IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE POLAR BEAR ENDANGERED SPECIES ACT LISTING AND § 4(d) RULE LITIGATION	Misc. Action No. 08-764 (EGS) MDL Docket No. 1993
This Document Relates To: *Center for Biological Diversity, et al. v. Salazar, et al.*, No. 08-2113, and *Defenders of Wildlife v. United States Department of the Interior, et al.*, No. 09-153.	

SUPPLEMENTAL BRIEF OF THE NATIONAL TRADE ASSOCIATIONS ON REMEDY ISSUES, IN RESPONSE TO THE COURT'S APRIL 19, 2011 MINUTE ORDER

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Introduction

The Court has requested supplemental briefs on the "appropriate remedy in the event the Court were to find that the 4(d) Rule violates either (a) the Endangered Species Act [ESA], or (b) the National Environmental Policy Act [NEPA]."[1] The National Trade Association Intervenors[2] support the position of the U.S. Fish and Wildlife Service ("FWS" or the "Service") that the ESA § 4(d) special rule for the threatened polar bear complies with the relevant statutes – the ESA, NEPA, and the Administrative Procedure Act ("APA"). If the Court disagrees, the appropriate remedy is a remand without vacatur.

Vacatur is not warranted for several reasons. First, vacatur is not appropriate under judicial precedent in this Circuit because any defect the Court might find could be corrected on remand. Second, vacating the rule could lead to ill-founded lawsuits, unnecessary administrative actions and delays, and potential liability for many thousands of otherwise lawful activities outside the polar bear's current range. Recognizing the extraordinary scope of the potential harms and exercising the statutory discretion expressly afforded to it under the ESA, the FWS appropriately concluded in the 4(d) Rule that such lawful activities should not be found to result in an ESA § 9 "take" of polar bears, and thus be subject to civil and criminal penalties under 16 U.S.C. § 1540(a) and (b). FWS's determination, as set forth in the 4(d) Rule, is not only lawful and rational, but also promotes certainty in the law, eliminates unwarranted liability, and avoids

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[1] Minute Order (April 19, 2011). Under that Order, Plaintiffs filed their opening brief on May 11, 2011. The "Supplemental Brief of Center for Biological Diversity . . ." (doc. 259) will be referred to as "Pl. Remedy Br."

[2] The "National Trade Association Intervenors" are the American Iron & Steel Institute, American Petroleum Institute, Edison Electric Institute, National Association of Manufacturers, National Chamber Litigation Center, Inc., National Mining Association, and National Petrochemical & Refiners Association.

dubious litigation. Thus, vacatur would result in significant disruption. Accordingly, remand without vacatur is the proper remedy should the Court find the 4(d) Rule deficient.

Background

This case challenges an application of the ESA adopted by the prior Administration and reaffirmed by the current one. Both the prior and current Administrations have acknowledged that the ESA cannot be used to regulate emission of greenhouse gases.[3] Accordingly, under both Administrations the Service has retained its rule issued under ESA § 4(d), providing, *inter alia,* that "otherwise lawful activities" occurring outside "the current range of the polar bear" are not subject to any ESA "take" prohibition. 50 C.F.R. § 17.40(q)(4) (the "4(d) Rule"). As a result, the 4(d) Rule continues its protection from ESA challenges for otherwise legal greenhouse gas-emitting activities, ranging from farming to residential heating to electric power generation.

These limitations on take liability for lawful greenhouse gas activities build on established principles of ESA jurisprudence. Any "take" liability requires a demonstration of proximate causation.[4] Here, the Service has concluded that greenhouse gas emissions from individual, lawful activities outside the polar bear's range cannot be causally linked to any harm allegedly faced by the polar bear. Exercising its discretion to "apply any or all" of ESA § 9(a)(1)'s take prohibitions to a threatened species, *see e.g. Sweet Home Chapt. of Com. for a*

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[3] "[T]he Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts." Interior news release entitled "Salazar Retains Conservation Rule for Polar Bears" (May 8, 2009) (available at http://www.doi.gov/news/09_News_Releases/050809b.html). "Nothing within our authority under section 4(d) of the ESA . . . would provide a means to resolve this threat" from global climate change. 73 Fed. Reg. 76262 (Dec. 16, 2008).

[4] Plaintiffs do not dispute that *Babbitt v. Sweet Home Chapt. of Comtys, for a Great Oregon*, 515 U.S. 687, 691 n.2, 696-703 nn. 9 & 13 (1995), determined that proof of "proximate cause" of an injury or death of an individual animal is necessary to demonstrate a "take" under the ESA.

Great Oregon v. Babbitt, 1 F.3d 1, 7-8 (D.C. Cir. 1993), the Service decided that liability could not be extended to otherwise legal activities outside the animal's range.

The administrative record provides well-reasoned support for, and indeed compels, the Service's decision. As a detailed letter from the Environmental Protection Agency's Assistant Administrator noted, ". . . the risk of harm to any listed species [from any individual source], including the listed corals or polar bears" is "uncertain" and "remote." AR4D014333. In a subsequent memorandum, the U.S. Geological Survey concluded, "[i]t is currently beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of specific climate impacts at an exact location." AR4D014144A.01. In the discussion of this issue in the 4(d) Rule's preamble, the Service specifically addressed the absence of a causal connection between individual greenhouse gas-emitting projects and harm to the polar bear. There, the Service concluded that, "[t]here is currently no way to determine how the emissions from specific action both influence climate change then subsequently affect specific listed species, including polar bears." 73 Fed. Reg. 76265-66.

With respect to NEPA compliance, the Service followed its longstanding policy of declining to prepare an environmental impact statement when the Service makes its listing decision and contemporaneously promulgates a 4(d) rule. The Service explained its reasoning and cited to the only case that addressed this issue, *Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 2005 WL 2000928 (N.D. Cal. 2005). 73 Fed. Reg. 28317 (May 15, 2008); 73 Fed. Reg. 76269 (Dec. 16, 2008). That case held that "NEPA is inapplicable to the promulgation of a Section 4(d) rule." 2005 WL 2000928 at *11-12. In addition, the Service noted that it had determined that rules of this sort are exempt from NEPA and recounted its

policy on the subject. This approach conforms to the Service's historic practice in listing decisions for many other species.[5]

In its April 19, 2011 Minute Order, the Court stated that it is considering what remedy to impose should the Court find a deficiency in the Service's procedure described above. For the reasons described below, the National Trade Associations respectfully submit that any remedy should not include vacatur of the 4(d) Rule.

Argument

I. WHETHER TO VACATE THE 4(D) RULE DURING ANY REMAND TURNS ON THE SERIOUSNESS OF ANY DEFICIENCY AND THE DISRUPTIVE CONSEQUENCES OF VACATUR. THERE IS NO PRESUMPTION IN FAVOR OF VACATUR.

When a federal court in the District of Columbia considers whether to vacate a rule, that court considers both the significance of the legal deficiency and the disruptive consequences that would flow from a potential vacatur. More precisely, "[t]he decision whether to vacate depends on [1] 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150-51

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[5] *See, e.g.,* Listing of the Shovelnose Sturgeon, 75 Fed. Reg. 53,598, 53,603-04 (Sept. 1, 2010); Listing of a population of Northern Sea Otters, 71 Fed. Reg. 46,864, 46,869 (Aug. 15, 2006) ("The opportunity for public comment – one of the goals of NEPA – is also already provided through section 4[d] rulemaking procedures. This determination [that NEPA does not apply to a 4(d) rule] was upheld in Center for Biological Diversity v. U.S. Fish and Wildlife Service, No. 04-04324 (N.D. Cal. 2005)."); Listing of the Chiricahua Leopard Frog, 67 Fed. Reg. 40,790, 40,810 (June 13, 2002); Threatened Status and Special Regulation for the Mountain Plover, 67 Fed. Reg. 72,396, 72,406 (Dec. 5, 2002) (explaining that no NEPA compliance was necessary because the proposed special rule was developed as an integral component of the mountain plover listing action); *accord* Addition of Argali to List of Endangered and Threatened Wildlife, 57 Fed. Reg. 29,014, 28,023 (June 23, 1992) (stating that "an [EA], as defined under the authority of [NEPA], need not be prepared in connection with regulations adopted pursuant to section 4(a) of the [ESA] . . . ." where a special rule issued in concert with a listing action allowed the limited importation of sport-hunted argali sheep trophies).

(D.C. Cir. 1995) (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990).

Under the deficiency prong of the *Allied-Signal* test, to avoid vacatur the agency need show only "a serious *possibility* that the [agency] will be able to substantiate its decision on remand." *Apache Corp. v. FERC,* 627 F.3d 1220, 1223 (D.C. Cir. 2010) (quoting *Allied-Signal, Inc.*, 988 F.2d at 151) (emphasis added). Therefore, vacatur should be used only if it is "unlikely" that the agency "will be able to justify a future decision to retain the rule." *Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027, 1049 (D.C. Cir. 2002). Indeed, if there is a "non-trivial likelihood" that an agency would be able to justify the rule on remand, the court should not vacate the rule. *WorldCom, Inc. v. FCC,* 288 F.3d 429, 434 (D.C. Cir. 2002). Even if the defect at issue is a "material deficiency in the regulation," so long as the defect can be cured on remand, the court need not vacate the rule. *Coalition for Common Sense in Gov't Procurement v. United States,* 671 F. Supp. 2d 48, 59 (D.D.C. 2009).

Moreover, a high level of disruption is not necessary for a court to find vacatur inappropriate. Particularly in cases involving a curable deficiency, courts do not require a high level of disruption in deciding not to vacate a rule. For example, in *Apache Corp.*, the court recognized a "serious possibility" that approval of a pipeline lease could be substantiated on remand and, without *any* finding as to vacatur-caused disruption, the court remanded without vacatur. 627 F.3d at 1223. *See also Fox Television Stations, Inc.,* 280 F.3d at 1048-49 (no set aside even though the "disruptive consequences of vacatur might not be great"). Similarly, in cases where the only "disruption" from vacatur would be repayment or reallocation of funds, courts have declined to require vacatur on remand. *E.g., Milk Train, Inc. v. Veneman,* 310 F.3d 747, 748, 756 (D.C. Cir. 2002) (declining to reallocate funds in 1999 subsidy program for milk

producers); *Sugar Cane Growers Coop v. Veneman,* 289 F.3d 89, 91, 97-98 (D.C. Cir. 2002) (declining to require suspension of payment-in-kind program for sugar crop under Food Security Act). Certainly, the potential for disrupting thousands of greenhouse gas-emitting projects exceeds the threshold enunciated in the case law.

As these decisions illustrate, contrary to Plaintiffs' arguments (Pl. Remedy Br. at 2-3), there is no presumption, let alone a requirement, that a defective rule be vacated because the court has identified some curable shortcoming.[6] "[B]edrock principles of administrative law preclude [a court] from declaring that [an agency] was arbitrary and capricious without first affording [the agency] an opportunity to articulate, if possible, a better explanation." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999); *see Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999). As the Supreme Court has explained:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

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[6] Plaintiffs' suggestion that the APA, by its terms, mandates vacatur is simply wrong. *See* Pl. Remedy Brief at 2-3. Under the language of the statute, "Nothing . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny any other appropriate legal or equitable ground . . ." 5 U.S.C. § 702(1). Moreover, even the passage selectively cited by Plaintiffs is qualified. A reviewing court is to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . .without observance of procedure required by law; . . ." 5 U.S.C. § 706(2). Obviously, this Court would be acting in accordance with the APA, for example, to "find" that a particular agency "conclusion" is "without observance of procedure by law" and set that particular "conclusion" aside without doing away with the rule itself.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).[7] Indeed, *Allied-Signal* relies on an opinion that acknowledges the rarity of vacatur. "We have *commonly remanded without vacating* an agency's rule or order where the failure lay in lack of reasoned decisionmaking . . . [or] where the order was otherwise arbitrary and capricious." *Int'l Union, UMW*, 920 F.2d at 966-67 (emphasis added).

Plaintiffs' assertion of a presumption in favor of vacatur is belied both by the volume of cases remanding without vacatur and by the reasoning of these cases.[8] Plaintiffs cite District Judge Lamberth's view in *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010), as authority for their claim. Yet, Judge Lamberth's "presumption" is plainly at odds with controlling precedent and, as Judge Lamberth recognized, the Supreme Court opinion in *Florida Power & Light*. *Id.* Indeed, consistent with the Supreme Court in *Florida Power & Light* and the overwhelming majority of federal case law, this Court has stated, "remand to the administrative agency is commonly the *only* available or appropriate remedy" in a failure-to-explain case. *Lynom v. Widnall*, 222 F. Supp. 2d 1, 5 (D.D.C. 2002) (Sullivan, J.) (emphasis added).

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[7] *See also Int'l Union, UMW v. FMSHA*, 626 F.3d 84, 94 (D.C. Cir. 2010) (remanding without vacating to allow MSHA to provide explanation for rule); *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (remanding without vacatur "because there seems to be a significant possibility that the Commission may find an adequate explanation for its actions, and, in any event, it appears that the consequences of its current ruling can be unraveled if it fails to").

[8] *See* K. Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemaking*, 80 N.Y.U. L. Rev. 278, nn. 89-94 (2005) (collecting D.C. Circuit cases in which the Court remanded without vacatur). In addition to the D.C. Circuit cases cited above and in the Daugirdas note, numerous D.D.C. opinions support that vacatur is not the presumed remedy for such a defect. *E.g., Mori v. Dep't of Navy*, 731 F. Supp. 2d 43, 49 (D.D.C. 2010); *Utility Workers Union of America v. Fed. Election Comm'n*, 691 F. Supp. 2d 101, 107-08 (D.D.C. 2010); *Loma Linda U. Med. Center v. Sebelius*, 684 F. Supp. 2d 42, 57-58 (D.D.C. 2010); *Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 123-25 (D.D.C. 2006).

II. THE COURT SHOULD NOT VACATE THE 4(d) RULE BECAUSE ANY POTENTIAL DEFECTS IT MIGHT FIND ARE CURABLE ON REMAND.

A long line of D.C. Circuit precedents holds that, "[w]hen an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."[9] Indeed, this Court has already taken this approach in these consolidated cases, remanding for FWS to provide further explanation of its listing decision, without vacatur. *In Re Polar Bear Endangered Species Act Listing And § 4(d) Rule Litigation*, 748 F. Supp. 2d 19, 30 (D.D.C. 2010). *See also Shays v. Fed. Election Comm'n*, 424 F. Supp. 2d 100, 116-17 (D.D.C. 2006) (Sullivan, J.). Here, whether premised on noncompliance with the ESA, APA or NEPA, the FWS can cure any defect the Court might find. Accordingly, the first prong of the *Allied-Signal* test favors remand without vacatur.

A. Any Deficiency in the Service's ESA or APA Compliance Can Be Cured on Remand.

As explained in prior briefing and at oral argument, the FWS and National Trade Associations contend that the 4(d) Rule is both consistent with the ESA and is well-supported by record evidence. Controlling D.C. Circuit precedent holds that § 4(d) confers upon the Service discretionary authority to extend or not to extend the ESA § 9 prohibition on "take" of an *endangered* species to a *threatened* species, or to extend a "take" prohibition only in part,

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[9] *Heartland Regional Med. Center v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). *See, e.g., Apache Corp.* 627 F.3d at 1223; *Northeast Md. Water Disposal Auth. v. EPA*, 358 F.3d 936, 949-50 (D.C. Cir. 2004); *Fox Television Stations, Inc.*, 280 F.3d at 1048-49 (no set aside even though the "disruptive consequences of vacatur might not be great"); *County of Los Angeles*, 192 F.3d at 1023; *Allied-Signal*, 988 F.2d at 151; *Int'l Union, UMW v. FMSHA*, 920 F.2d at 966-67.

without any required showing that this advances "conservation" of the threatened species within the meaning of ESA § 4(d)'s first sentence.[10]

Furthermore, there is ample record support for the 4(d) Rule. For example, FWS has already explained that the lack of a demonstrable causal connection between a particular greenhouse gas-emitting activity and "take" of an individual polar bear means that any such emission would not constitute a "take."[11] Moreover, the record reflects a detailed consideration of this issue of causal connection to greenhouse gas emissions from an individual source, including (i) a letter from the Assistant Administrator of the Environmental Protection Agency to the FWS Director describing the "risk of harm [from greenhouse gas emissions] to any listed species, including . . . polar bears" as "too uncertain and remote" to trigger ESA obligations (AR4D014333), and (ii) a United States Geological Survey Memorandum concluding that, "it is currently beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of specific climate impacts . . . ." (AR4D014144A.01).

Plaintiffs argue that the Rule is defective on various grounds under the ESA and NEPA. *See* Pl. Remedy Br. at 1, 4-7. For example, Plaintiffs allege that the Service has not properly explained the exercise of discretion under ESA § 4(d). We dispute all of Plaintiffs' arguments

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[10] *Sweet Home Chapt. of Cmtys. for a Great Oregon v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993). *See also Wash. Envtl. Council v. Nat'l Marine Fisheries Serv.*, 2002 WL 511479 at *8 (W.D. Wash. 2002). *See* "Mem. of the National Trade Ass'ns . . . on the 4(d) Rule . . ." at 4-12 (doc. 184, filed March 26, 2010); "Reply of the National Trade Ass'ns . . . on the 4(d) Rule" at 2-6 (doc. 209, filed Aug. 16, 2010); "Mem. in Support of Fed. Defs' Cross-Motion . . ." at 15-32 (doc. 156, filed Feb. 2, 2010); "Reply in Support of Fed. Defs' Cross-Motion for Summ. J. on the 4(d) Rule" at 2-24 (doc. 205, filed July 2, 2010). Even Plaintiffs admit that "Section 4(d) may be read to contain two separate grants of authority." "Pls' Reply . . . on the § 4(d) Rule Claims" at 5 (doc. 202, filed May 25, 2010).

[11] 73 Fed. Reg. 28247 and 28300 (May 15, 2008); 73 Fed. Reg. 76265-66 (Dec. 16, 2008).

about such defects.[12] However, if the Court should find that there is such a defect, the proper remedy would be to remand without vacatur, identifying issues of concern to the Court, so FWS could provide a more fulsome description of its reasons for exempting otherwise lawful activities outside the polar bear's range from the ESA § 9(a)'s take prohibitions and address the Court's concerns. And, though the statute does not require that a 4(d) rule "provide for conservation,"[13] FWS could augment its discussion of the conservation effects of the 4(d) Rule.

The record contains considerable explanation on the lack of a proximate causation link between any single source of greenhouse gas and injury/take of a polar bear. If that explanation is insufficient, the Service could supplement this discussion with further analyses.

The critical point at this juncture of the litigation is that there clearly is more than a "serious possibility" or "non-trivial likelihood" that the Service can address any defect under the ESA or APA.

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[12] Plaintiffs' Reply seems to concede that FWS had provided a procedurally sufficient explanation and that many GHG issues were not before the Court. *See* "Pls. Reply in Support of Their Motion for Summ. J. . . " at 12 n.5 (doc. 202, filed May 25, 2010) ("Pl. Reply"). Instead, Plaintiffs argue that it is *substantively* arbitrary to exempt an alleged source of future threats to the polar bear – mankind's billions of sources of GHG emissions – from ESA citizen suits alleging "take" violations. *See* Pl. Reply at 10-13. In the current briefing, Plaintiffs argue a variant of substantive arbitrariness under the APA, to which we have not had an opportunity to respond. *See* Pl. Remedy Br. (at 1, 6-7). Judicial review should not extend to oversight of an Executive Branch agency's legitimate policy choices: "When a challenge to an agency's construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail; in such a case, federal judges . . . have a duty to respect legitimate policy choices made" by the co-equal Executive Branch. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency"); *Springfield, Inc. v. Buckles*, 292 F.3d 813, 819 (D.C. Cir. 2002). And, "regulations . . . are not arbitrary just because they fail to regulate everything than could be thought to pose any sort of problem." *Personal Watercraft Ind. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995); *see Mobil Oil Exp. & Prod. Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 230-31 (1991).

[13] *See supra,* n. 10.

Plaintiffs' reliance on *NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007), is unwarranted. Pl. Remedy Br. at 5-6. In *NRDC*, the court found that in light of the statutory violations committed by EPA there – that the Clean Air Act did "not permit EPA to set a 'no emission reduction' standard for listed [pollutants], create a low-risk subcategory, or extend the deadline for sources to comply" – EPA "could not justify those choices by shoring up its reasoning on remand." *NRDC*, 489 F.3d at 1374. In contrast, here, the Service can address any potential defect in the 4(d) Rule on remand. Similarly, the Court's decisions in *Humane Soc'y of the U.S. v. Kempthorne*, 579 F. Supp. 2d 7 (D.D.C. 2008), and *Friends of Blackwater v. Salazar*, 2011 U.S. Dist. LEXIS 31249 (D.D.C. 2011), upon which Plaintiffs rely (Pl. Remedy Br. at 5) are inapposite. Both cases concerned delisting rules that removed existing protections from previously listed species, action that the Court found counseled in favor of vacatur upon remand. Here, the issue is not FWS's decision to remove existing protections, but rather what protections for a newly listed species are warranted and whether the Service adequately explained its decision.[14]

Accordingly, if the Court were to find that the Service violated the ESA or APA, it should have confidence that any deficiency can be repaired on remand. As a result, remand without vacatur is the appropriate remedy.

B. Any Deficiency in the Service's NEPA Compliance Can Be Cured on Remand.

Because NEPA is a purely procedural statute, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-353 (1989), an appropriate remedy for a NEPA violation should be

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[14] Moreover, in neither case did the Court conclude that vacatur is required simply because a rule was inconsistent with the ESA; rather, the Court's decisions in those cases turned on the second *Allied-Signal* factor. As explained *infra* in Section III, the disruption that would result from vacatur of the 4(d) Rule weighs in favor of remand without vacatur.

remand without vacatur, particularly where there are reliance interests involved on a rule or other continuing agency action.[15]

If this Court were to find fault with the Service's explanation of its compliance with NEPA, the Court should remand the matter for the Service to determine what level of NEPA analysis should be required. It is for FWS, not the Court, to decide whether its actions with respect to the polar bear (i) qualify for a categorical exclusion, (ii) require an environmental assessment ("EA") and a potential Finding of No Significant Impact ("FONSI"), or (iii) require preparation of an environmental impact statement ("EIS").[16]

Here, the Service might well decide that, because it has listed the bear as threatened and because the protections of the Marine Mammal Protection Act ("MMPA") continue to apply, the application of NEPA might not require detailed environmental analysis. Indeed, given the administrative record, FWS might determine that the rule is properly within the Service's categorical exclusion for "regulations . . . of [a] legal, . . . or procedural nature; or whose environmental effects are too . . . speculative for current NEPA analysis." 43 C.F.R. § 46.210(i).

Alternatively, the Service could conclude that some assessment of the environmental impacts of its decision through preparation of an EA, accompanied by a FONSI, would be sufficient. Even Plaintiffs accept this possibility. *See* Pl. Brief on Merits at 47-48 (citing with

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[15] *See, e.g., Natural Resources Defense Council v. Nuclear Reg. Comm'n*, 606 F.2d 1261, 1272-73 (D.C. Cir. 1979); *State of Alaska v. Andrus*, 580 F.2d 465, 485-87 (D.C. Cir. 1978); *Hammond v. Kempthorne*, 448 F. Supp. 2d 114, 121 (D.D.C. 2006); *Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 66-67 (D.D.C. 2005) (remanding without vacatur for agency to prepare EA); *Asphalt Roofing Mfg. Assoc. v. ICC*, 567 F.2d 994, 1006 (D.C. Cir. 1977) (remanding without vacatur otherwise valid ICC orders for ICC to conduct NEPA analyses).

[16] A Court should not "substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21 (1976). Accordingly, if a court concludes that some NEPA document is required, it normally should remand the agency's decision on whether to prepare an EA or an EIS. *See O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 239-40 (5th Cir. 2007); *Gov't of Province of Manitoba v. Norton,* 398 F. Supp. 2d 41, 65-67 (D.D.C. 2005).

approval two instances where the Secretary of Commerce issued Environmental Assessments – as opposed to an EISs – in conjunction with proposed 4(d) rules).

In either case, on remand, the Service's view of NEPA would essentially require no more than an explanation. Either the Service would explain why its categorical exclusion applies and why it does not perceive "extraordinary circumstances" that might require even an EA[17] or, alternatively, the Service would assess environmental impacts associated with the 4(d) Rule in an EA and recount its assessment of impacts in an EA and FONSI. In short, this is precisely the sort of subject where the agency will be able to "substantiate its decision on remand." *Allied-Signal, Inc.*, 988 F.2d at 151. Indeed, in this instance, Plaintiffs, by endorsing an EA, have essentially conceded the "serious possibility" or a "non-trivial likelihood" that the Service can remedy any possible NEPA violation by assessing environmental impacts and explaining its decision in an EA. It follows that the rule should not be vacated for want of compliance with NEPA.

The same result would hold even if the Service were to conclude that an EIS might be warranted under all the circumstances of this controversy. The decision to prepare an EIS would come in the context of the other statutory protections afforded by the MMPA and the Service's other actions and protections pursuant to the ESA. What is more, even in the case of a perceived need for a full-blown EIS, the Supreme Court has rejected the proposition that a NEPA violation should be presumed to give rise to an injunction, an equitable remedy analogous to vacatur:

> [T]he statements [of the lower courts] . . . appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted . . . . It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue . . . .

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[17] *See* 40 C.F.R. § 1508.4.

Monsanto Co. v. Geertson Farms, 130 S. Ct. 2743, 2757 (2010); *see also Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008) (where there is a NEPA defect, such as failure to prepare environmental documents, court may issue declaratory relief rather than an injunction).

Plaintiffs reliance on *Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010), to support their claim that vacatur is the standard remedy for NEPA violations is misplaced. First, in *Reed,* the record documented very serious doubts about a contractor's performance and the environmental consequences from the contractor's deficient performance.[18] Here, no comparable conditions exist. Second, in *Reed*, the government's record was devoid of any explanation for invoking a categorical exclusion from NEPA in the face of a record of serious environmental deficiencies. *Reed,* 744 F. Supp. 2d at 115. Here, the Service explained its decision, cited authority for its position, and followed its longstanding practice. Third, the federal defendants in *Reed* did not object to vacatur. *Reed,* 744 F. Supp. 2d at 119. Here, both the Service and the regulated community strongly object. Finally, the matter at issue in *Reed* was a narrow, individual contract as opposed to a rulemaking that could affect thousands of sources nationwide.

Plaintiffs' bald assertion that vacatur is needed to ensure a fair decisionmaking process on remand is wrong. *See* Pl. Remedy Br. at 7, 15-16. Within the D.C. Circuit, courts cannot vacate on the assumption that, without vacatur, the agency will not fairly reconsider its decision following a NEPA analysis. Courts "*should not prejudge* the reconsiderations that agencies will

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[18] This record evidence included "unsuccessful" completion of requirements of a "Biology Program," failure to complete two of three prescribed burns in a Fire Program, defects in programs that affect "public health," "wildlife health and safety," and "habitat maintenance," and underfeeding 64 bison. In addition, FWS had directed the contractor to cease performing for its failure to meet various wildlife management standards. *Reed,* 744 F. Supp. 2d at 117.

make" after a NEPA document. *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456-57 (D.C. Cir. 1977). This approach accords with Ninth Circuit practice where a defective EIS does not "void" the underlying federal action, and courts "must assume that the Secretary will comply with the law" by reconsidering after he or she reviews the NEPA document. *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156-58 (9th Cir. 1988). A "NEPA violation is subject to traditional standards in equity for injunctive relief and does not require an automatic blanket injunction against all development." *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 842-44 (9th Cir. 2007); *see also Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069 (9th Cir. 2010).

III. BECAUSE SETTING ASIDE THE 4(d) RULE WOULD HAVE DISRUPTIVE CONSEQUENCES, THE COURT SHOULD NOT VACATE THE RULE.

The second factor to be considered in deciding whether to vacate or remand is "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 151. Here, there are compelling reasons showing that setting aside the 4(d) Rule would have significant disruptive consequences. Accordingly, even if this Court finds a deficiency, the 4(d) Rule should be remanded without vacatur.

A. Vacating the 4(d) Rule Would Have Disruptive Consequences Outside The Range Of The Polar Bear.

Under the 4(d) Rule, "otherwise lawful activities" occurring outside "the current range of the polar bear" are not subject to any ESA "take" prohibition. 50 C.F.R. § 17.40(q)(4). As discussed above, if section 17.40(q)(4) were to be suspended, and if the similar May 2008 interim rule were not reinstated, otherwise-lawful activities occurring outside the polar bear's range could be subject to attack under the ESA "take" prohibition. Such a result would produce several disruptive consequences:

1. Vacatur would expose thousands of entities whose legal activities emit greenhouse gases (*e.g.*, farmers, coal and oil and gas producers and refiners, electricity

producers) to unnecessary ESA "take" litigation risks and expenses. These are not idle or unfounded concerns. Plaintiffs imply that they are ready to bring ESA citizen suits alleging that certain greenhouse gas-emitting activities must be enjoined pending FWS's issuance of incidental take permits, because such activities allegedly "take" the polar bear. *See* Pl. Remedy Br. at 14 n.9. To be sure, the National Trade Associations believe such suits would ultimately fail on the merits. Even so, it is highly likely that scores of cases would be filed, presenting issues of proximate cause and other facts, and straining limited judicial, agency, and private resources. *Cf. Louisiana Federal Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (remanding in part in light of economic harm that would result from vacatur); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (same). Unleashing Plaintiffs to file a blizzard of frivolous citizen suits against entities that emit greenhouse gases anywhere in the United States, potentially leading to judicial gridlock, is the paradigmatic example of disruption calling for rejection of vacatur.

2. Another set of disruptive consequences would be the potential delays in issuance of approvals and other authorizations required for otherwise lawful greenhouse gas-emitting activities. Some federal agencies could interpret a Court order setting aside the 4(d) Rule as a signal that regulated activities that emit greenhouse gases require incidental take authorization under the ESA. If a proposed project requires some federal authorization, regulators and project proponents might face uncertainty as to whether an incidental take statement should be obtained after ESA § 7 consultation with the Service. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). This uncertainty would delay decisions on projects involving greenhouse gas emissions while agencies and regulated entities assess whether some formal authorization of incidental take of polar bears will be required.

3. Even if a project requires no federal permit, some might conclude that incidental take approval is necessary under ESA § 10(a), 16 U.S.C. § 1539(a). ESA § 10(a) can require that the project proponent commit land and resources to a habitat conservation plan, and the project proponent might, as a precaution, seek to obtain an incidental take permit under conditions set by FWS. State and local agencies will be uncertain about requiring such a permit and about the litigation risk of a decision not to require the permit.[19] The time delays for obtaining incidental take permits under ESA § 10 are substantial. A recent report found that the average time to obtain such a permit, including an EIS, is *54.9 months*.[20]

Plaintiffs argue, contrary to the reasoning of the D.C. Circuit, that courts should simply ignore "whether vacatur will be disruptive *to regulated entities*." Pl. Remedy Br. at 14. In fact, the D.C. Circuit has specifically considered whether "vacatur would be unnecessarily disruptive" to industries exempted from EPA regulation in deciding to remand a rule without vacatur. *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994) (remanding without vacatur EPA rule exempting small, transient, non-community water systems from compliance with the national primary drinking water standard for lead); *see also Louisiana Federal Land*

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[19] *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (finding a state regulatory agency liable for "take" from private fishing). Several legal commentators conclude that government regulators should not be culpable causes of "take." *E.g.*, Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations under the ESA*, 45 NAT. RES. J. 103 (2005); Ruhl, *State and Local Government Vicarious Liability under the ESA*, 16 NAT. RES. & ENV'T 70 (ABA Fall 2001).

[20] AN INDEPENDENT EVALUATION OF THE U.S. FISH & WILDLIFE SERVICE'S HABITAT CONSERVATION PROGRAM at 31 (Management Systems International Sept. 2009) (available at http://www.familyforestfoundation.org/downloads/hcp/papers/MSI%20HCP%20Evaluation%20Report%20-%20Final%209%2022%202009.pdf)

Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003) (protecting "voluntary transactions" that occur under the rule).[21]

Similarly, this Court should find that vacatur would be unnecessarily disruptive to the otherwise lawful activities outside the polar bear's range that are exempted from ESA "take" litigation or regulation by 50 C.F.R. § 17.40(q)(4).

B. Vacating That Portion Of The 4(d) Rule That Applies Within The Polar Bear's Range Could Disrupt Alaska Activities.

Many economic and cultural activities in northern Alaska depend on MMPA permits for allowing non-lethal harassment "takes" of polar bears. By virtue of 50 C.F.R. § 17.40(q)(2), such an MMPA permit is all that is needed to authorize such non-lethal "takes" of polar bears. Alaska Native and other interests in Alaska have relied on the 2008-adopted 4(d) Rule for the ability to conduct activities with MMPA permits. If the 4(d) Rule is set aside, NGOs will seek to suspend actions such as vital oil and gas exploration and development until ESA incidental take permission is obtained. These actions could sap the scarce resources of agencies and the courts. And, of course, potential delays for ESA incidental take permitting and litigation would cause serious disruptions of oil and gas, construction, and other activities in Alaska.[22]

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[21] *Water Works* also illustrates that Plaintiffs (e.g., Remedy Br. at 9, 14) are unconvincing in arguing that the most environmentally protective result must be favored in deciding whether to vacate a remanded rule. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (improper for courts to rule based only on the statute's primary objective); *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 41-44 (D.D.C. 2007) (despite the "conservation" policy in the ESA, ESA § 10 does not require that incidental take permits advance "conservation") (Sullivan, J.).

[22] To avoid unnecessary repetition, we incorporate and adopt the Alaska Intervenors' discussion of the details of this potential delay.

IV. IF THE CURRENT 4(d) RULE WERE TO BE VACATED, THE INTERIM RULE SHOULD APPLY.

If the challenged 4(d) Rule adopted at 73 Fed. Reg. 76249 (Dec. 16, 2008) were to be set aside, by operation of law, the nearly identical interim 4(d) rule adopted at 73 Fed. Reg. 28305 (May 15, 2008) should be reinstated. Supplanting the current rule ordinarily has the effect of reinstating the pre-existing rule. *See Action on Smoking & Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("by vacating or rescinding the [rule at issue], the judgment of this court had the effect of reinstating the rules previously in force"). *See also Am. Petroleum Inst. v. Johnson,* 541 F. Supp. 2d 165, 186-87 (D.D.C. 2008) (prior regulation remains in force after subsequent regulation is vacated). If the Court were to vacate the 4(d) Rule, it should confirm that the interim 4(d) rule is effective, because that interim rule cannot be set aside until it has been challenged and its legality has been resolved.

Consequently, vacatur of the 4(d) Rule would simply lead to additional unnecessary litigation in this Court, further impacting scarce judicial resources. The Court can consider the impacts on scarce judicial resources in deciding not to vacate an agency action. *See generally Carpenters Industrial Council v. Salazar*, 734 F. Supp. 2d 126. 135-37 (D.D.C. 2010) (Sullivan, J.). Moreover, as explained above, during the time it would take to adjudicate any future challenge to the interim 4(d) Rule, the Service could correct the purported deficiency found by the Court with respect to the 4(d) Rule, another reason why vacatur in this case would be wasteful and ill-advised.

Conclusion

Because the FWS can cure any purported defect with the 4(d) Rule, vacatur is unwarranted, and the 4(d) Rule should remain in place during the pendency of any remand.

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