UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 19-2181 (FYP)
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	(consolidated with 19-2198 and 19-3270)
Defendants.	)	

DEFENDANTS' MEMORANDUM REGARDING
PROPOSED REMAND WITH VACATUR

Defendants U.S. Environmental Protection Agency and Administrator Michael S. Regan respectfully submit this memorandum in response to the Court's March 3, 2022 Minute Order stating that Defendants may file an objection with respect to remand with vacatur as to Claim Four in case number 19-3270 by March 17, 2022. For the reasons discussed below, Defendants do not object to remand of Claim Four but do object to vacatur.

BACKGROUND

In June 2019, EPA published *Freedom of Information Act Regulations Update* (the "Rule") in the Federal Register, 84 Fed. Reg. 30028. The Rule made limited changes to EPA's FOIA regulations "to implement statutory updates, correct obsolete information, and reflect internal EPA realignment and processing changes to improve the Agency's FOIA response process." *Id.* The Rule became effective on July 26, 2019, 30 days after it was published in the Federal Register. *Id.* at 30038.

Shortly before the Rule became effective, three lawsuits were filed challenging various

aspects of the Rule. *See Citizens for Responsibility and Ethics in Washington v. EPA*, No. 19-2181 (D.D.C.); *Center for Biological Diversity v. EPA*, No. 19-2198 (D.D.C.); *Ecological Rights Foundation v. EPA*, No. 19-3270 (D.D.C.). On January 27, 2021, following dispositive motions briefing in the three cases, the parties notified the Court that they were engaged in settlement discussions. ECF No. 42. On November 16, 2021, the parties in the *CREW* and *CBD* matters informed the Court that they had reached an agreement in principle to settle the claims in those cases, ECF No. 48, and they filed their signed settlement agreement on February 10, 2022, ECF No. 50.

The parties in case number 19-3270 did not reach a settlement. In a February 10, 2022 Joint Status Report, those parties provided their positions regarding the impact of the settlement agreement on case number 19-3270. ECF No. 51. In the Joint Status Report, Defendants explained that, pursuant to the settlement agreement, EPA will propose revisions to the text of 40 C.F.R. § 2.103(b)—the same regulation that the *EcoRights* Plaintiffs are challenging in Claim Four of their complaint. Therefore, as an alternative to resolving Defendants' motion to dismiss as to Claim Four, Defendants proposed that the Court instead remand that claim to the agency without vacatur. At the March 3, 2022 status conference, the Court proposed remanding Claim Four with vacatur and permitted Defendants to file a written response to that proposal by March 17, 2022. Defendants appreciate the opportunity to provide their position on the Court's proposal. For the reasons stated below, if the Court remands Claim Four to the agency, it should do so without vacatur.

ARGUMENT

I. The Court Should Not Vacate 40 C.F.R. § 2.103(b) Because the Court Has Not Made a Determination on the Merits

Judicial authority to vacate rules is derived from the Administrative Procedure Act ("APA"), which provides that a court may "set aside agency action" if it makes one of several enumerated determinations, such as that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. And the Court cannot make any of those determinations without first finding that it has jurisdiction to address the claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (courts must determine jurisdiction before considering the merits). Accordingly, courts routinely determine that they cannot vacate agency regulations "without judicial consideration of the merits." *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009); *see also WildEarth Guardians v. Bernhardt*, No. 20-56, 2020 U.S. Dist. LEXIS 197810, at *3 (D.D.C. Oct. 23, 2020) (remanding without vacatur because court had not reviewed the information underlying the agency decisions and "therefore, it has no basis to vacate the agency action"); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 136 (D.D.C. 2010) (court lacked authority to order "vacatur without a determination of the merits"); *California v. Regan*, No. 20-cv-03005-RS, 2021 U.S. Dist. LEXIS 181075, at *13-14 (N.D. Cal. Sep. 16, 2021) (stating, albeit in dicta, that the court would not have granted plaintiffs' request for remand with vacatur where EPA was reconsidering a rule "primarily for policy reasons" because "there has been no evaluation of the merits—or concession by defendants—that would support a finding that the rule should be vacated."). Similarly, the D.C. Circuit has rejected the

argument that agency consent is sufficient for a court to vacate a rule. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015).[1]

Here, because the Court has not yet reached the merits of Claim Four, it has not made a finding under 5 U.S.C. § 706 that is a prerequisite to vacatur. Defendants, moreover, dispute that the Court has jurisdiction over Claim Four and that Plaintiffs should prevail on the merits. The Court therefore lacks "the authority to order vacatur . . . without an independent determination that the [agency's] action was not in accordance with the law." *Carpenters Indus. Council*, 734 F. Supp. 2d at 135. Thus, the options at this time are to "remand without vacatur or . . . proceed to the merits." *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 42 (D.D.C. 2013).[2]

If the Court proceeds to the merits of Claim Four, Defendants respectfully request the Court dismiss that claim for the reasons previously described in the briefing on Defendants' motion to dismiss:

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[1] In some of the cases cited above, the courts emphasized the desire to avoid circumventing the APA's notice-and-comment provisions as a reason not to vacate a regulation without first finding an APA violation. *See, e.g.*, *Nat'l Parks Conservation Ass'n*, 660 F. Supp. 2d at 5. Defendants acknowledge that that reasoning does not apply to 40 C.F.R. § 2.103(b), which is exempt from notice-and-comment requirements under the APA's procedural exception. *See* 5 U.S.C. § 553(b)(3)(A); Mot. to Dismiss, ECF No. 26, at 35-36. Nevertheless, these cases also reflect the more fundamental point that the Court's authority to vacate agency rules derives from the APA and, therefore, a court must make appropriate findings pursuant to the APA before vacating.

[2] Defendants acknowledge that there are decisions from outside the D.C. Circuit recognizing an inherent authority to vacate regulations without first finding them to be unlawful under the APA. *See, e.g.*, *Ctr. for Native Ecosystems v. Salaza*r, 795 F. Supp. 2d 1236, 1240-42 (D. Colo. 2011); *In re Clean Water Act Rulemaking*, No. 20-04636, 2021 U.S. Dist. LEXIS 203567, at *26-27 (N.D. Cal. Oct. 21, 2021). But the view followed by courts in the D.C. Circuit is most faithful to the APA's text—providing for vacatur of agency action "found to be" unlawful on certain, enumerated grounds, 5 U.S.C. § 706(2)—and keeps with other maxims of administrative law, namely the limited and deferential role that courts play in reviewing agency action. The out-of-circuit decisions also cannot be squared with the D.C. Circuit's decision in *Mexichem*, in which the court ruled that it could not "vacate a rule" based on an agency's "concession of a significant merits issue." 783 F.3d at 557.

(1) the Court lacks jurisdiction over Claim Four because Plaintiffs have not shown a substantial probability that 40 C.F.R. § 2.103(b) will cause them any injury;

(2) as the D.C. Circuit held in an analogous situation, "in the absence of a particularized FOIA request, the validity of [the agency's FOIA regulation] is not ripe for judicial review," *Webb v. HHS*, 696 F.2d 101, 106 (D.C. Cir. 1982);

(3) an APA suit is precluded where the plaintiff has an adequate alternative remedy and, here, Plaintiffs have an adequate alternative remedy in the form of a FOIA action in the event of an unlawful withholding of information; and

(4) Section 2.103(b) does not authorize EPA officials to withhold a portion of a record on the basis of responsiveness. Instead, it authorizes the withholding of a "portion of a record" "under one or more exemptions under the FOIA" but not on the basis of responsiveness. Entire records, on the other hand, may be withheld "on the basis of responsiveness or under one or more exemptions[.]"

See Mot. to Dismiss, ECF No. 26, at 20-29; Reply in Supp. of Mot. to Dismiss, ECF No. 29, at 20-33; Sur-Reply in Opp'n to Pls' Cross-Mot. for Partial Summ. J., ECF No. 53, at 3-5.[3]

[3] In the time since Defendants filed their Reply in Support of Defendants' Motion to Dismiss, one of the decisions cited therein, *Cause of Action Institute v. United States DOJ*, 453 F. Supp. 3d 368 (D.D.C. 2020), was reversed. In *Cause of Action Institute v. United States DOJ*, 999 F.3d 696 (D.C. Cir. 2021), the D.C. Circuit held that the plaintiff had standing to challenge a particular agency FOIA policy. 999 F.3d at 703-04. Unlike here, however, the agency in that case had already withheld information from the plaintiff pursuant to that policy. *Id*. at 698-99. Ultimately, the D.C. Circuit dismissed the claim on ripeness grounds, *id*. at 704-05, and that ruling reinforces Defendants' ripeness argument in this case, *see, e.g.*, *id*. at 705 ("[J]udicial appraisal [of the issue] is likely to stand on a much surer footing in the context of a specific application of [agency policy] than could be the case in the framework of [a] generalized challenge."); *id*. (finding that the burden of having to file a FOIA action to challenge the withholding of a portion of a record was not sufficient hardship to avoid dismissal on ripeness grounds).

II. Remand Without Vacatur is Appropriate

The Court can also remand Claim Four without vacatur. *Am. Forest Res. Council*, 946 F. Supp. 2d at 42. Motions for voluntary remand are "commonly granted even when they are opposed." *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013), *aff'd*, 601 F. App'x 1 (D.C. Cir. 2015) (granting voluntary remand without vacatur). Here, EPA proposed a remand without vacatur because it is already proceeding with a rulemaking to revise Section 2.103(b). *See* Joint Status Report, ECF No. 51, at 1-3. This request should be granted in light of EPA's inherent authority to reconsider its own decisions, to ensure the integrity of the administrative process, and to conserve the Court's and the parties' resources.

The standard for remand without vacatur is met here. Voluntary remand without vacatur is proper where an agency requests "a remand (without confessing error) in order to reconsider its previous position." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018). Remand should be granted "so long as 'the agency intends to take further action with respect to the original agency decision on review.'" *Id*. (quoting *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017)); *see Edward W. Sparrow Hosp. Ass'n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C. 2011) (noting that motions for voluntary remand are "usually granted"). This practice is rooted in judicial deference to an agency's inherent authority to reconsider its own decisions, judicial respect for the integrity of the administrative process, and an interest in conserving the resources of courts and parties. *See, e.g., Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416-18 (6th Cir. 2004); *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73-74 (D.D.C. 2015). "Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *see also Util. Solid Waste*, 901 F.3d at 436; *Limnia, Inc*., 857 F.3d at 386-88 (refusing remand where agency had no intention to revisit challenged decision).

Here, EPA seeks remand for substantial and legitimate reasons: it intends to propose revisions to Section 2.103(b), pursuant to its settlement agreement, to remove the doubt created by these lawsuits and to make absolutely clear to the public that EPA does not claim the authority to withhold portions of responsive records on the grounds that portions are non-responsive. Indeed, EPA is already working on the notice of proposed rulemaking that will propose revised text for Section 2.103(b). EPA notes that the settlement agreement specifically requires notice-and-comment rulemaking.

Thus, a remand would ensure that the Court does not prematurely intervene in the agency's process. "In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference' in an ongoing decision-making process." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87 (D.C. Cir. 2012). Allowing the administrative process to run its course here will give EPA an opportunity to revise its own regulation without the need for judicial review.

Remand would also promote judicial economy and conserve the parties' and the Court's resources. Courts "have recognized that '[a]dministrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts,'" *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990), and that deferring to the agency's process can avoid "inefficient" and perhaps "unnecessary" "piecemeal review," *Pub. Citizen Health Rsch. Grp. v. Comm'r, FDA*, 740 F.2d 21, 30 (D.C. Cir. 1984) (citation omitted). It makes little sense for this Court (and potentially the D.C. Circuit, if either party were to appeal) to spend judicial resources resolving the dispute over Claim Four, given that EPA is already in the process of revising the challenged regulation.

"In deciding a motion to remand, [courts] consider whether remand would unduly prejudice the non-moving party." *Util. Solid Waste Activities Grp.*, 901 F.3d at 436. The only prejudice that Plaintiffs claim is their concern that EPA might rely on Section 2.103(b) to withhold non-responsive portions of records from them. But there are several reasons why the Court should not credit Plaintiff's speculation.

First, EPA has repeatedly, unequivocally, and publicly explained that it *does not* have the authority under the FOIA to withhold non-responsive portions of records on grounds of responsiveness. It is implausible to conclude that EPA will reverse course and start withholding non-responsive portions of records, in violation of its expressly-acknowledged legal obligations.

Second, the D.C. Circuit "requires" a presumption "that government officials discharge their duties in good faith." *Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("We must presume an agency acts in good faith[.]")). A finding that EPA officials – after acknowledging the legal prohibition on withholding non-responsive portions of records – will nevertheless withhold such portions and violate their legal obligations would be contrary to the good faith presumption.

Third, EPA has issued guidance to the public and to its personnel involved in responding to FOIA requests, and that guidance expressly states, "EPA Organizations may not redact non-responsive information within a responsive FOIA record."[4] To the extent there is any perceived lack of clarity in Section 2.103(b), EPA's guidance makes the agency's position clear.

[4] *See* Freedom of Information Act Procedures, at 14 (available at https://www.epa.gov/sites/default/files/2021-03/documents/final_epa_foia_procedures_z.pdf); *see also* Freedom of Information Act Policy, at 3 (same) (available at https://www.epa.gov/sites/default/files/2021-03/documents/final_epa_foia_policy_z_0.pdf).

Fourth, Plaintiffs still have presented no evidence that EPA has withheld non-responsive portions of records from Plaintiffs because of Section 2.103(b). Plaintiffs first tried to make such a showing in their Cross-Motion for Partial Summary Judgment, but the examples they cited occurred years *before* there was any binding authority prohibiting federal agencies from withholding portions of records as non-responsive. *See* Reply in Supp. of Mot. to Dismiss, ECF No. 29, at 21. Those examples also occurred years before Section 2.103(b) was even issued and, therefore, they are not probative of how the agency implements that regulation.

Plaintiffs later argued that EPA withheld non-responsive portions of a record in March 2020. Reply in Supp. of Pls' Cross-Mot. for Summ. J. at 12-13. But as EPA explained, it withheld that information because it determined that the information was not part of the requested record but instead constituted a *separate record*. *See* Sur-Reply in Opp'n to Pls' Cross-Mot. for Partial Summ. J., ECF No. 53, at 3-5; Decl. of Elizabeth White, ECF No. 32-4, ¶¶ 8-9. Those withholdings, therefore, do not suggest that EPA believes it may withhold non-responsive portions of records.

At the March 3, 2022 status conference in this case, Plaintiffs' counsel again referred to instances in which EPA had allegedly withheld non-responsive portions of records. After the status conference, at Defendants' request, Plaintiffs' counsel identified eight such examples. Exhibit 1. In each of those instances, however, EPA withheld the information *under specific FOIA exemptions*. Declaration of Eric Wachter ¶¶ 4, 6. The redaction boxes provide some additional description of the underlying material, such as that the redacted information is a "Nonresponsive Conference code," to help the requester decide whether to challenge the withholding. *Id*. ¶ 6. FOIA requesters usually seek more, not less, information about the withheld material, so it would be perverse to penalize EPA for indicating that exempt material is also nonresponsive to the FOIA

request. EPA also determined that some of the withholdings constitute separate records, not portions of records. *Id*. ¶ 7.

Fifth, even if EPA were to withhold a non-responsive portion of a record from Plaintiffs, Plaintiffs would have a remedy—they could bring a FOIA action to challenge the improper withholding. Notably, the D.C. Circuit has held, in the ripeness context, that the "burden" of filing a lawsuit is not enough to create cognizable hardship. *See Webb v. Dep't of Health & Human Servs.*, 696 F.2d 101, 107 (D.C. Cir. 1982); *Cause of Action Institute*, 999 F.3d at 705. For the same reason, the potential burden of filing another lawsuit does not justify denying Defendants' remand request.

For these reasons, if the Court remands Claim Four, it should do so without vacatur.

Respectfully submitted,

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