ORAL ARGUMENT NOT YET SCHEDULED
No. 16-5279

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIMNIA, INC.,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 13-cv-37 (Hon. Ketanji Brown Jackson)

OPENING BRIEF OF APPELLANT LIMNIA, INC.

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January 11, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES[1]

Pursuant to Circuit Rule 28(a)(1), Appellant Limnia, Inc. submits this certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

At the time this litigation commenced, Plaintiff-Appellant Limnia, Inc. was a Delaware corporation; however, it is now a California corporation.

Defendant-Appellee United States Department of Energy is an executive branch department of the United States Government, an "agency" within the meaning of 5 U.S.C. § 701(b). It is charged with administering the loan programs at issue in this case. The agency's principal office is located in Washington, D.C. Secretary of Energy Ernest Moniz was named in his official capacity.

There were no *amici* or intervenors in the district court. There are no intervenors associated with this appeal at this time.

B. Ruling Under Review

Appellant appeals rulings issued by the Honorable Ketanji Brown Jackson of the United States District Court for the District of Columbia. On July 14, 2015, Judge Jackson issued a memorandum opinion denying in part and granting in part

[1] Upon transmission from the district court, this case was captioned *XP Vehicles, Inc. v. Department of Energy*. On December 23, 2016, Appellants moved this Court to re-caption the case *Limnia, Inc., v. Department of Energy*. *See* Doc. No. 1652763. On January 3, 2017, although Appellees disagreed with the procedural route Appellants chose, they "consent[ed] to the essence of Appellants' requested relief." *See* Doc. No. 1653864. Hence, the present caption.

Defendants' motions to dismiss. J.A. 85–151. The opinion is published at 118 F. Supp. 3d 38 (D.D.C. 2015). On January 15, 2016, Judge Jackson issued a memorandum opinion and order granting Defendants' motion for a "voluntary" remand. J.A. 261–76. The opinion is published at 156 F. Supp. 3d 185 (D.D.C. 2016). On July 21, 2016, Judge Jackson issued an order denying reconsideration of the "voluntary" remand order, relinquishing jurisdiction, and closing the case. J.A. 329–32. The order is not published.

C. Related Cases

This case has not previously been before this Court. Counsel is unaware of other related proceedings, as defined by Circuit Rule 28(a)(1)(C), currently pending before this or any other court.

CORPORATE DISCLOSURE STATEMENT

When this litigation commenced, Limnia, Inc. was a Delaware corporation; it is now a California corporation. It is not publically traded and does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests the Court grant oral argument. The resolution of when a district court should grant a voluntary remand and thus allow it to evade meaningful judicial review of its actions is a matter of sufficient

importance and the issues are sufficiently complex that this Court would benefit from oral argument.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
ATVM	Advanced Technology Vehicles Manufacturing
DOE	United States Department of Energy
GAO	Government Accountability Office
LGP	Loan Guarantee Program
XPV	XP Vehicles, Inc.

INTRODUCTION

This case presents the novel legal question of whether an agency may escape meaningful judicial review of an informal adjudication, which is final agency action under the Administrative Procedure Act ("APA"), by requesting a voluntary remand when the agency: (1) did not move for remand until twenty-six months after the complaint was filed and after it lost a motion to dismiss; (2) has made no admission of fault or possibility of error; and (3) where the remand would not provide complete relief.

Limnia has adequately alleged that political considerations infected the Department of Energy's ("DOE") decision-making process on its loan applications. Limnia has also alleged that DOE granted a waiver of the application fees for those loans, but then revoked that waiver and used the non-payment of fees as a pretextual basis for denying the application.

Despite DOE denying the validity of these allegations, and after failing to completely evade scrutiny through a motion to dismiss, DOE belatedly sought a remand to require Limnia to submit a new application for a new loan solicitation subject to higher application fees. The district court granted DOE's request, despite recognizing that the remand did not provide complete relief and financially prejudiced Limnia. In doing so, the district court abused its discretion when it allowed the agency to use voluntary remand as a litigation tactic in such a manner.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Limnia asserted district court jurisdiction pursuant to Article III of the United States Constitution; 28 U.S.C. §§ 1331, 1346, and 1391; and the Administrative Procedure Act, 5 U.S.C. § 702. J.A. 13; Am. Verified Compl. ¶ 5.

STATEMENT OF ISSUES

1. Whether a district court abuses its discretion by granting a contested motion for voluntary remand where the agency: (1) did not move for remand within a reasonable period of time, (2) lost a motion to dismiss, (3) has made no admission of fault or possibility of error, (4) offers a remand that would not provide complete relief, (5) does not propose to reconsider its initial decision, and (6) the plaintiff has plausibly alleged that the agency's procedures are procedurally flawed and tainted by political bias.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), the relevant statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. THE DEPARTMENT OF ENERGY'S LOAN PROGRAMS

Congress created the Advanced Technology Vehicles Manufacturing ("ATVM") loan program in section 136 of the Energy Independence and Security

Act of 2007, which was codified at 42 U.S.C. § 17013. The purpose of this program was to support the manufacturing of advanced technology vehicles in the United States. J.A. 13; Am. Verified Compl. ¶ 8. Congress mandated that not later than one year after the date of enactment, and subject to the availability of funds, Defendants "shall carry out a program to provide a total of not more than $25,000,000,000 in loans to eligible individuals and entities." 42 U.S.C. § 17013(d)(1). Congress did not give Defendants unfettered discretion to determine borrower qualifications or to use unpublished and standardless "merit review" criteria to choose between qualified applicants. Rather, Congress mandated certain borrower qualifications, including an applicant's: (1) financial viability; (2) demonstration that the "investment is expended efficiently and effectively;" (3) compliance with "other criteria as may be established and published by" DOE; and (4) certification that funds were being provided to "eligible individuals." *Id*. § 17013(d)(3).

DOE published a regulation establishing a three-stage review for ATVM loan applicants. First, DOE said it would screen applicants for eligibility, requiring applicants to be either a manufacturer of automobiles or of qualifying components, 10 C.F.R. § 611.100(a)(i)–(ii), and financially viable, 10 C.F.R. § 611.100(c); *see* 42 U.S.C. § 17013(b), (d)(3). Second, DOE said it would screen applications for eligibility, assessing whether they contained all the information required by

regulation and whether the proposed loan complied with other statutes and regulations. 10 C.F.R. § 611.103(a). During this second phase, Congress did not provide DOE the authority to reject an application for any reason; rather, DOE could only "reject an application . . . that does not meet these requirements." *Id*. Finally, DOE said it would conduct a substantive review of the application, evaluating it based on the technical merit of the proposal. 10 C.F.R. § 611.103(b); *see* 42 U.S.C. § 17013(g).

Congress also set clear limits on DOE's discretion under the Loan Guarantee Program ("LGP"). The LGP's purpose was to support innovative clean-energy technologies that were unable to obtain private financing. J.A. 14; Am. Verified Compl. ¶ 11. Congress defined eligible projects and set loan and repayment terms. 22 U.S.C. §§ 16511, *et seq*. DOE promulgated rules clarifying these requirements, establishing criteria for applicants, and promising to consider applications in a "competitive process." 10 C.F.R. § 609.7(a). Some of the criteria included: (1) the extent to which the project avoids, reduces, or sequesters greenhouse gas emissions or air pollutants; (2) the likelihood that the project would be ready for commercial operation in the proposed time frame; (3) the project's feasibility; and (4) the applicant's expertise. *Id*.

II. FACTUAL BACKGROUND

A. XP Vehicles and Limnia's Loan Application Process

XP Vehicles, Inc. ("XPV") and Limnia, Inc. ("Limnia") are closely affiliated corporations with common ownership and similar business models. In the past, they have worked together on projects for DOE and collaborated on advanced vehicle development. J.A. 14; Am. Verified Compl. ¶ 12. The two companies' innovations and projects for which they sought DOE loans were designed to complement and reinforce one another.[2] J.A. 15; *id*. ¶ 19.

XPV was an advanced technology vehicle company and an ATVM loan applicant. J.A. 12, 14; *id*. ¶¶ 1, 14. In response to a DOE solicitation, XPV applied for $40 million in loan funding to produce an advanced technology vehicle. J.A. 14, 15; *id*. ¶¶ 14, 17.

Limnia is an advanced-technology, green energy company that has worked with DOE's Sandia National Laboratory since 2002 on an advanced energy storage system for electric cars. DOE has supported Limnia's work with Sandia over the past decade. J.A. 14; *id*. ¶ 12. Limnia applied for both LGP funding and for a $15 million ATVM loan. Sandia was named as one of Limnia's key subcontractors. J.A. 14, 24; *id*. ¶¶ 12–13, 68.

[2] XPV was originally a party to this litigation but it has now been dismissed from the suit.

DOE told XPV that its ATVM loan application was "substantially complete" and, at all times relevant, XPV qualified for a loan under DOE's criteria. J.A. 24; *id*. ¶ 66. DOE staff deemed XPV a "qualified applicant" and DOE's comparison matrices placed XPV in the top five percent of applicants. J.A. 16; *id*. ¶¶ 21–23. In April 2009, DOE notified XPV that its application had been assigned to a technical eligibility and merit review team. J.A. 17–18; *id*. ¶ 27. A month later, DOE told XPV that it had passed review of the agency's technical review team and that "everything looked good." J.A. 18; *id*. ¶ 28–29.

Shortly thereafter, XPV discovered that two applicants, both with close Executive Branch political ties, were receiving special assistance from DOE on their applications. J.A. 18, 27–31; *id*. ¶¶ 30, 90–109. XPV requested similar treatment, which DOE denied. J.A. 18; *id*. ¶ 31. In June 2009, DOE announced it was awarding eight billion dollars in loans to three companies, all of which had close ties to the administration. Five days later, XPV wrote to DOE staff and asked for an update on its application. J.A. 19; *id*. ¶¶ 34–35. Over the next seven weeks, DOE repeatedly assured XPV that everything was on track and that XPV had met every loan criterion. J.A. 19; *id*. ¶ 36.

On August 21, 2009, XPV received a letter from the director of the ATVM Program, Lachlan Seward, denying its application. Mr. Seward said that, although DOE deemed XPV "eligible" for a loan, DOE could not lend to all eligible

applicants and that XPV had failed the agency's "merit review." Mr. Seward did not disclose the criteria for this "review," which remain unknown to this day. J.A. 19–20; *id*. ¶¶ 37–38.

XPV sent then-Secretary of Energy Steven Chu a letter requesting reconsideration of the decision. J.A. 22; *id*. ¶ 54. Mr. Seward responded to the letter, but his response only raised more questions. Mr. Seward failed to answer XPV's questions instead offering new "cut and paste" pretexts for denial. J.A. 22–23; *id*. ¶¶ 55–61. Mr. Seward did not say that XPV failed to meet statutory or regulatory eligibility requirements. As to the "reasons" given for denial, Mr. Seward's letter was the first time DOE had raised them despite nearly a year of financial and technical underwriting. J.A. 20–24; *id*. ¶¶ 38–65.

Limnia fared no better than XPV. Although Limnia made a battery system for electric advanced-technology vehicles, Mr. Seward initially denied the company's ATVM loan application because the battery system was not "designed for installation in an advanced technology vehicle." J.A. 24–25; *id*. ¶¶ 68–69. Limnia responded, advising Mr. Seward that the relevant patents showed the system was specifically developed for advanced technology vehicles. Mr. Seward again denied the application because the technology was not "installed" in such a vehicle. J.A. 25; *id*. ¶¶ 70–74.

While Limnia was finalizing its LGP application, "Limnia participated in a conference call with John Podesta, [Secretary] Chu, and Interior Secretary Kenneth Salazar, during which [Secretary] Chu said he felt the LGP fee and process were unduly onerous and burdensome. [Secretary] Chu further promised to waive the application fee." J.A. 26; *id.* ¶ 76. Limnia relied on this promise and submitted its LGP application in February 2009 with a letter stating it was Limnia's understanding the application fee had been waived. J.A. 26; *id.* ¶ 77. Two weeks later, DOE called Limnia and said the initial application fee of $18,000 was not waived and was due by midnight. J.A. 26; *id.* ¶ 78. Although Limnia had funds to pay the fee, it was unable to complete the transaction by midnight. J.A. 26; *id.* ¶ 79. The next day, DOE called Limnia and said there was flexibility on the fee issue and that DOE would continue to review Limnia's application. J.A. 26; *id.* ¶ 80. In April 2009, DOE sent Limnia an email stating that due to fee non-payment, the application was denied. J.A. 26; *id.* ¶ 81.

B. Oversight of DOE's Loan Programs Uncovered Favoritism

Following an in-depth review of the agency's loan programs, the Government Accountability Office ("GAO") determined that DOE had awarded billions of dollars without engaging "the engineering expertise needed for technical oversight" or having adequate measures in place to ensure taxpayers were financially protected. J.A. 27; *id.* ¶¶ 85–87. GAO also found that DOE had treated

applicants inconsistently, favored some applicants over others, and ignored its own underwriting standards by failing to properly document reviews. GAO concluded that DOE's actions reduced the "assurance that [the agency had] treated applicants fairly and equitably." J.A. 31; *id.* ¶ 111.

Additionally, Congress released emails in connection with a House Committee on Oversight and Government Reform report confirming that Secretary Chu and Mr. Seward had politically infected DOE's loan program. An internal DOE email conveyed an order to loan program staffers from Secretary Chu, who was "adamant that this transaction is going to OMB by the end of the day Fri[day] if not sooner. [This is n]ot a way to do things but a direct order." J.A. 32; *id.* ¶ 112. Another internal DOE email revealed the agency "ha[d] made a political commitment to get [a loan applicant] through the approval process by 6/15." J.A. 31–32; *id.* ¶ 112; *see id.* ¶ 112 (internal DOE emails explaining that the "pressure is on real heavy" and was "due to interest from VP"). Since leaving his position at DOE, Secretary Chu has acknowledged that he "got personally involved, more and more, on when to pull the plug and when not to pull the plug" and that he made the final call on every loan that was issued. J.A. 81–84.

In this heavily politicized environment, DOE never gave Limnia or XPV a fair shot because they were not connected with political "bundlers" or politicians.

III. PROCEDURAL HISTORY

On August 20, 2013, XPV and Limnia filed an Amended Verified Complaint alleging Defendants had violated due process and equal protection in processing their loan applications and violated the APA by arbitrarily and capriciously allowing political considerations to infect the loan-determination process. J.A. 12.[3]

On September 18, 2013, Defendants filed two motions to dismiss, one to dismiss the individual-capacity claims against Secretary Chu and Mr. Seward, and the other to dismiss the official-capacity claims against DOE and the Secretary of Energy. J.A. 6.

On July 14, 2015, the district court entered a memorandum opinion and order allowing two of Limnia's claims to move forward. J.A. 85, 147–50.[4] The district court found that "the APA claims against the Official Capacity Defendants arising out of the DOE's denial of Limnia's ATVM loan application . . . and LG Program application" may go forward because:

> Taken as true, these allegations are sufficient to support Plaintiffs' contention that the DOE's decision with respect to Limnia's ATVM application was arbitrary and capricious because the DOE relied on impermissible considerations that ran counter to the evidence before it

[3] Plaintiffs filed their original Verified Complaint on January 10, 2013. J.A. 4.

[4] The district court dismissed the claims against the individual-capacity defendants, the due process and equal protection claims, and XPV from the case because it was a dissolved corporation that could not maintain an APA claim. J.A. 85.

> and the applicable regulations, and because Limnia was treated differently from other applicants without any legitimate justification.

J.A. 147–48. However, the district court did not allow XPV to remain a party to the case because, as a dissolved California corporation, it could "only sue for purposes of 'winding up' its business operations, and it [was] not in a position to receive the relief of reconsideration or approval of its ATVM loan application as if it were operating as a going concern." J.A. 124.

On September 17, 2015, Defendants filed an Answer. J.A. 152. One month later, on October 16, 2015, Defendants moved for "voluntary" remand without admitting any wrongdoing or explanation of how, upon remand, the processing of Limnia's loan applications would differ from the first adjudication.[5] J.A. 184. Plaintiff opposed the remand. J.A. 203. After a hearing, the district court granted the remand but retained jurisdiction over the case. J.A. 261.

Due to DOE not admitting any wrongdoing and the district court not imposing any procedural protections for the remand, on April 6, 2016, Limnia sent a letter to DOE requesting that the agency develop procedures to ensure that any resubmitted application would receive fair consideration. J.A. 282. DOE responded that the district court "neither demanded that DOE conduct itself in a particular manner nor ordered the agency to take any additional measures before

[5] The term "voluntary remand" in this case is a misnomer. It was "voluntary" in the same way the motion to dismiss was voluntary: the agency sought to evade scrutiny, while Limnia sought a judicial determination of the facts at issue.

considering Limnia's applications." J.A. 280. DOE, therefore, refused to provide protections against the same politicization that Limnia sufficiently alleged occurred in the first adjudication. DOE also refused to waive the application fees as Limnia alleged they promised to do. Instead, DOE insisted that Limnia pay an application fee nearly five times higher than the fee applicable to the program for which Limnia applied. *Compare* J.A. 92 (Limnia applied to an LGP solicitation with a $75,000 application fee), *with* J.A. 324 (After remand, DOE required Limnia to apply to a solicitation with a $350,000 application fee).

On June 30, 2016, the parties submitted a joint status report explaining their positions. J.A. 321. Limnia outlined how a remand would prejudice its legal position and expose it to higher application fees. J.A. 324. Defendants argued that because Limnia had not submitted a new application, the district court should dismiss the case for failure to prosecute. J.A. 326–27. On July 21, 2016, the district court construed Limnia's position "as a motion for reconsideration of [its] order remanding the case" and denied that motion, J.A. 330, and then dismissed the case. J.A. 331–32. On September 13, 2016, Plaintiff filed a timely notice of appeal. J.A. 333.

SUMMARY OF ARGUMENT

A court should only grant an agency's contested motion for "voluntary" remand if: the agency pledges to reconsider its initial decision as a result of (a) new evidence, a change in controlling law, or intervening events outside the agency's control that affect the validity of its decision; (b) the agency admits error or mistake; or (c) other substantial concerns demonstrating the agency has a genuine interest in reconsideration, such as doubt about the outcome of its decision or a desire to review procedures. These circumstances notwithstanding, a court should deny a remand if the request: (a) is frivolous, in bad faith, or based on litigation posturing; or (b) would unduly prejudice the non-moving party.

Despite none of these factors existing here, the district court granted remand. DOE refused to reconsider its original decision; failed to identify any new evidence, a change in law, or intervening event that would affect the validity of its initial decision; refused to admit error or mistake; and failed to provide other substantial and legitimate reasons for remand. Further, the requested remand — coming at the "eleventh hour" and only after losing a motion to dismiss — smacks of litigation posturing.

The district court also ignored how the remand unduly prejudiced Limnia, by denying its statutory rights, failing to ensure that any renewed consideration of Limnia's application would be conducted free of political taint, preventing Limnia

from abating harm to its reputation, and failing to account for increased application fees. After granting remand, the district court recognized the error it made by exposing Limnia to application fees nearly three times higher than its original application. Despite this recognition, the district court nonetheless dismissed the case when Limnia declined to submit a new application to a new loan solicitation subject to new, higher fees.

Finally, the district court erred in basing its decision almost entirely on cases in which agency decisions were eligible for *Chevron* deference, typically notice-and-comment rulemaking. DOE's denial of Limnia's loan applications is inapposite to those situations because in doing so the agency is not interpreting an ambiguous statute, which is the type of action eligible for *Chevron* deference.

ARGUMENT

I. STANDARD OF REVIEW

This Court has not established the proper standard of review for an appeal from a district court's grant of a contested motion for voluntary remand. A review of case law from courts in this Circuit and other circuit courts reveals the district court was exercising a discretionary power when it granted the type of remand at issue in this case. In *SKF USA Inc. v. United States*, the Federal Circuit identified that when an agency requests a remand, the "court has discretion over whether to [grant that] remand." 254 F.3d 1022, 1029 (Fed. Cir. 2001). Other courts have

used similar language. *See Shakeproof Assembly Components Div. of Il. Tool Works, Inc. v. United States*, 412 F. Supp. 2d 1330, 1335 (Ct. Int'l Trade 2005) (A "reviewing court has discretion over whether to remand[.]") (citing *SKF*); *see also Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) ("[I]t is an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs[.]") *Code v. McHugh*, 139 F. Supp. 3d 465, 468 (D.D.C. 2015) ("The decision whether to grant an agency's request to remand is left to the discretion of the court."); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 42 (D.D.C. 2013), *aff'd on other grounds*, 601 F. App'x 1 (D.C. Cir. 2015) (When "the remand request [is] one based on the agency's recognition of its own error . . . remand is discretionary rather than mandatory[.]"); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) ("Even in the absence of new evidence or an intervening event, however, courts retain the discretion to remand an agency decision when an agency has raised 'substantial and legitimate' concerns in support of remand."). Limnia, therefore, believes the proper appellate standard of review is for an abuse of discretion.[6]

A district court abuses its discretion when its actions are "clearly unreasonable, arbitrary, or fanciful," *Carey Can., Inc. v. Colum. Cas. Co.*, 940 F.2d 1548, 1559 (D.C. Cir. 1991) (discovery) (citation omitted); if it "committed a clear

[6] *See* 4 Am. Jur. 2d Appellate Review § 623 ("Rulings committed to the discretion of a trial court are generally subject to review for abuse of discretion[.]").

error of judgment in the conclusion it reached upon a weighing of the relevant factors," *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 596 (D.C. Cir. 1996) (attorney fees); or "if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014) (attorney fees) (citation omitted). "Whether the lower court applied the proper legal standard in exercising that discretion, however, is a question of law reviewed *de novo*." *Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 349 (D.C. Cir. 2003) (citation omitted).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING VOLUNTARY REMAND

A. Standards Governing Voluntary Remands

The rules governing voluntary remand in this Circuit are not pellucid. Given that lack of clarity, this Court should adopt the following standard. A court should only grant an agency's contested motion for "voluntary" remand if: the agency pledges to reconsider its initial decision as a result of (a) new evidence, a change in controlling law, or intervening events outside the agency's control that affect the validity of its decision; (b) the agency admits error or mistake; or (c) other substantial concerns demonstrating the agency has a genuine interest in reconsideration, such as doubt about the outcome of its decision or a desire to review procedures. These circumstances notwithstanding, a court should deny a

remand if the request: (a) is frivolous, in bad faith, or based on litigation posturing; or (b) would unduly prejudice the non-moving party.

In *SKF*, the Federal Circuit offered a valuable framework to consider these issues. The *SKF* court outlined five possible positions that an agency may take when its action is challenged in court:

> First, it may choose to defend the agency's decision on the grounds previously articulated by the agency. Second, it may seek to defend the agency's decision on grounds not previously articulated by the agency. Third, the agency may seek a remand to reconsider its decision because of intervening events outside of the agency's control. Fourth, even in the absence of intervening events, the agency may request a remand, without confessing error, to reconsider its previous position. Finally, . . . the agency may request a remand because it believes that its original decision was incorrect on the merits and it wishes to change the result.

254 F.3d at 1028. A remand may be proper if an intervening event, such as "a new legal decision or the passage of new legislation . . . may affect the validity of the agency action." *Id*. A remand is also appropriate if "both sides acknowledge [the record] to be incorrect or incomplete," *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993), or if the agency admits that its "policies [are] contrary to both the [authorizing statute] and the Constitution." *Lamprecht v. Fed. Commc'ns Comm'n*, 958 F.2d 382, 385 (D.C. Cir. 1992).

A court may also consider a remand if the request is based on something within the agency's control. For example, when the agency wishes "to reconsider its previous position," "consider further the governing statute," reexamine "the

procedures that were followed," has "doubts about the correctness of its decision," or if "it believes that its original decision is incorrect on the merits and wishes to change the result." *SKF*, 254 F.3d at 1028. Importantly, in all of the instances where a court has discretion to grant a remand, it is for the agency to reconsider its *original decision*, not to escape judicial review of that original decision and require the plaintiff to begin the administrative process anew, as occurred in this case.

Notwithstanding the circumstances above, a court should not grant remand when the "the agency's request is frivolous or in bad faith." *Id.* at 1029; *Cal. Cmtys. Against Toxics v. Envtl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (same). This Court has held that a "novel, last second motion to remand" based on a non-binding policy statement is not a basis for remand. *Lutheran Church-Missouri Synod v. Fed. Commc'ns Comm'n*, 141 F.3d 344, 349 (D.C. Cir. 1998). A remand request where an agency "has not confessed error [and] its policy statement is directed only towards the future," is nothing more than a "legal tactic . . . to avoid judicial review[.]" *Id.*; *see Byrd v. Heckler*, 576 F. Supp. 549, 550 (D.D.C. 1983) (denying remand where the government waited "until the eleventh hour . . . [to] further delay by moving for voluntary remand").[7]

[7] Other courts have taken a similar approach. *See Citizens Against the Pellissippi Parkway*, 375 F.3d at 417 ("[A]n agency's reconsideration of its own decision may in some contexts be unwarranted, or even abusive"); *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1257 (Ct. Int'l Trade 2003) (The agency's "brief does not provide any reason, policy or otherwise, for requesting a remand . . . . [It]

To guard against frivolous or bad faith requests, courts have required agencies to give a "substantial and legitimate reason" why remand is appropriate. *SKF*, 254 F.3d at 1029. Such legitimate reasons include: when the record demonstrates the original decision "ha[s] serious procedural and substantive deficiencies," *Belville Mining Co. v. United States*, 999 F.2d 989, 998 (6th Cir. 1993); where new evidence or later-acquired information has the potential to change the agency's initial decision, *Ethyl Corp.*, 989 F.2d at 523–24; *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 24–25 (D.D.C. 2008) (allowing remand in light of new evidence to "allow[] [the defendant] to cure its own potential mistake"); and where the agency has been forthcoming about the merits of the plaintiff's challenges, *Cal. Cmtys. Against Toxics*, 688 F.3d at 992. Again, all of these substantial and legitimate reasons relate to the agency reconsidering its *original decision*; they are not a backdoor way to evade meaningful judicial review by requiring the plaintiff to begin the administrative process again.

B. The District Court Abused its Discretion by Allowing Defendants to use Remand as a Litigation Tactic to Evade Judicial Review.

Limnia's case arises from a politically tainted Executive Branch process. Defendants have never admitted error, conceded Limnia's application was affected

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merely requests remand so that it can 'reconsider its decision.' This is insufficient to support a voluntary remand."); *Guam Pres. Trust v. Gregory*, No. 10-677, 2011 U.S. Dist. LEXIS 101537, at *18 (D. Haw. June 30, 2011) (denying remand where "Defendants want to have their cake and eat it too").

by political favoritism, nor described how a remand will guarantee a fair process and provide full relief. The remand request, thus, should have been denied.

The district court's decision to grant the motion for remand is not in accordance with case law or the APA. Although it claimed to apply the appropriate standards, the district court ignored a crucial prerequisite: an agency either admitting error or demonstrating a good faith willingness to reconsider its *original decision*. The LGP solicitation to which Limnia applied was closed. J.A. 202 (DOE declaration offering remand for "active" and "open solicitations"); J.A. 296 (DOE counsel outlining remand was "for a current and active [loan] solicitation," not the original program). Therefore, remand was improper because DOE could not reconsider the original LGP decision and would not in any event.

The district court also failed to consider remedies available to Limnia if the case had been allowed to proceed to the merits or by remanding with instructions. The district court granting remand rises to the level of an abuse of discretion, which, if left uncorrected, establishes a dangerous precedent that allows agencies to evade meaningful judicial review by employing bad faith litigation tactics.

1. The district court's reasoning ignored crucial factors. Even under that reasoning, however, it should have denied remand.

The district court's January 15, 2016 Order stated that remand is appropriate when (1) there is "new evidence" that affects the agency's original decision, (citing *Carpenters Indus. Council*, 734 F. Supp. 2d at 132) or (2) there are "substantial

and legitimate concerns in support of remand," (citing *SKF*, 254 F.3d at 1029; *Code*, 139 F. Supp. 3d at 468). J.A. 263. The court then stated:

> Judges in this district have deployed a three-pronged framework to guide the exercise of their discretion in this circumstance; this inquiry asks: (1) whether defendants have "identified substantial and legitimate concerns in support of a voluntary remand," (2) whether voluntary remand "would conserve the Court's and the parties' time and resources," and (3) whether voluntary remand would cause "undue prejudice to plaintiff."

J.A. 264 (citing *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70 (D.D.C. 2015)). Regardless of whether this framework is proper, the district court's analysis of the factors is so flawed as to constitute the wrong standard.

a. There are no substantial and legitimate concerns justifying a remand in this case.

The district court identified two "substantial and legitimate reasons" that it believed supported remand. First, "the fact that Limnia's technology has likely 'advanced' over the past six years (which is, in and of itself, a relevant changed circumstance) and that remanding the case to the agency 'will afford Limnia the opportunity to reapply to DOE's loan programs and update its loan applications with any new information about its project.'" J.A. 266 (citing Defs.' Mem. in Supp. of Mot. for Voluntary Remand, at 6; J.A. 193). Second, the district court found that because Limnia's APA claim and "the requested voluntary remand route both lead to the same result" the remand will conserve judicial and party resources.

J.A. 266. No other court has found that standing alone these are "substantial and legitimate" concerns, particularly where the agency has denied possibility of error.[8]

In *SKF*, the Federal Circuit found "substantial and legitimate concerns" include an agency seeking "to reconsider its previous position" because "it wished to consider further the governing statute, or the procedures that were followed [or] [i]t might simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies." 254 F.3d at 1029.

None of these circumstances are present here. DOE did not indicate a need to ponder its governing statute or regulations, or to reconsider its procedures, nor has it in any way raised the possibility of error. DOE did not even wish to reconsider its original decision. Instead, DOE sought remand so that Limnia could submit new applications for new or different loan solicitations, which, of course, Limnia could have done at any time.

b. DOE has explicitly stated that it did not commit any error, and refuses to allow even for the possibility of error, in its original decision.

The district court recognized that DOE never conceded error but dismissed the importance of that factor, concluding that "an agency's refusal to admit the

[8] This Court has never used the "substantial and legitimate concern" phraseology in ruling upon a request for voluntary remand nor has it provided guidance as to what a "substantial and legitimate concern" would be (nor has it ever cited to *SKF* as the district court does). The January 15 Order does not cite to a single D.C. Circuit opinion in its "Applicable Legal Standards" section. J.A. 263–64.

error of its (prior) ways poses no obstacle to its reaching the right result when the matter is returned for its review." J.A. 268 (citing *FBME Bank*, 142 F. Supp. 3d at 74). The district court wrote that although "it is common for an agency to cast doubt on the challenged act in order to support its request for remand, courts have found remand appropriate where the agency stops short of falling on its sword[.]" J.A. 267 (citing *Am. Forest Res. Council*, 946 F. Supp. 2d at 40; *Code*, 139 F. Supp. 3d at 468; *SKF USA*, 254 F.3d at 1029).

All of the cases the district court cited, however, while including language that an agency need not confess error or the equivalent, involve (1) an agency in fact admitting that it did something wrong (or at least acknowledging room for dispute), and (2) additional language indicating that there must be some acknowledgement of potential error. For example, in *FBME Bank*, the agency *did* admit error:

> A voluntary remand, [the agency] urges, would respect the agency's desire to correct its own errors. . . . Although [the agency] does not directly confess error, it recognizes that the Court has identified serious 'procedural concerns' with the Final Rule, and it agrees that the 'record . . . needs to be supplemented.' . . . Moreover, [the agency] does not challenge the preliminary injunction, nor does it wish to continue to defend its previous rulemaking.

142 F. Supp. 3d at 74–75 (citations omitted).

In *SKF*, the agency admitted that in performing its "expense calculation" it "agree[d] [with the plaintiff] that [a] loss should not be included in" the

calculation. 254 F.3d at 1026. The *SKF* court found, therefore, that the "case should be remanded to [the agency] to remove the [losses] related to the sale of the Korean facility from [the] . . . calculation." *Id.*

Similarly, in *Code*, the agency sought "remand in order to correct a mistake made by the [agency component] . . . [and] to address an issue that the [agency component] failed to address in its decision[.]" 139 F. Supp. 3d at 470. Finally, in *American Forest Resource Council*, the agency "concede[d] that its explanation for the challenged designation is deficient, and hence it argues that voluntary remand is within the Court's equitable discretion and appropriate in this case." 946 F. Supp. 2d at 41. Thus in all of the cases the district court cited there was some admission of error supporting the remand request.

The district court correctly reasoned that "at bottom, what really matters when an agency requests a voluntary remand of a case in order 'to reconsider its previous position' is whether the agency is genuinely willing to revisit the challenged determination." J.A. 268 (citing *SKF*, 254 F.3d at 1029). This is why an agency admission of error or the possibility of error remains such an important factor. Absent such an admission, neither the court nor the plaintiff can gain any assurance that the agency is truly reconsidering its previous decision. It is inappropriate to weigh these policy considerations in DOE's favor in this case because it neither admitted error nor proposed reconsidering its initial decision.

c. Speculation regarding changed circumstances is not a basis for remand.

The district court admitted DOE has not "identified new evidence" relevant to the consideration of Limnia's original applications, J.A. 264, yet a mere two pages later claimed that DOE "has provided several good reasons for requesting that this case be remanded. First among them is the fact that Limnia's technology has likely 'advanced' over the past six years[.]" J.A. 266.

The district court's claim appears to be based on speculation DOE's counsel made in the motion for remand and during the hearing on that motion. *See* J.A. 188–89 ("In the six years since Limnia initially applied for the government programs, it *may have* developed additional information that *could be* submitted in support of its application."); J.A. 245, Dec. 15 Hr'g Tr. 19:2–3 ("There *might not be* the most up-to-date information about Limnia's eligibility for . . . these programs [.]"); J.A. 246; *id*. 20:18–20 ("Because *if there is new evidence*, Your Honor, then you would not have before it a complete record with the most up-to-date information.") (emphases added throughout).

The type of evidence or changed circumstances courts have found to be sufficient bases for voluntary remand do not include the speculative musings of the government's counsel, such as those regarding Limnia's state of affairs. Rather, "new evidence" involves the agency discovering or developing information that casts doubt on its initial decision. *See, e.g.*, Toni M. Fine, *Agency Request for*

Voluntary Remand: A Proposal for The Development of Judicial Standards, 28 Ariz. St. L. J. 1079, 1112 (1997) ("Grants of unilateral motions for remand threaten to frustrate the spirit of the *Chenery* Doctrine, which requires that the agency itself in the order(s) under review articulate adequate grounds for its actions. Representations by counsel or supposition by the Court will not do.").

This usually involves an agency's "confession of error" or at least a tacit acknowledgement of problems with its decision that need to be cured. *See, e.g.*, *Carpenters Indus. Council*, 734 F. Supp. 2d at 134 ("[T]he Court also disagrees with the CIC plaintiffs' assertion that the record lacks evidentiary support for the federal defendants' confession of legal error. . . . Therefore, in view of the federal defendants' later-acquired information regarding the actions of Deputy Assistant Secretary MacDonald, which raise 'substantial and legitimate concerns' about the rule-making process for the northern spotted owl, the Court concludes that the [agency's] request for voluntary remand is well justified."); *Ethyl Corp.*, 989 F.2d at 523–24 ("The Administrator acknowledges that evidence developed since denial of the waiver has undermined the stated basis for denial, and asks that we remand the matter to the Agency for further consideration. . . . [G]iven the tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question, we see no basis to extend Congress's remedy for delay into a similarly radical remedy for error.").

This is not the case here. The agency only expressed a willingness to consider a new application, not to reconsider its original decision and it refused to concede any error. Thus the "new" evidence, if it exists, would only be relevant to a potential new decision on a new application; it is not relevant to a reconsideration of the agency's original decision and would not affect judicial review of the administrative record of that original decision. In sum, while courts have allowed remand when there is new evidence, they have only done so when the new evidence relates to the original decision, which is not the case here, and when it leads the agency to reconsider its original decision, which DOE is not doing here.

d. Policy considerations regarding judicial efficiency and party resources should not override Limnia's right to judicial review.

Although the district court asserted in its "three-pronged framework" that it must consider "whether voluntary remand 'would conserve the Court's and the parties' time and resources,'" J.A. 264, the case law is conflicting on this issue.

The origin of the resource-conservation consideration appears to be this Court's decision in *Ethyl Corp*. 989 F.2d at 524.[9] The *Ethyl Corp*. court, however, merely made the unremarkable statement that when an agency seeks remand to consider new evidence that bears on the agency's original decision, the court commonly grants such motions, "preferring to allow agencies to cure their own

[9] None of the four cases this Court cited in *Ethyl Corp*. explicitly discuss judicial or party resource conservation. 989 F.2d at 524 n.3.

mistakes rather than wasting the courts' and the parties' resources reviewing a record that *both sides acknowledge* to be incorrect or incomplete." *Id.* (emphasis added). In this case, however, where the agency does not seek to cure its own mistakes or rethink its initial decision, and the parties do not agree that the record is incomplete, the *Ethyl Corp*. rationale bears little weight.

Other courts have declined to consider judicial and party resources. *See Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3 (D.D.C. 2009); *SKF*, 254 F.3d at 1022. Still others have only mentioned them in passing when recognizing that an agency admission of error or potential error justifies remand. *See Code*, 139 F. Supp. 3d at 470 (resource conservation relevant when "both sides acknowledge [the record] is incorrect and incomplete"); *Am. Forest Res. Council*, 946 F. Supp. 2d at 40 (resources conserved when agency does not wish to defend its initial decision); *Carpenters Indus. Council*, 734 F. Supp. 2d at 134–35 (resource conservation relevant when agency wishes to cure its own mistake); *Sierra Club*, 560 F. Supp. 2d at 24–25 (same).

Regardless, Limnia should not be deprived of meaningful judicial review and its day in court merely to conserve judicial and party resources, especially when it opposes the motion to remand. In such a situation, the only resources being conserved are those of the court and the agency that wishes to escape judicial review. In the context of assessing a contested motion, resource conservation

considerations always weigh against the opposing party, here Limnia, creating an unfair thumb on the scale in favor of the agency. The district court did, after all, find that Limnia sufficiently alleged DOE arbitrarily and capriciously allowed political considerations to taint its decision-making process. Given DOE's unwillingness to even consider the possibility these allegations are true, resource conservation should not prevent Limnia from pursuing its case on the merits.

2. The district court abused its discretion by relinquishing the case to DOE.

Courts should deny a motion for remand "if the agency's request is frivolous or in bad faith." *SKF*, 254 F.3d at 1029; *Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (same); *Citizens Against the Pellissippi Parkway*, 375 F.3d at 417 (such requests "may in some contexts be unwarranted, or even abusive"). A remand request meets this standard when it is made at the last minute, *Byrd*, 576 F. Supp. at 550 (agency improperly waited until "the eleventh hour"); is based on nonbinding statements, *Lutheran Church-Missouri Synod*, 141 F.3d at 349; or is a litigation tactic to evade judicial review. *Id.*

Unreasonable delay is perhaps the clearest example of a bad faith motion for remand. In *Frito-Lay, Inc. v. Department of Labor*, a court in the Northern District of Texas canvassed the available case law for "what constitutes 'reasonable time' with respect to voluntary remand." 20 F. Supp. 3d 548, 555–57 (N.D. Tex. 2014).

Absent "unusual circumstances, the time period would be measured in weeks, not years." *Id*. at 555 (citing *Belville Min. Co.*, 999 F.2d at 1000).

The *Frito-Lay* court summarized that while "no true rules exist," time periods of twenty-seven, twenty, fourteen, and six years have been found unreasonable, while three and thirty-one days have been found reasonable. 20 F. Supp. 3d at 555–56. Courts have not treated time periods in between consistently. They "have rejected periods of five months and nine months as unreasonable, yet upheld eight months as reasonable. Oddly, two years has been held to be both reasonable and unreasonable. And, while one year and three years have been held unreasonable, four-and-a-half years has been deemed acceptable." *Id*. at 556 (numerous citations omitted). In *Frito-Lay* itself, the court found a twenty-month delay to be reasonable because as soon as "Defendants became aware of the error, they moved to remand the case." *Id*.

In this matter, the district court recognized that a remand motion should be denied if it is made in bad faith or "without a confession of error [as] a litigation tactic employed to avoid judicial review." J.A. 268–69. It concluded, however, that "[t]here is nothing in the record that suggests that [Defendant's] request is a litigation tactic made in bad faith[.]" J.A. 275. The district court's position is incorrect for two reasons. First, Defendants waited an unreasonable amount of time and until after they lost the motion to dismiss to move for remand. Second,

the district court improperly relied on unsupported representations during oral arguments as facts upon which to base the decision. J.A. 259; Dec. 15 Hr'g Tr. 33:12–14 (district court noting DOE's counsel asserted new facts during hearing).

a. DOE's unreasonable delay in requesting remand demonstrates its bad faith.

DOE's twenty-six-month delay between Plaintiff filing the amended complaint and DOE filing its motion for remand is unreasonable.[10] The reasonableness of DOE's delay should be measured by the intervening events between the agency learning of the complaint and filing the motion. If the agency had been reacting to changed circumstances or an event outside of its control, then perhaps a twenty-six-month delay could have been justified. But that is not what happened here. DOE has consistently asserted it did nothing wrong and Limnia's claims are without merit. As is their right, they filed a motion to dismiss. Only after the district court found Limnia's APA claim alleging that political taint infected the agency process could move forward did DOE move for remand.

In its Answer, filed between losing the motion to dismiss and the motion for remand, Defendant continues to assert that the claim lacks merit and even attempts to relitigate defenses the district court already resolved. *Compare* J.A. 117 (District court finding that "DOE's unequivocal rejection of Limnia's ATVM loan

[10] The delay was thirty-three months from the filing of the original complaint when Defendants first learned of the allegations.

application was a 'final' action on the part of the agency."), *with* J.A. 152 (DOE's Answer claiming that "there has not been a final agency action as required under the [APA]"); *see also* J.A. 188 (DOE "den[ying] that it erred in the manner it originally considered Plaintiff's applications for the loan programs that form the basis of the surviving APA claims, and believes that it would prevail if this matter were to continue to summary judgment[.]").

Defendants' remand motion essentially amounts to a second motion to dismiss. Such an effort smacks of litigation posturing aimed at evading judicial review. If DOE were truly interested in reconsidering its decision to deny Limnia's applications, then it would not have waited until the "eleventh hour" to seek remand. *Byrd*, 576 F. Supp. at 550. The fact that DOE waited 26 months — after failing to dismiss the case and when the LGP solicitation to which Limnia had applied was no longer extant — suggests it had no good-faith basis for seeking remand and no interest in a legitimate reconsideration of its original decision.

b. The district court improperly relied on facts presented during oral arguments.

During the district court hearing on the remand motion, DOE's counsel put forth unsubstantiated facts to support its motion. Although the district court appeared to recognize that it was improper for the government to assert facts in this manner, it nonetheless relied on those statements to justify granting the motion.

During the hearing, Limnia's counsel argued that in other cases granting remand, the agency has promised to do something different, it "has taken some sort of step, [it's] removed tainted staff, [or the decision has] gone to an independent board." J.A. 237; Dec. 15 Hr'g Tr. 11:23–25. The district court asked if DOE had made a "representation that the staff that reviewed the prior application [are] no longer with the agency?" J.A. 238; *id*. 12:1–3. Limnia's counsel responded that he did not "believe they made that representation. Additionally, . . . *without the administrative record, certainly we cannot tell and the Court cannot tell who was potentially tainted, who wasn't, which sort of regulations or guidelines were followed or not followed*[.]" J.A. 238; *id*. 12:6–11.

Later in the hearing, DOE's counsel stated: "the concern about the decision-makers that may or may not be in place at [DOE], I can report that most, if not all, the senior level decision-makers that would be making a decision regarding these programs have since moved on from the 2009–2010 time frame." J.A. 258; *id*. 32:19–24. The district court responded: "I don't know what I'm [supposed] to do with your representations here of those facts." J.A. 259; *id*. 33:12–13.

Although the district court claimed not to know what to do with unsupported factual representations offered by DOE's counsel for the first time during the hearing, it nevertheless converted them into hard facts to support its opinion. In its decision granting remand, the district court wrote: "The agency points out that the

reviewing officials whose prior lenses were allegedly tainted by impermissible political cronyism have left the DOE[.]" J.A. 269.

First, it is improper for the district court to find that fact as it did, as nothing exists in the record — other than DOE's counsel stating "I can report" — to support the truth of such a claim. *See Rogers Corp. v. Envtl. Prot. Agency*, 275 F.3d 1096, 1105 (D.C. Cir. 2002) ("An accelerated decision . . . is inappropriate when there is a disputed issue of material fact giving rise to conflicting inferences and a choice among them would amount to fact finding."); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("legal memoranda and oral argument are not evidence").

Second, as the administrative record has not yet been produced, it remains unknown who the decision makers were in this case. As Limnia's counsel asserted during the hearing, "without the administrative record . . . we cannot tell and the Court cannot tell who was potentially tainted, who wasn't[.]" J.A. 238; Dec. 15 Hr'g Tr. 12:7–9. If it remains unknown who the tainted decision makers were, how can DOE's counsel "report" that such individuals are no longer at the agency? Regardless, it remains improper for the district court to rely on DOE counsel's representations presented during a hearing as "facts" to support its decision.

3. "Voluntary" remand prejudiced Limnia and could not provide complete relief.

The district court maintained that granting remand would not prejudice Limnia because its "remedy under the APA is the same unbiased review of Limnia's loan application packages that the government is offering to undertake if the case is remanded." J.A. 275. The district court's analysis ignored the ways the remand harms Limnia and places it in a worse position than absent a remand.

a. Voluntary remand denies Limnia its statutory rights.

The APA provides that a court shall "hold unlawful and set aside agency action" and, in cases of inappropriate political interference in discretionary decision-making, remand and instruct for a determination on the merits by a disinterested decision-maker. 5 U.S.C. § 706; *Aera Energy LLC v. Salazar*, 642 F.3d 212, 222 (D.C. Cir. 2012); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972). In *Aera Energy*, this Court held that when politics infects a decision, the remedy is remand to an unbiased appeals board or administrative law judge, writing "[S]ometimes political pressure crosses the line and prevents an agency from performing its statutorily prescribed duties. When that occurs, . . . we have directed the agency to use the traditional administrative tools at its disposal to render a politically untainted decision." 642 F.3d at 224.

Here, Limnia was denied a court ruling that DOE's decision was unlawful and should be set aside. This is a key remedy as it affects the industry and

market's evaluation of Limnia's product technology. A remand in this case further prejudices Limnia by preventing the court from ensuring that DOE carries out its statutory responsibilities. DOE's refusal to admit political taint illustrates the need for a full record and a merits determination to craft an appropriate remand order to remedy the wrongdoing, none of which was accomplished by the court's remand.

b. The district court erroneously concluded that it lacked authority to remand with special instructions.

The district court wrote, without citation, that "the cases do not support the contention that a prevailing plaintiff in this type of APA case is entitled to some sort of special 'detailed' order." J.A. 272. The district court is incorrect.

The Supreme Court has stated that district courts do have the power to remand with specific instructions. *See Sullivan v. Hudson*, 490 U.S. 877, 885 (1989) ("Where a court finds that the Secretary has committed a legal or factual error in evaluating a particular claim, the district court's remand order will often include *detailed instructions* concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed.") (emphasis added).

This Court has repeatedly accompanied its remand orders with detailed instructions. *See, e.g.*, *Coburn v. McHugh*, 679 F.3d 924, 934–35 (D.C. Cir. 2012) ("Instructions on Remand: Where an agency has failed . . . to explain the path it has taken, we have no choice but to remand for a reasoned explanation. . . . On remand, the [agency] must reconsider [plaintiff's] case and, in so doing, address, at

a minimum, the following questions:") (citation and quotation marks omitted); *Astroline Commc'n Co. v. Fed. Commc'ns Comm'n*, 857 F.2d 1556, 1574 (D.C. Cir. 1988) ("First, the Commission should indicate whether and how proof of extreme market concentration would affect its public interest analysis . . . . Second, the Commission should reconsider whether the existing record presents a substantial and material question of fact necessitating an evidentiary hearing. . . . The Commission should state, or, if necessary, develop, standards to guide itself when evaluating the impact of market concentration on the public interest.").[11]

The Supreme Court has gone as far as to suggest, albeit in dicta, that requiring an agency to grant a loan may be appropriate in certain circumstances. *See Lyng v. Payne*, 476 U.S. 926, 936 (1986) ("If, for example, a farmer had filed a loan application prior to the expiration of the loan deadline and a court determined that the denial of the application after the deadline's expiration was 'arbitrary, capricious [and] not in accordance with law,' the appropriate remedy under the APA would be to direct that the application be granted or reconsidered.") (citation omitted). Although it is unclear whether this case would meet such criteria, at a minimum *Lyng* establishes that such relief is as least possible if the case had been

[11] Other courts have also done so. *See Miccosukee Tribe of Indians of Fla. v. United States*, No. 04-21448, 2008 WL 2967654, at *41 (S.D. Fla. July 29, 2008) ("Circuit courts have upheld district court decisions to remand with specific instructions to the agencies in cases brought under the APA."); *Hilo Coast Processing Co. v. United States*, 7 Cl. Ct. 175, 194–95 (Cl. Ct. 1985) (providing instructions regarding what agency must do on remand).

decided on the merits. As such, the remand denied Limnia the opportunity to pursue such relief and Limnia is thus prejudiced by the remand.

The district court took the position that proceeding through summary judgment would have no value and would not "necessarily guide the agency's course in the future." J.A. 273. During the hearing on the remand motion, the district court said, "[W]hat I'm not sure about is your claim that there's some sort of independent value in the judgment, especially in this situation as in contrast to other APA situations in which you need the judgment in order to move forward. You need the undoing of the agency's rule making or whatever. That's the typical APA, you know, 'hold unlawful and set aside' kind of language. I just don't know that this fits that dynamic." J.A. 257; Dec. 15 Hr'g Tr. 30:24–31:7.

As an initial matter, the APA requires courts to do two things when it finds an agency action unlawful; they "shall [1] hold unlawful and [2] set aside" the action. 5 U.S.C. § 706(2). These are separate and distinct requirements; to hold otherwise would be "contrary to [courts'] general reluctance to treat statutory terms as surplusage." *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (alternations omitted).[12] The act of holding an agency action

[12] The Sixth Circuit's view that "the presumption against surplusage does not apply to doublets—two ways of saying the same thing that reinforce its meaning," *Doe v.*

unlawful is contained in the court's judgment explaining how the agency has violated the law. The act of setting an agency action aside is the judicial command to the agency that it may no longer maintain its previous position.

There is value to Limnia in obtaining a judgment and having DOE's action held unlawful. Succeeding on the merits would benefit Limnia in two ways. First, Limnia would be able to clear the reputational harm to its name that currently exists from being denied a government loan on the basis that its technology did not meet government standards. It is well established that reputational harm is a cognizable injury. *See Foretich v. United States*, 351 F.3d 1198, 1211 (D.C. Cir. 2003) (citing *Meese v. Keene*, 481 U.S. 465, 473–77 (1987)).

Reputational injury caused by the government may be abated if the government retracts the offending statement. *See Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991) (finding the government's retraction of the offending statement as crucial to the lapse of injury). In this case, however, a remand where the government refuses to admit fault or reconsider its original decision — and one that prevents Limnia from succeeding on the merits of its claims — leaves the denial of the initial loan application on the books. Thus the remand prevents Limnia from obtaining both of the remedies available to it under the APA: a court has neither held DOE's actions unlawful nor set aside that action.

Boland, 698 F.3d 877, 881 (6th Cir. 2012), does not apply in the case of 5 U.S.C. § 706(2) because "to hold unlawful" is not another way of saying "to set aside."

A merits decision showing that DOE's adjudication was infected with political taint would stem the harm of the loan denial by providing APA statutory relief.

Second, the judgment would demonstrate to the agency the precise action(s) it must take or avoid taking on remand. As described above, this could take the form of judicial instructions to the agency. Courts have also limited agency action on remand by, for example, restricting the scope of the proceedings, *Key v. Sullivan*, 925 F.2d 1056, 1061 (7th Cir. 1991); defining the precise questions the agency is to address, *In re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988); and requiring agency action by a certain date, *United States v. AT&T*, 551 F.2d 384, 395 (D.C. Cir. 1976). Even if the court does not provide explicit instructions, the court's decision on the merits would provide the agency with cues about how the agency should proceed and would firmly establish that its adjudication of Limnia's application was unlawful.

c. Special instructions are necessary in this case because DOE has taken positions that call into question its ability to fairly evaluate the application upon remand.

DOE has explicitly taken the position that it did nothing incorrectly and that Limnia's ATVM and LGP applications must be rejected as a matter of law. For example, in its motion for remand, DOE unrepentantly asserts that the original decision against Limnia was untainted by political favoritism and remains correct. J.A. 195 ("DOE strongly disputes that it erred in the manner it considered

Plaintiff's original applications"). In moving to dismiss the complaint, the Individual Capacity Federal Defendants stated that "DOE denied Limnia's application, as a matter of law[.]" Individual Fed. Defs.' Mot. to Dismiss, at 12. ECF No. 27. The Official Capacity Federal Defendants said the same thing: "DOE replied, stating that '[a]t this time, the additional information has not changed our determination that your proposed project cannot, as a matter of law, be funded under the [ATVM] Program.'" J.A. 58.

The legal positions DOE continually espoused in this litigation stand as significant and potentially insurmountable barriers to Limnia's efforts to apply for either an ATVM loan or an LGP loan guarantee on remand and to the government's ability to fairly evaluate its applications.

d. Remand would financially prejudice Limnia by requiring it to pay higher fees for its loan guarantee application.

There are a variety of fees associated with DOE's loan programs, including an initial fee due at or near the submission of the application. On February 10, 2009, Limnia submitted an application in response to a solicitation issued pursuant to DOE's LG Program. J.A. 26; Verified Am. Compl. ¶ 77. The application fee for the solicitation was $75,000 with $18,000 due upon initial application. J.A. 26; *id*. ¶ 78.[13] Ten days prior to submitting its application, "Limnia participated in a

[13] *See also* Dep't of Energy, Federal Loan Guarantees For Projects That Employ Innovative Energy Efficiency, Renewable Energy, And Advanced Transmission

conference call with John Podesta, [Secretary] Chu, and Interior Secretary Kenneth Salazar, during which [Secretary] Chu said he felt the LGP fee and process were unduly onerous and burdensome. [Secretary] Chu further promised to waive the application fee." J.A. 26; *id*. ¶ 76.[14]

After the district court granted the remand, DOE continued to take the position that the agency did not and could not waive any application fees and also that it would not reconsider its initial position on Limnia's applications. Instead, DOE required Limnia to file brand new ATVM and LGP applications. The agency wanted Limnia to submit its LGP application to the "Renewable Energy & Efficient Energy Projects Solicitation," which was issued on June 3, 2014.[15]

Not only is this a different LGP solicitation than the one at issue in this litigation — with different terms, conditions, and criteria — but the application fees are also substantially higher. The application fee for this solicitation is

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And Distribution Technologies Reference Number, DE-FOA-0000005, at 12 (2008), *available at* http://bit.ly/2hdNa2D.

[14] Although Defendants dispute this fact, J.A. 165; Answer ¶ 76, as when reviewing a district court decision on a motion to dismiss, this fact should be construed in Limnia's favor. At a minimum it should be viewed as a disputed fact, as when reviewing a district court decision on a motion for summary judgment.

[15] Details regarding this solicitation are available on DOE's website. Dep't of Energy, Renewable Energy & Efficient Energy Projects Solicitation, http://bit.ly/2haZO0K (last accessed Jan. 11, 2017).

$350,000 with $50,000 due upon application.[16] Therefore, the remand exposes Limnia to initial application fees nearly triple the original solicitation and total application fees nearly five times higher.

The district court's remand order fails to take any of this into account. It does not allow Limnia to renew its LGP application on the same terms and with the same fee structure that was in place in 2009, nor does it allow for further consideration of whether, in fact, DOE waived the fees entirely.[17] Thus, the remand financially prejudices Limnia.

e. Subsequent to granting remand, the district court recognized its error on the fee issue but failed to take remedial action.

During the June 3, 2016 status conference after granting remand, the district court recognized the dilemma that remand placed on Limnia in terms of fees, acknowledged that its order granting remand provided no guidance on the matter, and suggested that an appropriate resolution might include DOE conceding the fee

[16] *See* Dep't of Energy, Federal Loan Guarantee Solicitation & Supplements for Renewable Energy Projects And Efficient Energy Projects, DE-SOL-0007154, at 18–19 (2015), *available at* http://bit.ly/2hdISIE.

[17] DOE claims that it is statutorily required to charge, and Limnia is required to pay, a fee in connection with any LGP application. J.A. 78–79. This ignores that fact that, as evidenced by GAO, DOE waived similar fees for other applications. *See* Am. Verified Compl. Ex. 13 (GAO Report 12-157), at 157, ECF No. 26-1 (listing DOE as needing to "collect full fee from an application" as "applicable but not performed"). Moreover, even if DOE is legally obligated to charge fees, no law requires it to charge a particular fee amount or to charge the fees associated with the 2014 solicitation rather than with the 2009 solicitation.

issue. J.A. 296–98, 302–19; June 3 Hr'g Tr. 12–14, 18–35. Yet despite recognizing the problems remand created, the district court abused its discretion by ignoring the fee issue in its July 21 Order closing the case. J.A. 329.

DOE's position is that the district court granted remand so that Limnia could file a new application for a new loan solicitation with a requirement that Limnia pay the fees associated with that new solicitation. J.A. 296; June 3 Hr'g Tr. 12:8–13. At the time it granted remand, however, the district court did not consider that this process would expose Limnia to a higher fee requirement and prevent it from litigating whether DOE had waived the LGP fees entirely. J.A. 296; *id*. 12:23–25 (The district court "[did not] recall any particular discussion of whether when Limnia refiled their application it would be with the fee or not [with] the fee[.]"); J.A. 302; *id*. 18:20–25 (district court commenting that "nobody apparently focused on the government's indication in its motion for a voluntary remand that it was talking about active solicitations . . . and that they intended to have [Limnia] pay a fee"); J.A. 307; *id*. 23:3–5 (district court noting that its "remand order . . . admittedly did not address [the fee] issue").

Although the district court did not address the fee issue in its remand order, once presented with how the issue prejudiced Limnia, the district court recognized its error. J.A. 305–06; *id*. 21:25–22:4 ("What I don't know what to do with is this fee dispute and the extent to which now on remand [Limnia is] somehow worse

off."; J.A. 306; *id*. 22:11–12 (district court recognizing that the fee dispute is "one isolated issue that is not being resolved by the voluntary remand process"); J.A. 309; *id*. 25:1–7 (district court realizing that although "it sounded like to me that they were getting everything that they had come to court for[.] What I did not focus on . . . is on remand, once you got the application that they would submit, did they have to pay the 50,000-dollar fee or not before you would consider it.").[18]

The district court also admitted that the remand operated essentially like a forced settlement, one that would require Limnia to forfeit its claim that application fees had been waived. Recognizing the prejudice this forced settlement created, the district court attempted to resolve it by suggesting DOE waive the LGP fees. J.A. 311; *id*. 27:5–12 ("[T]he voluntary remand process is in a way like a settlement because it is like getting rid of the plaintiffs' initial claims in light of the government's representations that it's willing to provide us essentially the remedy that Plaintiffs have articulated in their complaints. . . . [I]t wouldn't, I

[18] The district court recognized Limnia had not conceded the issue. J.A. 308; June 3 Hr'g Tr. 24:14–20 ("There was never really a full vetting of the [fee] question of on remand, which the government is asking for the Court to order, over plaintiffs' objection they wanted to go forward full steam on their initial allegation that someone had told them that no fee was required and that you denied the application improperly on that ground."); J.A. 309; *id*. 25:12–20 ("And so now we have a dispute . . . [that] really does bring us back to . . . [Limnia's] initial complaint about the fee in a way that we've had hoped to get away from by having a voluntary remand process.").

think, be untoward for the government to consider some kind of concession with respect to fee in this context.").

DOE maintained that even if Limnia were permitted to litigate the fee issue and prevailed, the district court was unable to provide relief requiring DOE to process the LGP application without the fee. J.A. 312; *id*. 28:13–24. This argument caused the district court again to rethink its remand order and ponder the fee dispute on the merits. J.A. 313; *id*. 29:11–22 ("If they win, . . . [if the] trier of fact agrees with Plaintiff that [DOE] had originally said no fee, Plaintiff wins. When Plaintiff goes back on remand they have to suddenly pay the fee now? Maybe [DOE's] right, I don't know the answer to that question."); J.A. 315; *id*. 31:10–11 ("This is like a thought experiment. It's fabulous. I love it."); J.A. 316–17; *id*. 32:19–33:6 ("[T]his is so fascinating because we've now found a loophole in the . . . agency review process and interaction with the courts[.] Someone who approaches the agency with an application with the associated fee at that time, who then alleges that the agency acted arbitrarily and capriciously in reviewing and considering that application could be affirmatively damaged even after they win with . . . the Court agreeing with them that the agency acted improperly in the review of that application if it takes two years to process and now on remand the application fee is twice as much."); J.A. 318; *id*. 34:16–22 ("I never thought about this before. It hasn't really happened in this way. But [DOE's] position is [that]

no order from the Court related to the amount of fees on remand [is proper], because that's up to the agency. . . . Well, could be that we have an impassable sort of dynamic[.]").

The district court's recognition of the problems associated with the fee issue demonstrates why remand is wholly inappropriate in a case like this one where the agency does not propose to reconsider its initial decision.

This case involves Limnia seeking judicial review of a politically tainted loan application process; it is not primarily a "thought experiment." DOE twice sought to evade meaningful judicial review. It failed in its first attempt in a motion to dismiss. The district court permitted DOE, however, to use a remand motion to dismiss the case. After doing so, the district court realized that it had created a "loophole" and financially prejudiced Limnia in two ways. First, by exposing Limnia to higher fees than were associated with Limnia's initial LGP application. Second, by dismissing Limnia's claim that DOE had waived the fees entirely. The district court, in recognizing its error, should have closed the loophole it created by rescinding the order granting remand, and allowing the case to proceed to the merits. In failing to do so, the district court abused its discretion.

C. The Criteria for Granting Remand Have Been Developed in Cases, Unlike This One, Where *Chevron* may be Implicated.

Virtually all of the cases on which the district court relied involved situations where the agency's decision may be eligible for deference under

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The *SKF* court indicated that if a statute is ambiguous and an agency interpretation is eligible for *Chevron* deference, the standards for granting remand may be relaxed, writing, "Where there is no step one *Chevron* issue, we believe a remand to the agency is required[.]" 254 F.3d at 1029–1030 (citation omitted)); *see also Wagner v. Principi*, 370 F.3d 1089, 1092–93 (Fed. Cir. 2004) (*Chevron* is relevant to whether remand is appropriate). The policy rationale underlying this approach is that in *Chevron* step two circumstances "an agency must be allowed to assess 'the wisdom of its policy on a continuing basis.' Under the *Chevron* regime, agency discretion to reconsider policies does not end once the agency action is appealed." *SKF*, 254 F.3d at 1030 (citation omitted); *see Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (same, citing *SKF*).

Agency interpretations in informal and formal rulemakings, and formal adjudications may be eligible for *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Agency interpretations in informal adjudications, however, such as a decision on a loan application, are generally not entitled to *Chevron* deference. *See, e.g., Fogo de Chao (Holdings) Inc. v. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136 (D.C. Cir. 2014) (denying *Chevron* deference where interpretation was in "informal adjudication . . . rather than a formal adjudication or notice-and-comment rulemaking"); *but see Menkes v. Dep't of Homeland Sec.*,

637 F.3d 319 (D.C. Cir. 2011) (applying *Chevron* deference to informal adjudication). These interpretations are instead generally entitled only to *Skidmore* power-to-persuade deference. *See Fogo de Chao*, 769 F.3d at 1137; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Additionally, remand — especially unconstrained remand as exists here — is more appropriate for rulemaking or formal adjudications where standards governing the process are already in place. By contrast, here there was and is no process for the agency to follow. *See* J.A. 251; Dec. 15 Hr'g Tr. 25:12–14 (government counsel stating, "[M]y understanding is that there isn't a . . . set-down procedure that must be followed"). The agency's positions described above highlight why no deference should be given and why remand was inappropriate. The underlying rationale for remand did not exist here.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the district court used the wrong standard and abused its discretion in ordering a voluntary remand and subsequently dismissing the case. This Court should reverse the judgment of the lower court and remand for further proceedings.

Date: January 11, 2017

Respectfully submitted,

/s/ John J. Vecchione

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(e)(2(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e)(2)(B) because it contains 12,321 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1). I hereby certify that this brief also complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

Date: January 11, 2017

/s/ John. J. Vecchione
John J. Vecchione

CERTIFICATE OF SERVICE

I hereby certify that, on January 11, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

Date: January 11, 2017

/s/ John J. Vecchione
John J. Vecchione

STATUTORY AND REGULATORY ADDENDUM

ADDENDUM TABLE OF CONTENTS

5 U.S.C. § 706. Scope of review (2015)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. §17013 (2009)

Advanced technology vehicles manufacturing incentive program

(a) Definitions

In this section:

(1) Advanced technology vehicle

The term “advanced technology vehicle” means an ultra efficient vehicle or a light duty vehicle that meets—

(A) the Bin 5 Tier II emission standard established in regulations issued by the Administrator of the Environmental Protection Agency under section

202(i) of the Clean Air Act (42 U.S.C. 7521(i)), or a lower-numbered Bin emission standard;

(B) any new emission standard in effect for fine particulate matter prescribed by the Administrator under that Act (42 U.S.C. 7401 et seq.); and

(C) at least 125 percent of the average base year combined fuel economy for vehicles with substantially similar attributes.

(2) Combined fuel economy

The term "combined fuel economy" means—

(A) the combined city/highway miles per gallon values, as reported in accordance with section 32904 of title 49; and

(B) in the case of an electric drive vehicle with the ability to recharge from an off-board source, the reported mileage, as determined in a manner consistent with the Society of Automotive Engineers recommended practice for that configuration or a similar practice recommended by the Secretary.

(3) Engineering integration costs

The term "engineering integration costs" includes the cost of engineering tasks relating to—

(A) incorporating qualifying components into the design of advanced technology vehicles; and

(B) designing tooling and equipment and developing manufacturing processes and material suppliers for production facilities that produce qualifying components or advanced technology vehicles.

(4) Qualifying components

The term "qualifying components" means components that the Secretary determines to be—

(A) designed for advanced technology vehicles; and

(B) installed for the purpose of meeting the performance requirements of advanced technology vehicles.

(5) Ultra efficient vehicle

The term "ultra efficient vehicle" means a fully closed compartment vehicle designed to carry at least 2 adult passengers that achieves—

(A) at least 75 miles per gallon while operating on gasoline or diesel fuel;

(B) at least 75 miles per gallon equivalent while operating as a hybrid electric-gasoline or electric-diesel vehicle; or

(C) at least 75 miles per gallon equivalent while operating as a fully electric vehicle.

(b) Advanced vehicles manufacturing facility

The Secretary shall provide facility funding awards under this section to automobile manufacturers, ultra efficient vehicle manufacturers, and component suppliers to pay not more than 30 percent of the cost of—

(1) reequipping, expanding, or establishing a manufacturing facility in the United States to produce—

(A) qualifying advanced technology vehicles;

(B) qualifying components; or

(C) ultra efficient vehicles; and

(2) engineering integration performed in the United States of qualifying vehicles, ultra efficient vehicles, and qualifying components.

(c) Period of availability

An award under subsection (b) shall apply to—

(1) facilities and equipment placed in service before December 30, 2020; and

(2) engineering integration costs incurred during the period beginning on December 19, 2007, and ending on December 30, 2020.

(d) Direct loan program

(1) In general

Not later than 1 year after December 19, 2007, and subject to the availability of appropriated funds, the Secretary shall carry out a program to provide a total of not more than $25,000,000,000 in loans to eligible individuals and entities (as determined by the Secretary) for the costs of activities described in subsection (b). The loans shall be made through the Federal Financing Bank, with the full faith and credit of the United States Government on the principal and interest. The full credit subsidy shall be paid by the Secretary using appropriated funds.

(2) Application

An applicant for a loan under this subsection shall submit to the Secretary an application at such time, in such manner, and containing such information as the Secretary may require, including a written assurance that—

(A) all laborers and mechanics employed by contractors or subcontractors during construction, alteration, or repair that is financed, in whole or in part, by a loan under this section shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with sections 3141–3144, 3146, and 3147 of title 40; and

(B) the Secretary of Labor shall, with respect to the labor standards described in this paragraph, have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (5 U.S.C. App.) and section 3145 of title 40.

(3) Selection of eligible projects

The Secretary shall select eligible projects to receive loans under this subsection in cases in which, as determined by the Secretary, the award recipient—

(A) is financially viable without the receipt of additional Federal funding associated with the proposed project;

(B) will provide sufficient information to the Secretary for the Secretary to ensure that the qualified investment is expended efficiently and effectively; and

(C) has met such other criteria as may be established and published by the Secretary.

(4) Rates, terms, and repayment of loans

A loan provided under this subsection—

(A) shall have an interest rate that, as of the date on which the loan is made, is equal to the cost of funds to the Department of the Treasury for obligations of comparable maturity;

(B) shall have a term equal to the lesser of—

(i) the projected life, in years, of the eligible project to be carried out using funds from the loan, as determined by the Secretary; and [1]

(ii) 25 years;

(C) may be subject to a deferral in repayment for not more than 5 years after the date on which the eligible project carried out using funds from the loan first begins operations, as determined by the Secretary; and

(D) shall be made by the Federal Financing Bank.

(e) Improvement

Not later than 60 days after September 30, 2008, the Secretary shall promulgate an interim final rule establishing regulations that the Secretary deems necessary to administer this section and any loans made by the Secretary pursuant to this section. Such interim final rule shall require that, in order for an automobile manufacturer to be eligible for an award or loan under this section during a particular year, the adjusted average fuel economy of the manufacturer for light duty vehicles produced by the manufacturer during the most recent year for which data are available shall be not less than the average fuel economy for all light duty vehicles of the manufacturer for model year 2005. In order to determine fuel economy baselines for eligibility of a new manufacturer or a manufacturer that has not produced previously produced equivalent vehicles, the Secretary may substitute industry averages.

(f) Fees

Administrative costs shall be no more than $100,000 or 10 basis point [2] of the loan.

(g) Priority

The Secretary shall, in making awards or loans to those manufacturers that have existing facilities, give priority to those facilities that are oldest or have been in existence for at least 20 years or are utilized primarily for the manufacture of ultra efficient vehicles. Such facilities can currently be sitting idle.

(h) Set aside for small automobile manufacturers and component suppliers

(1) Definition of covered firm

In this subsection, the term “covered firm” means a firm that—

(A) employs less than 500 individuals; and

(B) manufactures ultra efficient vehicles, automobiles, or components of automobiles.

(2) Set aside

Of the amount of funds that are used to provide awards for each fiscal year under subsection (b), the Secretary shall use not less than 10 percent to provide awards to covered firms or consortia led by a covered firm.

(i) Authorization of appropriations

There are authorized to be appropriated such sums as are necessary to carry out this section for each of fiscal years 2008 through 2012.

(j) Appointment and pay of personnel

(1) The Secretary may use direct hiring authority pursuant to section 3304(a)(3) of title 5 to appoint such professional and administrative personnel as the Secretary deems necessary to the discharge of the Secretary's functions under this section.

(2) The rate of pay for a person appointed pursuant to paragraph (1) shall not exceed the maximum rate payable for GS-15 of the General Schedule under chapter 53 such title 5.

(3) The Secretary may retain such consultants as the Secretary deems necessary to the discharge of the functions required by this section, pursuant to section 427 of title 41.

10 C.F.R. § 609.7 (2009)

Programmatic, technical and financial evaluation of applications.

(a) In reviewing completed Applications, and in prioritizing and selecting those to whom a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, the applicable solicitation, and this part. Applications will be considered in a competitive process, i.e. each Application will be evaluated against other Applications responsive to the Solicitation. Greater weight will be given to applications that rely upon a smaller guarantee percentage, all else being equal. Concurrent with its review process, DOE will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee. Applications will be denied if:

(1) The project will be built or operated outside the United States;

(2) The project is not ready to be employed commercially in the United States, cannot yield a commercially viable product or service in the use proposed in the project, does not have the potential to be employed in other commercial projects

in the United States, and is not or will not be available for further commercial use in the United States;

(3) The entity or person issuing the loan or other debt obligations subject to the loan guarantee is not an Eligible Lender or other Holder, as defined in § 609.11 of this part;

(4) The project is for demonstration, research, or development.

(5) The project does not avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases; or

(6) The Applicant will not provide an equity contribution.

(b) In evaluating Applications, DOE will consider the following factors:

(1) To what measurable extent the project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases;

(2) To what extent the new or significantly improved technology to be employed in the project, as compared to Commercial Technology in general use in the United States, is ready to be employed commercially in the United States, can be replicated, yields a commercial viable project or service in the use proposed in the project, has potential to be employed in other commercial projects in the United States, and is or will be available for further commercial use in the United States;

(3) To the extent that the new or significantly improved technology used in the project constitutes an important improvement in technology, as compared to Commercial Technology, used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, and the Applicant has a plan to advance or assist in the advancement of that technology into the commercial marketplace;

(4) The extent to which the requested amount of the loan guarantee, and requested amount of Guaranteed Obligations are reasonable relative to the nature and scope of the project;

(5) The total amount and nature of the Eligible Project Costs and the extent to which Project Costs are funded by Guaranteed Obligations;

(6) The likelihood that the project will be ready for full commercial operations in the time frame stated in the Application;

(7) The amount of equity commitment to the project by the Applicant and other principals involved in the project;

(8) Whether there is sufficient evidence that the Applicant will diligently pursue the project, including initiating and completing the project in a timely manner;

(9) Whether and to what extent the Applicant will rely upon other Federal and non-Federal governmental assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the project and how such assistance will impact the project;

(10) The feasibility of the project and likelihood that the project will produce sufficient revenues to service the project's debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations;

(11) The levels of safeguards provided to the Federal government in the event of default through collateral, warranties, and other assurance of repayment described in the Application;

(12) The Applicant's capacity and expertise to successfully operate the project, based on factors such as financial soundness, management organization, and the nature and extent of corporate and personal experience;

(13) The ability of the applicant to ensure that the project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;

(14) The levels of market, regulatory, legal, financial, technological, and other risks associated with the project and their appropriateness for a loan guarantee provided by DOE;

(15) Whether the Application contains sufficient information, including a detailed description of the nature and scope of the project and the nature, scope, and risk coverage of the loan guarantee sought to enable DOE to perform a thorough assessment of the project; and

(16) Such other criteria that DOE deems relevant in evaluating the merits of an Application.

(c) During the Application review process DOE may raise issues or concerns that were not raised during the Pre-Application review process where a Pre-Application was requested in the applicable solicitation.

(d) If DOE determines that a project may be suitable for a loan guarantee, DOE will notify the Applicant and Eligible Lender or other Holder in writing and provide them with a Term Sheet. If DOE reviews an Application and decides not to proceed further with the issuance of a Term Sheet, DOE will inform the Applicant in writing of the reason(s) for denial.

10 C.F.R. § 611.100 (2009)

Eligible applicant

(a) In order to be eligible to receive a loan under this part, an applicant

(1) Must be either—

(i) An automobile manufacturer that can demonstrate an improved fuel economy as specified in paragraph (b) of this section, or

(ii) A manufacturer of a qualifying component; and

(2) Must be financially viable without receipt of additional Federal funding associated with the proposed eligible project.

(b) Improved fuel economy.

(1) If the applicant is an automobile manufacturer that manufactured in model year 2005, vehicles subject to the CAFE requirements, the applicant must demonstrate that its adjusted average fuel economy for its light-duty vehicle fleet produced in the most recent year for which final CAFE compliance data is available, at the time of application, is greater than or equal to the adjusted average fuel economy of the applicant's fleet for MY 2005, based on the MY 2005 final CAFE compliance data.

(2) If the applicant is an automobile manufacturer that did not manufacture in model year 2005, vehicles subject to the CAFE requirements, the applicant must demonstrate that the projected combined fuel economy for the relevant the advanced technology vehicle that is the subject of the application is greater than or equal to the industry adjusted average fuel economy for model year 2005 of equivalent vehicles, based on final CAFE compliance data.

(3) The CAFE values under this paragraph are to be calculated using the CAFE procedures applicable to the model year being evaluated.

(4) An applicant must provide fuel economy data, at the model level, relied upon to make the demonstration required by this section.

(5) An applicant that is a manufacturer of a qualifying component under paragraph (a)(1)(ii) of this section does not need to make a showing of improved fuel economy under this paragraph.

(c) In determining under paragraph (a)(2) of this section whether an applicant is financially viable, the Department will consider a number of factors, including, but not limited to:

(1) The applicant's debt-to-equity ratio as of the date of the loan application;

(2) The applicant's earnings before interest, taxes, depreciation, and amortization (EBITDA) for the applicant's most recent fiscal year prior to the date of the loan application;

(3) The applicant's debt to EBITDA ratio as of the date of the loan application;

(4) The applicant's interest coverage ratio (calculated as EBITDA divided by interest expenses) for the applicant's most recent fiscal year prior to the date of the loan application;

(5) The applicant's fixed charge coverage ratio (calculated as EBITDA plus fixed charges divided by fixed charges plus interest expenses) for the applicant's most recent fiscal year prior to the date of the loan application;

(6) The applicant's liquidity as of the date of the loan application;

(7) Statements from applicant's lenders that the applicant is current with all payments due under loans made by those lenders at the time of the loan application; and

(8) Financial projections demonstrating the applicant's solvency through the period of time that the loan is outstanding.

(d). For purposes of making a determination under paragraph (a)(2) of this section, additional Federal funding includes any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance from the Federal government, or any agency or instrumentality thereof, other than the proceeds of a loan approved under this Part, that is, or is expected to be made available with respect to, the project for which the loan is sought under this Part.

10 C.F.R. § 611.103 (2009)

Application evaluation

(a) *Eligibility screening*. Applications will be reviewed to determine whether the applicant is eligible, the information required under § 611.101 is complete, and the proposed loan complies with applicable statutes and regulations. DOE can at any time reject an application, in whole or in part, that does not meet these requirements.

(b) *Evaluation criteria*. Applications that are determined to be eligible pursuant to paragraph (a) of this section shall be subject to a substantive review by DOE based upon factors that include, but are not limited to, the following:

(1) The technical merit of the proposed advanced technology vehicles or qualifying components, with greater weight given for factors including, but not limited to:

(i) Improved vehicle fuel economy above that required for an advanced technology vehicle;

(ii) Potential contributions to improved fuel economy of the U.S. light-duty vehicle fleet;

(iii) Likely reductions in petroleum use by the U.S. light-duty fleet; and

(iv) Promotion of use of advanced fuel (e.g., E85, ultra-low sulfur diesel).

(2) Technical Program Factors such as economic development and diversity in technology, company, risk, and geographic location.

(3) The adequacy of the proposed provisions to protect the Government, including sufficiency of Security, the priority of the lien position in the Security, and the percentage of the project to be financed with the loan.

(4) In making loans to those manufacturers that have existing facilities, priority will be given to those facilities that are oldest or have been in existence for at least 20 years even if such facilities are idle at the time of application.