



Institute for Policy Integrity

new york university school of law

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Committee on Judicial Review
Administrative Conference of the United States

Subject: Comments on Draft Recommendations for Remand Without Vacatur

The Institute for Policy Integrity at NYU School of Law submits the following comments on the ACUS Committee on Judicial Review's draft recommendations for remand without vacatur. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy.

The ACUS draft recommendations recognize the potential value of the remand without vacatur remedy and distill some best practices for courts and agencies to follow. The recommendations should be strengthened by:

1. Creating a strong presumption in favor of remand without vacatur when it furthers the interests of the prevailing parties;
2. Soliciting opinions from the parties on the need to set timelines for revision of a rule remanded but not vacated;
3. Clarifying the scope of the administrative record in the case of remand without vacatur.

1. REMAND WITHOUT VACATUR SHOULD BE PRESUMPTIVELY APPROPRIATE WHEN IT SERVES THE INTERESTS OF THE PREVAILING PARTIES.

Balanced judicial review is an essential part of a well-functioning regulatory process. But when courts find that agency action has been improper, the traditional legal remedy of vacating the agency action can create an antiregulatory bias. For proregulatory stakeholders—who may prefer the imperfect regulation over the status quo, even as they seek substantive and procedural improvements—the prospect of winning a court-ordered remand, only to lose out on net regulatory benefits until the agency completes a new rulemaking, presents a troubling disincentive to litigation. To protect the ability of proregulatory parties to challenge a rule as insufficiently stringent without sacrificing the net regulatory benefits while the agency develops a stronger alternative, remand without vacatur is a necessary remedy to preserve judicial review as a balanced part of the regulatory process.¹

¹ RICHARD L. REVESZ AND MICHAEL L. LIVERMORE, RETAKING RATIONALITY 159-61 (2008). *See also, e.g.*, *Mississippi v. EPA*, 273 F.3d 246 (D.C. Cir. 2013) (granting remand without vacatur (in part) after both the state and the

Remand without vacatur can sustain important benefits of flawed rules that still significantly advance the public welfare.² For example, in *North Carolina v. EPA*, the D.C. Circuit Court of Appeals granted remand without vacatur on the Clean Air Interstate Rule (CAIR), an EPA regulation that aimed to reduce cross-state emissions of harmful air pollution like particulate matter. Such pollution was linked to major health problems, such as respiratory and cardiovascular symptoms resulting in hospital admissions, asthma exacerbation, acute and chronic bronchitis, and premature mortality.³ These important public health gains could have been jeopardized by a traditional remedy that vacated the rule due to its legal flaws. Instead, the D.C. Circuit granted remand without vacatur in order to “temporarily preserve the environmental values covered by CAIR.”⁴ This remedy helped preserve approximately \$181.2 billion in total net health and environmental benefits during the three years between when the court issued the remand without vacatur and when EPA’s replacement rule, the new Transport Rule, was scheduled to take effect.⁵

Parties who desire a more stringent rule thus may find remand without vacatur to be a more preferable remedy.⁶ Reassuring proregulatory stakeholders that this alternative will be available as courts fashion equitable remedies is necessary to correct the antiregulatory disincentive to litigate that proregulatory parties face under traditional legal remedies. Remand without vacatur is generally appropriate in situations when it serves the interests of the prevailing parties and should be the presumptive remedy in those cases.

ACUS should include a recommendation stating:

Remand without vacatur should be presumptively appropriate in cases where the interests of the prevailing parties would be served by that remedy.

environmental intervenors (Earthjustice) stipulated in briefs that if the court found the petitions had merit that the appropriate remedy would be remand without vacatur, and the EPA agreed; the court stated that “vacating a standard because it may be insufficiently protective would sacrifice such protection as it now provides, making the best an enemy of the good”); *Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (granting remand without vacatur after the Sierra Club, as an environmental intervenor, requested the rule not be vacated on remand so that their purpose of enhanced protection of the environment would not temporarily be defeated).

² Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 287-88 (2005).

³ OFFICE OF AIR & RADIATION, ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FINAL CLEAN AIR INTERSTATE RULE 4-1 to -2 (2005).

⁴ *North Carolina v. EPA*, 550 F.3d 1176, 1178 (2008) (granting remand without vacatur on rehearing).

⁵ OFFICE OF AIR & RADIATION, ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FINAL CLEAN AIR INTERSTATE RULE 1-1 (2005) (“EPA has estimated the benefits and costs of the Clean Air Interstate Rule and finds that the rule results in estimated annual net benefits of . . . \$60.4 in 2010 . . . reflect[ing] a discount rate of 7 percent.”). CAIR was remanded without vacatur in December 2008, and the Transport Rule was scheduled to take effect in 2012, amounting to approximately three years of net benefits. The Transport Rule was vacated by the D.C. Circuit Court in *EME Homer City Generation, LP v. EPA*, 696 F.3d 7, 39-40 (2012); that case is currently on appeal to the Supreme Court.

⁶ See STEPHANIE J. TATHAM, THE EXTRAORDINARY REMEDY OF REMAND WITHOUT VACATUR: DRAFT REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 2 & n.2 (2013).

2. COURTS SHOULD ASK FOR THE PARTIES' VIEWS ON THE NEED TO DEVELOP A TIMELINE FOR RECONSIDERATION OF THE REMANDED RULE.

Recommendation #5 currently stipulates that courts should ask the parties for their views on whether remand without vacatur is appropriate. Courts need to consider all relevant information in order to balance the interests of the parties. The recommendations should clarify that, as part of this information-gathering effort, courts may consider asking parties for their views on the need to set a timeline for the agency to reconsider any rule that may be remanded but not vacated.

Agency delay following remand without vacatur has sometimes been a problem. For instance, the ACUS draft report states that “three cases were identified where the court issued a writ of mandamus in response to agency inaction after remand without vacatur.”⁷ Indeed, agency delay generally is a recognized problem.⁸ And, a major criticism of remand without vacatur, as the preamble of ACUS’s draft recommendations recognizes, is that it could reduce “pressure on agencies to comply with APA obligations and to respond to a judicial remand.”⁹ The preamble counters that, “[g]iven the relative infrequency of application of the remedy, these prudential and theoretical concerns have generally not been realized and are unlikely to be systematic.”¹⁰ But, if courts implement remand without vacatur more frequently, as advocated above, delay may increasingly become a problem. Though some agencies have typically responded quickly after rules are remanded,¹¹ even if agencies have good intentions to finish a rule revision in a timely fashion, delays may still happen.¹²

A timeline for reconsideration could help keep the revision on track despite these opportunities for delay. Courts have utilized timelines for these purposes before. The ACUS draft report notes that in *Rodway v. U.S. Department of Agriculture*, the court ordered a deadline of 120 days for the USDA to complete a rule revision.¹³ Ultimately, courts should have the information they need to consider including timelines as part of designing an equitable remedy, and so a simple best practice would be to collect opinions from the parties on the need for such a timeline.

Recommendation #5 would therefore be strengthened by clarifying that courts may collect information from the parties on the need for a timeline (changes to the existing ACUS draft recommendation are in bold):

⁷ *Id.* at 48.

⁸ *See, e.g.*, DANIEL T. SHEDD, CONG. RESEARCH SERV., ADMINISTRATIVE AGENCIES AND CLAIMS OF UNREASONABLE DELAY: ANALYSIS OF COURT TREATMENT (2013); GOV’T ACCOUNTABILITY OFFICE, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA’S STANDARD SETTING (2012).

⁹ Administrative Conference of the United States Committee on Judicial Review, Remand Without Vacation: Proposed Recommendation for Council Meeting (Nov. 5, 2013).

¹⁰ *Id.*

¹¹ ROBERT J. HUME, HOW COURTS IMPACT FEDERAL AGENCY BEHAVIOR 88-89 (2009).

¹² *See, e.g.*, CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS: DRAFT REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (2013) (noting how OIRA and interagency reviews can create regulatory delays).

¹³ TATHAM, *supra* note 6, at 4.

When a court has decided to remand an agency action, it should consider asking the parties for their views on the appropriate remedy in light of its ruling, **including the parties' views on the need to develop a timeline for agency action if a rule is remanded without vacatur.**

3. AGENCIES SHOULD CLARIFY WHETHER MATERIALS IN THE ORIGINAL DOCKET WILL BE INCORPORATED INTO THE DOCKET FOR THE REVISED RULE.

In *EME Homer City Generation, LP v. EPA*, there was some controversy over whether issues raised during the proceedings on CAIR (which had been remanded without vacatur) were automatically incorporated into the proceedings on the Transport Rule, the reconsidered rule. The scope of the docket evidently had not been clear to all the parties, and there was even disagreement among the judges as to whether previous comments were incorporated.¹⁴ To help avoid such confusion in the future, agencies should make clear to stakeholders whether or not past materials are incorporated in the docket for the revised rule.

To that effect, an additional recommendation regarding the incorporation of the previous docket and record is advisable:

Both at the time of remand (in conjunction with the notice of remand placed in the docket) and at the time of revision (in conjunction with the notice of proposed rulemaking), the agency should clearly state whether public comments and other materials in the docket for the original rule will or will not be incorporated into the docket for the revision. The default assumption should be that material from the remanded rule's docket is not automatically incorporated into the revised rule's administrative record, and that courts should not look to any unincorporated materials from the previous docket when reviewing the revised rule.

Sincerely,

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¹⁴ *EME Homer City Generation, LP v. EPA*, 696 F.3d 7, 39-40 (2012) (Rogers, J., dissenting); Reply Brief for Petitioners at 9, *EME Homer City Generation, LP v. EPA*, No. 12-1182 (U.S. June 3, 2013) (“The CAA prohibits judicial invalidation of EPA rulemaking on any ground not ‘raised with reasonable specificity during the period for public comment.’ 42 U.S.C. 7607(d)(7)(B).”); see also Richard L. Revesz & Michael A. Livermore, *Sharp Legal Strategy in the Successful Challenge to Obama's Air Quality Rule*, HUFFINGTON POST (Aug. 24, 2012), http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/sharp-legal-strategy-in-t_b_1823784.html (“It is a foundational premise of administrative law that an agency's decision can be challenged only on the basis of arguments that were presented to the agency during its rulemaking process. This principle is meant to discourage exactly the kind of result that occurred in this case.”).