UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAKOTA RURAL ACTION, *et al.*, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants*.	Civ. Action No. 18-2852 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION.

By Defendants' own admission, the Farm Service Agency's ("FSA") categorical exclusion of financial assistance to create or expand medium concentrated animal feeding operations ("medium CAFO CatEx") suffers from "defect," which is why they have moved for remand. Defendants do not dispute Plaintiffs' extensive briefing and mountain of evidence showing that medium CAFOs create significant environmental effects. Because they cannot point to anything in the Administrative Record to even suggest otherwise, they ask for remand without vacatur so that FSA can selectively target documents that support a "no significance" finding after the fact, and without public input—an approach that is not allowed.

Defendants' proposal of remand without vacatur is improper for three reasons. First, the CatEx is so riddled with violations of the National Environmental Policy Act ("NEPA") and Administrative Procedure Act ("APA") that it cannot continue in its current form. Second, there is no serious possibility that FSA can justify the CatEx given the clarity and volume of information showing significant and damaging effects of medium-sized CAFOs on the human environment. These effects lead to the third and most important reason for vacatur: the impacts from FSA-supported medium CAFOs on public health and the environment currently harm, and will continue to harm, the Plaintiffs in this case, their members, and other rural communities. *See, e.g.*, Tom Frantz Decl. ¶¶ 4-5, 9-12 (Dkt. No. 35-1) (describing respiratory problems felt while living on and working his San Joaquin Valley farm, located in a California region polluted from dairy emissions that continues to see medium dairy CAFOs receiving FSA funding). To protect their members' communities and allow those communities to adequately protect themselves, Plaintiffs need immediate access to environmental analysis and public notice of FSA

assistance for new and expanding medium CAFOs. Contrary to Defendants' assertions, this relief is only available if the medium CAFO CatEx is vacated.

Indeed, it is the Plaintiffs—not Defendants—who represent the rural communities directly impacted by the widespread harms from medium CAFOs. Defendants' repeated attempts in their briefing and declarations to claim the mantel of promoting "family farms" on the basis of their broad definition of the term is equivalent to promoting Perdue Pharma's interests as a "family pharmacy" because it happens to be owned by related members of the Sackler family.

Under Defendants' proposal for remand without vacatur, FSA will continue to fund facilities that pump out incalculable tons of animal waste annually into the environment, polluting the air, wells, and streams of the people who rely on those resources, without any public notice or environmental review whatsoever. In contrast, vacatur would require FSA to give notice to and hear from the affected rural communities, and consider such significant effects to the environment and public health before financing such harmful projects—exactly as NEPA envisions.

ARGUMENT.

I. THE MEDIUM CAFO CATEX SHOULD BE VACATED BECAUSE FSA CANNOT JUSTIFY IT.

FSA cannot possibly categorically exclude medium CAFO financing, because these lending actions have cumulatively significant effects on the environment. To receive remand without vacatur, FSA must at least show that there is a "serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Haw. Longline Ass'n v. NMFS*, 288 F. Supp. 2d 7, 12 (D.D.C. 2003) (Kollar-Kotelly, J.) (describing one of two prongs of the remand without vacatur test). Plaintiffs have demonstrated beyond any doubt that medium CAFOs have significant effects on the human environment. *See* Pls.' MSJ Br. 23-30 (Dkt. No.

35) (describing massive scope of CAFO operations' impacts and several categories of damaging effects on the environment, including air pollution, water pollution and overconsumption, increased risk of disease and antibiotic resistance, disproportionate impacts on environmental justice communities, and harm to animals and ecosystems). Therefore, FSA cannot possibly justify categorically excluding medium CAFO financial assistance. 40 C.F.R. § 1508.4 (no categorical exclusion allowed if there are significant effects on the environment).

Defendants' only response to this mountain of evidence is to tell the Court to ignore it, contending that it is not the Court's "task" to look to whether the agency's actions have significant effects. *See* FSA MSJ Opp. 20 n.8 (Dkt. No. 37). FSA intends to further ignore Plaintiffs' evidence on remand, as it has nowhere stated it intends to provide for notice-and-comment on the CatEx. *See* Pls.' MSJ Br. 17 n.11 (Dkt. No. 35). Distilled to its essence, Defendants are saying that to satisfy the "serious possibility" test here, all FSA must do is submit a declaration baldly stating it expects to substantiate the CatEx by cherry picking the record and searching for future data that will support a finding of no significant effects, *see generally* Nell Fuller Decl. (Dkt. No. 31-1)—all the while excluding any consideration of Plaintiffs' own expert declarations and submissions during both motions practice and on subsequent remand.

However, reams of case law show that courts look to record and extra-record evidence to determine whether the agency action could have significant effects on the environment and, thus, whether here FSA is likely to substantiate its efforts to dodge congressionally mandated NEPA review. *See, e.g.*, *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 23-24 (D.D.C. 2009) (Kollar-Kotelly, J.) (finding arbitrary and capricious a categorical exclusion for lifting gun restrictions in National Parks because information showed "a substantial dispute exists with respect to the environmental effects of the Final Rule, and that such effects may have

a significant impact on public health or safety"); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 13-14 (D.D.C. 1998) (finding that elk feeding, bison feeding, and bison management programs all have environmental effects on bison herd, and therefore holding the agency's failures to consider those actions' effects "are in violation of NEPA").[1]

FSA's claim that Plaintiffs improperly introduced this evidence is particularly baseless. Plaintiffs' expert declaration "features exactly the sort of commentary that parties typically submit to an agency," especially for "technical subject matter." *Oceana v. Pritzker*, 126 F. Supp. 3d 110, 113-14 (D.D.C. 2015). Such technical declarations aid the court when plaintiffs otherwise are unable to present the information before the agency and the record is deficient. *Id.* (allowing declaration where there was no notice and comment period on the subject matter); *see also Sierra Club v. Bosworth*, 2005 WL 2281074, *4-7 (E.D. Cal. Sept. 16, 2005) (allowing expert declarations "to assist the Court in determining whether the [agency] considered all relevant factors and to assist in explaining complex scientific issues" in facial challenge to categorical exclusion) (categorical exclusion vacated on appeal, 510 F.3d 1016 (9th Cir. 2007)); *United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 3-7 (D.D.C. 2017) (considering fifteen declarations pursuant to this Circuit's jurisprudence "consistently" stating that district

[1] *See also, e.g., Found. on Economic Trends v. Heckler*, 756 F.2d 143, 145 (D.C. Cir. 1985) (enjoining NIH's approval of deliberate release of genetically engineered organisms because "[s]ome observers believe that such dispersion would affect the environment and the climate in harmful ways," and the agency "ignoring possible environmental consequences will not suffice"); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 996 (9th Cir. 2004) ("Although it might ultimately be appropriate for the agency to conclude, after a proper analysis, that the projects would not have significant cumulative effects, the potential for such cumulative impacts is apparent here, such that the subject requires more" than provided); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1028-29 (9th Cir. 2007) (vacating a categorical exclusion where an agency "summarizing the results" of its substantiation efforts "is inadequate as a cumulative impacts analysis because it offers only conclusory statements that there would be no significant impact," despite the Court observing that the category of actions has "potential significant effects, such as effects on soil and water quality" and "effects on wildlife and vegetation").

courts may consider extra-record evidence when the court "cannot determine from the administrative record whether the agency complied with its procedural obligations").[2] FSA *invited* this discussion by seeking remand without vacatur, claiming "there is a serious possibility that FSA will substantiate its decision" by showing that medium CAFOs have "no significant effects." FSA MSJ Opp. 11 (Dkt. No. 37). Defendants' expectation that the Court should take FSA's word for that assertion highlights the arbitrary and capricious nature of FSA's approach.

A categorical exclusion is only proper if medium CAFOs individually and cumulatively have no significant effect on the environment. 40 C.F.R. § 1508.4. Here, Defendants acknowledge the record does not show consideration of the public health and environmental effects of medium CAFOs, and even admit FSA needs to examine "additional data" including "peer-reviewed scientific data" on remand. FSA MSJ Opp. 11 (Dkt. No. 37). Therefore, Plaintiffs' additional materials beyond the "defect[ive]" record, *see id.* at 20, are properly considered by the Court when determining that there is no serious possibility FSA can show medium CAFOs have no significant environmental effects.

II. THE MEDIUM CAFO CATEX SHOULD ALSO BE VACATED BECAUSE THERE IS NO REASONED BASIS FOR IT.

Ignoring Plaintiffs' evidence and citations to the record, FSA instead asserts that "[1] the substantial data [it] examined, [2] CEQ's concurrence that FSA gave adequate consideration to the potential environmental effects of the activities covered by the CatExs, and [3] the additional data that FSA will examine" show it can substantiate the medium CAFO CatEx on remand. FSA

[2] The other fifteen declarations in this case that Defendants complain of are standing declarations, which Plaintiffs are required to submit at summary judgment. *See, e.g.*, *Scenic Am. v. U.S. DOT*, 836 F.3d 42, 49 n.3 (D.C. Cir. 2016) ("Scenic should have accompanied its summary judgment materials with evidence of standing").

MSJ Opp. 11 (Dkt. No. 37). Each of these points is wrong, demonstrating that even without the (properly submitted) Martin declaration, the CatEx is beyond repair and must be vacated.

A. The Record Contains No Substantial Data Justifying the CatEx.

Contrary to Defendants' claim, there is no "substantial data" in the record demonstrating that medium CAFOs individually and cumulatively do not have significant environmental effects. FSA cannot even find all of the documents at which the agency says it looked. *See* Rebecca Deaton Decl. ¶ 2 (Dkt. No. 33-2) (certifying that the supplemental record index "identifies *most of the documents*, along with the documents provided in the Administrative Record, directly or indirectly considered by FSA") (emphasis added). Defendants admit that none of the "data" FSA reviewed was specific to medium CAFOs. FSA MSJ Opp. 8 (Dkt. No. 37). Moreover, they point to *no* evidence in the record regarding several types of potentially significant environmental effects of medium CAFOs, including effects on environmental justice communities, *see* Pls.' MSJ Br. 29-30 (Dkt. No. 35), and on endangered wildlife and other animals, *see id*. at 30-31. Likewise, Defendants do not show any consideration of the potentially significant climate change and public health effects of medium CAFO air emissions. These emissions, including the release of methane, hydrogen sulfide, and ammonia, have damaging effects on nearby communities and the climate. *See* Pls.' MSJ Br. 25 (Dkt. No. 35). The failure to consider certain types of significant environmental effects violates NEPA and demonstrates the rule cannot be salvaged. *See Brady Campaign*, 612 F. Supp. 2d at 17; *see also Buffalo River Watershed Alliance v. USDA*, 2014 WL 6837005, *1, 4 (E.D. Ark. Dec. 2, 2004).

In fact, Defendants' few citations to the record—which almost entirely concern water quality and not the numerous other required NEPA considerations—do not come from the final rule or the Supporting Documentation, where FSA is required to explain its decision and

substantiate the lack of significant effects. *See Edmonds Inst. v. Babbitt*, 42 F. Supp. 2d 1, 18 (D.D.C. 1999) (finding it "practically determinative" that "while defendants have relied on a categorical exclusion before this Court, they have provided no evidence whatsoever of such a determination being made before the [action] was finalized"); *Habitat Educ. Ctr. v. Bosworth*, 363 F. Supp. 2d 1090, 1102 (E.D. Wis. 2005) (holding that "deficiencies in the EIS cannot be cured by documents in the administrative record"). FSA's stray, essentially *post hoc* considerations of environmental effects from CAFOs instead are from a variety of unrelated materials that FSA provided in its Supplemental Administrative Record. *See* FSA MSJ Opp. 24 (Dkt. No. 37). FSA cannot "cobble together a 'hard look' from various other analyses" into a "patchwork" to satisfy NEPA. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1073-74 (9th Cir. 2010). Indeed, the Council on Environmental Quality ("CEQ") Categorical Exclusion Memo and *FSA's own regulations* require the agency to send the "administrative record" substantiating any new or modified categorical exclusion to CEQ for approval. *See* Pls.' MSJ Br. 21 (Dkt. No. 35) (citing 75 Fed. Reg. 75628, 75633-34 (Dec. 6, 2010) and 7 C.F.R. § 799.34(b)-(c)). Incidental and incomplete consideration of some environmental effects of medium CAFO assistance, appearing in different places within the Administrative Record, does not constitute the required substantiation.[3]

[3] FSA contends the CEQ substantiation requirement is "merely guidance" with no "legally binding requirements." *Id*. at 25. But FSA has repeatedly stated that it is following the CEQ Categorical Exclusion Memo when it establishes categorical exclusions, including the medium CAFO CatEx. *See, e.g.*, Fuller Decl. ¶¶ 6-7 (Dkt. No. 31-1); AR 1500 (proposed rule explaining FSA is following CEQ Categorical Exclusion Memo). By not adhering to the process in the guidance that it purported to follow, FSA acted arbitrarily and capriciously. *Cf. Teva Pharms., USA, Inc. v. FDA*, 254 F.3d 316 (Table), 2000 WL 1838303, *2 (D.C. Cir. Nov. 15, 2000) (holding agency's failure to follow the case-by-case method that it previously obligated itself to follow "fails for want of reasoned decisionmaking"). Moreover, as noted throughout, even the documents FSA points to outside the administrative record are insufficient to justify the rule.

Without justifying their failure to consider the other NEPA factors, Defendants say FSA considered agricultural waste management and its implications for water quality. *See* FSA MSJ Opp. 24 (Dkt. No. 37). But Defendants' record citations do nothing to contradict the fact that waste from medium CAFOs creates significant cumulative effects. For example, the agency's identification of a "Virginia Poultry" document identifying waste management as "a bigger issue when production is concentrated," *see id*. (quoting AR 2020), is precisely why there should be NEPA review for CAFOs, which both concentrate their waste and cluster around slaughterhouses and processing facilities. *See* Pls.' MSJ Br. 6-8 (Dkt. No. 35) (describing CAFOs as part of industrial animal production). Similarly, the anecdotal fact that some CAFOs voluntarily attempt to reduce their environmental effects—through "best management practices" that are certainly not adopted across the industry—cannot justify an entire CatEx. *Cf. Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1432 (D.C. Cir. 1985) (agency's "mere statement" that "market forces" would act to reduce the environmental significance of an action is "not enough" to avoid preparation of an EA). Indeed, NEPA review could identify where those practices are needed as mitigation to reduce environmental impact.

Moreover, Defendants fundamentally misrepresent or do not understand the underlying federal waste management requirements applicable to medium CAFOs. Contrary to Defendants' briefing, *see* FSA MSJ Opp. 3 (Dkt. No. 37), CAFOs are generally *not* required to apply for National Pollutant Discharge Elimination System ("NPDES") permits or to develop a nutrient management plan. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) (prohibiting EPA from "impos[ing] a duty to apply for a [NPDES] permit on a CAFO that 'proposes to discharge' or any CAFO before there is an *actual* discharge" and a likelihood that those actual discharges will continue) (emphasis in original). EPA does not even know where

many medium CAFOs are located, much less regulate their pollution. *See* 76 Fed. Reg. 65431 (Oct. 21, 2011). Defendants' reliance on an outdated EPA rule predating case law that fundamentally changed which CAFOs are subject to any regulation whatsoever underscores just how little they have explored the environmental effects of the industry FSA is financing.

Regarding their failure to consider air impacts, all Defendants can muster is a statement that FSA considered "standards imposed by the EPA and state regulatory entities," without any citation to the Administrative Record. *See* FSA MSJ Opp. 24 (Dkt. No. 37). Had FSA in fact considered EPA standards for medium CAFOs, it would have learned that EPA comprehensively carved out medium CAFOs from all air emissions regulatory requirements when it commenced a study to establish air emissions estimations methodologies—this again shows FSA did not consider the relevant issue at all. *See Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1037 (D.C. Cir. 2007) (Rogers, J., dissenting); EPA Office of Inspector Gen., "Eleven Years After Agreement, EPA Has Not Developed Reliable Emissions Estimation Methods to Determine Whether Animal Feeding Operations Comply With Clean Air Act and Other Statutes," Rep. No. 17-P-0396 (Sept. 2017);[4] *see also* Pls.' MSJ Br. 37 (Dkt. No. 37) (describing years-long carve-out for CAFO air emissions reporting obligations during pendency of EPA's voluntary remand without vacatur); EPA, "CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms"[5] (showing EPA is continuing to exempt CAFOs from reporting air emissions). An actual analysis of EPA and state regulatory agency air regulations would have provided even more evidence that Plaintiffs' communities need the

[4] *Available at* https://www.epa.gov/sites/production/files/2017-09/documents/_epaoig_20170919-17-p-0396.pdf.

[5] *Available at* https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms.

information and environmental review under NEPA to protect themselves—and that, therefore, no CatEx is proper.

On the flip side, Defendants contend that it was entirely proper to categorically exclude assistance to medium CAFOs on the basis that it would help encourage industry growth because "FSA *must* consider comments on the proposed rule." FSA MSJ Opp. 25 (Dkt. No. 25) (emphasis added). This misconstrues Plaintiffs argument and contravenes precedent. The inquiry into what Congress does not intend an agency to consider turns on whether the agency "relied" on such improper factors in its decision-making. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, Defendants do not dispute that Congress sought to protect the environment in enacting NEPA, and that Congress did not intend for agencies to tailor their environmental review procedures according to industry growth potential. *See Public Utils. Comm'n of State of Cal. v. FERC*, 900 F.3d 269, 282 (D.C. Cir. 1990) (explaining that 42 U.S.C. § 4332 requires agencies "to consider a variety of environmental, not economic, factors"). By relying solely on the "onerous impediment" to industry when it excluded medium CAFO assistance from NEPA review, *see* Pls.' MSJ Br. 20 (Dkt. No. 35) (citing AR 1610), FSA acted arbitrarily and capriciously.

B. CEQ's Conformity Letter Does Not Salvage the Unreasoned CatEx.

In place of a sufficient administrative record, FSA points to a conformity letter it received from CEQ, but this is a red herring. The letter says nothing about medium CAFOs, let alone whether FSA can substantiate that medium CAFO assistance has no significant effects. Indeed, as FSA acknowledges, in the conformity letter CEQ gave "no position on whether the actions to be excluded have the potential for having significant environmental impacts." FSA MSJ Opp. 11 (Dkt. No. 37) (quoting letter at AR 1734). The letter provides nothing for Defendants to rely on.

Even if CEQ's conformity decision somehow weighed in Defendants' favor, the July 15, 2016 letter appears to have been written *before* the medium CAFO CatEx was proposed. The letter only applied to "new and revised categorical exclusions." AR 1734. As Defendants state, the CatEx was created "by implication" in the August 2016 final rule without first being identified in the proposed rule, and was "not listed in [the FSA categorical exclusion] provision," section 799.32. FSA Mot. Vol'y Remand 1 n.1 (Dkt. No. 31). Logically, the CEQ conformity letter would have been written without any knowledge of new categorical exclusions later created "by implication." *See* AR 1734. Thus, the letter's contents say nothing—not even a "no position" assertion—about the medium CAFO CatEx.

C. New Evidence Will Not Salvage the Unreasoned CatEx.

Finally, Defendants' assertion that additional "peer-reviewed scientific data" will justify the medium CAFO CatEx is factually incorrect and contrary to the record here. *See* FSA MSJ Opp. 11 (Dkt. No. 37) (quoting Fuller Decl. ¶ 7). As the Martin declaration, government documents, and other peer-reviewed studies cited in Plaintiffs' summary judgment motion show, FSA's scientific literature review will inexorably conclude that medium CAFOs cumulatively have a wide variety of significant effects on the human environment. *See* Pls.' MSJ Br. 23-30 (Dkt. No. 35); Martin Decl. ¶¶ 6-38 (Dkt. No. 35-14) (literature-supported explanation of how medium CAFO waste "is disposed of in a manner that can pollute the air as well as surface and groundwater resources, and therefore represents a significant public health and ecological hazard").[6] Defendants' plan to target additional studies during remand (without offering notice-

[6] Indeed, even during the time period between Plaintiffs' summary judgment motion and this reply brief, researchers publishing a NASA study in the journal *Nature* found that dairies contribute a whopping *26 percent* of all of California's point-source methane emissions—more than the oil and gas sector. *See* Ex. A (Duren et al., *California's methane super-emitters*, 575 Nature 180 (Nov. 7, 2019)).

and-comment) that will support the medium CAFO CatEx runs headlong into what Plaintiffs have already briefed—that medium CAFOs have significant cumulative environmental effects. *See* Pls.' MSJ Br. 23-30 (Dkt. No. 35); *see also Midcoast Fishermen's Ass'n v. Gutierrez*, 592 F. Supp. 2d 40, 45 (D.D.C. 2008) (explaining it would be problematic if "the agency cherry-picked documents that support its position and ignored those that did not").

* * * *

In short, FSA cannot possibly substantiate its current position that assistance to build or expand medium CAFOs does not individually or cumulatively cause significant effects on the environment. Defendants cannot point to anything in the record that signals such substantiation is even remotely likely, so instead attempt to exclude Plaintiffs' evidence. Because there is no "serious possibility" of FSA justifying the medium CAFO CatEx, the Court should vacate it. *See Haw. Longline Ass'n*, 288 F. Supp. 2d at 12.

III. THE MEDIUM CAFO CATEX SHOULD ALSO BE VACATED BECAUSE THERE WAS NO NOTICE AND PUBLIC COMMENT.

Even if the Administrative Record supported the medium CAFO CatEx, it should be vacated because the public had no fair notice of, nor opportunity to participate in, its creation. It would, therefore, be unlawful and unjust to force rural communities to live with the environmental and public health harms of the CatEx. Defendants argue that the CatEx's creation by eliminating the Environmental Assessment ("EA") requirement for medium CAFOs was foreseeable because the previous EA requirement was "in practice no different than a CatEx." FSA MSJ Opp. 22 (Dkt. No. 37) (contending that a Class I EA under the previous regulations is in effect the same as a CatEx under the current rule). This plays fast and loose with the facts.

Under the previous regulations, FSA assistance for some CAFOs that now would qualify for the "medium CAFO"[7] CatEx actually required the agency to prepare a Class II EA. For example, FSA assistance to create a 110,000 broiler chicken CAFO—a medium CAFO—would have required a Class II EA. *See* AR 21 (previous 7 C.F.R. § 1940.312(c)(9)). A Class II EA "was a more detailed assessment than a Class I EA." FSA Mot. Vol'y Remand 7-8 (Dkt. No. 31) (quoting previous regulations at AR 20, 32). It required an understanding of "the comprehensive nature of the impacts which must be analyzed" and consultation with other agencies. AR 60-65 (previous regulations providing a five-page exhibit describing the substantive review requirements of a Class II EA). Contrary to FSA's repeated claims, FSA *was* required to provide public notice of Class II EAs, as well as of EAs for Class I actions that would affect floodplains, wetlands, important farmlands, prime rangelands, or prime forest lands; potentially violate state water quality standards; or be located near residential areas that could suffer from "noise, odor, visual, or transportation impacts." AR 21, 40 (previous 7 C.F.R. §§ 1940.312(c)(10), 1940.331(3)-(4)). In other words, both prior to the medium CAFO CatEx and through the vacatur Plaintiffs seek, FSA would put the affected communities on notice, and enable public participation, before it funded certain medium CAFOs.

In contrast, under the CatEx, FSA *at most* fills out a checklist on an Environmental Screening Worksheet ("ESW"); often the agency leaves the ESW blank. *See, e.g.*, Tucker Decl. Ex. A at 28-32 (Dkt. No. 35-6) (blank ESW for support for CAFO adjacent to mobile home park). Blank worksheets provide no opportunity to consider alternative, less harmful actions or mitigation measures. And regardless of whether the agency fills out the ESW, its use of the

[7] *See* 40 C.F.R. § 122.23 (Clean Water Act regulation describing animal number thresholds for different categories of CAFOs).

worksheet does not provide public notice of the agency action. Without notice, neighboring, downstream, and downwind communities cannot participate prior to a CAFO being funded and polluting the air and water and increasing the risk of spread of antibiotic resistant bacteria, often in low income communities and communities of color. *See, e.g.*, Pls.' MSJ Br. 12-14 (Dkt. No. 35) (citing declarations explaining CAFOs' numerous harms to rural communities, including unbearable stench, increased risk of asthma, and increased risk of contaminated drinking water, among others). In short, FSA is wrong that the previous regulations are "in practice no different than a CatEx." *See* FSA MSJ Opp. 22 (Dkt. No. 37).

In any event, the CEQ Categorical Exclusion Memo and FSA's own regulations mandate public notice of a new categorical exclusion and *then* solicitation of comment. 75 Fed. Reg. at 75634-35 (citing 40 C.F.R. § 1507.3); 7 C.F.R. § 799.34(c). The first time the public became aware of the medium CAFO CatEx was in the final rule, *see* FSA Mot. Vol'y Remand 1 n.1 & 3 (Dkt. No. 31), and FSA did not offer an additional comment period for the public to comment on it. FSA therefore violated NEPA and the APA by failing to provide for notice and public comment on a new categorical exclusion. *See* 5 U.S.C. § 555(b); 40 C.F.R. § 1507.3. The only way to remedy this is to vacate the rule and require the agency to begin anew.[8]

[8] The public comments from Plaintiffs and other environmental groups that Defendants cite actually demonstrate that the public did *not* reasonably expect the EA-CatEx "switcheroo" in the final rule. *See* FSA MSJ Opp. 22-23 (Dkt. No. 37). The comments asked FSA to go *beyond* requiring preparation of EAs for medium and large CAFOs by asking the agency to "discontinue the practice" of funding CAFOs altogether, or at least in floodplains; if FSA would not impose a moratorium, Plaintiffs would then "support" the baseline EA requirement in the proposed rule. AR 1487-88. Plaintiffs and the public had no reason to expect that the EA baseline would be removed, especially because of NEPA's notice requirements for new categorical exclusions.

IV. VACATUR IS THE ONLY APPROPRIATE REMEDY.

FSA has failed to meet its burden of showing that vacatur—the presumptive remedy in NEPA cases—does not apply; there is no serious possibility that FSA can justify the medium CAFO CatEx on remand and, even if there were, the unlawful process thus far would be unjust to leave in place. Both of those reasons are amplified by the very real harms that will continue to be felt by Plaintiffs, their members, and other rural communities around the country who had no say in the CatEx's creation and yet live with the dangerous effects of it.

Plaintiffs have extensively demonstrated the numerous ways in which medium CAFOs cumulatively affect the environment, *see* Pls.' MSJ Br. 23-30 (Dkt. No. 35), to which Defendants have no response other than asking the Court to not consider Plaintiffs' briefing and information. *See* FSA MSJ Opp. 20 n.8 (Dkt. No. 37). Moreover, FSA has committed several other errors—both procedural and substantive—which it will not and cannot fix during remand. Consistent with this, "vacating the rule or action promulgated in violation of NEPA is the standard remedy" in this Circuit. *See* Pls.' MSJ Br. 32 (quoting *Humane Soc'y v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007)).

Defendants' argument for vacatur relies on several misstatements of law. They insist that *Sierra Club v. Bosworth* was an as-applied challenge and thus the resulting vacatur applied to the unique facts of the categorically excluded projects. FSA MSJ Opp. 9 (Dkt. No. 37). In reality, the case presented a facial challenge to the categorical exclusion. *See Bosworth*, 510 F.3d at 1023-24 (describing "Challenge to the Fuels CE" as distinct from the as-applied challenges). In response to this facial challenge, the Ninth Circuit held that the Forest Service erred by "declaring that no significant environmental effects were likely without complying with the requirements of NEPA," and enjoined the agency from "implementing the [categorical exclusion] pending its

completion of an adequate assessment of significance of the categorical exclusion from NEPA." *Id*. at 1033-34 (limiting the injunction to projects that the agency had not yet approved prior to initiation of the lawsuit). Similarly, here Plaintiffs ask the Court to enjoin the medium CAFO CatEx's application to any future approval of medium CAFO assistance.

Defendants' argument that vacatur is improper purely because of the disruption to industry is also inconsistent with the law. It demonstrates "economic myopia" and gives "short shrift to the potentially disruptive effects that could flow from remand without vacatur," which is not allowed. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 105 (D.D.C. 2017) (quotation omitted).

Defendants also confusingly assert that "no case in this Circuit authoriz[es] nationwide relief to challenge a federal agency project that was authorized by a generally applicable rule." FSA MSJ Opp. 10 n.3. Plaintiffs do not challenge a specific "federal agency project," but rather facially challenge the medium CAFO CatEx. *See, e.g.*, Am. Compl. ¶¶ 1, 209-210, 220, 227, 233. 240 (Dkt. No. 24). For such a challenge to a nationwide rule, the text of the APA itself authorizes the "nationwide relief" Plaintiffs seek: "the reviewing court shall . . . hold unlawful and set aside agency action." 5 U.S.C. § 706(2). Moreover, in their brief, Plaintiffs repeatedly cited this Court's decision in *Brady Campaign*, which found the National Park Service improperly established a categorical exclusion, and enjoined the agency's underlying rule allowing visitors to carry firearms within a national park or wildlife refuge. *See Brady Campaign*, 612 F. Supp. 2d at 29. The vacatur Plaintiffs seek is both available and standard.

In addition, Defendants are mistaken that reinstatement of the previous regulation for medium CAFO assistance "would not address Plaintiffs' concerns with notice and the level of analysis they complain of under the 2016 rule." FSA MSJ Opp. 14 (Dkt. No. 37). As explained

above, vacatur would lead to public notice of FSA medium CAFO assistance in two different ways. First, some medium CAFOs would require preparation of a Class II EA if the previous regulation were reinstated—and the Class II EA process required public notice.[9] *See* AR 40 (previous 7 C.F.R. § 1940.331(3)-(4)). Under the previous regulations, FSA also provided public notice of Class I EA actions that would affect floodplains, wetlands, important farmlands, prime rangelands, or prime forest lands. *Id*. Second, as FSA official Steven Peterson explained, FSA's handbook now requires "public comment, typically in the form of soliciting public comments" for all EAs. Peterson Second Decl. ¶ 8(b) (Dkt. No. 31-2). Vacatur of the CatEx will require the preparation of an EA for medium CAFO assistance (either the Class I or Class II variety); therefore, vacatur will lead to the public notice and comment opportunities that will allow Plaintiffs, their members, and other affected rural communities to protect themselves.[10]

Finally, the equities favor vacatur. Defendants fail to rebut the point that there is no disruption to the agency and regulated industry in returning to a requirement they operated under for over 25 years, and until very recently. *See* Pls.' MSJ Br. 35 (Dkt. No. 35) (citing *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 21 (D.D.C. 2014)). Instead, Defendants attempt to sow confusion about returning to the former Class I EA worksheet. *See* FSA MSJ Opp. 15-16 (Dkt. No. 37). But that suggested confusion is misleading. FSA and the CAFO industry operated from 1980 to 2016 under three types environmental review processes—a categorical exclusion, a Class I EA, and a Class II EA. *See* AR 9768-9779 (categorizing FSA guaranteed loans for

[9] For the same reason, reinstatement of the prior regulation will ensure a more comprehensive Class II EA for certain medium CAFOs. In addition, the prior Class I EA process provided for more environmental analysis than the current CatEx—as explained above, FSA regularly does not fill out an ESW in the new regime. *See, e.g.*, Tucker Decl. Ex. A at 28-32 (Dkt. No. 35-6).

[10] If Defendants truly are concerned about using an "obsolete" Class I EA to conduct review, Plaintiffs do not oppose Defendants' idea of simply "requir[ing] FSA to conduct an EA review of proposed loan actions to medium CAFO farmers." FSA MSJ Opp. 15-16 (Dkt. No. 37).

agricultural facilities during the 2010-11 time period into the three environmental review processes). Here, vacatur would again return the agency and industry to three environmental review processes—a categorical exclusion for small CAFOs, a Class I EA or Class II EA for medium CAFOs,[11] and an EA for large CAFOs. To the extent there is any additional administrative burden, it does not rise to the level of "a strong showing . . . that vacatur will unduly harm economic interests"; and without such a showing, this Court has been "reluctant to rely on economic disruption" to deny vacatur. *Pub. Emps. for Envtl. Responsibility v. FWS*, 189 F. Supp. 3d 1, 3 (D.D.C. 2016).

CONCLUSION.

For the reasons stated above and in Plaintiffs' Cross Motion for Summary Judgment and Opposition to Defendants' Motion for Remand without Vacatur (Dkt. No. 35), Plaintiffs respectfully request that the Court grant them summary judgment, declare the medium CAFO CatEx unlawful, vacate it, and remand the August 3, 2016 final rule to FSA.

Dated: November 14, 2019

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[11] As explained in Section III, above, some facilities classified as medium CAFOs under the 2016 rule required Class II EAs under the previous regulations. Those Class II EAs under the previous regulation would satisfy the EA requirements in the 2016 rule. *Compare* AR 60-65 (previous regulation requirements for Class II EAs) *with* 7 C.F.R. § 799.42.

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