IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

STROMBORG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 14-cv-01807-JDB
	)	
UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING FURTHER JUDICIAL ACTION

Pursuant to the Court's March 29, 2016 Order, Defendants Fish and Wildlife Service, *et al* ("FWS" or "Service"), address further judicial action following the Court's Memorandum Opinion granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Cross-motion.[1]

Under the circumstances, it is appropriate for the Court to remand this matter to the agency to 1) take a "hard look" at the Depredation Orders' ("Orders") effect on cormorant populations and 2) consider a reasonable range of alternatives, consistent with the National Environmental Policy Act ("NEPA"), Council on Environmental Quality Regulations, and the Court's Memorandum Opinion. However, the Court should not vacate the Orders at issue in this litigation while the agency conducts the additional NEPA analysis. Vacatur is not necessary or appropriate where, as here, it would result in environmental, economic, and administrative

[1] On April 14, 2016, FWS and Plaintiffs discussed a possible joint remediation plan but did not reach agreement.

injuries that outweigh any harm identified by Plaintiffs. Accordingly, the Court should remand to FWS without vacatur.

I. PROCEDURAL HISTORY

In this matter, Plaintiffs claimed that the FWS violated NEPA, 42 U.S.C. § 4321-4370m-12, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, et seq. by extending the Orders without preparing an Environmental Impact Statement ("EIS"); by relying on an insufficient Environmental Assessment ("EA") to support the Finding of No Significant Impact (FONSI"); and by failing to consider a reasonable range of alternatives. In a March 29, 2016 Memorandum Opinion (ECF No. 36), this Court concluded that FWS had not taken a hard look at the Orders' effects on the cormorant populations and failed to consider a reasonable range of alternatives. *Id.* at 17. The Court, therefore, granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Cross-motion.

The Court did not enter final judgment or issue an order concerning relief. In the Memorandum Opinion, the Court noted that the Plaintiffs asked that the Court vacate the Orders. *Id.* at 15. Because the parties did not discuss the issue of relief in the summary judgment briefing, the Court asked for supplemental briefing to address whether vacatur is proper and to propose a remediation plan on remand. *Id.* at 16.

II. ARGUMENT

A. THE COURT SHOULD REMAND THE MATTER TO THE FWS FOR ADDITIONAL NEPA REVIEW, BUT NOT VACATE THE ORDERS

When a Court makes a determination that an agency's NEPA compliance is insufficient, the proper remedy is a remand to the agency for further proceedings. *See* e.g., *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 596 (D.C. Cir. 1994); *Back Country Horsemen of Am.*, 424 F. Supp.2d 89, 91 (D.D.C. 2006); *Nat' Wildlife Fed' v. Norton*, 332 F. Supp.2d 170, 182 (D.D.C.

2004). The same is true under the APA. "Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) (citation omitted); *see also Fla. Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985) (proper course is to remand to agency for additional investigation or explanation); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*, 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

However, a Court need not necessarily vacate the challenged agency action during remand. *See Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002). As the Court noted, there is "discretion in deciding appropriate relief based on what 'equity demands.'" ECF No. 36 at 16 (quoting *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991)). The decision whether to vacate or not "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." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002) (quoting *Allied-Signal v. U. S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)). In this case, as argued below, equitable considerations argue for leaving the Orders in place while the FWS conducts the ordered NEPA analysis.

In considering whether vacatur is warranted based on the seriousness of the violation, the court should consider whether the same rule could be in place following remand. *Milk Train*, 310 F.3d at 755-56. As the D.C. Circuit explained, "In our view, there is at least a 'serious possibility' that the Secretary on remand could explain her use of the 1999 funds in a manner

that is consistent with the statute or choose an allocation method to correct the problem, a factor that favors remanding rather than vacating." Id. at 756 (citing *Allied-Signal*, 988 F.2d at 151). NEPA is a procedural statute and requires no substantive outcome. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Therefore, if the Court were to remand solely to allow the agency to conduct a NEPA analysis, there is a "serious possibility" that, following that analysis, the same 5-year extension of the Depredation Orders could be in place. This factor weighs in favor of not vacating the existing rule. See *Milk Train*, 310 F.3d at 756; *see also Natural Res. Def. Council*, 275 F. Supp. 2d at 1145 ("Where the existing rule is more likely to fall during remand, the courts are more reluctant to enforce that rule in the intervening period.").

Nor is it mandatory that a Court provide injunctive relief upon a finding of a NEPA violation. "Injunctive relief does not follow automatically upon a finding of statutory violations, including environmental violations. On the contrary, '[a]n injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Town of Huntington v. Marsh*, 859 F.2d 1134, 1143 (2d Cir. 1988) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). "When equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy." *Fertilizer Institute*, 935 F.2d at 1303 (citing *Western Oil & Gas Assoc. v. EPA*, 633 F.2d 803, 813 (9th Cir.1980); *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 236 (5th Cir.1989)).

A court's consideration as to whether to vacate a promulgated rule has also been roughly analogized to the standards for issuing preliminary injunctive relief. *International Union, United Mine Workers of America v. Federal Mine Safety & Health Administration*, 920 F.2d 960, 967 (D.C. Cir. 1990) (providing "cf." cite to *Wash. Metropolitan Area Transit Comm'n v. Holiday*

Tours, Inc., 559 F.2d 841, 844 (D.C. Cir.1977)). Here, since States and entities are already using the Orders, and have been since its promulgation in 1998, an injunctive order would constitute an alteration of the status quo, for which the burden on the party requesting the relief is even greater. *See Qualls v. Rumsfeld*, 357 F. Supp.2d 274, 278 (D.D.C. 2005) (requiring a showing that the moving party is clearly entitled to relief or that extreme or very serious damage will result from the denial of the injunction).

Furthermore, the purposes of NEPA do not mandate vacatur. As the Supreme Court has stated, a court finding a NEPA violation "has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS." *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 381 (2008); *see also Hammond v. Kempthorne*, 448 F. Supp. 2d 114, 121 (D.D.C. 2006) ("Under NEPA, the Court retains its traditional equitable discretion to decide on an appropriate remedy based on balance of competing harms.")(citations omitted). When a court finds a NEPA violation, it must decide whether an action may proceed while the NEPA violation is corrected by the agency based on consideration of the potential environmental effects of the action and "the social and economic costs of delay." *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261, 1273 (D.C. Cir. 1979). "What is called for, in each case, is a 'particularized analysis' of the violations that have occurred, of the possibilities of relief, and of any countervailing considerations of public interest." *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978), vacated in part on other grounds, *Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (quoting *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 513 (D.C. Cir. 1974). Thus, a court need not vacate an agency action based upon a NEPA violation.

A sister D.C. District Court in a similar NEPA lawsuit for the FWS' hunting program on the National Wildlife Refuge System remanded the NEPA analysis to the agency without vacatur. *See Fund for Animals v. Hall*, 777 F. Supp. 2d 92 (D.D.C. 2011).[2] The Court weighed the impact of vacating the program to the NEPA deficiency, in that case the failure to conduct a cumulative impact assessment, and determined that the disruption to the program would outweigh the harm to the Plaintiffs. In that case, FWS pledged to conduct a new NEPA analysis in about 8 months, comparable to the 6.5 months here (*see* below Section III). (*See Also Fund for Animals v. Mainella*, 283 F Supp.2d 418, 434 (D. Mass. 2003) where Court declined to enjoin the National Park Service's hunting program while new NEPA analysis was being conducted. "The most equitable and prudent solution is to allow the status quo to continue during the pendency of the environmental review.")

1. Vacatur Of The Orders Would Have Wide-Ranging Detrimental Impacts

In determining whether to leave Orders in effect pending further NEPA analysis on remand, the Court should consider the need to avoid potential "irreversible effect[s] on the environment, until the possible adverse consequences are known" and the need "to preserve for the agency the widest freedom of choice when it reconsiders its action after coming into compliance with NEPA." *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977); *see also Province of Manitoba*, 398 F. Supp. 2d at 66-67. These factors do not support vacatur of the Orders. First, the agency has already engaged in a lengthy administrative process, and allowing the Orders to remain in place will not in any way limit the agency's options on remand.

[2] At 97, "Nonetheless, despite finding that the contested final rules were promulgated in violation of NEPA, Judge Urbina held off on vacating the rules. [448 F. Supp. 2d 127 (D.D.C. 2006)] at 137 n.7. The Court instead granted the Fish and Wildlife Service additional time to complete a new environmental analysis. [Doc. 94 at 2.]"

Rather, not vacating the Orders would simply preserve the status quo pending further analysis of environmental effects by the agency. See Alaska, 580 F.2d at 485.

Leaving the Orders in place would be appropriate because doing so will prevent significant disruptive consequences and, thus, leaving the rule in place satisfies the second factor of the Allied-Signal test. As described in detail in the attached Declaration of Jerome Ford, vacatur of the Orders would have wide-ranging detrimental impacts. *See* Decl. of Jerome Ford, attached as Exhibit 1. Specifically, vacatur of the Orders will result in numerous, significant disruptive consequences, including environmental impacts (Decl. ¶ 13-14), administrative burdens on the Service (Decl. ¶ 12, 18-20), burdens on the regulated community (Decl. ¶ 12, 17, 19), disruption of the activities on the regulated community (Decl. ¶ 12, 17-19), and potential litigation burdens on the courts, the regulated community, and other Federal agencies (challenges to the depredation permits described in Decl. ¶ 12). Under such circumstances, the Court should exercise its discretion to leave the Orders in place.

Detrimental environmental impacts would likely result from vacating the Orders. FWS estimates that, without the Orders, the cormorant population would increase and stabilize at higher numbers, leading to detrimental impacts to colonial waterbirds and other co-nesting species. Specifically, cormorants may cause habitat damage by removing vegetation, and impacting forest communities by changing the soil characteristics through the deposition of acidic guano. Cormorants may also move in to areas where they may congregate and damage vulnerable species, or certain age-classes of important fish stocks. In some locations this may shift predation pressure onto high conservation priority fish species. Decl. ¶ 13. The severity of habitat destruction partially caused by cormorants can be seen in Decl. ¶ 14 (and the Declaration's Exhibit 1). Considering the negative consequences on the environment and

resources at issue is undeniably a valid reason for the Court to leave the Orders in place. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) ("This court has further noted that it is appropriate to remand without vacatur in particular occasions where vacatur 'would at least temporarily defeat . . . the enhanced protection of the environmental values covered by [the EPA rule at issue].'") (quoting *Environmental Def. Fund v. U.S. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990)).

Second, vacatur of the Orders will cause substantial disruption to the regulated community and the Service. If the Court were to vacate the Orders, the immediate effect would be that activities the regulated community undertakes on a daily basis would have to stop until a depredation permit was submitted, the application evaluated and appropriate action taken under the MBTA, and subsequently approved. (Decl. ¶ 12, 17, 19). This reason alone provides ample rationale to leave the Orders in place, as courts repeatedly have exercised their discretion to avoid the vacatur of an agency action where such vacatur would cause serious disruption of an affected industry and entities. *See, e.g., Chamber of Commerce v. SEC*, No. 05-1240, 2006 WL 890669, at *16-17 (D.C. Cir. Apr. 7, 2006); *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949-50 (D.C. Cir. 2004); *North Carolina Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 104 (D.D.C. 2007) ("the court of appeals does seem to disfavor invalidating a regulation in whole or part where doing so would cause unwarranted disruption to regulated industry or the parties.") (citations omitted).

Furthermore, there would be significant impacts to recreational fisheries and the aquaculture industry. Fisheries impacts can be in the millions of dollars, and that these trust resources are co-managed with tribes. Decl. ¶ 15. Similarly, the impacts to the aquaculture could be in the millions of dollars. Decl. ¶ 16. The D.C. Circuit has frequently considered the

reliance interests of the regulated community in deciding against vacatur. *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994); *Chamber of Commerce*, 443 F.3d at 909; *Louisiana Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003). This Court should also consider these legitimate interests and leave the Orders in place. For the Service, vacatur of the Orders would result in additional administrative burdens due to the need to conduct the required analysis of the depredation permit. Decl. ¶ 18. This additional burden could result in substantial delays of necessary management to the regulated community and the public. Decl. ¶ 12. In addition, some environmentally beneficial activities would not occur as it would be cost prohibitive by the applicant. Decl. ¶ 19.

For these reasons, FWS requests that this Court allow the Orders remain in place during the NEPA remand process. *See Fertilizer Institute*, 935 F.2d at 1312 (declining to vacate rules where removal might reasonably be expected to have substantial adverse consequences; also noting, "'[o]ur intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible.'") Here, because of the beneficial environmental effects from the Orders, the most equitable and prudent solution is to permit the Orders to continue during the pendency of the environmental review.

2. Plaintiffs' Recreational And Aesthetic Interests Do Not Tip The Balance To Vacutur

In determining whether vacatur of the Orders is an appropriate remedy in this case, the Court should consider the irreparable harm to Plaintiffs if vacatur is not ordered, balanced against the harm to defendants if that remedy is ordered *See Wash. Metropolitan Area Transit Comm'n*, 559 F.2d at 844(cited in *Int' Union*, 920 F.2d at 967). Here, Plaintiffs are not able to demonstrate any irreparable harm that outweighs the significant harm to Defendants and the environment if vacutur is ordered.

Plaintiffs argue that their recreational and aesthetic interests will be irreparably harmed by the decreased number of cormorants if the Orders are left in effect. In this Circuit, however, the mere fact that there would be a decreased number of cormorants does not necessarily satisfy the irreparable harm standard. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir.1975) ("To equate the death of a small percentage of a reasonably abundant game species with irreparable injury without any attempt to show that the well-being of that species may be jeopardized is to ignore the plain meaning of the word."). Cormorants are "reasonably abundant," indeed, the aim of the Orders is to ensure that they do not become overabundant. Accordingly Plaintiffs cannot show how the limited number of cormorants taken under the Orders irreparably harms their recreational and aesthetic interest in contrast to the detrimental impacts of vacatur outlined above.

B. FWS PROPOSES A REASONABLE REMEDIATION PLAN ON REMAND

Given the substantial harm that would result if the Orders are vacated, FWS believes that remand without vacatur is appropriate and submits the following proposed remediation plan. FWS's remediation plan will allow FWS to ensure meaningful compliance with NEPA, while, at the same time, avoiding the environmental and economic harm that would result from vacatur.[3]

To address the defects identified by the Court, FWS plans to amend its NEPA analysis, provide a 30-day public comment on the amended NEPA analysis, and consider the comments and publish a new Final Rule by October 31, 2016. This timeline is described in detail below.

First, FWS anticipates that it will require four months for staff to perform the NEPA

[3] During the NEPA remand process, FWS requests that the Orders remain in place while the revised EA is in preparation in order to avoid adverse ecological and economic impacts. If the court chooses to vacate any part of the Orders, FWS requests that the remedy be as narrowly tailored as possible to maintain the Orders during the remand process. Decl. ¶ 5.

analysis, update the models, and develop and analyze reasonable alternatives. In addition, once the draft amended Environmental Assessment ("EA") is ready for Washington, D.C. Office review, FWS will make every effort to streamline the process of review. FWS will publish in the Federal Register around August 15, 2016 the revised EA and Notice of Availability, and make the new NEPA analysis available for public comment for 30 days. FWS will review, quantify, collate, and consider all comments, and then analyze and respond to all substantive comments received. FWS expects it will likely require about a month to analyze and respond to the public comments. After analyzing comments and preparing a final determination and final EA, the FWS will utilize an expedited review process. FWS believes it can have final documentation prepared by October 15, 2016. Overall, FWS requires a total of approximately seven months to prepare its supplemental analysis under NEPA, provide opportunity for adequate public input, consider and, as appropriate, respond to that input and finalize our determination under NEPA and the provisions of the Migratory Bird Treaty Act to again publish the Final Rule in the Federal Register by October 31, 2016. Decl. ¶ 4. (At this time, FWS has no reason to believe this action, the five-year extension of the existing Orders, will require an EIS; for more about a potential EIS see Decl. ¶ 6.)

In order to take a hard look on the Orders' effects on cormorants, FWS will need to update its assessment framework. Previously, FWS used a Potential Biological Removal ("PBR") approach to gauge the effect of alternatives on the cormorant population in the 2009 EA. The PBR framework allows FWS to determine a limit to human-caused mortality that would ensure populations remain above the level of maximum net productivity, thus maintaining long term sustainability. Decl. ¶ 7.

FWS will again utilize the PBR approach, coupled with a population model, to project the

size of the cormorant population 5 and 20 years into the future based on the hypothesized effects of the alternatives. All of the population analysis presented in the 2014 EA will be updated to better communicate the effects of the Orders on the cormorant population through at least 2019. In order to perform this update analysis, FWS will require annual nest counts of cormorant throughout the Great Lakes; annual number of nests oiled at each colony in the Great Lakes; and the annual number of cormorant killed under the depredation order. These data are available through 2014. FWS will request egg oiling and harvest data will be requested from Service Regional Offices and the USDA Wildlife Services. Once all data are acquired, all modeling can be completed and results summarized. Decl. ¶ 8.

FWS will reconsider an expanded range of alternatives. FWS has reviewed comments received on the 2014 EA, and will develop reasonable alternatives that take into consideration the approaches suggested by the commenters. FWS will consider some alternatives from previous NEPA documents, some approaches that were suggested by commenters, and some new alternatives. Decl. ¶ 9-10.[4]

C. IF THE COURT WERE TO REMAND AND VACATE, IT SHOULD STAY THE DATE OF VACATUR TO AVOID UNDUE HARDSHIP.

Finally, if the Court is inclined to vacate the Orders, the Service requests that the Court exercise its equitable discretion to stay the effect of its order to allow the Service time to address NEPA

[4] FWS is amenable, if the Court chooses a remand without vactur, to modify the Orders to require both increased spatial and temporal/seasonal buffers. For the former, FWS proposes to increase the buffer size around islands for shooting cormorants in order to emphasize more localized control of fish hatcheries, aquaculture facilities, release sites for hatchery fish, and spawning beds for endangered and threatened fish. The current buffer is 500 meters and the Service would be willing to increase this "no shooting" zone. For the latter, the FWS proposes to limit shooting of adult cormorants when chicks are present in the nest. Similarly, an amenable Order restriction would be to limit shooting of cormorants away from colonies during the nesting season to prevent abandoning chicks. There would also be a focus on egg oiling during May and June.

and promulgate and issue a new rule. In light of the substantial disruptive consequences explained above that will occur absent the Orders, a stay of the effect of the Court's order is entirely permissible and warranted. *See Chamber of Commerce*, 443 F.3d at 909 (staying mandate for 90 days to avoid disruptive effects to industry); *Anacostia Riverkeeper v. EPA*, 713 F. Supp. 2d 50, 55 (D.D.C. 2010) (staying vacatur of Clean Water Act rules to allow agency to promulgate new rules); *Hawaii Longline Ass'n v. National Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 12 (D.D.C. 2003) (staying the effect of order for five months to allow agency to conduct further studies). As explained above, the Service is willing to commit to a schedule for completion of remand and anticipates it would likely need until October 31, 2016 to address NEPA. Decl. ¶ 4.

V. CONCLUSION

In this case, the Court should remand the matter to FWS for further NEPA compliance consistent with the Court's Memorandum Opinion. A consideration of the equities, however, demonstrates that vacatur of the Orders is not an appropriate remedy. For these reasons, FWS requests that the Court issue an order remanding the case for further proceedings consistent with the Court's March 29, 2016 Memorandum Opinion and specifically decline to vacate the Orders.

Respectfully submitted, April 20, 2016.

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