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Stuart Gillespie
Earthjustice, sgillespie@earthjustice.org

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ARTICLE

PRE-MERITS VACATUR: AN EFFICIENT, EQUITABLE, AND ENVIRONMENTALLY SOUND REMEDY

STUART C. GILLESPIE*

ABSTRACT

Federal agencies are increasingly requesting voluntary remands of challenged rules, thereby circumventing judicial review, and avoiding ever having to defend the merits of those rules. Courts routinely grant these extraordinary requests, often under the guise of saving judicial resources and giving agencies a second chance to reconsider. But voluntary remands come at a steep cost, particularly in the arena of environmental litigation. There, voluntary remands not only deprive litigants of their day in court, but can also subject them (and the broader public) to unlawful and inadequate rules that are causing serious environmental harm.

Courts have long guarded against the inequitable consequences of voluntary remands by simultaneously vacating the challenged rules, even prior to a conclusive determination on the merits. That remedy—also known as pre-merits vacatur—falls well within the court's broad equitable authority. It has, however, come under assault in recent years, particularly from industry groups who rarely profit from the court's equitable discretion. So too, the Biden Administration has questioned the court's ability to vacate Trump-era environmental regulations on voluntary remand, thereby prolonging those rules' adverse environmental impacts. Some legal commentators have assumed, with little or no analysis, that court's lack the authority to order pre-merits vacatur.

This article sets the record straight and provides a complete defense of the court's authority to order pre-merits vacatur as a condition of voluntary remand. The article also refutes misplaced

* Stuart Gillespie is a senior attorney with Earthjustice, a non-profit environmental law firm. The opinions expressed in this article are his alone.

attempts to strip courts of that remedial power, which provides a crucial backstop against agencies' increasing use of voluntary remands. Finally, the article provides a compelling policy justification for remanding and vacating insufficiently protective environmental rules, as demonstrated by two recent cases that vacated and remanded Trump-era rules that eliminated long-standing Clean Water Act protections. In both cases, pre-merits vacatur provided an efficient, equitable, and environmentally sound remedy.

INTRODUCTION

President Donald Trump systematically eliminated bedrock environmental protections by rolling back approximately 100 environmental regulations, including longstanding protections for clean water, clean air, endangered species, and public health.[1] To prevent irreversible environmental damage, Native American tribes, State governments, and public interest groups filed dozens of lawsuits asking courts to set aside and vacate those unlawful regulations.[2] At stake were protections for over half of the nation's wetlands,[3] critical limits on planet-warming carbon dioxide emissions from power plants,[4] fundamental protections for threatened and endangered species,[5] and air-quality standards that prevented thousands of premature deaths per year.[6]

On January 20, 2021, President Joe Biden took office and inherited these high-stakes cases. On day one, he issued an executive order declaring the Nation's commitment to advance environmental justice, to listen to the science, and to improve public health and protect our environment.[7] To that end, President Biden directed federal agencies to identify Trump-era rules that

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[1] Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (Jan. 20, 2021) [https://perma.cc/6VV9-TS9U].

[2] Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d 949, 951 (D. Ariz. 2021) (challenging rule that limited scope of Clean Water Act); *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1014 (N.D. Cal. 2021) (challenging Clean Water Act Certification rule), appeal filed, Case No. 21-16961 (9th Cir. Nov. 22, 2021), stay granted, Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1347 (2022); Sierra Club v. EPA, 21 F.4th 815, 816 (D.C. Cir. 2021) (challenging standards for ozone under Clean Air Act); Am. Lung Ass'n v. EPA 985 F.3d 914, 940–41 (D.C. Cir. 2021) (challenging rule that repealed and replaced prior plan for regulating power plants' emissions of greenhouse gases to address climate change).

[3] *See, e.g.,* Annie Snider, *Trump Set to Gut Water Protections*, POLITICO (Jan. 14, 2020, 9:33PM), https://www.politico.com/news/2020/01/14/trump-water-regulation-rollback-099016 [https://perma.cc/L2DY-N2M2] ("The latest Trump regulation rollback could remove federal safeguards for half the country's wetlands and millions of miles of streams."). *See Pascua Yaqui Tribe*, 568 F. Supp. 3d (challenging rule that limited scope of Clean Water Act that relates to wetlands).

[4] *Am. Lung Ass'n*, 985 F.3d at 929–30.

[5] Center for Biological Diversity v. Haaland, No. 19-cv-05206-JLT, 2022 WL 2444455 (N.D. Cal. July 5, 2022).

[6] Popovich, *supra* note 1 at 5; *Sierra Club*, 21 F.4th at 816.

[7] Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

warranted reconsideration.[8] That months-long process identified multiple rules that suffered from serious legal flaws and were causing severe, irreversible harm to the environment with each passing day.[9] The Biden Administration committed to replacing these rules at some indefinite point in the future.[10]

At the same time, however, the Administration tried to insulate those very same rules from judicial rule, thereby locking in years' worth of additional environmental injury. The government's strategy was deceptively simple. Under the guise of judicial economy, the Administration repeatedly asked courts to voluntarily remand Trump-era rules to the agencies and forego a ruling on the merits of the cases challenging those rules.[11] Despite seeking to terminate these cases, the Administration studiously avoided addressing the issue of whether the courts should also vacate the challenged rules on remand—the presumptive remedy

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[8] *Id.*; *see also* Press Release, White House Briefing Room, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ [https://perma.cc/3VUX-NM6Y] (directing federal agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021).

[9] Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 1, 2021) (to be codified at 40 C.F.R. pt. 121); Notice of Public Meetings Regarding "Waters of the United States," 86 Fed. Reg. 41,911, 41,914 (Aug. 4, 2021) (providing a schedule of public meetings to discuss revising the definition of "waters of the United States").

[10] Notice of Public Meetings Regarding "Waters of the United States," 86 Fed. Reg. at 41,914 (setting up public meetings to revise definition of "waters of the United States" but not providing a timeline for a proposed or final rule); Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. at 29,542 (committing to a proposed revision of the Clean Water Act Section 401 Certification Rule but not providing a timeline for a final rule).

[11] Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d 949, 951 (D. Ariz. 2021) (discussing government's request for voluntary remand of Trump-era Navigable Waters Protection Rule); *In re* Clean Water Act Rulemaking, No. C 20-04636 WHA, 2021 WL 4924844, at *3 (N.D. Cal. Oct. 21, 2021) (discussing government's request for voluntary remand of Clean Water Act Section 401 Certification rule).

under the Administrative Procedure Act ("APA").[12] Instead, the Government vaguely suggested that the courts could not vacate the rules absent a merits determination—the very ruling the agencies sought to prevent through their requests for voluntary remand.[13] These self-serving requests provided the Government with a win-win solution: a way to avoid litigation over the rules (voluntary remand) and a way to snatch victory from the jaws of defeat (without vacatur).

These requests were also deeply inequitable and threatened serious environmental harm. They would have denied litigants their day in court, all while subjecting them to additional, irreversible environmental harm caused by the challenged rules. Multiple courts rejected that outcome by vacating and remanding the rules, even prior to a conclusive merits determination.[14] The court's recognized that vacatur was essential due to the serious errors in the rules and the need to prevent serious environmental harm from leaving the flawed rules in place. Even though that relief falls squarely within the court's equitable authority, various industry-led groups have mounted a concerted effort to strip the courts of this remedial power and leave the public with no recourse to ongoing, severe environmental destruction.

This article provides a complete defense of the court's long-standing authority to vacate rules on a motion for voluntary remand, even without a conclusive merits determination. Part I starts with an overview of the court's increasingly permissive

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[12] *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1023 (N.D. Cal. 2021) (explaining that the Environmental Protection Agency "neglected to address why the instant action is the exception meriting remand without vacatur or why the default standard of vacatur … should not apply here"); Defendants' Opposed Motion for Voluntary Remand of the NWPR Without Vacatur at 13, Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949 (D. Ariz. 2021) (No. CV-20-00266-TUC-RM), ECF No. 72 (requesting voluntary remand of Navigable Waters Protection Rule but neglecting to address why the court should not simultaneously vacate the rule).

[13] Defendants' Opposition to Business Intervenor's Motion for Stay Pending Appeal at *8, Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949 (D. Ariz. 2021) (No. CV-20-00266-TUC-RM), ECF No. 112 (asserting, without support, that "vacatur should only be ordered after the court has resolved the merits").

[14] *See generally In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1028; *Pascua Yaqui Tribe*, 557 F. Supp. 3d at 957; Navajo Nation v. Regan, No. 20-CV-602-MV/GJF, 2021 WL 4430466 at *5–6 (D.N.M. Sept. 27, 2021); Center for Biological Diversity v. Haaland, No. 19-cv-05206-JLT, 2022 WL 2444455 (N.D. Cal. July 5, 2022).

approach to granting voluntary remands, often in the name of judicial economy. This framework developed against the backdrop of the court's broad authority to vacate the challenged action to prevent inequitable outcomes on remand. Indeed, this permissive approach to voluntary remand is workable *only* if courts retain the power to couple voluntary remands with vacatur.

Part II focuses on recent attempts to strip courts of their authority to vacate rules on motions for voluntary remand. Industry has repeatedly argued that courts are powerless to vacate rules absent a conclusive merits determination. Under that theory, courts must instead leave the challenged rules in place on voluntary remand so that industry can continue to profit at severe expense to the environment. Although the Biden Administration has not explicitly adopted these baseless arguments, it has tried to hand-cuff the courts by presenting them with no option but to leave flawed rules in place on remand.

Part III documents the courts' broad equitable authority to vacate rules on motions for voluntary remand, particularly when necessary to prevent irreparable environmental harm. This remedy falls well within the court's broad and flexible authority to order such relief as necessary to ensure justice. To guide this remedial authority, courts have relied on the familiar, two-part test set forth in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*[15] to assess the seriousness of the errors in a challenged rule and the harms of leaving it in place on remand. That test provides a crucial safeguard to ensure that agencies are not using voluntary remands as an end-run around the courts or the APA.

Part IV concludes with a policy justification for vacating and voluntarily remanding challenged rules prior to a conclusive merits determination. This equitable remedy is essential in the context of environmental litigation where leaving a defective rule in place may risk serious, irreversible harm. It also ensures litigants access to the courts and provides a crucial counterweight against the government's increasing use of voluntary remands to avoid judicial review. Finally, pre-merits vacatur saves judicial and administrative resources that would otherwise be spent litigating a flawed rule the agencies plan to replace. These policy justifications are at the forefront of two recent decisions vacating

[15] Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

and remanding Trump-era regulations that eliminated longstanding Clean Water Act protections.[16]

PART I. THE RISE OF VOLUNTARY REMANDS

Voluntary remands are a unique and exceptional form of equitable relief that allows federal agencies to halt, if not circumvent, judicial review. While courts routinely grant these requests, they have long recognized (and exercised) their authority to simultaneously vacate the challenged rules.

A. The Exceptional Remedy of Voluntary Remand

Voluntary remands arise when an administrative agency asks the court to send a challenged action back to the agency for reconsideration.[17] These requests are characterized by two primary features. First, they precede a ruling on the merits.[18] Indeed, agencies often seek voluntary remands to avoid defending the merits of the challenged decision.[19] Second, voluntary remands terminate the pending lawsuits.[20] Agencies frequently seek not only a remand of their prior decision, but dismissal of the lawsuit itself.[21]

These characteristics transform voluntary remands into an exceptional form of equitable relief. As one commentator explained, "no other motion allows a defendant to rid itself of a lawsuit without refuting its opponent's legal contentions (as in a

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[16] *See In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1017, 1021–22; *Pascua Yaqui Tribe*, 557 F. Supp. 3d at 952.

[17] Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361, 366–67 (2018) (defining voluntary remands and explaining how they are "unique in American Law").

[18] *See* SKF USA Inc. v. United States, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001) (identifying three scenarios where agency might seek voluntary remand prior to a merits determination).

[19] Revesz, *supra* note 17, at 370.

[20] *Id.* at 367 (explaining "when a federal court 'remands' an agency rulemaking, it terminates the current action").

[21] When the government seeks voluntary remand, it also often requests dismissal of the case. *Pascua Yaqui Tribe*, 557 F. Supp. 3d at 957 (granting government's request for voluntary remand and dismissal of claims challenging Navigable Waters Protection Rule).

motion to dismiss) or without the opposing party's consent (as in a settlement)."[22]

Not surprisingly, there is a strong incentive for agencies to seek and obtain voluntary remands.[23] From a strategic standpoint, voluntary remands allow agencies to avoid a loss on the merits and even "snatch a temporary victory from the jaws of potential defeat."[24] Agencies can also use voluntary remands to sidestep an adverse ruling on the merits that could tie their hands on remand.[25] In addition, they can save resources otherwise spent litigating the case and focus instead on a new rulemaking to reconsider their challenged decision.[26]

B. Courts Have Developed a Permissive Framework for Voluntary Remands Against the Backdrop of Vacatur.

Courts have developed a largely permissive approach to granting voluntary remands, often under the theory of judicial economy and out of respect for the executive branch.[27] This permissive approach to voluntary remand is workable *only* if courts retain the power to couple voluntary remand orders with vacatur.

The Federal Circuits' decision in *SKF USA Inc. v. United States,* provides an often-cited framework for assessing (and granting) voluntary remands.[28] There, the Federal Circuit identified five situations where remand would arise, three of which involve scenarios where an agency might seek voluntary remand to prematurely end a lawsuit.[29]

First, the agency might seek remand "because of intervening events outside of the agency's control, for example, a new legal

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[22] *See* Revesz, *supra* note 17, at 367.
[23] *Id.* at 370–81 (discussing in detail benefits and costs of seeking voluntary remand).
[24] *Id.* at 370.
[25] *Id.* at 375.
[26] SKF USA Inc. v. United States, 254 F.3d 1022, at 1029 (Fed. Cir. 2001) (explaining that "remand may conserve judicial resources, or the agency's views on the statutory question, though not dispositive, may be useful to the reviewing court").
[27] *See* Revesz, *supra* note 17, at 385–89 (exploring doctrinal roots of voluntary remand).
[28] *SKF USA Inc.*, 254 F.3d at 1027–28.
[29] *Id.* at 1028–29.

decision or the passage of new legislation."[30] In such a scenario, the *SKF* court explained, remand would normally be required.[31]

Second, an agency might seek remand (without confessing error) to reconsider its previous position.[32] The agency "might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision."[33] For an action with this type of posture, the *SKF* court advised that "if the agency's concern is substantial and legitimate, a remand is usually appropriate."[34] In other words, remand should be granted so long as "the agency intends to take further action with respect to *the original agency decision on review*."[35]

Third, "the agency might request a remand because it believes that its original decision is incorrect on the merits and wishes to change the result."[36] In this scenario, the *SKF* court held that "remand to the agency is required, absent the most unusual circumstances verging on bad-faith."[37]

For all three of these scenarios, *SKF* either requires or strongly encourages courts to acquiesce in an agency's request for a voluntary remand.[38] The court grounded this permissive approach in *Chevron U.S.A. v. Natural Resource Defense Council, Inc.*,[39] explaining agencies are entitled to reconsider their decisions and should be granted the opportunity to "assess the wisdom of its

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[30] *Id.* at 1028. While *SKF* identified this as the third situation where the agency might seek remand, it is the first situation involving voluntary remand and thus, is labeled as the first scenario in this law review for ease of reading.
[31] *Id.* at 1028–29.
[32] *Id.*
[33] *SKF USA*, 254 F.3d at 1029.
[34] *Id.*; Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta, 375 F.3d 412, 417 (6th Cir. 2004) ("If the agency's concern is substantial and legitimate, a remand is usually appropriate." (quoting *SKF USA*, 254 F.3d at 1029)).
[35] Limnia, Inc. v. DOE, 857 F.3d 379, 386 (D.C. Cir. 2017).
[36] *SKF USA*, 254 F.3d at 1029.
[37] *Id.* at 1029–30; Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012) ("Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." (quoting *SKF USA.*, 254 F.3d at 1029)).
[38] *SKF USA*, 254 F.3d at 1029.
[39] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984).

policy on a continuing basis."[40] The court also justified this approach on the grounds of saving judicial resources.[41]

Other courts adopted this permissive approach to voluntary remands based on a clear understanding of their broad authority to simultaneously vacate the challenged agency action.[42] At the time of *SKF*, the D.C. Circuit had made clear that remand with vacatur was the presumptive remedy, only to be avoided after assessing the severity of the flaws in the rule and the potential disruptive consequences of vacatur, as demonstrated in *Allied-Signal*.[43] Courts also had a long-standing practice of granting voluntary remands with vacatur, even prior to a merits determination.[44] No court questioned this authority. To the contrary, courts underscored their broad authority to condition voluntary remands to safeguard the plaintiffs' rights from serious harm during the remand.[45] One court even denied a voluntary

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[40] *SKF USA*, 254 F.3d at 1030.

[41] *Id.* at 1029; Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414, 436 (D.C. Cir. 2018) ("Remand has the benefit of allowing 'agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." (quoting Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993))); B.J. Alan Co. v. ICC, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (asserting that "administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." (quoting Commonwealth v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978))).

[42] *Cal. Cmtys. Against Toxics,* 688 F.3d at 992 (approving *SKF USA* taxonomy and then analyzing whether to vacate rule on voluntary remand prior to a merits determination).

[43] Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (establishing a two-factor analysis for vacatur, which multiple circuit courts have adopted). NRDC v. EPA, 808 F.3d 556, 584 (2d Cir. 2015) (quoting *Allied-Signal* and acknowledging that an invalid regulation "need not necessarily be vacated"); *Cal. Cmtys. Against Toxics,*, 688 F.3d at 989 (9th Cir. 2012); Cent. Maine Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001) (citing *Allied-Signal* and acknowledging that the court is "not required automatically to set aside an inadequately explained order").

[44] *See* WORZ, Inc. v. FCC, 268 F.2d 889, 890 (D.C. Cir. 1959) (remanding and vacating an order of the FCC); Gen. Signal Corp. v. EPA, No. 90-1560, 1993 WL 183999, at *1 (D.C. Cir. Apr. 16, 1993) (summarily granting motion for voluntary remand and vacatur); Pac. Gas & Elec. Co. v. FERC, No. 04-1122, 2004 WL 2672300, at *1 (D.C. Cir. Nov. 22, 2004).

[45] NRDC v. Train, 510 F.2d 692, 703 n.59 (D.C. Cir. 1974) ("Even where the court stays its hand as to a determination of the merits, it may grant relief pendente lite to safeguard plaintiff's rights from irreparable injury during the pendency of

remand in an environmental case because "EPA made no offer to vacate the rule; thus EPA's proposal would have left petitioners subject to a rule [the challengers] claimed was invalid."[46]

The *SKF* framework was thus built on the court's long-standing authority and practice of vacating agency actions on remand, even prior to a merits determination. Indeed, *SKF* implicitly adopted Professor Toni Fine's balancing test for assessing voluntary remands,[47] which recognized the court's authority to vacate rules as a necessary safeguard or condition of voluntary remands.[48]

In the wake of *SKF*, courts continued to exercise their authority to vacate rules on motions for voluntary remand.[49] Courts viewed this approach as essential to prevent irreversible environmental harm on remand, such as where the challenged rule

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administrative review."); Tyler v. Fitzsimmons, 990 F.2d 28, 32 n.3 (1st Cir. 1993) ("[A] reviewing court . . . possesses the 'inherent' authority to condition its remand order as it deems appropriate." (citing Melkonyan v. Sullivan, 501 U.S. 89, 101–02 (1991)).

[46] Chlorine Chemistry Council v. EPA, 206 F.3d 1286, 1288 (D.C. Cir. 2000).

[47] *See* Revesz, *supra* note 17, at 387 (explaining that *SKF USA* implicitly adopted Fine's balancing test).

[48] Toni M. Fine, *Agency Requests for "Voluntary" Remand: A Proposal for the Development of Judicial Standards*, 28 ARIZ. STATE L.J. 1079, 1130 (1996) ("When granting a request for remand, the court should consider whether it would be appropriate to order a stay of the effectiveness of the challenged agency action, or some other form of interim relief, pending final agency action on remand. Appropriate interim relief would minimize the risk of injury to the parties and the public by continued application of agency action that may later be found to be unlawful, review of which had been delayed at the urging of the agency.").

[49] *See* Safer Chemicals, Healthy Families v. EPA, 791 F. App'x 653, 656 (9th Cir. 2019); *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1029–29; *Pascua Yaqui v. EPA*, 557 F. Supp. 3d at 957; Navajo Nation v. Regan, 20-CV-602-MV/GJF, 2021 WL at 4430466, at *3 (D.N.M. Sept. 27, 2021); All. for Wild Rockies v. Marten, CV 17-21-M-DLC, 2018 WL 2943251, at *4 (D. Mont. June 12, 2018); ASSE Int'l, Inc. v. Kerry, 182 F. Supp. 3d 1059, 1065 (C.D. Cal. 2016); Ctr. for Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236, 1243 (D. Colo. 2011); *see also* N. Coast Rivers All. v. DOI, 1:16-cv-00307-LJO-MJS, 2016 WL 8673038, at *6, 13 (E.D. Cal. Dec. 16, 2016) (acknowledging authority to vacate rule on motion for voluntary remand but declining to do so after balancing equities); NRDC v. DOI, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002) (holding that "the same equitable analysis for vacatur of the rules" applies on motions for voluntary remand, but declining to exercise that equitable authority).

eliminated crucial environmental protections.[50] Agencies, in turn, recognized the need to limit any harms during remand by seeking vacatur themselves[51] or suspending their actions pending further reconsideration.[52] In this way, the courts and agencies achieved an equilibrium: the agency could seek and likely obtain a voluntary remand to reconsider a challenged rule, but it was not a cost-free strategy. If the agency did not take steps to limit the harms on remand, such as by requesting vacatur of the rule, the courts could and would vacate those rules, especially where necessary to safeguard the public interest and environment.

PART II. RECENT ATTEMPTS TO STRIP COURTS OF THEIR EQUITABLE AUTHORITY TO GRANT VOLUNTARY REMAND WITH VACATUR

In recent years, industry groups have attempted to curtail the court's authority to vacate rules on voluntary remand because that equitable discretion rarely profits industry's bottom line. So too, the Biden Administration has attempted to sidestep, if not deny, the court's authority to vacate rules on voluntary remand.

A. Industry's Efforts to Curtail the Courts' Authority to Voluntarily Remand and Vacate Challenged Rules.

Industry rarely profits from the court's equitable authority to vacate rules on voluntary remand. The reason is simple: the equities almost always favor protecting the environment from

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[50] *See* Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d 949, 955 (D. Ariz. 2021) ("remanding without vacatur would risk serious environmental harm"); *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1027 (N.D. Cal. 2021) (finding that "significant environmental harms will likely transpire should remand occur without vacatur").

[51] *See* Arizona Pub. Serv. Co. v. EPA, 562 F.3d 1116 (10th Cir. 2009) (seeking voluntary remand and vacatur of challenged rule); *see also infra* note 185 (collecting examples where agencies sought voluntary remand coupled with vacatur).

[52] *See* Sierra Club v. Van Antwerp, 560 F. Supp. 2d 21, 25 (D.D.C. 2008) (explaining that "the permit's suspension in effect removes the potential harm" of voluntary remand).

irreparable harm.[53] Courts thus routinely vacate rules that eliminate environmental protections, thereby preventing any further environmental injury on remand.[54] While courts can leave flawed rules in place on remand, they only do so in limited circumstances, such as where the rule provides safeguards necessary to prevent environmental injury.[55]

By contrast, courts rarely leave agency rules in place to protect profits, especially when that comes at the expense of the environment. As courts have noted, industry has "no inherent right to maximize revenues."[56] Courts have thus questioned whether they can even consider lost profits in assessing whether to vacate a rule on remand.[57] Even where businesses can identify a potential economic harm due to vacatur, it rarely rises to the

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[53] Pollinator Stewardship Council v. EPA, 806 F.3d 532–33 (9th Cir. 2015) (vacating a challenged rule and leaving the rule in place "risks more potential environmental harm than vacating it"); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (choosing not to vacate because vacatur would risk potential extinction of a snail); Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 994 (9th Cir. 2012) (choosing not to vacate because vacatur could lead to air pollution).

[54] *See e.g. In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013 (N.D. Cal. 2021).

[55] *See id.*; *see also* Sierra Club v. EPA, 167 F.3d 658, 664 (D.C. Cir. 1999) (leaving a "hopelessly irrational" air-quality standard in place on remand so as to avoid a regulatory void); Nat'l Lime Ass'n v. EPA, 233 F.3d 625, 635 (D.C. Cir. 2000) (leaving an air-quality standard in place on remand to ensure some protection of the environment).

[56] N. Plains Res. Council v. U.S. Army Corps of Eng'rs, 460 F. Supp. 3d 1030, 1047 (D. Mont. 2020).

[57] *See* Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010) ("[I]t is not clear that economic consequences is a factor the Court may consider in environmental cases"); NRDC v. DOI, 275 F. Supp. 2d 1136, 1146 n.21(C.D. Cal. 2002) (noting the "differences in character" between the potential irreversible environmental harm and any potential economic harm to private developers); NRDC v. EPA, 676 F. Supp. 2d 307, 317 n.10 (S.D.N.Y.2009) (questioning whether economic considerations may be given any weight in a decision regarding whether to vacate insecticide registrations by the EPA). Other courts have considered economic harms in their equitable calculus, while noting that environmental laws, such as the Clean Water Act, often impose "inherent economic effects." *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1028 (N.D. Cal. 2021). Courts of appeals have thus "focused more on environmental consequences when considering whether to vacate [environmental] rules," than economic impacts." *Id.*

level of irreparable harm that would outweigh environmental concerns and thereby warrant vacatur.[58]

Given that the equities are stacked in favor of protecting the environment, industry has repeatedly attempted to strip courts of their power to vacate rules on voluntary remand.[59] That would force courts to leave rules in place whenever they grant voluntary remands. That outcome benefits industry where the challenged rule eliminates environmental protections and reduces compliance costs, thereby increasing profits.

The timber industry pursued this strategy in *Carpenters Industrial Council v. Salazar*, a case that arose out of the timber wars in the Pacific Northwest.[60] The case challenged an Endangered Species Act ("ESA") rule that stripped protections from over 1.5 million acres of forested lands that were critical to the survival and recovery of the northern spotted owl.[61] The government confessed legal error after the Inspector General found the rule was potentially the product of improper political interference.[62] Rather than defending the rule, the Government sought a voluntary remand with vacatur—a remedy that would have restored prior protections for the species while the government spent the next 24 months formulating a new rule.[63]

The court found that it was obligated to grant the government's request for voluntary remand due to the "substantial and legitimate concerns" about the rulemaking process.[64] But the court was not "persuaded" it could vacate the rule on remand.[65] Unable to explain why it lacked that equitable authority, the court adopted the timber industry's argument that vacating the rule "would allow the Federal defendants to do what they cannot do

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[58] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d (rejecting industry's arguments about economic harms counseling against vacatur and explaining that "harm is one thing, irreparable harm another"); *but see Cal. Cmtys. Against Toxics*, 688 F.3d at 994 (declining to vacate air quality plan because doing so could result in additional air pollution and "also be economically disastrous").
[59] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1021; Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 136 n.9 (D.D.C. 2010); Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 126, 129 (D.D.C. 2009).
[60] *See Carpenters Indus. Council*,734 F. Supp. 2d 126.
[61] *Id.* at 130.
[62] *Id.* at 131.
[63] *Id.*
[64] *Id.* at 134.
[65] Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 136 (D.D.C. 2010).

under the [APA], repeal a rule without public notice and comment, without judicial consideration of the merits."[66] The Court thus left the flawed rule in place, allowing the timber industry to reap the benefits of environmental deregulation.[67]

Some commentators have since jumped to the conclusion that courts categorically lack the authority to vacate rules prior to a conclusive merits determination.[68] But that reasoning mistakenly assumes that the APA limits the court's equitable authority, when it does not as explained below in Section IV. Despite pressing this false argument, commentators acknowledged that it would lead to inequitable outcomes: courts would presumptively grant voluntary remands, all while being forced to leave in place unlawful rules that cause serious harm to the public.[69]

B. The Biden Administration's Attempts to Circumvent the Court's Authority to Vacate Rules on Voluntary Remand

Over the past year, the Biden Administration has sought voluntary remands of multiple, Trump-era environmental regulations.[70] Across these requests, the Biden Administration has consistently declined to address whether the rules should be vacated on remand.[71] The Government instead has vaguely suggested that the courts must leave the rules in place, notwithstanding the harms to the environment.

The Biden Administration pursued this strategy in response to the multiple lawsuits challenging the Trump-era Navigable

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[66] *Id.* at 135–36.

[67] *Id.* at 136–37 (the court also denied the environmental groups' request to proceed with partial summary judgment briefing, effectively insulating the rule from judicial review).

[68] *See* Revesz, *supra* note 17, at 390.

[69] *Id.* at 402–03 (acknowledging that courts grant voluntary remands without considering the costs of remand without vacatur).

[70] *See generally* Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021) (explaining that federal defendants moved for voluntary remand of the Navigable Waters Protection Rule); *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1017–18 (N.D. Cal. 2021) (N.D. Cal. Oct. 21, 2021) ("Plaintiff states, tribes, and non-profit conservation groups have challenged EPA's Clean Water Act certification rule, and now EPA moves to remand the proceedings without vacatur.").

[71] *See generally, Pascua Yaqui Tribe*, 557 F. Supp. 3d at 954–56 (for review of court decisions regarding whether agency actions should be vacated); *see also In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1021–23.

Waters Protection Rule.[72] For example, in *Pascua Yaqui Tribe v. EPA*, a coalition of Native American tribes challenged the rule on the grounds that it adopted an unlawfully narrow definition of waters of the United States.[73] In lieu of defending the rule, the agencies sought a voluntary remand on the grounds that the rule suffered from serious legal errors and was causing significant environmental harm.[74] Nonetheless, the Government refused to address the issue of vacatur—the presumptive remedy that would accompany the requested remand.[75] Instead, the Government ignored the issue and sought a remand without vacatur so that it could continue to apply the rule at record-setting pace, thereby risking further harms to the environment and tribes.[76]

The Biden Administration took the same approach in the trifecta of lawsuits challenging the Trump-era Clean Water Act Section 401 Certification Rule. There, the Environmental Protection Agency ("EPA") promulgated a rule that gutted the

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[72] *See* Definition of Waters of the United States, 33 C.F.R. § 328 (2022). Multiple parties challenged the rule in various district courts. *See generally, e.g.*, N.M. Cattle Growers' Ass'n v. EPA, No. 1:19-CV-00988 (D.N.M. Oct. 22, 2019); Or. Cattlemen's Ass'n v. EPA, 3:19-CV-00564 (D. Or. Apr. 16, 2019); Pueblo of Laguna v. Regan, No. 1:21-CV-00277, 2021 WL 4290179 (D.N.M Sept. 21, 2021); Navajo Nation v. Regan, No. 20-CV-602-MV/GJF, 2021 WL 4430466 (D.N.M Sept. 27, 2021.); California v. Wheeler, No. 20-CV-03005-RS, 2020 WL 4916601 (N.D. Cal. Aug. 13, 2020); Waterkeeper All. v. Regan, No. 18-CV-03521-RS, 2021 WL 4221585 (N.D. Cal Sept. 16, 2021); Colorado v. EPA, No. 1:20-CV-01461 (D. Colo. May 22, 2020); Env't Integrity Project v. Wheeler, No. 20-CV-1734, 2021 WL 6844257 (D.D.C. Jan. 27, 2021); Chesapeake Bay Found. v. Wheeler, No. 1:20-CV-01064 (consolidated with 1:20-CV-01063) (D. Md. Apr. 27, 2020); Conservation L. Found. v. EPA, No. 1:20-CV-10820 (D. Mass. Apr. 29, 2020); Murray v. Wheeler, No. 1:19-CV-01498 (N.D.N.Y. Dec. 4, 2019); S.C. Coastal Conservation League v. Regan, No. 2:20-CV-01687-BHH, 2021 WL 3886152 (D.S.C. May 21, 2021); Puget Soundkeeper All. v. EPA, No. 2:20-CV-00950 (W.D. Wash. June 22, 2020); Wash. Cattlemen's Ass'n v. EPA, No. C19-0569-JCC, 2019 WL 3206052 (W.D. Wash. July 16, 2019).

[73] The Tribes moved for summary judgment on their claims challenging the Navigable Waters Protection Rule. *See Pascua Yaqui Tribe*, 557 F. Supp. 3d at 951.

[74] *See id.* at 954.

[75] *Id.* ("The Agency Defendants have not requested vacatur"). The agency defendants later denied the court's authority to order vacatur prior to a merits determination but provided no analysis or argument to support this position.

[76] *See* Pasqua Yaqui Tribe v. EPA, No. CV-20-00266-TUC-RM, 2021 WL 4844323, at *2 (D. Ariz. Apr. 12, 2021) (documenting "Defendants' active implementation of that rule, including at the Rosemont Mine site in the Santa Rita Mountains southeast of Tucson.").

authority of States and Tribal governments to apply key environmental protections to ensure compliance with local water quality requirements.[77] Because of the significant harms to fiscal and natural resources posed by that rule, states, tribes, and environmental groups filed multiple lawsuits seeking vacatur of the rule.[78] Before litigation could reach the merits, however, EPA stopped in its tracks. It announced its intent to revisit the rule to "restore" the federal-state balance enshrined within the Clean Water Act.[79] Also, EPA asked the district court to remand the rule, but again refused to address the issue of vacatur. Instead, EPA "neglected to address why the instant action is the exception meriting remand without vacatur or why the default standard of vacatur . . . should not apply here."[80] Industry, in turn, seized on this omission and argued the court could not vacate the rule because the Government did not ask for such relief.[81] This argument would have forced the court to leave the rule in place on remand, despite its substantive flaws and the serious risk of irreparable environmental injury.

These cases reveal a concerted effort by the Biden Administration to divorce remand from the associated remedy of vacatur. That strategy, however, overlooked the court's equitable authority to vacate the agencies' rules on voluntary remand.

PART III. THE COURT'S LONG-STANDING AUTHORITY TO VACATE RULES ON VOLUNTARY REMAND

The Supreme Court has consistently reaffirmed its "broader" and "more flexible" authority to order such relief as necessary to "protect the public interest" and do "full justice to all the real parties in interest."[82] Vacating an agency rule on a pre-merits request for voluntary remand is a proper exercise of this well-

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[77] *See* 40 C.F.R § 121 (2022).
[78] *See In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1018 (N.D. Cal. 2021).
[79] *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29541 (proposed June 2, 2021) (to be codified at 40 C.F.R. pt. 121).
[80] *In re Clean Water Act Rulemaking,* 568 F. Supp. 3d at 1018.
[81] Intervenor Defendants' Reply in Support of Motion to Strike at 2, *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1014 (N.D. Cal. 2021) (No. 20-CV-0436), 2021 WL 4924844, at *5.
[82] Porter v. Warner Holding Co., 328 U.S. 395, 398, 400 (1946).

established equitable authority and necessary to avoid injustice when voluntary remand thwarts judicial review. Nothing in the APA strips the court of this authority.

A. Courts Have Broad Equitable Authority to Vacate Agency Actions on Voluntary Remand.

When an agency files a motion for a voluntary remand, it seeks an extraordinary form of equitable relief—an order that effectively terminates the lawsuit, as discussed above.[83] Courts have the power to vacate a rule on such a motion, lest the challengers of the rule be left subject to a rule they claim is invalid and causes serious harm.[84] Only in that way can courts of "equity do complete rather than truncated justice."[85]

The Supreme Court identified the roots of this equitable authority in *Ford Motor Co. v. NLRB*.[86] There, the Court analogized the voluntary remand of an agency action to the "familiar appellate practice" of remanding a case to a district court "for further proceedings without deciding the merits."[87] In such a scenario, the appellate court can and often does set aside the lower court's decision. That same approach applies to the voluntary remand of agency actions prior to a merits determination. The court can either vacate the agency action or allow the agency itself to vacate the rule on remand, "[i]n either event the findings and order are vacated."[88]

Consistent with this authority, lower courts have repeatedly vacated agency rules on voluntary remand, to guard against harms to public interest and the environment. Equity often requires such

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[83] *See* Cent. Power & Light Co. v. United States, 634 F.2d 137, 145 (5th Cir. 1980); *see also supra* Section II(A) and accompanying notes (discussing the exceptional remedy of voluntary remand).

[84] *See* Chlorine Chem. Council v. EPA, 206 F.3d 1286, 1288 (D.C. Cir. 2000) (denied motion for voluntary remand without vacatur).

[85] *Porter*, 328 U.S. at 398.

[86] Ford Motor Co. v. NLRB, 305 U.S. 364, 372 (1939).

[87] *Id.* at 373.

[88] *Id.* at 375; *see* Tyler v. Fitzsimmons, 990 F.2d 28, 32 n.3 (1st Cir. 1993) (holding that courts have long recognized the "'inherent' authority" of a reviewing court "to condition its remand order as it deems appropriate"); *see also* Ind. & Mich. Elec. Co. v. Fed. Power Comm'n, 502 F.2d 336, 346 (D.C. Cir. 1974) (holding that when reviewing actions of administrative agencies, courts have the power to adjust relief to exigencies of the case).

a remedy: "[l]eaving an agency action in place while the agency reconsiders may deny the petitioners the opportunity to vindicate their claims in federal court and would leave them subject to a rule they have asserted is invalid."[89] Thus, rather than waiting for the agency to withdraw a flawed rule on remand—a process that can take years[90]—courts can and do vacate the agency action to avert additional harm during remand.[91]

Courts have applied the familiar, two-part test from *Allied-Signal, Inc. v. U.S. NRC* to evaluate the equities of vacating an agency action on voluntary remand.[92] Under *Allied-Signal*, the "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."[93] Courts typically

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[89] *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d at 1021.

[90] Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 958–59 (2008) (finding that it takes many agencies almost two years after issuing a notice of proposed rulemaking to complete a final rule).

[91] *See, e.g.,* Safer Chemicals, Healthy Families v. EPA, 791 F. App'x 653, 656 (9th Cir. 2019); Center for Biological Diversity v. Haaland, No. 19-cv-05206-JLT, 2022 WL 2444455 (N.D. Cal. July 5, 2022); *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013 (N.D. Cal. 2021); Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d 949 (D. Ariz. 2021); Navajo Nation v. Regan, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *3 (D.N.M. Sept. 27, 2021); Alliance for Wild Rockies v. Marten, No. CV-17-21-M-DLC, 2018 WL 2943251, at *2–3 (D. Mont. June 12, 2018); ASSE Int'l, Inc. v. Kerry, 182 F. Supp. 2d 1059, 1064 (9th Cir. 2015); Ct. For Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2010); N. Coast Rivers All. v. DOI, No. 1:16-CV-00307-LJO-MJS, 2016 WL 8673038, at *6 (E.D. Cal. Dec. 16, 2016) (acknowledging authority to vacate rule on motion for voluntary remand but declining to do so after balancing equities); NRDC v. DOI, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002) (holding that "the same equitable analysis for vacatur of the rules" applies on motions for voluntary remand but declining to exercise that equitable authority); *but see* Alaska Wildlife All. v. Haaland, No. 3:20-CV-00209-SLG, 2022 WL 1553556, at *3 (D. Alaska May 17, 2022) ("Given the Supreme Court's recent stay order and the dearth of Ninth Circuit authority on the matter, the Court is not persuaded that it has the authority to vacate the challenged agency action absent a merits determination.").

[92] Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150–51 (D.C. Cir. 1993); *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d at 1022 (applying "the familiar *Allied-Signal* test" to evaluate pre-merits vacatur); Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d at 954 (following the Ninth Circuit's analogue of *Allied Signal* in evaluating vacatur).

[93] *Allied-Signal, Inc.*, 988 F.2d at 150–151; *see* Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012) (multiple circuit courts have adopted the *Allied-Signal* test for evaluating vacatur after a merits determination).

vacate the challenged rule under this test; the courts only leave agency actions in place "when equity demands," such as to prevent serious environmental harm.[94]

Allied-Signal provides a useful framework for assessing the equities prior to a merits determination.[95] The test first arose out of the preliminary injunction context where courts evaluate the appropriate remedy based on the likelihood of success on the merits.[96] The first *Allied-Signal* prong turns on the "extent of doubt whether the agency chose correctly," which is established in multiple ways.[97] Courts can consider the degree to which the agency action contravenes the purposes of the statute in question, whether the same rule could be adopted on remand, and whether the action was the result of reasoned decision making.[98] Conclusive findings of agency error are sufficient but not necessary to vacate an agency rule on voluntary remand.[99]

Courts have relied on multiple lines of evidence and argument to assess the seriousness of the errors in the challenged rule. Courts often start the inquiry by assessing the underlying record, including the text and preamble of the rule itself.[100] Courts can also consider declarations provided by the agencies documenting the errors in the agency action that warrant voluntary remand, as those same errors inform the vacatur analysis. [101] When needed, the court can request additional briefing on the extent of the errors or disruptive consequences of vacatur.[102] In addition, courts can

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[94] *Cal. Cmtys. Against Toxics*, 688 F.3d at 992; *see also supra* text WHAT? and accompanying note 52.
[95] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1023.
[96] *Id.*; *see also ASSE Int'l, Inc.*, 182 F. Supp. 3d at 1064 ("[c]ourts faced with a motion for voluntary remand employ 'the same equitable analysis' courts use to decide whether to vacate agency action after a ruling on the merits").
[97] *Allied-Signal, Inc.*, 988 F.2d at 150–51.
[98] *See* Pollinator Stewardship Council v. EPA, 806 F.3d 520, 532 (9th Cir. 2015).
[99] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1022.
[100] *See id.* (explaining that the court properly focused on the final rule and its preamble in finding serious errors).
[101] *Id.* at *9. Upon a motion for voluntary remand, moreover, evaluations of remand and vacatur do not occur in isolation from one another*; see* Safer Chems., Healthy Families v. EPA, 791 F. App'x 653, 656 (9th Cir. 2019); *Pollinator Stewardship Council*, 806 F.3d at 532–33 (9th Cir. 2015); Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 993–94 (9th Cir. 2012).
[102] *See In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1023.

evaluate the parties' arguments on the merits, such as when agencies seek voluntary remand during or after merits briefing.[103]

In some cases, an agency might admit error as part of a request for voluntary remand.[104] While that can help demonstrate serious errors warranting vacatur,[105] it is not a prerequisite for vacatur. Courts find serious errors, even where the agency "does not admit fault."[106] For example, in *California Coalition Against Toxics*, EPA sought a voluntary remand of an ambient air quality standard, all while maintaining the standard was not arbitrary and capricious based on new reasoning.[107] The Ninth Circuit rejected that impermissible, post-hoc argument, finding the standard was invalid—a substantive error supporting vacatur.[108]

By undertaking a robust review under the first prong of *Allied Signal*, courts can guard against gamesmanship by the agencies. For example, an agency might seek voluntary remand without conceding error to evade vacatur of the challenged action. Such silence is not an impediment to vacating the challenged action; otherwise, the agency would have veto power over the court's remedial authority.[109] Alternatively, an agency might summarily concede error to obtain prompt vacatur of a challenged rule, but such conclusory statements are not determinative, either.[110] Therefore, it is not the act of conceding error that matters, but rather the seriousness of the errors underlying the challenged rule,

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[103] *See* Pasqua Yaqui Tribe v. United States EPA, No. CV-20-00266-TUC-RM, 2021 U.S. Dist. LEXIS 203490, at *3 (D. Ariz. Apr. 12, 2021) (summarizing tribal plaintiffs' merits arguments challenging Navigable Waters Protection Rule); *see also* Navajo Nation v. Regan, 20-CV-602-MV/GJF, 2021 WL at 4430466, at *3 (D.N.M. Sept. 27, 2021).

[104] *Safer Chemicals* 791 F. App'x at 656 (granting a request by the EPA for voluntary remand with vacatur after finding that the request was not frivolous or made in bad faith).

[105] *See In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1021.

[106] *Id.* at 1026; *see also* Ctr. for Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236, 1242 (D. Co. 2011). Courts often refuse to uncritically accept an agency's concession of error. *See* Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 557 (D.C. Cir. 2015).

[107] Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012).

[108] *Id.* at 993.

[109] *See generally In re Clean Water Act Rulemaking*, 568 F. Supp. 3d.

[110] *See* Nat'l Parks Conservation Ass'n, 660 F. Supp. 2d 3, 5 (D.C. 2009) (rejecting agency's concession of error on the grounds that it would allow the agency to circumvent notice and comment, if the court vacated the rule).

as assessed by the reviewing court under the first prong of *Allied Signal*.

Courts are also well equipped to evaluate the second prong of *Allied Signal*—the disruptive consequences of vacatur—prior to a merits adjudication.[111] This analysis involves weighing the harms to the parties and public interest, an inquiry courts routinely undertake in the context of preliminary injunctions.[112] This prong of the analysis almost always favors protecting the environment from irreparable harm.[113] Thus, even where the court finds serious errors in a challenged rule, including where the agency concedes error, the court can still remand the rule without vacatur so as to ensure against irreparable environmental harm on remand.[114]

Courts have treated vacatur as the presumptive remedy on motions for voluntary remand.[115] That approach is appropriate, even absent a merits determination, given the severe consequences of voluntary remands, which preclude the plaintiffs from obtaining a ruling on the merits even though the agency admits substantial, if not fatal, flaws in its action.[116] The burden rests on the agency to

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[111] Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

[112] *See, e.g.*, Winter v. NRDC, 555 U.S. 7, 20 (2008) (holding that "plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction"). To be clear though, the standards for vacatur and preliminary injunctions are decidedly different. Vacatur does not require plaintiffs to establish irreparable harm; rather, it is the agency's burden to demonstrate that "vacating a faulty rule could result in possible environmental harm." Pollinator Stewardship Council v. EPA, 806 F.3d 520, 532 (9th Cir. 2015). Furthermore, the analysis turns on the *risk* of harm, not the likelihood of irreparable harm. *See also* Nat'l Fam. Farm Coal. v. EPA, 960 F.3d 1120, 1144–45 (9th Cir. 2020) (considering whether leaving the decision in place "would risk environmental harm").

[113] *See also supra* textWHAT? accompanying notes 52–54.

[114] *Id.*

[115] *See Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d at 955 ("the Court will apply the ordinary test for whether remand should include vacatur"); *see also* ASSE Int'l Inc. v. Kerry, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016) ("Courts faced with a motion for voluntary remand employ 'the same equitable analysis' courts use to decide whether to vacate agency action after a ruling on the merits"); N. Coast Rivers All. v. DOI, No. 1:16-CV-00307-LJO-MJS, 2016 WL 8673038, at *6 (E.D. Cal. Sept. 23, 2016) ("In deciding whether to vacate an agency action, courts . . . have employed 'the same equitable analysis' used to decide whether to vacate agency action after a 'ruling on the merits.'").

[116] Indeed, the government routinely acknowledges that vacatur is the presumptive remedy when it concedes error. *See* Respondent EPA's Unopposed Motion for Voluntary Vacatur and Remand at 7, California v. EPA, No. 21-1035

demonstrate why the equities warrant leaving the action in place on remand, such as to prevent irreversible harm to the environment.[117] Absent that, "equity does not demand the atypical remedy of remand without vacatur."[118]

In sum, courts have broad authority to vacate challenged rules, even prior to a merits determination. The familiar *Allied-Signal* framework provides an important procedural safeguard for district courts to exercise remedial authority and reach equitable outcomes wherever an agency seeks voluntary remand.

B. The Administrative Procedure Act does not Strip Courts of Their Equitable Power to Vacate Agency Action on Voluntary Remand

Some courts have incorrectly assumed that the APA strips them of their authority to vacate agency actions prior to a ruling on the merits.[119] The argument misreads the law and unduly constrains the court's ability to ensure equitable relief on remand.

The Supreme Court has long rejected constrains on the court's authority "to do equity and to mould each decree to the necessities of the particular case."[120] Thus, courts are reluctant to limit their equitable discretion, absent an express congressional mandate to the contrary,[121] "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[122]

(D.C. Cir. Mar. 17, 2021) (explaining a request for vacatur of air quality rule because agency conceded that it failed to provide notice and comment).

[117] *See* Klamath-Siskiyou Wildlands Ctr. v. NOAA, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) ("Put differently, 'courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error.'").

[118] *See Pascua Yaqui Tribe*, 557 F. Supp. 3d 956.

[119] *See* Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 135 (D.D.C. 2010); Nat'l Parks Conservation Ass'n, 660 F.Supp.2d 2, 5 (D.D.C. 2009).

[120] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

[121] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982) (holding that "a major departure from the long tradition of equity practice should not be lightly implied." Statutes should be construed "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.").

[122] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

No section in the APA prohibits courts from vacating agency actions prior to a decision on the merits. To the contrary, the APA's legislative history confirms that the APA's judicial review provision should not be construed as "limiting or unduly expanding judicial review."[123] The Attorney General's Manual on the Administrative Procedure Act (1947) also explains that the APA's judicial review provision is intended as "a general restatement of the principles of judicial review embodied in many statutes and judicial decisions."[124]

Nonetheless, commentators often argue that Section 706 of the APA expressly limits the court's remedial discretion.[125] That section directs courts to set aside agency action "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[126] The provision is inapposite as a court considering an agency's request for remand—a judicially created course of action not addressed in the APA—is not engaging in judicial review. Remand, in fact, *avoids* judicial review of the challenged rule. Thus, Section 706 does not preclude courts from determining whether vacatur should accompany an agency's request for voluntary remand.

Furthermore, courts have routinely rejected the argument that Section 706 constrains the court's equitable discretion to set aside agency action. Section 706(2)(A) provides that a court "shall" set aside unlawful agency actions, suggesting that vacatur of an unlawful agency action is mandatory after a court finds an error[127] While that language may be mandatory, it is not exclusive. It "does not expressly limit a reviewing court's authority to set-aside an agency's action; it merely requires a reviewing court to do so in certain circumstances."[128]

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[123] Legislative History of the Administrative Procedure Act, Sen. Doc. No. 158, 79th Cong. 2d Sess., at 39 (1944-46).

[124] TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

[125] *See, e.g.,* Revesz, *supra* note 17, at 390.

[126] 5 U.S.C. § 706(2).

[127] *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (quoting Anderson v. Yungkau, 329 U.S. 482, 485 (1947)) ("the mandatory 'shall'. . . normally creates an obligation impervious to judicial discretion").

[128] Ctr. For Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236, 1241 (D. Colo. 2011).

Courts have consistently held that vacatur is a discretionary remedy entrusted to their sound equitable discretion, even under Section 706.[129] For example, courts have repeatedly held, when equity demands, a flawed rule need not be vacated, even where it is found to be arbitrary, capricious, or contrary to law.[130] The vacatur power is not therefore limited to the provisions of the APA but rests in the sound equitable discretion of the court.[131] That same reasoning supports the corollary proposition, namely that the court retains discretion to vacate a rule prior to establishing a definitive error. [132] One court succinctly explained this point with the following syllogism, "because vacatur is an equitable remedy, and because the APA does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of vacatur without a decision on the merits."[133] No appellate court has

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[129] Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1139 (10th Cir. 2010) (holding that "[v]acatur is an equitable remedy . . . and the decision whether to grant vacatur is entrusted to the district court's discretion").

[130] Many courts have held that, while "[t]he ordinary practice is to vacate unlawful agency action," courts retain equitable discretion to "not vacate the action but instead remand for the agency to correct its errors" in certain limited circumstances. United Steel v. Mine Safety & Health Admin., 925 F.3d 1279, 1287 (D.C. Cir. 2019); *see also* Pollinator Stewardship Council v. EPA, 806 F.3d 520, 522, 532 (9th Cir. 2015) (discussing equitable considerations requiring remand *with* vacatur); Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012) (discussing equitable considerations requiring remand *without* vacatur). This practice underscores that the decision to vacate or retain administrative actions rests in the sound equitable discretion of the court.

[131] Professor Levin examined the court's equitable authority to remand without vacatur, even in the face of the APA's mandate to set aside agency action found arbitrary, capricious, or contrary to law. Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 323–29 (2003). He concluded that the Administrative Procedure Act should not be read literally as that would constrain the court's discretion to adjust its relief to the exigencies of the circumstances.

[132] *See Ctr. For Native Ecosystems*, 795 F. Supp. 2d at 1241 n.8 (explaining how the equitable principles identified by Professor Levin support pre-merits vacatur); *see also In re* Clean Water Act Rulemaking, No. C 20-04636 WHA, 2021 WL 5792968, at *4 (N.D. Cal. Dec. 7, 2021).

[133] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1022 (quoting *Ctr. for Native Ecosystems*, 795 F. Supp. 2d at 1241–42).

disavowed that logic as doing so would unduly constrain equity jurisdiction.[134]

Nonetheless, some district courts have refused to order pre-merits vacatur on the grounds that such relief would violate the notice and comment requirements of APA.[135] The argument is unfounded as that requirement does not bind the court.[136] It also assumes vacating a rule prior to the merits would allow agencies to end-run their notice and comment obligations.[137] But vacatur is not a *fait accompli*; the court must assess whether to remand with vacatur based on the two-prong *Allied Signal* test, which safeguards against strategic behavior by agencies.[138] Therefore, courts can take into consideration concerns about agencies circumventing the APA, but that is not a categorical basis for categorically denying the court's authority to order pre-merits vacatur.[139]

Sovereign immunity is not a jurisdictional bar to pre-merits vacatur either.[140] Section 702 of the APA[141] is intended broadly to "eliminate the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer."[142] Furthermore, vacatur only arises when the agency files a motion for voluntary remand, thereby *invoking* the court's equitable authority to fashion an appropriate remedy, including remand with vacatur.[143] Even when the court vacates the agency rule, it

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[134] To the contrary, appellate courts have implicitly affirmed their authority to vacate rules prior to a merits determination. Safer Chemicals, Healthy Families v. EPA, 791 F. App'x 653, 656 (9th Cir. 2019); Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992–94 (9th Cir. 2012) (evaluating vacatur on motion for voluntary remand).

[135] *See* Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126 (D.D.C. 2010).

[136] *See Ctr. for Native Ecosystems Council*, 795 F. Supp. 2d at 1241 n.6 ("a court's decision to vacate an agency's action is not subject to the APA['s]" notice-and-comment requirements).

[137] *Id.*

[138] *Id.*

[139] *See* discussion *infra* Section V (discussing contrasting policy concerns raised by pre-merits vacatur, all of which can be considered by the courts through the *Allied-Signal* framework).

[140] *See In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013 (N.D. Cal. 2021) (rejecting theory that sovereign immunity precludes pre-merits vacatur).

[141] 5 U.S.C. § 702 (2012).

[142] H.R. REP. NO. 94-1656, at 9 (1976) (Conf. Rep.) (emphasis added).

[143] E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 681 (9th Cir. 2021) (Agencies understand that "[s]ingular equitable relief," such as vacatur of a nationwide rule, "is 'commonplace' in APA cases").

does not issue any binding determinations that would constrain the agency or encroach on its decision making functions on remand. Instead, the court returns the case to the agency "in order that it may take further action in accordance with the applicable law."[144] The agency thus escapes a potentially adverse ruling on the merits and is free to reevaluate its decision.[145]

In this light, it is inaccurate to characterize pre-merits vacatur as affording plaintiffs complete relief without ever having to prove their case. While the court sets aside the agency action due to the seriousness of the errors and disruptive consequences, it does not issue any definitive rulings that constrain the agency's options on remand. Pre-merits vacatur is not therefore a complete victory for plaintiffs; nor is it a complete loss for the agency. Both sides survive to fight another day.

By contrast, stripping courts of their authority to order vacatur on motions for voluntary remand leads to one-sided inequitable outcomes. Agencies would be able to obtain voluntary remands under the permissive framework adopted by courts without any risk of vacatur. This process would allow agencies to "snatch a temporary victory from the jaws of defeat" and insulate a possibly unlawful rule from judicial review, even when such an outcome would cause severe harm.[146] To guard against such an inequitable outcome, courts retain the longstanding authority to voluntarily remand challenged rules with vacatur and thereby check administrative agencies seeking to escape judicial review. Again, nothing in the APA demonstrates a clear intent to depart from this long tradition of equity practice.

PART IV. THE POLICY JUSTIFICATION FOR VACATING RULES ON A MOTION FOR VOLUNTARY REMAND

Courts have broad authority to order vacatur on motions for voluntary remand prior to a merits determination. But doing so raises contrasting policy implications, which may lead courts to

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[144] Ford Motor Co. v. NLRB, 305 U.S. 364, 374 (1939).
[145] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) (explaining that agency must provide reasoned basis for reversing prior decision).
[146] Revesz, *supra* note 17 at 369–70 (discussing prejudice to plaintiffs due to voluntary remands without vacatur).

differing outcomes based on the facts of each case.[147] Three policy considerations, however, weigh heavily in favor of pre-merits vacatur of insufficiently protective environmental regulations: (1) preventing serious environmental harm on remand, (2) ensuring access to the courts, and (3) saving judicial resources. These considerations were at the forefront of two recent decisions vacating and remanding Trump-era regulations that eliminated longstanding Clean Water Act protections.[148]

A. Pre-Merits Vacatur Prevents Serious Environmental Harm That Would Otherwise Occur During A Voluntary Remand.

Environmental injury is "often permanent or at least of long duration, *i.e.*, irreparable."[149] Leaving an inadequate rule in place can cause serious, irreversible environmental harm on remand. That concern is particularly acute given that it often takes agencies two years, if not longer, to reconsider and reverse a flawed rule.[150] Vacatur is an expeditious way to prevent years worth of irreversible harm.[151]

Also, vacatur dovetails with the policy goals underlying environmental statutes. For example, the Clean Water Act ("CWA") has the express goal "to restore and maintain the

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[147] *See In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1022 (noting "[c]ontrasting policy" implications of pre-merits vacatur). *Compare* Ctr. For Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011), *with* Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 135–36 (D.D.C. 2010).

[148] *See* Pascua Yaqui Tribe v. U.S. EPA, 557 F. Supp. 3d 949 (D. Ariz. 2021); *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1022.

[149] Amoco Prod. Co. v. Gambell, 480 U.S. 531, 545 (1987).

[150] *See* O'Connell, *supra* note 90, at 964. More recent examples confirm these findings. For example, on June 6, 2021, the Biden Administration stated its intent to replace the Trump-era Clean Water Act Certification Rule. *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 2, 2021) (to be codified at 40 C.F.R. pt 121). The Administration explained that it did not anticipate finalizing a revised rule until Spring 2023 at the earliest, a delay of almost two years. *See In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1020 (documenting anticipated delay). In the lawsuits challenging the Navigable Waters Protection Rule, the agency was unable to provide a timeline for replacing that rule.

[151] *See* Pollinator Stewardship Council v. EPA, 806 F.3d 520, 522, 532 (9th Cir. 2015) (vacating a challenged rule as leaving the rule in place "risks more potential environmental harm than vacating it").

chemical, physical, and biological integrity of the Nation's waters."[152] The ESA commands federal agencies to "insure" that their actions "do not jeopardize" the continued existence of a threatened or endangered species.[153] Leaving a flawed rule in place on remand (e.g., one that exposes the Nation's waters to degradation or endangered species to jeopardy) is antithetical to those statutory mandates. For that reason, appellate courts have focused on environmental consequences when assessing whether to remand a rule with or without vacatur.[154]

Preventing serious environmental injury was a driving reason behind two recent decisions that remanded and vacated the Navigable Waters Protection Rule.[155] There, the courts granted the government's request for a voluntary remand while simultaneously vacating the rule to stem any further "serious environmental harms."[156] The courts found that vacatur was necessary to prevent "cascading downstream effects" attributable to the rule, including "effects on water supplies, water quality, flooding, drought, erosion, and habit integrity."[157] These harms would disproportionately affect the plaintiff tribes of the arid southwest, who have relied on clean water since time immemorial.[158] As the courts further noted, "[s]uch pollution and

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[152] 33 U.S.C. § 1251(a) (2012).

[153] 16 U.S.C. § 1536 (2012) (directing all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species . . . ."); *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) (describing the Endangered Species Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation").

[154] *See Pollinator Stewardship Council,* 806 F.3d at 532 (vacating a challenged rule where leaving the rule in place "risks more potential environmental harm than vacating it"); Idaho Farm Bureau Fed'n, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (choosing not to vacate because vacatur would risk potential extinction of a snail); Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 994 (9th Cir. 2012) (choosing not to vacate because vacatur could lead to air pollution).

[155] *See* Pascua Yaqui Tribe v. U.S. EPA, 557 F. Supp. 3d 949, 955 (D. Ariz. 2021); Navajo Nation v. Regan, 20-CV-602-MV/GJF, 2021 WL at 4430466, at *5 (D.N.M. Sept. 27, 2021).

[156] *See Pascua Yaqui Tribe*, 557 F. Supp. 3d at 955–56; *Navajo Nation*, 2021 WL at 4430466 at *4.

[157] *Navajo Nation*, 2021 WL at 4430466 at *4; *Pascua Yaqui Tribe*, 557 F. Supp. 3d at 953.

[158] *Navajo Nation*, 2021 WL at 4430466 at *4.

destruction cannot easily be undone."[159] Pre-merits vacatur are thus essential to prevent serious harm, as the agencies candidly admitted.[160]

Environmental protection was also at the forefront of a recent decision vacating a Trump-era rule that limited state and tribal government's authority to deny the necessary certification for CWA permits.[161] The court found the plaintiffs in that case—states, tribes, and environmental organizations—would suffer "significant environmental harm" including harms that would endure for a generation, should the court remand the rule without vacatur.[162] Rather than endorsing that outcome—an outcome that "contravenes the structure and purpose of the [CWA]"—the court vacated the rule, thereby restoring long-standing safeguards on remand.[163]

Across these cases, pre-merits vacatur prevented further environmental harm while also providing the regulated community with regulatory certainty. As both courts noted, the agencies planned to reconsider and replace the Trump-era rules due to their serious flaws.[164] Vacatur expedited that outcome by reinstating the prior regulatory regime and providing industry

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[159] *Id.*

[160] The defendant agencies provided declarations documenting the serious harms posed by the Navigable Waters Protection Rule during the year it was in effect. *See Pascua Yaqui Tribe*, 557 F. Supp. 3d at 950–51 (summarizing agencies' declarations). They have since provided additional analysis demonstrating how the Navigable Waters Protection Rule irreparably harmed the nation's waters in violation of the Clean Water Act—harms that would have continued unabated absent vacatur. *See* Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372, 69,407–16 (proposed Dec. 7, 2021) (to be codified at 10 C.F.R. pt. 120).

[161] *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1027 (N.D. Cal. 2021).

[162] *Id.*

[163] *Id.* at 1026. The Supreme Court subsequently stayed the district court's order "insofar as it vacates the current certification rule," pending disposition of the appeal in the Ninth Circuit and a timely petition for a writ of certiorari, if sought. *See* Louisiana v. American Rivers, 142 S. Ct. 1347, 1347 (2022). The Court did not provide any rational for its ruling.

[164] *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1026 (N.D. Cal. 2021); Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949, 953 (D. Ariz. 2021).

with a familiar framework for complying with the CWA.[165] In this way, pre-merits vacatur *reduced* the uncertainties associated with regulatory change on remand.[166]

Pre-merits vacatur also foreclosed any misplaced reliance interests on the flawed rules, which were only in place for a short period of time.[167] For example, in *In re Clean Water Act Rulemaking*, the court rejected industry's contention that it had relied on the 2020 CWA Certification Rule, "[t]he 2020 rule was in effect for thirteen months — and under attack since before day one — too brief and unsettled a time for justifiable reliance to build up."[168] To foreclose any justifiable reliance, the court promptly vacated the rule on remand.[169] That would not have been possible, had the court been powerless to vacate the rule on remand or been obligated to delay relief for months pending a merits ruling.

None of these cases involved a situation where the agency was attempting to use vacatur to reinstate a regulatory regime that was insufficiently protective or out of compliance with an environmental statute. In such a scenario, environmental protection would provide a compelling, if not overriding, basis to deny pre-merits vacatur. Indeed, courts have withheld vacatur in such situations to avoid a regulatory void and the associated environmental harm.[170] Preventing serious harm is thus a weighty factor in the court's assessment, and one that can be achieved by promptly vacating insufficiently protective environmental rules on voluntary remand.

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[165] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1027 (explaining that returning to the prior regulatory regime, which it had been in for decades, would be "less disruptive" than leaving the flawed, Trump-era rule in place); *see also Pascua Yaqui*, 557 F. Supp. 3d at 956 (explaining that Industry failed to identify any harm from returning to the prior regulatory regime, which was "familiar" and had been in place for decades).

[166] As courts have noted, regulatory uncertainty typically attends vacatur of any rule and is insufficient to justify remand without vacatur. *Pascua Yaqui*, 557 F. Supp. 3d at 956 (pre-merits vacatur mitigated those concerns by returning promptly to "familiar" regulatory regimes that had been in place for decades).

[167] To establish a property interest protected by due process, an entity must "have a legitimate claim of entitlement to it," rather than "a unilateral expectation of it." *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

[168] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1027.

[169] *Id.* at 1028–29 (declining to stay order vacating Clean Water Act Certification Rule).

[170] *See supra* notes 50-54 and associated text WHAT? – differs from FN 94 & 113.

B. Pre-Merits Vacatur Ensures Access to the Courts.

Public-interest environmental litigation depends upon the public's access to the courts, including the opportunity to obtain "complete rather than truncated justice."[171] Voluntary remands without vacatur run contrary to that principle—they deprive litigants of their day in court and subject them to harmful rules on remand with no recourse. Pre-merits vacatur is thus essential to mitigate that result and provide litigants with singular relief, as is "commonplace in APA cases."[172]

Ensuring access to the court was at the forefront of *In re Clean Water Act Rulemaking*. There, EPA asked the district court to remand the CWA Certification Rule without vacatur, which would have cut off judicial review with no relief to the plaintiffs, states, tribes, or environmental organizations. The court expressed concern that leaving the challenged rule in place on remand would "deny the petitioners the opportunity to vindicate their claims in federal court and would leave them subject to a rule they have asserted is invalid."[173] Indeed, the court identified this concern as "more pertinent than the competing concern" of an agency repealing a rule without public notice and comment.[174]

Access to the courts was also a driving concern in *Pasqua Yaqui Tribe*, where the government tried twice to deny the plaintiff tribes their day in court. There, the defendant agencies first attempted to stay the litigation challenging the Navigable Waters Protection Rule, all while the agencies continued to apply the rule at record setting pace to strip longstanding CWA protections.[175] The court rejected the request, noting the requested stay would force the plaintiff tribes to "idly stand by while the Agencies fully apply and actively implement" the rule "to the detriment of the Tribes' and the Nation's waters."[176] Despite that ruling, the agencies then sought an even harsher remedy: voluntary remand of the rule coupled with *dismissal* of the Tribes' claims challenging

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[171] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).
[172] E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 681 (9th Cir. 2021) ("Singular equitable relief is 'commonplace' in APA cases.") (quotation omitted).
[173] *In re* Clean Water Act Rulemaking, 568 F. Supp. 3d 1013, 1021 (N.D. Cal. 2021).
[174] *Id.*
[175] Pasqua Yaqui Tribe v. United States EPA, No. CV-20-00266-TUC-RM, 2021 U.S. Dist. LEXIS 203490, at *1 (D. Ariz. Apr. 12, 2021).
[176] *Id.* at *2 (quotations omitted).

the rule.[177] That request would have kicked the tribes out of court without any opportunity to reach the merits—a common feature of voluntary remands. While the court granted the government's request for remand and dismissal, it vacated the rule to safeguard the Tribes' interests and provide them with relief.[178]

Pre-merits vacatur does not deprive intervenor defendants of their day in court, contrary to arguments often made by industry groups. For example, in *Pascua Yaqui Tribe*, industry supported the government's request for a voluntary remand of the Navigable Waters Protection Rule.[179] Industry was in no position to claim harm from obtaining that result as industry had its day in court. Furthermore, industry's interests were fully protected on remand for two reasons. First, the court did not conclusively rule on the merits or direct the agencies to take any particular action during the forthcoming rulemaking on remand.[180] Thus, the agency was free to consider the parties' arguments about the CWA in a new rulemaking, including industry's contentions. Second, industry could participate in that rulemaking, thereby influencing the process.[181] If industry was nonetheless dissatisfied with the resultant rule, it could file its own lawsuit and obtain its day in court.[182]

In sum, pre-merits vacatur provides a crucial counterweight against the government's increasing use of voluntary remands to avoid judicial review. Requesting such remands is no longer a risk-

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[177] Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021) (in addition to the Government's motion for voluntary remand, the Defendant-Intervenors sought dismissal of the Tribes' claims challenging the Navigable Waters Protection Rule).

[178] *Id.*

[179] *Id.* at 951 (Industry also opposed accelerated merits briefing, foregoing its opportunity to brief the merits before the court remanded and vacated the rule).

[180] *Id.* at 957 (the court's opinion did not rule on the parties' summary judgment motions, which were dismissed without prejudice).

[181] Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (proposed Dec. 7, 2021) (to be codified at 33 C.F.R. § 328 and 40 C.F.R. pt. 120) (after the court remanded the Navigable Waters Protection Rule, the Agencies sought notice and comment on a proposed rule to revise the definition of waters of the United States).

[182] *See* Alsea Valley All. v. Dep't of Com., 358 F.3d 1181, 1184 (9th Cir. 2004) (holding that remand orders are not generally appealable by non-agency parties); *see also* Pit River Tribe v. U.S. Forest Serv., 615 F.3d 1069, 1075–77 (9th Cir. 2010) (applying and reinforcing *Alsea Valley*) (these reasons help explain why a remand order is non-final for the purposes of appellate review by non-agency litigants, such as industry intervenors).

free strategy for the government. If the government asks the court to forego a merits ruling, it may pay the price—vacatur of the challenged rule—unless the government can demonstrate that the equities warrant leaving that rule in place.

C. Pre-Merits Vacatur Saves Judicial and Administrative Resources.

Courts have consistently recognized that it is often more efficient for an agency to cure its own errors than for the court to issue a definitive ruling on the merits.[183] Pre-merits vacatur allows this action, the court can vacate and remand a challenged rule without going through a full adjudication and directing the agency to take specific action on remand.[184]

The Government has repeatedly recognized these efficiencies by seeking voluntary remand with vacatur in multiple rulemaking contexts.[185] The Government, however, has tried to stand as the gatekeeper to this remedy, claiming that vacatur is only appropriate when the Government concedes error.[186] But there is no basis for that condition precedent, which "simply puts a different spin on [the] contention there must be some sort of

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[183] B.J. Alan Co. v. ICC, 897 F.2d 561, 563, n.1 (D.C. Cir. 1999) (courts "have recognized that '[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.'") (quoting Commonwealth of Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978)).

[184] *See supra* Section IV.A.

[185] *See* Respondent EPA's Unopposed Motion for Voluntary Vacatur and Remand at 7, California v. EPA, No. 21-1035 (D.C. Cir. 2021) (requesting vacatur of a Trump-era air quality rule that had been promulgated without the requisite notice and comment); Respondent's Consent Motion for Voluntary Vacatur and Remand at 11–14, EDF v. EPA, No. 19-1222 (D.C. Cir. 2021) (requesting vacatur of a Trump-era rule that relied on reasoning rejected by court in a different case); Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 135–36 (D.D.C. 2010) (explaining that defendant agency sought remand with vacatur due to political interference in rulemaking process);
NRDC v. DOI, 275 F. Supp. 2d 1136, 1138 (C.D. Cal. 2002) (defendant agency sought voluntary remand and vacatur of critical habitat rule).

[186] *See, e.g.*, EPA's Final Corrected Answering Brief at 62–63, Clean Wis. v. EPA, 964 F.3d 1145 (D.C. Cir. 2020) (No. 18-1203) (arguing that court could not vacate rule because the agency did not confess error). *See also In re* Clean Water Act Rulemaking, No. C 20-04636, 2021 WL 5792968, at *4 (N.D. Cal. 2021) (industry adopted this same argument, opposing vacatur of the Clean Water Act Section 401 Certification Rule on the grounds that the agency had not confessed error).

conclusive statement regarding unlawfulness in order to set aside an agency action."[187] The government's flawed position would also deprive the courts of the efficiencies to be gained from pre-merits vacatur, while potentially causing years' worth of additional environmental harm on voluntary remand.[188]

Some commentators have acknowledged the efficiencies of voluntary remand, but then argued they are outweighed by the potentially severe consequences of leaving flawed rules in place.[189] These commentators have thus urged courts to forego voluntary remands and instead hold cases in abeyance pending a new rulemaking.[190] However, that recommendation simply overlooks the court's authority to order vacatur and ensure an efficient equitable outcome on voluntary remand. The recommendation also offers a false solution. While an abeyance does not deny litigants their day in court, it instead delays judicial review, sometimes indefinitely. Thus, the result is largely the same as a remand: the plaintiff has no access to judicial review, even while the unlawful rule remains in place and causes further harm. The real solution then is not to hold the case in abeyance, but for the court to grant the voluntary remand and vacate the challenged rule, thereby providing efficient, expeditious, and equitable relief. The court did just that in *Pascua Yaqui Tribe* when it denied the governments' motion to hold the case in abeyance and subsequently remanded the challenged rule with vacatur.[191]

Commentators have also urged courts to deny motions for voluntary remand, apparently under the theory that the continued threat of litigation will force the agency to act faster.[192] That approach is counterproductive for two reasons. First, it sacrifices the efficiencies of voluntary remand by forcing the government to

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[187] *In re Clean Water Act Rulemaking*, 2021 WL 5792968, at *4.
[188] *See supra* Section IV. (discussing environmental risks of voluntary remand without vacatur).
[189] Revesz, *supra* note 18, at 395–404.
[190] *See id.* at 406.
[191] *See supra* notes 169-72 and accompanying text discussing *Pascua Yaqui Tribe* procedural history.
[192] Revesz, *supra* note 18, at 406 (courts have also adopted this approach, essentially daring the agencies to act quicker or face the consequences of judicial review). *See* Memorandum Order at 3, Clark Cnty. v. DOI (No. 11-278 (RWR)), 2012 WL 3757552, at *1 ("Neither a remand nor a stay . . . is necessary to enable the federal defendants to review and reconsider the determination.").

litigate the case.[193] Second, the ongoing litigation consumes agency resources that would otherwise be spent promulgating a new rule on remand. Denying voluntary remand can therefore *delay* relief, and potentially exacerbate harms to litigants and the environment.

National Parks Conservation Association v. Salazar illustrates the lengthy delay and costs incurred when a court denies voluntary remand with vacatur and instead demands a full adjudication.[194] There, a coalition of environmental groups challenged a coal-mining rule that eliminated protections for streams.[195] Rather than defending the rule, the government sought a voluntary remand with vacatur to fix the alleged violations of the ESA.[196] The court, however, mistakenly believed that it was powerless to vacate the rule on a motion for voluntary remand.[197] It thus denied the government's request for a voluntary remand and ordered merits briefing. [198] Ten months later, the government filed a partial motion for summary judgment, conceding violations of the ESA and requesting vacatur.[199] Eight months after, the court finally ruled on the merits and vacated the rule due to the "clear" violations of the ESA.[200] During that eighteen month delay, however, the unlawful rule remained in place, negatively affecting multiple endangered species and critical habitat.[201] Pre-merits vacatur would have avoided those adverse effects by providing expeditious relief while saving precious judicial and administrative resources.

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[193] *See* Am. Forest Res. Council v. Ashe, 946 F. Supp. 2d 1, 43 (D.D.C. 2013) (because the agency did "not wish to defend" the action, "forcing it to litigate the merits would needlessly waste not only the agency's resources but also time that could instead be spent correcting the rule's deficiencies.").

[194] Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 4 (D.D.C. 2009).

[195] *Id.* at 3.

[196] *Id.* at 4.

[197] *See id.* at 5.

[198] *Id.*

[199] Federal Defendants' Memorandum in Support of Motion for Partial Summary Judgment at 34, Nat'l Parks Ass'n v. Jewell, 965 F. Supp. 2d 67 (2013) (No. 1:09-cv-00115BJR) 2013 WL 10918148.

[200] Nat'l Parks Conservation Ass'n v. Jewell, 62 F. Supp. 3d 7, 17 (D.D.C. 2014) (finding "clear evidence" that the agency failed to comply with Section 7 of the Endangered Species Act).

[201] *Id.* at 16–18 (detailing effects of coal mining operations on listed species that depend on stream habitat).

CONCLUSION

The Biden Administration inherited multiple lawsuits challenging Trump-era rules that eliminated longstanding environmental protections. Faced with this avalanche of litigation, the Administration ran for cover and tried to get rid of the lawsuits as quickly as possible. To that end, the Administration filed multiple motions for voluntary remand without vacatur that would have kicked the plaintiffs out of court and insulated the rules from review. That knee-jerk reaction would also have locked in ever greater ham to the very environmental resources the Administration promised to protect.

The courts prevented such an inequitable outcome by vacating and remanding the rules prior to a merits determination. That remedy falls well within the heartland of the court's authority to do complete, rather than truncated justices. In each of these cases, the courts carefully weighed the seriousness of the errors and the disruptive consequences of vacating the rule on remand. That familiar, two-step framework provides a significant procedural safeguard for district courts to exercise their remedial authority and reach equitable outcomes on voluntary remand that safeguard the environment, ensure access to the court, and save judicial resources.