Commerce have delegated their ESA responsibilities to FWS and the National Marine Fisheries Service, respectively. See 50 C.F.R. § 402.01(b). FWS has jurisdiction over the ABB. See id. §§ 17.11, 402.01(b).

one of two ways: either on the initiative of the Secretary or as a result of a petition submitted by an "interested person." Id. § 1533(b)(3)(A). The ESA directs the Secretary to determine whether a species should be listed as an endangered species or threatened species because of any one of five factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Id. § 1533(a)(1). The listing determination must be made:

> solely on the basis of the best scientific and commercial data available [ ] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

Id. § 1533(b)(1)(A).

If the Secretary determines that listing a species is warranted, she must publish a notice in the Federal Register that includes the complete text of a proposed rule to implement the action. Id. § 1533(b)(3)(B)(ii). The Secretary must act on a proposed rule within one year of the date of its publication. Id. § 1533(b)(6)(A). At that point, the Secretary may promulgate a final rule, withdraw the proposed rule if she finds that there is not sufficient evidence to justify it, or extend the one-year period for consideration by not more than six months if she finds that there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination[.]" Id. § 1533(b)(6)(B)(i).

After a species is listed as endangered or threatened, the Secretary must review the species' status at least every five years. Id. § 1533(c)(2). If the Secretary determines—as a result of a five-year review or at any other time that the status of a listed species has changed—she has the

authority to change the status of a species either from threatened to endangered (uplist), from endangered to threatened (downlist), or to remove the species from the list of threatened and endangered species (delist). To do so, the Secretary must engage in rulemaking and base her determination on the five listing factors and the best scientific and commercial data available. 16 U.S.C. §§ 1533(a)(1), 1533(b)(1), 1533(b)(5), 1533(b)(6); see also 50 C.F.R. § 424.11.

Listed species are afforded certain legal protections. Pursuant to ESA Section 7, federal agencies must consult with FWS and/or the National Marine Fisheries Service to ensure their actions are not likely to jeopardize the species' continued existence or destroy or modify designated critical habitat. ESA Section 9 prohibits "any person subject to the jurisdiction of the United States" from engaging in certain activities, including any illegal or unauthorized "take"[3] of endangered fish or wildlife species. Id. § 1538(a)(1). The ESA does not establish prohibitions for threatened species, but Section 4(d) authorizes FWS to extend Section 9 prohibitions, and other protective measures, to any threatened species. Id. § 1533(d). For species listed as threatened after September 26, 2019, none of the Section 9 prohibitions apply unless FWS issues a species-specific rule that contains all the applicable prohibitions and exceptions extended to the species. 50 C.F.R. § 17.31(c).

II. Factual Background

A. The American Burying Beetle

The ABB is the largest carrion beetle in North America, reaching between 1 and 1.8 inches in length. FWS001335.[4] It is known for burying vertebrate carcasses for reproductive purposes and caring for its young. Id. As an annual species, the ABB may live up to 12 to 16 months.

[3] The ESA defines "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[4] "FWS__" refers to the administrative record for this case. See ECF Nos. 14, 15, 17.

FWS001336. ABBs are active from late spring through early fall and bury themselves to hibernate in the winter. FWS001338. They are considered habitat generalists and have been found in a wide variety of habitats such as wet meadows, partially forested loess canyons, oak-hickory forests, shrub land, grasslands, lightly-grazed pastures, riparian zones, coniferous forests, and deciduous forests. FWS001343. During May and June, ABBs find a mate and a carcass for reproduction. FWS001340. Because of their size, ABBs require a larger carcass than other burying beetles to reach their maximum reproductive potential. FWS001347.

The ABB currently lives in three different geographic areas: the Northern Plains, the Southern Plains, and New England. FWS001354. FWS further divides the Northern and Southern Plains areas into three different analysis areas. Id. The Northern Plains has the Loess Canyons, Sandhills, and Niobrara River analysis areas; and the Southern Plains has the Red River, Arkansas River, and Flint Hills analysis areas. Id. In New England, the ABB is found on Block Island and Nantucket Island. Id. Historically, the ABB's range included 35 states in the United States and the southern borders of three Canadian provinces. FWS001336. From the early 1900s to the 1970s, the ABB lost 90% of its historical range. Id.; FWS001504. A similar decline has not been seen since, indicating the factors that caused the decline are reduced or modified. FWS001504. The prevailing theory regarding the ABB's population decline throughout its historical range is habitat loss that both reduced the amount of properly-sized carrion for ABB reproduction as well as increased scavenger competition for the resource. FWS001355.

B. Procedural History

FWS listed the ABB as endangered in 1989, and completed a recovery plan for the species in 1991. FWS005889–FWS005900; FWS004943–FWS005023. In 2008, FWS issued a five-year review of the status of the ABB. FWS005024–FWS005076. The ESA requires FWS to conduct five-year status reviews of each listed species using the five listing factors outlined above, although

the statute does not require FWS to take any further action after completing the review. 16 U.S.C. § 1533(c)(2); Am. Forest Res. Council v. Hall, 533 F. Supp. 2d 84, 87 (D.D.C. 2008). In the 2008 five-year review for the ABB, FWS recommended that the species remain listed as endangered. FWS005061.

On August 18, 2015, American Stewards of Liberty submitted a petition to delist the ABB under the ESA.[5] FWS001278–FWS001310. FWS issued a 90-day finding on the delisting petition on December 16, 2015, which determined that the petition presented substantial information indicating that the ABB may warrant delisting. 16 U.S.C. § 1533(b)(3)(A); FWS001311–FWS001320; 90-Day Findings on 29 Petitions, 81 Fed. Reg. 14,058 (Mar. 16, 2016).

In February 2019, FWS finished a Species Status Assessment ("SSA") for the ABB. FWS001321–FWS001504. The SSA is a peer-reviewed scientific document prepared by FWS that presents a comprehensive summary of the information on the ABB and incorporates the best scientific and commercial data available. U.S. FWS, USFWS Species Status Assessment Framework at 4 (Aug. 2016), https://www.fws.gov/sites/default/files/documents/species-status-assesment-framework-2016-08-10.pdf. The SSA uses the conservation-biology principles of resiliency, redundancy, and representation to evaluate the current and future condition of the species. Id.

[5] A species may be listed or delisted as a result of a petition submitted by an "interested person." 16 U.S.C. § 1533(b)(3)(A). In response to such a petition, FWS is required to publish an initial finding concluding whether the petition presents substantial information indicating that the petitioned action may be warranted (known as a "90-day finding"). Id. If a 90-day finding is positive, FWS is required to "promptly commence a review of the status of the species" and make a finding within 12 months (known as a "12-month finding") stating whether the petitioned action is "warranted," "not warranted," or "warranted, but . . . precluded" by other pending proposals. Id. § 1533(b)(3)(B).

Following completion of the SSA, FWS determined that the ABB no longer met the definition of an endangered species but was properly classified as a threatened species. As a result, FWS published a 12-month warranted finding and proposed rule to reclassify the ABB as a threatened species under the ESA with a 4(d) rule on March 5, 2019. FWS000158–FWS000174; Reclassifying the American Burying Beetle from Endangered to Threatened on the Federal List of Endangered and Threatened Wildlife with a 4(d) Rule, 84 Fed. Reg. 19,013 (May 3, 2019). The comment period closed on July 2, 2019, FWS000158, and FWS re-opened the proposed rules for a 30-day comment period on September 9, 2019 after receiving a request for public hearing, FWS000175; Reclassifying the American Burying Beetle from Endangered to Threatened on the Federal List of Endangered and Threatened Wildlife with a 4(d) Rule, 84 Fed. Reg. 47,231 (Sept. 9, 2019).[6]

On October 15, 2020, FWS published the final rule reclassifying the ABB as threatened ("Reclassification Decision") with a concurrent 4(d) rule ("4(d) Rule"). FWS000177–FWS000197; Reclassification of the American Burying Beetle from Endangered to Threatened with a Section 4(d) Rule, 85 Fed. Reg. 65,241 (Oct. 15, 2020). Plaintiff filed the instant lawsuit challenging the Reclassification Decision and the 4(d) Rule on March 25, 2021. ECF No. 1.

STANDARD OF REVIEW

FWS's decision to re-categorize the ABB as a threatened species is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which provides a right to judicial review

[6] Plaintiff improperly refers to the extra-record Declaration of Dr. Jon C. Bedick in support of a contention made in its discussion of the notice-and-comment process. ECF No. 21-1 at 21. "The Administrative Procedure Act limits judicial review to the administrative record except when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514 (D.C. Cir. 2010) (quotation omitted). Plaintiff has made no such showing here, and accordingly Defendants request that Plaintiff's extra-record citation be stricken from its brief.

of certain final agency actions. The APA provides that a court may set aside final agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." Env't Def. Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citing, inter alia, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971)); see also Am. Wildlands v. Kempthorne, 478 F. Supp. 2d 92, 96 (D.D.C. 2007) ("Under the APA's standard of review, there is a presumption of validity of agency action"), aff'd 530 F.3d 991 (D.C. Cir. 2008). A reviewing court is forbidden from "substituting its judgment for that of the agency." Costle, 657 F.2d at 283 (citing, inter alia, Overton Park, 401 U.S. at 416). Indeed, the APA standard "mandates judicial affirmance if a rational basis for the agency's decision is presented . . . even though [a court] might otherwise disagree." Id. (citations omitted). An agency's treatment of the evidence need not be a "paragon of clarity," but rather what is required is that the reviewing court be able to discern a "rational basis" for the agency's treatment of the evidence. Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 289–90 (1974).

Reviewing courts are to be at their "most deferential" when the agency is "making predictions, within its area of special expertise, at the frontiers of science." Balt. Gas Co. v. NRDC, 462 U.S. 87, 93, 96, 103, 105–06 (1983); see also Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 375–77 (1989) (where analysis "requires a high level of technical expertise," a court must defer to informed discretion of agency). As the D.C. Circuit noted in Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc), a court "must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." This Court has explained:

> With regard to FWS decisions in particular, "[g]iven the expertise of [FWS] in the area of wildlife conservation and management and the deferential standard of review, the Court begins with a strong presumption in favor of upholding decisions of [FWS]." . . . . In addition, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."

Am. Wildlands, 478 F. Supp. 2d at 96 (internal citations omitted). The D.C. Circuit is "particularly deferential when reviewing agency actions involving policy decisions based on uncertain technical information." State of New York v. Reilly, 969 F.2d 1147, 1150–51 (D.C. Cir. 1992); see also Am. Wildlands v. Kempthorne, 530 F.3d 991, 1000 (D.C. Cir. 2008) ("[I]n an area characterized by scientific and technological uncertainty[,] this court must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives." (quoting Int'l Fabricare Inst. v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992))). A reviewing court may reverse under the "arbitrary and capricious" standard only

> if the agency has relied on factors which Congress has not intended it to consider, [has] entirely failed to consider an important aspect of the problem, [or has] offered an explanation for [that] decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In the APA context, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." Occidental Eng'g Co. v. INS, 753 F.2d 766, 770 (9th Cir. 1985). A reviewing court should determine agency compliance with the law solely on the record on which the decision was made. Overton Park, 401 U.S. 402; Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam).

ARGUMENT

I. The Reclassification Decision Is Lawful Under the ESA and APA.

A. FWS Used the Best Available Scientific and Commercial Data Available When Analyzing the Threats Faced by the ABB in the Reclassification Decision.

FWS reasonably determined using the best available science that reclassifying the ABB as threatened was appropriate. As explained above, in deciding whether to reclassify a species from endangered to threatened, FWS is required to consider five factors, any one of which could independently, or in combination with other factors, support the determination. See 16 U.S.C. § 1533(a)(1). Additionally, the ESA requires FWS to make its listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The best available science requirement "merely prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence [s]he relies on." Sw. Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000) (quotation omitted). In this case, FWS conducted a thorough and in-depth analysis of the ABB's current status throughout all its range and under its "significant portion of its range" ("SPR") policy, and came to the reasoned conclusion that this species no longer meets the definition of an endangered species and instead qualifies for listing under the ESA as a threatened species based on the threats facing the ABB now and within the foreseeable future.

FWS primarily relied on the comprehensive scientific analyses contained in the 2019 SSA to reach its conclusions in the Reclassification Decision. The SSA summarizes the more than 200 scientific studies that FWS reviewed and analyzed regarding the ABB's biology, status, threats faced, and conditions needed to maintain long-term ABB viability. FWS001331–FWS1332; FWS001536–FWS001553. The SSA took years to develop, and contained analyses that were far more in-depth than those FWS had previously relied on. Compare FWS001475–FWS001497 (SSA

climate change analysis), with FWS005060 (five-year review noting "effects of climate change on the species have not been ruled out as concerns"). The SSA also underwent peer review by various species experts outside of FWS, who remarked on its comprehensive and thorough analyses. FWS005379 ("Clearly this was a monumental task and your team did an excellent job considering the issues."); FWS005557 ("I think the document is a fair assessment and represents a lot of work. I especially found analysis of climate change and temperature effects to be thorough and relevant."). Overall, the SSA incorporates "the best scientific and commercial information available concerning the status of the species," and accordingly the Reclassification Decision relies heavily on its scientific findings and analyses. FWS000178.

In the Reclassification Decision, FWS first looked at the status of the ABB throughout all of its range. FWS found that the ABB's current range "is much larger than originally thought when the species was listed," and that several large populations exist with relatively good genetic diversity and low current risks. FWS000190. The decision noted that the Southern Plains populations have large amounts of known and potential ABB habitat, with the Arkansas River and Flint Hills analysis areas supporting large populations with moderate to high resiliency, and recognizing that the Red River analysis area has a limited population with low resilience. Id. FWS also discussed that the Northern Plains populations are relatively big with large areas of suitable habitat and moderate to high resiliency in the Niobrara and Sandhills analysis areas, and with a smaller population of low to moderate resiliency in the Loess Canyons analysis area. Id. FWS then addressed the New England populations on Block Island and Nantucket Island, finding the Block Island population to be relatively small and moderately resilient, and the Nantucket Island population to have a larger habitat area but low resiliency that requires carcass supplementation to maintain. Id.

After considering the status of all of these populations, FWS found that the ABB faces a relatively low near-term risk of extinction based on current threats. Id. FWS determined that overutilization (Listing Factor B)—which was not identified as a threat to the species when listed—still is not a threat to the ABB today, and that disease and predation (Listing Factor C) are not known to result in population-level impacts. FWS000182. Further, the decision found that while existing regulatory mechanisms (Listing Factor D) such as state species protections and the implementation of the Sikes Act by the Department of Defense do not fully address the future threats faced by the ABB, Department of Defense installations currently provide management and conservation benefits to the ABB. FWS000182–FWS000183. Additionally, FWS discussed that current risks to the ABB in the Northern Plains include wind-energy development and conversion to cropland, and that in the Southern Plains current risks include grazing, silviculture, and oil and gas development. FWS000183. While all populations face some risks from urban or suburban development, those risks are limited because most current ABB populations are in rural areas. Id. FWS found that none of the populations are currently experiencing climate-related impacts except for the Red River analysis area in the Southern Plains. FWS001386–FWS001396. After analyzing all of these threats, FWS found that five of the populations (all of the populations in the Northern Plains and the Flint Hills and Arkansas River populations in the Southern Plains) currently have moderate to high resiliency, and that several of the populations are relatively large. FWS000190; see FWS001427. Accordingly, FWS found that the ABB is not presently in danger of extinction throughout all of its range. FWS000190.

The Reclassification Decision next assessed the threats faced by the ABB in the foreseeable future throughout all of its range. FWS found that the ABB will likely be extirpated from the Southern Plains due to climate change within the "mid-century" time period (2040 to 2069).

FWS000190. Climate change is expected to threaten the ABB because temperature-related increases in decomposition of carrion and development of fly larvae would limit or prohibit the ABB's reproductive success. FWS000184. In the Northern Plains, land management activities are expected to affect 5-15% of suitable habitat, with an additional habitat loss of 30% in the Loess Canyons analysis area from expansion of the invasive red cedar species.[7] Id. Given the combined effects of land use and future climate changes, FWS concluded that the ABB is likely to become in danger of extinction in the foreseeable future throughout all of its range. FWS000190–FWS000191.

Next, FWS analyzed whether the ABB is currently in danger of extinction or likely to become so in the foreseeable future throughout a significant portion of its range. Under FWS's SPR policy, FWS considers whether there is "substantial information indicating that (1) the portions may be significant and (2) the species may be in danger of extinction in those portions or likely to become so within the foreseeable future." 79 Fed. Reg. 37,586.[8] If the answer to both questions is yes, FWS conducts a more detailed analysis. Id. FWS can address either the "significant" or the "status" question first, and if the answer to either is "no," then the other question does not need to be evaluated. Id.

Here, FWS found that no portion of the ABB's range was currently in danger of extinction, but that all portions were likely to become endangered in the foreseeable future. FWS000191–

[7] In light of the threats the ABB faces in the North Plains populations from urban expansion and agriculture, the 4(d) Rule issued concurrently with the Reclassification Determination prohibits incidental take in suitable habitat that is the result of soil disturbance, including converting habitat from an existing land use to a different land use. FWS000194.

[8] The court in Center for Biological Diversity v. Everson, 435 F. Supp. 3d 69, 93 (D.D.C. 2020), vacated a portion of FWS's 2014 SPR policy after the proposed reclassification was published in the Federal Register but before issuance of the final Reclassification Decision and 4(d) Rule.

FWS000192. FWS examined the Northern Plains, Southern Plains, and New England analysis areas as the potential portions. FWS000191. For the Northern Plains portion, FWS found that the most important drivers for the species status were threats from habitat loss due to agricultural land uses, but that large areas of known and potential habitat buffer the effects of most land-use changes currently and were expected to in the foreseeable future. FWS000191–FWS00192. FWS then found that future effects from climate change made the ABB in the Northern Plains likely to become endangered in the foreseeable future. FWS000192. When analyzing the Southern Plains portion, FWS discusses that population-level impacts from land-use threats are not anticipated now or within the foreseeable future. Id. FWS also recognized that the Southern Plains analysis areas are currently experiencing the effects of climate change, although not presently at such a magnitude to put the species in danger of extinction. Id. But because during the mid-century time period all Southern Plains areas are expected to exceed threshold temperatures, the portion is likely to become endangered in the foreseeable future. Id. Finally, for the New England portion, FWS found that current threats were mitigated by the large amounts of protected habitat and significant ongoing active management, making the species not in danger of extinction currently. Id. Climate change is not expected to be a significant threat to this portion in the foreseeable future, but FWS expects it to face future threats from land-use change because of the already-limited habitat in the area and lack of existing regulatory mechanisms to keep conservation easements in place over time. Id. Because FWS determined that no portion was endangered and had already found that the ABB was threatened throughout all of its range, it did not reach the question of whether any portion was significant pursuant to its policy. FWS000192.

In sum, FWS concluded based on the best available science that the ABB met the definition of a threatened species throughout all of its range. FWS provided rational explanations for its

conclusion using its special expertise, and accordingly the Reclassification Decision is entitled to the Court's deference. See Marsh, 490 U.S. at 375–77.

B. FWS Complied with the APA and Reasonably Determined that the ABB Was Not Endangered in a Significant Portion of Its Range.

Plaintiff raises several challenges to FWS's SPR analysis, all of which fail. Contrary to Plaintiff's contentions, the logical outgrowth doctrine does not apply here, and even if it did, the Reclassification Decision is a logical outgrowth of the proposed rule. Additionally, FWS reasonably applied the ESA's definitions of "endangered species" and "threatened species" in the SPR analysis and articulated a rational connection between the best available science and the Reclassification Decision.

1. If the Logical Outgrowth Doctrine Applies, the Final Reclassification Decision Is a Logical Outgrowth of the Proposed Rule.

The Reclassification Decision satisfied the APA's notice-and-comment requirements for two reasons. First, because the final Reclassification Decision did not differ from the proposal, the logical outgrowth doctrine does not apply. Second, even if the logical outgrowth doctrine does apply, the Reclassification Decision is a logical outgrowth of the proposal, and FWS was not required to engage in yet another round of notice and comment before issuing the final Reclassification Decision.

The APA requires federal agencies to publish "general notice[s] of proposed rule making" in the Federal Register and allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" pertaining to the proposed rule. 5 U.S.C. § 553(c), (b). Agencies do, however, have authority to promulgate final rules that differ from the proposed rule on which the public was invited to comment. See Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 699 (D.C. Cir. 2007) ("An agency's final rules are frequently different from the ones it published as proposals. The reason is obvious. Agencies 'often

adjust or abandon their proposals in light of public comments or internal agency reconsideration.'" (quoting Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994))). If a federal agency decides to alter its proposed rule following the notice-and-comment period, the newly revised rule does not automatically become subjected to an additional round of notice and comment. Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 (D.C. Cir. 1973) ("The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions."). Whether a federal agency is required to re-open notice and comment on the revision depends on whether the revision is a logical outgrowth of the original proposal. Nat'l Mining Ass'n, 512 F.3d at 699.

A final rule is a logical outgrowth of a proposed rule if interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) (internal quotations and citations omitted). To determine whether an interested party should have anticipated that the change was possible, courts frequently analyze the "comments, statements and proposals made during the notice-and-comment period." Nat'l Mining Ass'n, 512 F.3d at 699; CSX Transp., Inc., 584 F.3d at 1081. Courts also consider "whether a new round of notice and comment would provide the *first* opportunity for interested parties to offer comments that could persuade the agency to modify its rule." Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1299 (D.C. Cir. 2000).

FWS's final Reclassification Decision did not differ from the proposal, and accordingly the logical outgrowth doctrine does not apply. The issue decided by FWS was straightforward: should the ABB be listed under the ESA, and if so, is it an endangered species or a threatened

species. In both the proposed and final rules, FWS found that the ABB should be listed under the ESA, and that it should be listed as threatened. FWS000158; FWS000177. Plaintiff incorrectly contends that because FWS used additional reasoning in the final rule to reach the same decision as the proposed rule, that it was unfairly denied an opportunity for notice and comment. However, the logical outgrowth doctrine only applies to differences in the decisions themselves, not to additional "support for the same decision [the agency] had proposed to take." Int'l Fabricare Inst., 972 F.2d at 399 (D.C. Cir. 1992). In other words, Plaintiff "had fair notice of, and full opportunity to comment on, the issue actually decided by [FWS]," i.e., whether the ABB should be listed as threatened. Id.[9]

Even if the logical outgrowth doctrine does apply here, the record before the Court demonstrates that the final Reclassification Decision was a logical outgrowth of the proposal because Plaintiff did anticipate, or at the very least should have anticipated, that the change in the SPR analysis was possible. First, Plaintiff already commented on the SPR issue. Plaintiff submitted a comment to FWS in response to the 2015 delisting petition arguing in an SPR section that the threats faced by ABB populations in Arkansas, Kansas, Texas, Oklahoma, and Nebraska—most of which are in the Southern Plains analysis areas—from land-use changes and climate change indicate that the ABB in those areas should be considered endangered. FWS000890–FWS000892. Moreover, Plaintiff had the opportunity to reiterate those arguments in its comment submitted regarding the proposed reclassification finding. While Plaintiff focused the entirety of the SPR arguments in its comment for the proposed rule on the part of the SPR policy that was later vacated,

[9] The facts of CSX Transp., Inc., 584 F.3d 1076, the case on which Plaintiff relies, are distinguishable. In that case, the standard articulated by the final rule differed from that in the proposed rule. Id. at 1078. Here, in contrast, the decision in the final and proposed rules remained the same.

FWS001006–FWS001010; see Everson, 435 F. Supp. 3d at 93, Plaintiff should have known that if its argument was successful in convincing FWS to take a different approach to the SPR analysis, then that analysis would likely be conducted. Indeed, in its comment on the delisting petition, Plaintiff discussed both its position that FWS's SPR policy was unlawful and why its proposed analysis should result in listing the species as endangered. FWS000890–FWS000892. Further, the lawsuit that ultimately resulted in vacatur of the relevant part of the SPR policy was consolidated in 2016 with a lawsuit filed by Plaintiff, long before FWS published the proposed reclassification in 2019. See Minute Order, Defenders of Wildlife v. Ashe, No. 1:16-cv-910 (D.D.C. June 6, 2016). Plaintiff should have known before commenting on the proposed rule that vacatur of that part of the policy was possible given it requested that relief in its 2017 combined motion for summary judgment. Proposed Order, Ctr. for Biological Diversity v. Ashe, No. 1:15-cv-477, ECF No. 52-15 (D.D.C. Apr. 14, 2017). In sum, a new round of notice and comment on the SPR discussion would not have been the first opportunity for Plaintiff to comment on whether FWS should have classified the Southern Plains ABB portion as threatened. See Ariz. Pub. Serv. Co., 211 F.3d at 1299.

Finally, Plaintiff faces no prejudice from the absence of another opportunity to comment on the SPR issue because at least one other party raised the argument in a comment responding to the proposed rule. The D.C. Circuit has held that if the comment that a party claims it would have submitted was made by others, the absence of another opportunity to comment would "be non-prejudicial because all that is necessary in such a situation is that the agency had an opportunity to consider the relevant views." Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1110 (D.C. Cir. 2014). Here, a comment submitted by Nebraska Game and Parks in response to the proposed rule discussed the threats that the Southern Plains ABB population faces from climate change, and

argues that the species should not be reclassified because the species "is predicted to go extinct in a significant portion of its current occupied range in a few decades." FWS001041. This is the same argument that Plaintiff makes in its summary judgment brief. ECF No. 21-1 at 27–29. Accordingly, the lack of another notice-and-comment period was non-prejudicial to Plaintiff.

For all these reasons, the Court should find that the Reclassification Decision satisfied the notice-and-comment requirements of the APA.

2. FWS Reasonably Applied the ESA's Definitions of "Endangered Species" and "Threatened Species" and Articulated a Rational Connection Between the Best Available Scientific Information and Its Reclassification Decision.

FWS reasonably applied the ESA terms "threatened species" and "endangered species" in the SPR analysis of its Reclassification Decision. As this Court has recognized, the distinction between an "endangered" species and a "threatened" one is temporal. In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig., 748 F. Supp. 2d 19, 26 (D.D.C. 2010) ("Polar Bear I"). The ESA defines a "threatened species" as "any species which is likely to become an endangered species *within the foreseeable future* throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (emphasis added). Conversely, an "endangered species" is "any species which is *in danger of extinction* throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (emphasis added). FWS has historically and consistently interpreted the phrase "in danger of extinction" to mean a species that is currently on the brink of extinction in the wild, an interpretation that has been upheld by this Court. See In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig., 794 F. Supp. 2d 65, 89 (D.D.C. 2011) ("Polar Bear II") ("[T]he Court finds that the agency's general understanding that an endangered species is "on the brink of extinction" is not clearly out of line with Congressional intent."), aff'd, In re Polar Bear

Endangered Species Act Listing & Section 4(d) Rule Litig., 709 F.3d 1 (D.C. Cir. 2013).[10] In other words, while an endangered species is *currently* on the brink of extinction, a threatened species is one that is likely to become endangered *within the foreseeable future*.

Here, FWS found at the time it issued its Reclassification Decision that the ABB is currently resilient in the Southern Plains portion of its range. The ABB is not currently experiencing a dire threat. To the contrary, FWS discussed that of the three Southern Plains analysis areas, two (Flint Hills and Arkansas River) presently have moderate to high resiliency based on habitat and population factors, FWS001427, and only the Red River analysis area—the smallest population—is currently experiencing climate-related impacts, FWS001386–FWS001396; see FWS001354. FWS also discussed that the ABB's high genetic variability suggests that current genetic makeup is well adapted to changing environmental conditions. FWS001429. Additionally, FWS noted that while grazing, silviculture, and oil and gas development are potential risks for the ABB, the agency does not consider these activities threats to the Southern Plains population because they are only expected to lead to a combined permanent loss of 1.2% of ABB suitable habitat in that area. FWS000183. Given these facts, FWS reasonably concluded that the ABB in the Southern Plains was not endangered. See Polar Bear II, 794 F. Supp. 2d at 89 ("[T]he decision to list a species as threatened or endangered is highly fact-specific.").

Plaintiff incorrectly contends that the distinction between endangered and threatened species also takes into account the seriousness of the future threats faced by a species, i.e., the

[10] Plaintiff's attempts to distinguish this case fall flat. Contrary to Plaintiff's contentions, the ABB is not currently experiencing severe retractions in its range, nor is it currently facing a "calamitous threat" in the Southern Plains. ECF No. 21-1 at 29 n.6. Instead, the Southern Plains ABB populations are now understood to be mostly larger than in the past, and climate change is not expected to seriously impact the Southern Plains portion until sometime in the foreseeable future.

more serious the future threat, the more likely that the species should be listed as endangered instead of threatened. ECF No. 21-1 at 26. Plaintiff's argument fails for several reasons.

First, FWS did not find that extirpation in the Southern Plains region is certain as Plaintiff appears to claim. See ECF No. 21-1 at 28. FWS determined that the ABB has an increased risk of being extirpated from that region in the foreseeable future, but the 20 different climate-change models FWS relied on do not demonstrate that such a scenario is set in stone. The climate change models used by FWS predict changes in temperature averages over 30-year periods—not changes in specific years—and demonstrate significant fluctuations within those timeframes. See FWS001476–FWS001478 (SSA discussing uncertainty of climate-change projections); FWS000183 (Reclassification Decision discussing climate change scenarios and 30-year time periods). Additionally, it is not certain which models or scenarios will most accurately reflect future climate changes, and some may not result in extirpation of the ABB from the Southern Plains. FWS001476 (discussing that more than one climate scenario is typically considered because "the emissions pathways that will actually occur in the future are not known"). For example, under a climate change scenario with less emissions, the mean maximum temperature for the Flint Hills, Kansas population in the Southern Plains is not expected to consistently exceed the 95-degrees that is estimated as the ABB's threshold temperature through 2100 under the five coolest models, whereas the mean of all the models projects the threshold temperature will be consistently exceeded in that area by 2060. FWS001530. In addition to the uncertainty of the climate-change projections, the SSA also discusses that the Southern Plains ABB could have behavioral differences that allow it to adapt to warmer climates, FWS001428; FWS001496, and the Reclassification Decision states that "ongoing and future conservation and recovery actions may help establish populations in areas that are safe from climate-related risks, potentially

precluding the need to reclassify the species in the future," FWS000187. In light of these findings and the uncertainty of the ABB's future status in the face of climate change projections, the Court should defer to FWS's reasonable determination. Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 219 (D.D.C.) ("Time and again courts have upheld agency action based on the "best *available*" science, recognizing that some degree of speculation and uncertainty is inherent in agency decisionmaking, even in the precautionary context of the ESA." (collecting cases)), order clarified, 389 F. Supp. 2d 4 (D.D.C. 2005).

Second, Plaintiff points to no portion of the ESA or its legislative history—and cites to no case[11]—that supports its proposed interpretation. To the contrary, the ESA's text and legislative history support the temporal distinction made by FWS, and that interpretation is entitled to the Court's deference. Polar Bear II, 794 F. Supp. 2d at 89; Polar Bear I, 748 F. Supp. 2d at 28 (discussing the ESA's legislative history emphasizes that an endangered species "is" in danger of extinction, whereas a threatened species is "likely to become" endangered); see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995) ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. . . . When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his." (internal citations omitted)).

[11] Plaintiff makes a puzzling reference to Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), which has no application to this matter. See ECF No. 21-1 at 26. In that case, the species at issue *was* listed as endangered, and the Court addressed an entirely different provision of the ESA (Section 7) than the one at issue here (Section 4). Contrary to Plaintiff's contentions, there is very much a "functional difference" between that case and the instant matter.

The ESA's structure also supports FWS's temporal interpretation of endangered versus threatened species. After a species has been listed, the ESA requires the Secretary to conduct a review of the species at least once every five years, and determine whether that species should be removed from the list or changed in status. 16 U.S.C. § 1533(c)(2); see also 50 C.F.R. § 424.21. The Secretary conducts this review in accordance with the five listing factors and on the basis of the best scientific and commercial data available. 16 U.S.C. §§ 1533(c)(2), 1533(a)(1), 1533(b)(1); see also 50 C.F.R. § 424.11. The ESA's legislative history demonstrates that the purpose of this five-year review is "to make sure that the endangered species list is kept up to date." Congressional Record 38,123, 38,134 (Oct. 14, 1978). So if FWS initially lists a species as threatened because it found at the time of listing that the species was not currently in danger of extinction but is likely to be so in the foreseeable future, FWS could find after conducting the five-year review that the species is now currently experiencing threats that place it on the brink of extinction, and recommend reclassifying the species as endangered. Or, if substantial scientific or commercial information becomes available, an interested person can petition FWS to reclassify the species. 16 U.S.C. § 1533(b)(3); see Am. Forest, 533 F. Supp. at 93 (D.D.C. 2008) ("[I]f plaintiff believes that the threatened listing of the [species] causes its members unwarranted injury, plaintiff has the right and the ability to petition FWS. . . . If plaintiff filed such a petition, statutory deadlines would require FWS to take prompt action, and the ESA explicitly makes FWS's decision on such petitions subject to judicial review."). In other words, the ESA's structure gives FWS the flexibility to reclassify the ABB as endangered in the future if appropriate to do so. FWS recognizes in the SSA that it is not certain when climate change will start to affect the as-of-now unaffected parts of the Southern Plains ABB population and when those effects would rise to the level of putting that portion in danger of extinction. FWS001476. So FWS will periodically review the status of the

ABB as required by the ESA and determine at the time of those reviews whether reclassification is warranted.

Additionally, the "foreseeable future" timeframe used by FWS to determine threatened versus endangered status in the Reclassification Decision is reasonable. At the time the proposed rule for the Reclassification Decision was published, Solicitor's M-Opinion 37021 guided FWS's analysis for what constitutes the "foreseeable future." Solicitor's Memorandum on the Meaning of "Foreseeable Future" in Section 3(20) of the ESA, M–37021 (Jan. 16, 2009).[12] The M-Opinion provides that the "foreseeable future describes the extent to which [FWS] can, in making determinations about the future conservation status of the species, reasonably rely on predictions about the future." Id. at 14. Additionally, FWS has the flexibility to identify the "foreseeable future" on a case-by-case basis. Id. at 7. Here, FWS determined that the foreseeable future timeframe for the ABB is between 2040 and 2069, or 20 to 49 years from the Reclassification Decision's issuance. See, e.g., FWS000192. This timeframe was selected because all climate change scenarios considered by FWS predict nearly identical conditions through 2055, and FWS used 30-year time periods for its climate change analysis. See FWS000183; FWS000188. And FWS appropriately found that the Southern Plains ABB was threatened based on that timeframe—while the magnitude of climate change effects is presently low enough so that the Southern Plains portion is not currently on the brink of extinction, the effects of climate change that could threaten it with extirpation are expected to occur sometime within the foreseeable future timeframe. See FWS000192 ("The bulk of the impact from climate change to [the Southern Plains] analysis areas occur[s] in the future according to our analysis."). Plaintiff's characterization of this timeframe as

[12] FWS has since adopted the M-Opinion's general approach as a regulation. See 50 C.F.R. § 424.11(d).

imminent is misleading. See ECF No. 21-1 at 27. This Court has upheld an even closer-in-time foreseeable future timeframe than that used in the Reclassification Decision. See Nat. Res. Def. Council, Inc. v. Coit, __ F. Supp. 3d __, No. 20-CV-1150 (CRC), 2022 WL 971288, at *7 (D.D.C. Mar. 31, 2022) (upholding a foreseeable future timeframe of 12 to 18 years). Here, because FWS has provided a rational explanation for its foreseeable future timeframe, the Court should defer to the agency's reasonable determination.

The fact that some parts of the Southern Plains ABB population are presently experiencing harm from climate change does not mean that the population is currently on the brink of extinction. See ECF No. 21-1 at 28–29. FWS found that climate change is presently only impacting a small part of the Southern Plains population, the Red River analysis area,[13] and that the two larger analysis areas in the Southern Plains support large populations with moderate to high resiliency. FWS000190. Accordingly, FWS reasonably determined that finding the Southern Plains portion endangered on the basis of climate change was not warranted. See Polar Bear II, 794 F. Supp. 2d at 85 (upholding FWS decision to list species as threatened where "although population monitoring showed evidence of significant declines in body condition in some polar bear populations, FWS found them insufficient to warrant endangered status for any particular population at the time of listing" (citation omitted)). Because FWS rationally explained why it found the effects of climate change did not presently warrant an endangered status for the ABB, its determination is entitled to the Court's deference. Bowman Transp., 419 U.S. at 289–90.

[13] The Red River analysis area includes the parts of Texas and Arkansas that Plaintiff notes have not recently had positive survey results. See FWS001404; ECF No. 21-1 at 28. So the above described analysis demonstrates that FWS considered the potential climate change effects that Plaintiff accuses it of ignoring, and provided a rational explanation as to why it found a threatened status for the species was warranted.

In sum, FWS reasonably determined that no portion of the ABB's current range is endangered, and accordingly did not reach the question of whether any portion was significant. FWS000192. The record, the ESA's text, the ESA's structure, and the ESA's legislative history all support FWS's finding, and the Court should defer to the agency's determination. See Polar Bear II, 794 F. Supp. 2d at 90 ("[T]he agency acted well within its discretion to weigh the available facts and scientific information before it in reaching its conclusion that the [species] was not endangered at the time of listing. Where an agency has exercised its Congressionally-authorized discretion to weigh the relevant factors, and it has made a listing determination based on a reasoned choice, the Court will not disturb its conclusion.").

C. FWS Adequately Explained Its Change in Position in the Reclassification Decision and Its Supporting Record.

FWS adequately explained why it changed the ABB's status from endangered to threatened both in the Reclassification Decision and its supporting record. Although Plaintiff contends that FWS did not adequately explain the change between the five-year review and the Reclassification Decision, the APA did not require FWS to provide any such an explanation. Instead, the change that FWS made in the Reclassification Decision was a change to the original 1989 listing rule. Notably, Plaintiff does not dispute that FWS adequately explained the change in position between the 1989 listing rule and the 2020 Reclassification Decision. And even if FWS was required to explain its change in position between the five-year review and the Reclassification Decision, the record demonstrates that it adequately did so. Accordingly, the Court should grant summary judgment in favor of Defendants on this claim.

It is a well-established principle of administrative law that "[a]n agency may change course so long as that change is reasoned." Phx. Herpetological Soc'y, Inc. v. U.S. Fish & Wildlife Serv., 998 F.3d 999, 1006 (D.C. Cir. 2021). If an agency changes position on an issue, "it need not always

provide a more detailed justification than what would suffice for a new policy created on a blank slate." Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016); see FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (holding no "heightened standard" of review applies when agencies change policy). All that courts require of an agency that changes position is an "awareness that it is changing position" and a showing "that there are good reasons for the new policy." Encino Motorcars, 579 U.S. at 221. The "requirement that an agency adequately explain its result 'is not particularly demanding' and 'nothing more than a brief statement is necessary.'" Mashpee Wampanoag Tribe v. Bernhardt, 466 F. Supp. 3d 199, 214 (D.D.C. 2020) (quoting Muwekma Ohlone Tribe v. Salazar, 813 F. Supp. 2d 170, 190 (D.D.C. 2011)); see Inv. Co. Inst. v. Commodity Futures Trading Comm'n, 720 F.3d 370, 377 (D.C. Cir. 2013) (describing the requirement to provide a reasoned explanation for a policy change as a "low bar"). Enhanced justification is only required "where a policy change rests on factual findings that contradict the facts undergirding the prior policy." Ark Initiative v. Tidwell, 816 F.3d 119, 129 (D.C. Cir. 2016); Fox, 556 U.S. at 515–16.

FWS both acknowledged that it changed the listing status for the ABB established in its 1989 listing decision and provided a reasoned explanation for the change. FWS clearly and repeatedly acknowledged in the Reclassification Decision that it was altering its position from the prior rule. In fact, that is the first thing that the Reclassification Decision does, as is readily apparent from both the title of the document ("Reclassification of the American Burying Beetle From Endangered to Threatened With a Section 4(d) Rule") and its first sentence ("We, [FWS], reclassify (downlist) the American burying beetle (*Nicrophorus americanus*) from endangered to threatened on the Federal List of Endangered and Threatened Wildlife."). FWS000177. The Reclassification Decision then devotes most of its discussion to explaining why it made the change.

See id.; FWS000180–FWS000186; FWS000190–FWS000192. FWS explained that after reviewing the current status of the ABB and analyzing the five listing factors, it found that the current range of the ABB "is much larger than originally thought when the species was listed in 1989," and that several large populations exist with relatively good genetic diversity and low current risks. FWS000190. Accordingly, FWS found that listing the species as endangered was not warranted at the time the decision was issued, but that the future threats the ABB faced made a threatened status appropriate. FWS000192. FWS's acknowledgment of the change in the status of the species and thorough analysis and explanation for the change are more than sufficient to meet the "low bar" for justifying a new policy. See Inv. Co. Inst., 720 F.3d at 377.

FWS appropriately focused on explaining the change from the 1989 listing rule to the 2020 Reclassification Decision pursuant to the standard set forth in Fox, 556 U.S. at 514–15, as opposed to a change from the five-year review to the Reclassification Decision as Plaintiff contends was appropriate. The 1989 listing rule and the Reclassification Decision are both final agency actions that enacted agency policy, whereas the five-year review is merely a recommendation that does not rise to the level of a rule or policy. As acknowledged in this Court's decision in American Forest Resource Council v. Hall, a five-year review cannot impose "new legal obligations," meaning it cannot change the status quo from that established by a final rule, or establish policy that can be changed by a final rule. 533 F. Supp. 2d at 93; see Fox, 556 U.S. at 514–15 (discussing APA requirements for changes in agency rules or policy). In that decision, the Court held that a five-year review does not qualify as a final agency action reviewable under the APA because it does not satisfy the two-part test in Bennett v. Spear, 520 U.S. 154, 177 (1997). Am. Forest, 533 F. Supp. 2d at 93–94. Specifically, the Court found that legal consequences do not flow from a five-year review pursuant to the test's second prong. Id. at 91. As the Court noted, nothing in the

ESA or its implementing regulations requires the Secretary to take further action as a result of a five-year review, see 16 U.S.C. § 1533(c)(2); 50 C.F.R. § 424.16, and if FWS chooses "to exercise its discretion to take further action, FWS would be required to publish a proposed regulation in the Federal Register, follow the APA notice and comment procedures, and promulgate a final rule," id. at 92; see Coos Cnty. Bd. of Cnty. Comm's v. Kempthorne, 531 F.3d 792, 813 (9th Cir. 2008) ("FWS's conclusions in five-year reviews are not set in stone."). Because the five-year review is only a recommendation that cannot alter FWS's determinations or policy made in a final listing rule, the standards outlined in Fox do not apply to such a document.[14]

Even if Fox does apply to changes from the 2008 five-year review, the Reclassification Decision both acknowledged that it reached a different conclusion than that in the 2008 five-year review and provided a sufficient explanation for the change. The reason the outcome in the Reclassification Decision differed from that of the 2008 five-year review is explicitly discussed in the decision and otherwise discernible from the administrative record.[15] See ECF No. 21-1 at 31.

[14] None of the cases cited by Plaintiff support its assumption that the Fox standard applies to differences between the five-year review and Reclassification Decision because they all consist of challenges based on differences between final agency actions. Ctr. for Biological Diversity v. Haaland, 998 F.3d 1061, 1067 (9th Cir. 2021) (challenging difference between two ESA twelve-month determinations); Fox, 556 U.S. at 506–11 (challenging changes in policy between final agency orders); U.S. Sugar Corp. v. EPA, 830 F.3d 579, 626 (D.C. Cir.) (per curiam) (challenging difference between two final agency rules), on reh'g en banc, 671 F. App'x 822 (D.C. Cir. 2016), and on reh'g en banc in part, 671 F. App'x 824 (D.C. Cir. 2016); Organized Vil. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 967 (9th Cir. 2015) (challenging difference between two final agency rules).

[15] In addition to the reasons discussed above regarding why the Fox standard does not apply to the five-year review, FWS was not required to provide an "enhanced justification" for changes from the five-year review to the Reclassification Decision. See Ark Initiative, 816 F.3d at 129. As Plaintiff acknowledges, the Reclassification Decision did not rely on facts that contradict those in the five-year review. ECF No. 21-1 at 34 (noting that the Reclassification Decision did not dispute "the central factual premises" in the five-year review). And even if it did need to provide an enhanced justification, as discussed below, FWS's "explanations relying on new data are sufficient

When putting together the Reclassification Decision, FWS took a fulsome look at all of the available science and data regarding the ABB's range, abundance, and risk factors, including 13 years of data and studies that post-date the five-year review. The five-year review relied on studies and data mostly from 2007 and before, see FWS005063–FWS005069, whereas the Reclassification Decision considered information up through 2020, see, e.g., FWS000185 (portion of Reclassification Decision citing Quinby (2020)); ECF No. 14-2 at 5–6 (administrative record index listing literature relied on by Reclassification Decision). Some parts of the decision explicitly state the differences that resulted from the availability of new data. For example, the decision notes that the pesticide dichloro-diphenyl-trichloroethane (commonly known as DDT) "and some other threats identified in the recovery plan and 5-year status review are either no longer a threat or pose less of a threat to the species." FWS000182.

Other new science and data that led to changes in FWS's perspective are readily discernable from the administrative record. See State Farm, 463 U.S. at 43 (1983) (discussing that the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned" based "on the record considered as a whole" (quotations omitted)); Nat. Res. Def. Council v. Nat'l Marine Fisheries Serv., 71 F. Supp. 3d 35, 58 (D.D.C. 2014) ("[T]he agency's rationale for the changed policy need not be reiterated fully in the Final Rule itself so long as the rationale may 'reasonably be discerned' from the administrative record as a whole."). For example, the map in the 2019 SSA that the Reclassification Decision relies on identifies more counties as part of the current ABB population than the map in the five-year review. Compare FWS001383 (SSA map with current ABB records through 2015), with FWS005044 (five-year review map with ABB

to satisfy the more detailed explanatory obligation discussed by Fox." Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 727 (D.C. Cir. 2016).

records through 2007). The differences between these maps reflect the increase in both the known range and known population numbers of ABB since 2007 due to expanded survey efforts.[16] Additionally, the SSA notes several areas that experienced high numbers of ABB surveyed after 2008. FWS001409 (discussing that Loess Hills population has increased since 2007); id. (noting that "more than 1,000 ABBs were trapped in Nebraska with relatively limited trapping" in 2010 and that "many more ABBs occur in that population than previously recognized"); FWS001409–FWS001410 (discussing that 2014 capture rates in South Dakota were higher than those reported in 2008); FWS001479 ("2016 appears to be a relatively good year for ABB catch rates in [Oklahoma]"). The SSA also provides a more detailed analysis of ABB habitat and risks faced in that habitat than the five-year review. The SSA discusses in detail the amount of protected habitat management for each population (a total of 2,752,696 acres), a discussion glossed over by the five-year review. FWS001422–FWS001427. Moreover, the Reclassification Decision found that land-management activities are only expected to lead to a combined permanent loss of 1.2% of ABB suitable habitat in the Southern Plains area, which was not a calculation conducted for the five-year review. FWS000183. Overall, FWS relied on its more complete understanding of ABB

[16] Plaintiff's argument that these populations were known to FWS when it conducted the five-year review is misleading. See ECF No. 21-1 at 35–36. While true that no new populations have been discovered since 2008, FWS's understanding of the numbers and range of the existing populations has expanded significantly. Plaintiff also incorrectly contends that the ABB's abundance has declined since 2008. See ECF No. 21-1 at 35–36. Plaintiff's argument fails to address the larger amount of ABBs surveyed in the majority of ABB analysis areas. See FWS001409–10. While true that the numbers of ABB have declined in the Red River analysis area, most of the decline happened by 2008 as discussed in the five-year review, and population numbers have not gone down significantly since that time. FWS005040 (five-year review discussing study that found ABB populations in Camp Maxey area were "dramatically reduced from 2005 levels"); FWS001405–FWS001408 (SSA noting large drop in Camp Maxey population numbers between 2005 and 2008).

abundance and risks currently faced by the ABB within its habitat when making the decision to reclassify the species as threatened. See FWS000190.

Plaintiff's reliance on Center for Biological Diversity v. Haaland, 998 F.3d 1061 (9th Cir. 2021) is misplaced. See ECF No. 21-1 at 32–33. There, FWS issued a 12-month finding in 2011 determining that listing the Pacific walrus under the ESA was warranted but precluded by other higher priority items. Ctr. for Biological Diversity v. Haaland, 998 F.3d at 1065. Then, in 2017, FWS issued a new 12-month finding determining that listing was not warranted. Id. at 1066. The Court found that the three-page 2017 12-month finding only provided a "cursory explanation" for FWS's change in position, and that further explanation was needed because the 2017 determination rejected specific findings made in the 2011 determination. In contrast, here FWS was not required to explain the differences between the five-year review and the Reclassification Decision pursuant to Fox because the five-year review was not a policy or rule. Additionally, unlike in the Pacific walrus case, the higher standard in Fox does not apply here because, as Plaintiff acknowledges, the Reclassification Decision did not rely on facts that contradict those in the five-year review. ECF No. 21-1 at 34–35; see Ark Initiative, 816 F.3d at 129. Further, FWS considered new information and provided a much more detailed explanation in the sixteen-page Reclassification Decision than that included in the three-page 2017 Pacific walrus 12-month finding. See FWS000177–FWS000192. For all these reasons, the Ninth Circuit's reasoning is not persuasive here.

Accordingly, FWS complied with its obligations under the APA as explained by Fox, and the Court should deny Plaintiff's motion on that basis.

D. Plaintiff's Challenges to the Reclassification Decision's Threats Analysis All Fail.

Plaintiff raises various other challenges to the threats analysis in the Reclassification Decision based on science and data from the 2008 five-year review, all of which fail. Plaintiff

incorrectly contends that threats to the ABB have increased in severity since 2008 even though the record demonstrates that no threat currently impacting the ABB has increased in severity. Instead, FWS's fulsome analysis of the best available science through the SSA process gave the agency a more accurate picture of the threats faced by the ABB in different populations both currently and in the foreseeable future.

Plaintiff mischaracterizes FWS's analysis of the land-use threats faced by the ABB in the Reclassification Decision.[17] Critically, Plaintiff's argument fails to recognize that the SSA, for the first time, looked at the effects of land-development activity region by region. FWS001383–FWS001397. Based on the SSA's discussion, the Reclassification Decision found that the Southern Plains populations are not threatened by land-use changes because they are only expected to lead to a combined permanent loss of 1.2% of suitable ABB habitat in that area. FWS000183. Although more effects from land-use changes are expected for the Northern Plains populations, as discussed further below, FWS accounted for the increased risk that the Northern Plains populations face from land-use threats by extending greater protections to the ABB in the Northern Plains populations through the 4(d) Rule. FWS000192–FWS000195. The five-year review did not conduct these region-specific analyses, let alone consider them, and accordingly Plaintiff's reliance on the five-year review's outdated assessment is misplaced. See ECF No. 21-1 at 36–37, 40–41. Additionally, FWS's analysis demonstrates that, contrary to Plaintiff's contentions, the agency did consider the effects of the potential reduction in conservation measures that could result from reclassifying the ABB as threatened, and appropriately tailored its 4(d) Rule to include ESA

[17] Plaintiff's reference to a characterization of these threats as "relatively minor" is from the proposed rule, not the final Reclassification Decision, ECF No. 21-1 at 37; FWS000165, and accordingly the Court should disregard Plaintiff's arguments related to that characterization on that basis in addition to the reasons discussed below.

protections necessary and advisable for the conservation of the ABB. See id. at 40–41. Indeed, FWS's practice is to finalize 4(d) rules concurrently with reclassification decisions to ensure "that the species receives appropriate protections at the time it is added to the list as a threatened species." Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753, 44,755 (Aug. 27, 2019).

Plaintiff also incorrectly contends that FWS failed to consider that the majority of ABBs in the Northern Plains populations occur on private land, which puts them at risk of habitat destruction and fragmentation. ECF No. 21-1 at 39–40. To the contrary, FWS explicitly considered that most of the ABB's habitat in the Northern Plains is on private land, and even performed two different analyses of future land-use change scenarios to account for that reality. FWS001397; FWS001439–FWS001475. Under Scenario 1, land-use change on private lands was assumed to continue at current rates with additional protected lands established. FWS concluded under Scenario 1 that for the Northern Plains analysis areas, future land use out to 2099 was not expected to change the resiliency of ABBs in Loess Canyons, Sand Hills, or Niobrara River, and that the analysis areas were expected to have moderate to high resiliency. FWS001448–FWS001451. Under Scenario 2, land-use change on private lands was assumed to be accelerated with no intentional management for the ABB. FWS001439. FWS concluded under Scenario 2 that for the Northern Plains analysis areas, future land use out to 2099 was expected to change the resiliency of ABBs in Loess Canyons,[18] but not in Sand Hills or Niobrara River, and that the analysis areas were expected to have low, high, and moderate resilience levels respectively. FWS001462–FWS001469. Those analyses are far more extensive than the discussion of private lands in the

[18] This finding by FWS takes into account the comments by Dr. Hoback that Plaintiff accuses it of ignoring. ECF No. 21-1 at 39.

five-year review that Plaintiff relies on. See FWS005056; FWS005060. In other words, FWS considered precisely what Plaintiff accuses it of ignoring, and found that—even under a more drastic land-use-change scenario—most of the Northern Plains analysis areas are large enough that the potential losses in the foreseeable future impact only a small percentage of the ABB's suitable habitat. FWS001474.

Plaintiff's argument regarding the historical range of the ABB is also unconvincing. See ECF No. 21-1 at 34–37. FWS acknowledged the historical range information and rationally explained why it did not alter the Reclassification Decision's conclusion. FWS noted that the species had lost about 90% of its historical range, likely as a result of a reduced amount of carrion resources. FWS000183. FWS further explained that the loss of historical range did not alter its conclusions because "the current range is much larger than originally thought when the species was listed and there are several large populations with relatively good genetic diversity and relatively low current risks." FWS000187. Moreover, the SSA noted the loss of the historical range occurred from the early 1900s to the 1970s, and that a similar decline has not been seen since, indicating the factors that caused the decline are changed or not occurring at the same rate. FWS001504.[19] This explanation was a rational, science-based finding entitled to the Court's deference. Ethyl Corp., 541 F.2d at 36. The case relied on by Plaintiff in support of its argument is inapposite. See Humane Society of U.S. v. Zinke, 865 F.3d 585 (D.C. Cir. 2017). In that case, FWS did not analyze the impact of the lost historical range on the species' status at all, which the Court found was arbitrary and capricious. Id. at 606. Here, in contrast, FWS explicitly analyzed and discussed the impact of the loss of historical ABB habitat in the Reclassification Decision and

[19] FWS did not consider that the historical decline stopped in the 1970s in the 2008 five-year review, nor did it have the same understanding at that time of the ABB's range and abundance, as previously discussed.

its supporting record as discussed above, and found that the threats that led to the historical decline are not currently causing ABB populations to decline and have not for the past 50 years. FWS001504. The Court should defer to FWS's reasoned explanation.

Plaintiff also mischaracterizes the timing and the certainty of the future threats that climate change poses to the ABB by pointing to less-informed predictions in the five-year review and taking statements from the SSA out of context. See ECF No. 21-1 at 37–39. One of the major improvements that the SSA made on the information in the five-year review is the SSA's thorough and comprehensive analysis of the effects of climate change on the ABB. See FWS005557 (peer review comment stating: "I especially found analysis of climate change and temperature effects to be thorough and relevant."). Whereas the five-year review merely mentions climate change as a potential threat, FWS005060, the SSA dedicated approximately 40 pages and an entire appendix to its climate change analysis, FWS001367–FWS001378; FWS001413–FWS001419; FWS001475–FWS001497; FWS001519–FWS001535. After conducting this thorough review, FWS found the vast majority of the ABB's populations are not currently being affected by climate change and are considered to have moderate to high resiliency. See FWS001327. While the smallest analysis area in the Southern Plains—the Red River analysis area—is potentially experiencing the effects of climate change now, the declines it experienced mostly occurred by 2008, and the status of that population has not changed much since then. FWS001419; FWS001479. It is true that the most serious threat faced by the Southern Plains ABB populations in the foreseeable future is climate change, but as discussed above, the severity and timing of the threat for most of the populations is not known. The ABB has an increased risk of extirpation from the Southern Plains region in the foreseeable future under some emissions scenarios and is very likely to face that risk under others, but it is not certain which scenario will play out, or when. See

FWS001476–FWS001478. Additionally, contrary to Plaintiff's contentions, the Northern Plains populations are not currently being affected by climate change, and only one of the two New England populations is not considered self-sustaining. See ECF No. 21-1 at 38–39; FWS001386–FWS001396; FWS000190. And, as previously discussed, FWS took the threats from climate change in the foreseeable future into account when deciding to list the ABB as threatened.

In sum, none of the arguments raised by Plaintiff demonstrate that the Reclassification Decision was arbitrary and capricious. FWS made a well-reasoned decision based on the best available science to reclassify the ABB as threatened after considering the threats that it faces currently and will face in the foreseeable future. Further, the Reclassification Decision complied with the APA's notice-and-comment requirements and duty to provide good reasons for the change in policy. While Plaintiff may disagree with FWS's conclusion, that policy disagreement is not grounds for a legal violation. For all these reasons, the Court should grant summary judgment in favor of Defendants on the Reclassification Decision claims and deny Plaintiff's motion.[20]

II. The 4(d) Rule Provides Necessary and Advisable Protections for the ABB.

The 4(d) Rule issued concurrently with the Reclassification Decision puts in place measures necessary and advisable to provide for the conservation of the ABB. Plaintiff contends that it was unlawful for FWS to not extend 4(d) incidental take prohibitions to Southern Plains ABBs. To the contrary, FWS lawfully provided a rational explanation for why it promulgated the 4(d) Rule provisions as it did, and the Court should defer to FWS's reasonable determination.

Section 4(d) of the ESA authorizes FWS "to extend any or all of the Section 9 take prohibitions, as well as other necessary protective measures, to any threatened species." Polar Bear

[20] If the Court grants summary judgment to Plaintiff on its Reclassification Decision claims, Defendants respectfully request that the Court also address the parties' 4(d) Rule arguments to avoid ambiguity regarding the status of that rule. See ECF No. 18 at 2–3.

Endangered Species Act Listing & 4(d) Rule Litig., 818 F. Supp. 2d 214, 220 (D.D.C. 2011) ("Polar Bear III"). The statute provides in relevant part:

> [W]henever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife.

16 U.S.C. § 1533(d). While FWS is not required to issue a rule pursuant to Section 4(d) under the auspices of it being "necessary and advisable," it has the discretion to do so. See Sweet Home Chapter of Cmties. for a Great Or. v. Babbitt, 1 F.3d 1, 8 (D.C. Cir. 1993), modified on other grounds on reh'g, 17 F.3d 1463 (D.C. Cir. 1994), rev'd on other grounds, 515 U.S. 687 (1995) ("[T]here is a reasonable reading of § 1533(d) that would not require [FWS] to issue formal 'necessary and advisable' findings when extending the prohibitions to threatened species. . . . The second sentence gives [FWS] discretion to apply any or all of the [Section 9] prohibitions to threatened species without obliging it to support such actions with findings of necessity. Only the first sentence of § 1533(d) contains the 'necessary and advisable' language and mandates formal individualized findings."). Here, FWS issued the 4(d) Rule because it found that it satisfied the requirement to issue regulations deemed necessary and advisable to provide for the conservation of the ABB. FWS000193.

The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided . . . are no longer necessary." 16 U.S.C. § 1532. "Congress has generally delegated to the Secretary of the Interior the responsibility of determining what measures are necessary for the conservation of threatened species." Polar Bear III, 818 F. Supp. 2d at 230; see

WildEarth Guardians v. Salazar, 741 F. Supp. 2d 89, 105 (D.D.C. 2010) ("Congress delegated to the Secretary the authority to determine the extent to which the ESA protects threatened species.").

In the instant matter, the 4(d) Rule tailors the ESA's protections to allow activities that have only minor or temporary effects on the ABB and are unlikely to affect the resiliency of ABB populations or viability of the species. FWS000193. First, the 4(d) Rule prohibits all intentional take of the ABB. Id. Second, it also prohibits incidental take caused by soil disturbance in suitable habitat in the New England and Northern Plains analysis areas. Id. Third, in the Southern Plains analysis area, the 4(d) Rule prohibits incidental take on certain conservation lands, although activities done in compliance with FWS-approved conservation plans that result in take of the ABB are not prohibited. Id. Fourth, the rule does not prohibit incidental take associated with ranching and grazing because FWS does not expect incidental take stemming from these activities to have an appreciable negative impact on the species, and the activities could provide potential habitat for the ABB. Id.

Plaintiff incorrectly contends—based on the outdated information in the five-year review—that the 4(d) Rule's differential treatment of land-use activities in New England and the Northern and Southern Plains is arbitrary and capricious. ECF No. 21-1 at 42–44. Plaintiff's argument is based on the assumption that the ABB faces the same threats from soil-disturbing activities in all of those regions. Id. However, as the 4(d) Rule explains, the risks to ABB from soil-disturbing activities are dramatically different in different geographic regions. FWS discusses that the New England analysis area is proportionally more sensitive and vulnerable to impacts because of its small size, and accordingly that urban and suburban development represent substantial risks to the ABB in that area. FWS000194. Additionally, for the Northern Plains analysis areas, FWS notes that the combined impacts of urban expansion and agriculture are

expected to affect five to fifteen percent of suitable habitat, that potential impacts from wind-energy expansion are likely, and that low percentages of the areas are protected, all of which result in land-use changes that risk the future viability of the ABB in those populations. Id. In contrast, the Southern Plains analysis areas are projected to have a combined permanent habitat loss of less than two percent, which is unlikely to affect the viability of the species there. FWS000194–FWS000195. Taking all of this into consideration, FWS reasonably tailored the 4(d) Rule to give more protections to the New England and Northern Plains analysis areas where they will provide for the conservation of the ABB.

Plaintiff mischaracterizes the SSA's analysis of the threat posed by land-use changes in the Southern Plains analysis areas. ECF No. 21-1 at 44–45. Review of the SSA demonstrates that while soil-disturbing activities are a risk factor for the ABB in the Southern Plains analysis areas, the large areas of known and potential habitat in the Southern Plains buffer the effects of most land-use changes. FWS001471. For example, when compared to the approximately 20,000,000 acres of suitable habitat and 3,000,000 acres of protected habitat in the Southern Plains, the "thousands of acres" of ABB habitat in the Southern Plains affected by facilities associated with petroleum and natural-gas drilling raised by Plaintiff are minor. See FWS001385; FWS001401; see also ECF No. 21-1 at 44.

Additionally, Plaintiff's argument regarding land development in conservation lands is incorrect. ECF No. 21-1 at 45. Contrary to Plaintiff's contentions, land development can occur in conservation lands, and accordingly the U.S. Department of Defense has implemented Integrated Natural Resources Management Plans for the relevant conservations lands to manage those activities. FWS000183; FWS000194. Moreover, the SSA demonstrates that these conservation lands have higher concentrations of the ABB than other areas in the Southern Plains. See

FWS001387 (discussing that the Fort Chaffee and Camp Gruber/Cherokee Wildlife Management areas are "areas with concentrations of positive surveys," and that the McAlester Army Ammunition Plant is included in the south-central concentration). It was rational for FWS to extend Section 9's prohibition against incidental take to these areas with higher ABB concentrations, and the Court should defer to FWS's reasonable conclusion.

Overall, Plaintiff's arguments regarding the 4(d) Rule all fail to demonstrate that it is arbitrary and capricious. The record before the Court shows that FWS carefully considered the threats facing the ABB in the various geographic regions and tailored the rule's protections in a manner that would contribute to the conservation of the species. Accordingly, the Court should grant summary judgment in favor of Defendants on Plaintiff's 4(d) Rule claim and deny Plaintiff's motion for summary judgment.

III. No Remedy Is Warranted, but Should the Court Grant Any Relief, Federal Defendants Request the Opportunity for Further Briefing.

Although unwarranted for the reasons discussed above, Plaintiff asks the Court to vacate the Reclassification Decision and the 4(d) Rule. ECF No. 21-1 at 47. As previously discussed, there has been no violation of law and vacatur is not warranted. But even if the Court were to find a legal violation, the propriety of vacatur depends on the seriousness of any legal violation and "the disruptive consequences of an interim change that may itself be changed." See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Because these considerations can be known only after a ruling on the parties' cross-motions for summary judgment, Defendants request the opportunity to address these issues through separate remedy briefing if the Court finds any violation of law. See, e.g., Am. Great Lakes Ports Ass'n v. Zukunft, 301 F. Supp. 3d 99, 102 (D.D.C. 2018) (noting the parties were instructed "to provide supplemental briefing addressing the appropriate remedy in this case" after the court

found two deficiencies in an agency rule), aff'd, Am. Great Lakes Ports Ass'n v. Schultz, 962 F.3d 510 (D.C. Cir. 2020).

CONCLUSION

FWS acted in accordance with the relevant statutory and regulatory authorities, biological science, and logic in determining that the ABB meets the definition of a threatened species because it is not currently in danger of extinction, but is likely to become an endangered species within the foreseeable future. FWS conducted a careful and thorough review of the best scientific and commercial information available and considered the relevant factors, precisely as the ESA requires. FWS's rulemaking process was transparent, and its evaluation of the available information was objective and balanced. This case is, at bottom, a policy disagreement: Plaintiff would prefer endangered status for the ABB even though that position is not warranted by the facts or the law. This policy disagreement does not demonstrate a legal violation, and it does not provide grounds for vacating FWS's Reclassification Decision or 4(d) Rule. See In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.--MDL No. 1993, 709 F.3d 1, 9 (D.C. Cir. 2013) (concluding that challenges to FWS's decision listing a species as threatened "amount to nothing more than competing views about policy and science, on which we defer to the agency" (quotation omitted)). For the reasons set forth above, the Court should enter summary judgment in favor of Defendants and deny Plaintiff's motion for summary judgment.

Respectfully submitted on this 10th day of May, 2022.

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