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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GENERAL LAND OFFICE OF THE STATE OF TEXAS, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE INTERIOR et al., *Defendants*, and SAVE OUR SPRINGS ALLIANCE, *Defendant-Intervenor*.	)	No. 1:23-cv-169-DAE-ML **DEFENDANT-INTERVENOR'S REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS AND ADMINISTRATIVE MATERIALS

INTRODUCTION

Plaintiff does not dispute that that the human population within the warbler's breeding range is projected to increase by over 60 percent between 2010 and 2050, threatening further loss and fragmentation of warbler habitat. AR008099. Nor does Plaintiff dispute that habitat fragmentation exposes warblers to more predators. AR003903; AR004470. Plaintiff further does not dispute that habitat fragmentation has sharply reduced the warbler's genetic fitness, AR000903; that warblers avoid establishing territories in forests affected by oak wilt, which occurs in 30 of the 35 Texas counties occupied by warblers, AR008104, AR005844; or that the U.S. Environmental Protection Agency has categorized the warbler as "critically vulnerable" to climate change due to the species' inability to shift its range in response to rising temperatures and increased incidence of catastrophic wildfire and drought. AR008105–06; AR002545–46.

Rather, Plaintiff claims that new studies show the warbler is "thriving" despite these threats, so the species should be stripped of Endangered Species Act protections. But Plaintiff's assertion rests upon significant misstatements of the science underlying the warbler delisting petition. The U.S. Fish and Wildlife Service—one of the nation's expert wildlife agencies—carefully considered all the science presented in the delisting petition as well as relevant information in its files. The Agency correctly found that, although the warbler's range and population size may be larger than was estimated at the time the species was listed, the threats to the warbler that drove the listing decision in the first place all remain.

Plaintiff also claims the Service repeated legal error in denying the petition to delist the warbler for a second time. However, Plaintiff's renewed attempt to overturn the Service's denial is meritless. Following the Fifth Circuit's instructions to correct a single legal error in the first petition denial, the Service evaluated the delisting petition without requiring it to present "new

information" the Service did not already possess. Nor did the Service require the petition to show "conclusive proof" of warbler recovery. The Service evaluated the petition on its merits, and rightfully determined that a reasonable person would not conclude that delisting the golden-cheeked warbler may be warranted.

For these reasons and those that follow, Plaintiff's motion for summary judgment should be denied, and Defendant-Intervenor's cross motion for summary judgment should be granted.

ARGUMENT

I. The Service's second denial of the 2015 delisting petition was lawful.

The Service properly denied the delisting petition upon its reexamination in 2021. In its 90-Day Finding, the Service provided a "rational basis for concluding that a reasonable person would not" accept the "interpretation of the data" proffered in the delisting petition. *Palouse Prairie Found. v. Salazar*, No. CV-08-032-FVS, 2009 WL 415596, at *2 (E.D. Wash. Feb. 12, 2009), *aff'd*, 383 F. App'x 669 (9th Cir. 2010). And for each of the delisting factors enumerated in the Endangered Species Act, the Service articulated a "rational connection" between the information in the delisting petition, the information already in the Agency's files, and its conclusion that the delisting petition would not "lead a reasonable person to believe" that delisting the golden-cheeked warbler "may be warranted" on the basis of that factor. *See* 50 C.F.R. § 424.14(b)(1) (2014); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted); 16 U.S.C. § 1533(a)(1); *see also* Intervenor-Defs.' Cross-Mot. Summ. J. & Opp'n to Pl.'s Mot. Summ. J. (ECF 58) ("SOSA Br.") at 8–16. As the Service discussed, warbler breeding habitat declined by almost 30 percent in a recent ten-year period, and continues to contract and fragment as human development in central Texas skyrockets (factor A), AR008098–99, AR001921; warblers are preyed upon by varied species,

some of which pose a bigger threat as warbler habitat is fragmented and the concealment afforded by expansive forest stands is lost (factor C), AR008101; regulatory mechanisms beyond the Endangered Species Act will not protect the warbler because they do not prohibit habitat destruction (factor D), AR008102; and the warbler is "critically vulnerable" to climate change because its specialized habitat requirements preclude it from shifting its range in response to rising temperatures, increased incidence of fire, and drought (factor E), AR008104–06. The Service thus reasonably concluded that delisting was not warranted on the basis of any of the Endangered Species Act's five factors. *See generally* AR008095–107; 16 U.S.C. § 1533(a)(1)(A)–(E).[1]

Plaintiff's attacks on the Service's five-factor analysis repeatedly misstate the science that was before the Agency at the time it denied the delisting petition. Most notably, Plaintiff claims that threats to the warbler are "overstated" because studies cited in the delisting petition show an "increasing" or "rising" warbler population and "expanding" habitat. *See* Pl.'s Resp. in Opp'n to Defs.' & Intervenor-Defs.' Mots. Summ. J. & Reply to their Opp'n to Pl.'s Mot. Summ. J. (ECF 59) ("GLO Reply Br.") at 16; *id.* at 5, 7, 8, 17, 19, 21, 23, 24. No studies show this. The current technology and methods now available to estimate warbler population and range size were unavailable at the time the warbler was originally listed. These new technologies and methods yield different estimates of total population and habitat size than those made in

[1] The Service's conclusions that delisting was not warranted were also adequately explained, Plaintiff's new argument to the contrary notwithstanding. *See* GLO Reply Br. at 9, 12; *id.* at 2 (citing *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.")). As a threshold matter, Plaintiff has waived this argument, which was not raised in Plaintiff's opening brief. *See Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) ("Reply briefs cannot be used to raise new arguments."). But, regardless, the Service conducted a comprehensive assessment of whether delisting "may be warranted" on the basis of each statutory factor, and thoroughly explained its determination. *See generally* AR008095–107; SOSA Br. at 17–21.

1990. The studies offering new estimates of population and range size do not give rise to any inferences of warbler population or range *increases*, however. *See* AR008097 ("[Mathewson et al. (2012) and other research efforts] represent new estimates rather than indicators of positive trends in warbler habitat and population size, and thus do not imply recovery.").

Regarding the conclusions of these studies, Plaintiff repeatedly overstates the findings from the Mathewson et al. (2012) study concerning warbler population estimates and the Collier et al. (2012) study of habitat size. *See* GLO Reply Br. at 13, 16, 20, 22, 23 (citing AR000057, which in turn cites Mathewson et al. (2012) and Collier et al. (2012)). Mathewson et al. (2012) makes no claims of positive trends or "increases" in warbler populations over time. Rather, in summarizing past efforts to estimate warbler population size, Mathewson et al. (2012) says: "Variation in population estimates results from the methods used to estimate the extent of habitat, and assumptions regarding what characteristics are representative of warbler habitat . . . ." AR003580. Collier et al. (2012) similarly makes no claims of habitat "increases" or "expansion," and in fact acknowledges the negative impact of human development in the warbler's breeding range. *See* AR001592 (explaining how different methodologies account for different habitat size estimates in past studies); *id.*, AR001596–97 (noting that "[t]he breeding range of the warbler . . . has seen an increase in human populations of approximately 50% since species listing" and finding that a "decrease in [habitat] patch size was correlated with . . . greater residential and commercial development in the south-east portion of the [warbler's] range"). In other words, these 2012 studies—based on technologies and methods not available in 1990—do not establish the warbler's possible population or range trends over the last three decades, *see* AR008097, and Plaintiff is wrong to suggest otherwise.

As for Plaintiff's argument that the Service's failure to designate critical habitat for the warbler leaves the Service with "no way . . . to determine the severity of any given habitat threat to the Warbler," GLO Reply Br. at 12, this contention is spurious. As this Court previously held in its denial of Plaintiff's challenge to the Service's 2016 90-Day Finding, the Service is required to evaluate a delisting petition through the lens of the five statutory factors, including "the present or threatened destruction, modification, or curtailment of its habitat or range," regardless of whether critical habitat has been designated. *See Gen. Land Off. of Tex. v. U.S. Fish & Wildlife Serv.*, No. AU-17-CV-00538-SS, 2019 WL 1010688, at *10 (W.D. Tex. Feb. 6, 2019), *aff'd in part, rev'd in part sub nom. Gen. Land Off. of Tex. v. U.S. Dep't of the Interior*, 947 F.3d 309, 321 (5th Cir. 2020); 16 U.S.C. § 1533(a)(1). And the Service has done so here, through the synthesis and analysis of numerous research studies concerning warbler habitat requirements and current and future threats to warbler habitat. *See generally* AR008095–99 and studies cited therein. Indeed, it is nonsensical to suggest that the Service's consideration of habitat threats is dependent on a prior critical habitat designation, given that the five statutory factors apply equally to delisting and listing decisions, and by definition, critical habitat cannot be designated for a not-yet-listed species. *See* 16 U.S.C. § 1533(a)(3)(A) (providing for designation of critical habitat for endangered and threatened species).

Plaintiff also suggests that "an increase in Warbler density across several monitoring sites from 1991–2008" buttresses its claim that the global population of warblers is "increasing." GLO Reply Br. at 7. This too is wrong. These monitoring plots were all located on protected areas—Fort Hood, Balcones Canyonlands Preserve, and Camp Bullis—which represent only tiny fractions of overall warbler breeding habitat. *See* AR002444–47; AR002559–62 (describing warbler conservation efforts at these and other sites); AR002416 ("Protected areas represent 4%

of the total potential habitat in the breeding range . . . ."). These results cannot be extrapolated to the warbler's entire breeding range, which is not similarly protected. Moreover, the trends from even just these protected areas were not as unequivocally positive as Plaintiff suggests. *See* AR002444–47 (warbler territory densities on the Balcones Canyonlands Preserve increased in only 2 of 5 plots defined as "prime habitat" between 1999 and 2006). Taken in context, these monitoring results do not advance Plaintiff's argument.

Plaintiff unjustifiably minimizes the threats to the warbler as well. Plaintiff states that "[t]here is no evidence to suggest that global effects of climate change affect the Warbler more acutely than any other species, whether endangered or not." GLO Reply Br. at 25. Not so: the U.S. Environmental Protection Agency has classified the warbler as "critically vulnerable" to climate change, the agency's highest possible classification of a species' climate-related vulnerability. *See* AR002286. But even if Plaintiff's assertion were true, it would still be irrelevant, as threats to the warbler are no less serious because other species also face them.

Urbanization also remains a significant threat to the warbler, Plaintiff's contentions to the contrary notwithstanding. *See* AR008098–99. Plaintiff wrongly suggests that Collier et al. (2012) and Reidy et al. (2009) support conclusions that "urbanization does not unduly harm the warbler" and "urbanization likely is not a serious threat to Warbler habitat even if it results in some fragmentation." GLO Reply Br. at 19 (citing AR001591; AR004466). Reidy et al. (2009) states that "[h]abitat loss and fragmentation resulting from urbanization and agricultural clearing . . . are considered the main threats to the golden-cheeked warbler[]," and that "[u]rban and suburban growth is particularly high in [the warbler's] central breeding range." AR004466. Reidy et al. (2009) merely concludes that "some large urban preserves can provide breeding habitat of comparable quality to rural locations," but says nothing to suggest that the threat of

urbanization has abated. *See* AR004466. And Collier et al. (2012) provides new estimates of warbler range size but does not suggest that these new estimates mean the warbler range is large enough to withstand the threat of urbanization, or that the warbler's range has been increasing in spite of urbanization. *See* AR001591; *supra* at 4.

Plaintiff further errs in attempting to discredit studies of threats to the warbler cited in the 90-Day Finding by calling them "older" than and "superseded" by Plaintiff's preferred studies of population and range size. GLO Reply Br. at 13, 17. In fact, the 90-Day Finding cites many studies published around or even more recently than the studies on which Plaintiff relies. *Compare* GLO Reply Br. at 13, 16, 20, 22, 23 (citing AR000057, which in turn cites Mathewson et al. (2012), Collier et al. (2012), Texas A&M Survey (2015)) *with* AR008095–106 (citing many studies from around same time period, including Reidy et al. (2016), Duarte et al. (2016), Peak and Thompson (2014), Robinson (2013), and others). Contrary to Plaintiff's intimation, there is plentiful new research showing current and grave threats to the warbler, and this research has not been "superseded" by Plaintiff's cited studies on population and range size. GLO Reply Br. at 13.

Plaintiff's scientific misstatements extend to its alternative argument that the "original data" that justified the listing of the warbler as endangered may have been "in error," even if its cited studies of population and range size do not evidence positive trends for the species. *See* GLO Reply Br. at 13–17, 19–20; 50 C.F.R. § 424.11(d)(3) (2014). On this theory, Plaintiff claims studies on population and range size show that the warbler population was "always high enough to sustain the species," regardless of the threats it has faced. GLO Reply Br. at 19–20; *id.* at 19 (claiming that warbler population may have been "always large enough to withstand threats to habitat"). However, yet again Plaintiff wrongly seeks to focus on population and range size

while disregarding the severity of ongoing threats to the species' population and range, even though analysis of the latter provided the basis for the Service's original listing decision. *See* Endangered and Threatened Wildlife and Plants; Final Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 53,153, 53,157–58 (Dec. 27, 1990). This approach is irrational, as demonstrated by the very science that Plaintiff references. Plaintiff asserts that "[a]bout 3,000 breeding pairs will sustain Warbler populations for 100 years." GLO Reply Br. at 20. To begin, this misrepresents the cited article, which found that habitat supporting 3,000 breeding pairs *per each of eight* delineated habitat "patches" would assure a probability of extinction of less than 5 percent over 100 years. *See* AR000530; AR000533; AR000535. Further, the scientists who prepared that projection in 1996[2] were clear that it was valid only under certain assumptions and "should not be taken out of context, because the assumptions and explanations surrounding them are very important to their use and understanding." AR000966. These included an assumption that habitat for the species remains "of good quality, and is sufficiently unfragmented to be usable by warblers." AR000984. Yet, as discussed, warbler habitat has been fragmenting and contracting over time, as exemplified by the loss of 29 percent of warbler habitat from 2001 to 2011. *See* AR001921. The projected 64 percent increase in human population in the warbler's range between 2010 and 2050 threatens similar or higher rates of habitat loss in the future. *See* AR008099. Thus, once again, citing population numbers divorced from a threats analysis ignores critical factors and affords no basis to delist the species.

In sum, the Service evaluated all the science presented in the delisting petition, as well as research already in its files, and concluded that the petition did not provide "substantial

[2] Plaintiff cites Alldredge et al. (2004) for this projection—*see* GLO Reply Br. at 20 (citing AR000063–64, which in turn cites AR000529–36)—but Alldredge et al. (2004) referenced a projection prepared by the Service in 1996. *See generally* AR000952–1016.

information" that delisting the warbler may be warranted. *See generally* AR008095–107; 50 C.F.R. § 424.14(b)(1) (2014). This Court's review of the Service's decision must be "highly deferential," *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008), "particularly . . . [because] there are technical and scientific findings." *Healthy Gulf v. U.S. Army Corps of Eng'rs*, 81 F.4th 510, 520–21 (5th Cir. 2023). Plaintiff's misstatements of this science are owed no such deference, and are unjustified in any event, as discussed above. The Service's denial of the delisting petition was reasonable.

II. The Service applied the correct legal standard of review to the delisting petition.

The Service's 90-Day Finding complied with the Fifth Circuit's 2020 remand instructions to "evaluate the delisting petition under the correct legal standard." *Gen. Land Off. of Tex.*, 947 F.3d at 321. The Agency evaluated each topic raised in the petition on its own merits—considering whether a "reasonable person" would find, based on the information cited in the delisting petition and in the Service's files, that warbler delisting "may be warranted," 50 C.F.R. § 424.14(b)(1) (2014)—and did not require the petition to present new information it had not already considered. *See* AR008095–107; *Gen. Land Off. of Tex.*, 947 F.3d at 321. Nor did the Service impermissibly require the delisting petition to show "conclusive proof of Warbler recovery" merely because it referenced "recovery" or "recovery criteria" in the 90-Day finding. *See* AR008097; GLO Reply Br. at 7, 10–11. Plaintiff's claims to the contrary are unavailing.

A. The Service did not require the delisting petition to show "conclusive proof of recovery."

Plaintiff argues that the Service impermissibly required the delisting petition to show "conclusive proof of Warbler recovery" and treated the warbler Recovery Plan as a "determining factor" in denying the delisting petition. GLO Reply Br. at 7. Plaintiff rests these claims on the Service's only two references to warbler "recovery" in the 90-Day Finding. *See id.*; AR008098

("The most serious threats described in the original listing rule . . . remain, and recovery criteria have not been accomplished . . . ."); AR008097 ("[The] [research] efforts [cited in the delisting petition] represent new estimates rather than indicators of positive trends in warbler habitat and population size, and thus do not imply recovery."). As an initial matter, Plaintiff's claim that the Service treated the warbler Recovery Plan as a "determining factor" in denying the delisting petition is undermined by the Agency's comprehensive discussions of each statutory delisting factor, drawing a "rational connection" between the information in the delisting petition, sources in its own files, and its conclusions that delisting was not warranted on the basis of the given factor. *See generally* AR008095–106; 16 U.S.C. § 1533(a)(1)(A)–(E). Even accepting Plaintiff's argument, two references to warbler recovery do not obviate that analysis.

In addition, Plaintiff offers no response to Defendant-Intervenor's argument that the Service was permitted to reference warbler recovery criteria, and the warbler Recovery Plan, in the manner it did. *Compare* SOSA Br. at 23–25 *with* GLO Reply Br. at 3–9. The Service's references to "recovery criteria," AR008098, and the mere concept of recovery, AR008097, were reasonable. Criteria in recovery plans are meant to be "predictive of the Service's delisting analysis" and "serve as proxies [for the delisting factors of 16 U.S.C. § 1533(a)(1)], tailored to what is known about the particular species." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 433–34 (D.C. Cir. 2012). Using these "objective, measurable criteria," the Service is able to "evaluate [its] progress toward its goal of conserving the species." *Id.* Plaintiff suggests that "recovery criteria" represent some impermissible consideration not to be discussed in a 90-day finding—GLO Reply Br. at 7, 10–11—but this ignores the close relationship between "recovery criteria" and "delisting criteria" under the Endangered Species Act. *Friends of Blackwater*, 691 F.3d at 433, 438 (discussing the relationship between the two sets of criteria and clarifying that

the Service may reasonably decide to let recovery criteria "guide . . . [the delisting] analysis"). Nor does Plaintiff respond to Defendant-Intervenor's point that the warbler Recovery Plan, as a relevant document "in the Service's files," was lawfully among the documents the Service considered in its evaluation of the delisting petition. SOSA Br. at 24 (quoting *W. Watersheds Project v. Norton*, No. CV 06-00127SEJL, 2007 WL 2827375, at *7 (D. Idaho Sept. 26, 2007)). Put simply, progress toward recovery criteria is a relevant consideration in determining whether delisting of a species may be warranted, and the Service did not err in considering such progress as one element of a holistic statutory analysis here.

Instead of responding to Defendant-Intervenor's arguments, Plaintiff newly suggests on reply that the Service was not allowed to counter the delisting petition's assertions that the warbler has completed "recovery benchmarks," and that this constituted "relevant information showing that delisting . . . may be warranted." GLO Reply Br. at 7–8 (internal citation omitted). This makes no sense. The Service was tasked with evaluating whether the petition contained "substantial scientific or commercial information" that delisting "may be warranted." 16 U.S.C. § 1533(b)(3)(A). If the delisting petition asserts that delisting may be warranted due to the "completion of recovery benchmarks," the Service cannot be barred from responding with information in its own files showing that is not the case, including information from the Recovery Plan. *See* AR008098 ("The most serious threats described in the original listing rule . . . remain, and recovery criteria have not been accomplished . . . ."). This was particularly true given that these "recovery benchmarks" in the delisting petition were copied verbatim from the warbler Recovery Plan. *Compare* AR007076–79 (outline of "recovery tasks" in Recovery Plan) *with* AR000119–29 (table in delisting petition enumerating same "recovery tasks" but as

"recovery standards"). In this light, Plaintiff's reproach of the Service for invoking the Recovery Plan in the 90-Day Finding is all the more unjustified.

Therefore, the Service properly evaluated whether the delisting petition presented "substantial . . . information" that delisting "may be warranted"; it was reasonable and lawful for that discussion to also include a mention of whether recovery criteria may have been met. 16 U.S.C. § 1533(b)(3)(A). And, regardless, the Service's analysis of each of the statutory delisting factors was well-reasoned and comprehensive, and two references to the Recovery Plan were not a "determining factor" in the Service's denial of the delisting petition. *See generally* AR008095–107; GLO Reply Br. at 7.

B. The Service did not require the delisting petition to present "new information."

The Service complied with the Fifth Circuit's remand order to "evaluate the delisting petition under the correct legal standard" by not requiring the delisting petition to "contain information that the Service had not [previously] considered." *Gen. Land Off. of Tex.*, 947 F.3d at 321. Plaintiff argues that the Service violated the Fifth Circuit's order when the Agency observed that the 2015 Texas A&M Survey "does not report any new data," and that this observation means the Service "impermissibly downplayed" that document. GLO Reply Br. at 10 (citing AR008097). But even Plaintiff admits that the Service did consider the "modeling studies the [2015 Texas A&M Survey] summarizes," as evidenced by the Agency's comments on the methodologies of those studies in its 90-Day Finding. GLO Reply Br. at 10–11 (citing AR008097). The Service considered other documents summarized in the 2015 Texas A&M Survey as well. *See* AR008097 (citing AR006781, which in turn discusses Loomis Austin (2008), SWCA (2007), Diamond (2007), Rappole et al. (2003), Diamond & True (2008), among others); *compare with* AR000090–92 (2015 Texas A&M summary of these research studies).

As for Plaintiff's purported "evidence" that the Service "disregarded or at least impermissibly downplayed" the 2015 Texas A&M Survey, Plaintiff references only the Service's comments that the studies cited in that survey "do not imply recovery" and that "recovery criteria have not been accomplished." GLO Reply Br. at 10–11 (citing AR008097–98). However, these comments do not show that the Service "discount[ed]" the 2015 Texas A&M Survey on the basis that it "does not report any new data." GLO Reply Br. at 10 (citing AR008097). Instead, they correctly referenced the fact, demonstrated by evidence in the record, that threats to the warbler remain unabated. Plaintiff thus fails to demonstrate that the Service impermissibly faulted the 2015 Texas A&M Survey for not presenting "new information" in contravention of the Fifth Circuit's remand order.

III. An order directing the Service to proceed directly to a 12-month review would not be appropriate here.

Finally, should Plaintiff prevail on the merits—which it should not for reasons already discussed—this Court should remand the matter to the Service instead of ordering the Agency to commence a 12-month review as Plaintiff requests. Remand of agency action is "the proper course, except in rare circumstances." *Buffalo Field Campaign v. Williams*, 579 F. Supp. 3d 186, 206 (D.D.C. 2022) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Plaintiff insists that "this is no ordinary case" in which remand is appropriate because the Fifth Circuit already vacated and remanded the Service's 2016 90-Day Finding. GLO Reply Br. at 26–27. But those circumstances do not inherently justify an extraordinary remedy, as illustrated by *Buffalo Field Campaign v. Williams*: there, the court remanded the Service's 90-day finding even after the agency "twice failed to employ the correct evidentiary standard in reviewing the long-pending petitions." 579 F. Supp. 3d at 206. The court stated that it had "no reason to believe that the agency is acting in bad faith or that it [was] unprepared to adhere to the Court's decision," so

no "rare circumstances" were present that would justify a departure from the normal rule of remand. *Id.*[3] Plaintiff offers no response to *Buffalo Field Campaign*, but the same remedial considerations apply here. Plaintiff's remedial request is therefore unwarranted.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be denied, and Defendant-Intervenor's cross-motion for summary judgment should be granted.

Dated: May 10, 2024

Respectfully submitted,

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[3] Nor is Plaintiff helped by its citations to cases concerning the "futility" of remand because those cases say nothing about remand under the circumstances of this case. *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1* and *NLRB v. Wyman* both held only that remand would be futile where a court concurs in the result of an agency action under review, even though the reviewing court disagrees with the agency's rationale behind that result. *See Morgan Stanley*, 554 U.S. 527, 544–45 (2008); *Wyman*, 394 U.S. 759, 766, 766 n.6 (1969). Neither case suggests that remand is futile where an agency has issued a decision in response to a prior remand order.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve a copy of the same on all counsel of record.

/s/ Sharmeen Morrison
Sharmeen Morrison