UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 663, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	Civil Action No. 0:19-cv-02660 The Honorable Joan N. Ericksen Magistrate Judge Tony N. Leung

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO STAY SUMMARY-JUDGMENT PROCEEDINGS AND FOR VOLUNTARY REMAND

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INTRODUCTION

Defendant, the U.S. Department of Agriculture ("USDA"), respectfully moves the Court for an order staying summary-judgment proceedings for 120 days and remanding consideration of the challenged regulation ("Final Rule") to the Food Safety and Inspection Service ("Agency") during that time.

In its previous order dismissing two of the three counts in Plaintiffs' complaint, this Court expressed concerns about whether the Agency adequately considered and responded to certain public comments it received during its rulemaking. These comments assert that the Final Rule's revocation of maximum evisceration-line speeds will expose slaughter establishment workers to an increased risk of physical injury. USDA takes the Court's concerns seriously and intends to respond by reconsidering these comments and taking appropriate action, such as publishing a supplemental response in the Federal Register.

Courts routinely grant this type of motion for voluntary remand in recognition of an agency's inherent authority to reconsider its own decisions and in order to conserve the court's and the parties' resources. Both of these rationales apply with full force here. The Agency has inherent authority to reconsider the Final Rule's potential effects on worker safety. Allowing it to do so now, rather than proceeding to summary judgment on the current record, will prevent unnecessary litigation over potential errors that the Agency has already agreed to address.

A motion for voluntary remand should be granted unless it is frivolous, made in bad faith, or would unduly prejudice the non-movant. None of these circumstances exists here. Defendant's motion is made in good faith; it reflects a sincere desire to fix potential errors in

the Final Rule without unnecessary litigation. And Plaintiffs will not be unduly prejudiced if Defendant's motion is granted. For one thing, Defendant is voluntarily offering to provide the relief that Plaintiffs would likely obtain if they were to prevail on the merits of their remaining claim—a remand to the Agency for reconsideration of the relevant public comments regarding establishment-worker safety. Moreover, granting Defendant's motion will not deprive Plaintiffs of their opportunity to litigate the merits of their claim and argue for vacatur of the Final Rule; it will instead narrow the issues to be litigated after remand, allowing the parties and the Court to focus on the substance of the agency's decision rather than needlessly continuing to litigate procedural disputes.

For these reasons, as explained further below, Defendant's motion should be granted.

BACKGROUND

I. Statutory and Regulatory Background

The Federal Meat Inspection Act (FMIA) reflects Congress's desire to protect "the health and welfare of consumers" by ensuring that "meat and meat food products . . . are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602. As relevant here, the FMIA furthers this goal by requiring USDA inspectors to make "a post mortem examination and inspection of the carcasses and parts" of all animals prepared for human consumption at any slaughter establishment. *Id.* § 604. The Secretary of Agriculture is authorized to "make such rules and regulations as are necessary for the efficient execution" of these provisions. *Id.* § 621.

The Secretary has tasked the Food Safety and Inspection Service ("Agency") with implementing the FMIA and carrying out USDA's mission of protecting consumer health and

welfare. *See* 9 C.F.R. § 300.2(b)(1). Accordingly, the Agency promulgates regulations governing, *inter alia*, post-mortem examinations at swine slaughter establishments. *See, e.g.*, 9 C.F.R. pts. 309 & 310; Swine Post-Mortem Inspection Procedures and Staffing Standards, 50 Fed. Reg. 19,900 (May 13, 1985); Cattle & Swine Post-Mortem Inspection Procedures and Staffing Standards, 47 Fed. Reg. 33,673 (Aug. 4, 1982). These regulations have historically promoted the efficiency of USDA inspections and establishment production. *See* 50 Fed. Reg. at 19,901; 47 Fed. Reg. at 33,673.

Current federal regulations require Agency inspectors to conduct a post-mortem inspection of each swine in three separate parts: head, viscera, and carcass. 9 C.F.R. § 310.1(b)(3); *see* Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780, 4783 (proposed Feb. 1, 2018) ("Proposed Rule"). Under the traditional inspection system developed in the 1970s, Agency inspectors stationed on an establishment's evisceration line identify localized defects correctable through trimming and direct establishment employees to remove these defects. 83 Fed. Reg. at 4783. Establishment employees working on the evisceration line are not required to sort animal parts or carcasses before the post-mortem inspection, either to identify and remove correctable defects or to flag potentially adulterated items that an Agency inspector may decide to condemn. *Id.*

The traditional inspection system prescribes maximum evisceration-line speeds that vary according to the number of Agency inspectors present on the line, in order to ensure that Agency inspectors have adequate time to inspect each head, carcass, and viscera; to identify localized defects; and to direct establishment employees to remove them. *See* 9 C.F.R. § 310.1(b)(3). These speed limits may also vary based on the configuration of the line, the

total distance that an inspector must walk between work stations during one inspection cycle (e.g., between viscera, carcass, and washbasin), and whether a mirror eliminates the need for inspectors to turn a carcass to inspect both sides of it. *See* 9 C.F.R. § 310.1(b)(3), tbls. 1, 2, & 4. For example, in a market hog establishment with two inspectors that uses a viscera-head-carcass line configuration requiring each inspector to walk a total of 16 to 20 feet per inspection cycle, the permissible evisceration-line speed may range from 151 to 227 head per hour. *Id.*, tbl. 2. In an establishment with five inspectors rotating between the head, viscera, and carcass inspection stations, the maximum evisceration-line speed is 859 head per hour. *Id.*, tbl. 4. And when seven inspectors—the maximum number allowed—are present, the maximum evisceration-line speed is 1,106 head per hour. *Id.* The Agency does not regulate line speeds during slaughter establishments' subsequent processing of meat products. Sidrak Decl. ¶ 12.

In the mid-1990s, the Agency launched a new initiative, known as the HACCP-Based Inspection Models Project (HIMP), with the goals of improving food safety and inspection effectiveness, reducing the risk of foodborne illness, promoting industry innovation, and more efficiently utilizing the Agency's resources. 83 Fed. Reg. at 4787 (citing 62 Fed. Reg. 31,553 (June 10, 1997)). The HIMP initiative included a pilot project in which the Agency designed and tested new inspection models in volunteer meat and poultry slaughter establishments. *Id.* From 2001 through March 2020, HIMP procedures were used in five high-volume market hog slaughter establishments that collectively account for about 15% of all pork produced in the United States. *See id.* at 4780, 4787, 4801; Sidrak Decl. ¶ 5.

In HIMP establishments, the post-mortem inspection process still required Agency

inspectors to examine the head, carcass, and viscera of each market hog at fixed stations on the evisceration line. 83 Fed. Reg. at 4788. Prior to the post-mortem inspection, however, establishment personnel sorted carcasses and parts, trimmed correctible defects, and marked carcasses and parts for disposal under Agency supervision. *Id.* This made the Agency's post-mortem inspections more efficient, as most observable defects had already been addressed by the establishment prior to inspection. *Id.* Recognizing that each inspector stationed on the evisceration line would need less time to perform an adequate inspection because of the pre-inspection sorting and trimming activities, the Agency waived the traditional evisceration-line speed limits for the HIMP establishments. *Id.* Instead, each HIMP establishment was permitted to set its own evisceration-line speeds. *Id.* These speeds varied based on the establishment's equipment, the size and condition of the animals, the number of establishment employees working on the evisceration line, and the establishment's ability to maintain process control when operating at a given speed. *Id.*; *see also* Sidrak Decl. ¶ 8.

Based on the results of the HIMP pilot, on February 1, 2018, the Agency published a notice of proposed rulemaking indicating its intent to amend its food-safety inspection regulations to establish an optional New Swine Slaughter Inspection System (NSIS) for market hog slaughter establishments. 83 Fed. Reg. at 4780. The key elements of NSIS include three features tested during the HIMP pilot: (1) requiring establishment employees to perform sorting and trimming activities prior to the post-mortem inspection by Agency personnel; (2) reducing the number of Agency inspectors stationed on the evisceration line to a maximum of three per line, per shift and increasing offline inspection activities; and (3) revoking maximum evisceration-line speeds and permitting establishments to set their own line speeds

based on their ability to maintain process control. *Id.* at 4781.

As explained in the Proposed Rule, the Agency found that the HIMP establishments operated at an average line speed of 1,099 head per hour—slower than the maximum speed allowed under the traditional inspection system—and that their line speeds varied from 885 head per hour to 1,295 head per hour.[1] *Id.* at 4796. The Proposed Rule also reported on data available with respect to the effects of evisceration-line speeds on establishment employee safety. *Id.* The Agency determined that five HIMP and 29 traditional market hog slaughter facilities had voluntarily submitted injury rate data to the Occupational Safety and Health Administration ("OSHA"). *Id.* A comparison of these data showed that HIMP establishments had a lower mean number of establishment-worker injuries than traditional establishments when analyzed under three OSHA measures.[2] *Id.* Yet the Agency also recognized that "factors other than line speed may affect injury rates (*e.g.*, automation and number of sorters per line)" and requested comments on "the effects of faster line speeds on worker safety." *Id.*

The Agency received over 83,000 comments in response to the Proposed Rule. Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,304 (Oct. 1, 2019) ("Final Rule"). Among these were comments from worker advocacy organizations and labor unions asserting that revoking maximum line speeds would increase risks to worker health and

[1] Although the average line speed at HIMP establishments was slower than the maximum speed allowed under the traditional inspection system, it was approximately 12.49 percent faster than the line speed at comparable traditional establishments. 84 Fed. Reg. 52,300, 52,335 (Oct. 1, 2019).

[2] The data the Agency utilized in this analysis, although not included in the Proposed Rule, was and is publicly available: OSHA's Establishment Specific Injury and Illness Data is posted on OSHA's website, and establishment level production volume information is posted on the Agency's website. *See* 84 Fed. Reg. at 52,305.

safety. *Id.* at 52,314. These comments pointed to documents published by, among others, OSHA explaining that repetitive stress injuries are common among workers employed in the meatpacking industry and recommending reduction of line speeds as a means of decreasing injury rates. *See id.*

On October 1, 2019, the Agency published the Final Rule, which went into effect on December 2, 2019. *Id.* at 52,300. The Final Rule adopted, in relevant part, the key components of the proposed optional NSIS discussed above.[3] *See id.*; *supra* pp. 5–6. The Final Rule reiterated that because establishment pre-sorting procedures would result in Agency inspectors being presented with healthier animals and carcasses with fewer defects, Agency inspections would be more efficient, permitting fewer inspectors to perform the same work. 84 Fed. Reg. at 52,300. Like the HIMP establishments, NSIS establishments are able to set their own evisceration-line speeds. *Id.* But Agency inspectors retain the authority to stop or slow the evisceration line if necessary. *Id.* Agency personnel may direct an establishment to reduce line speeds when, in their assessment, a carcass-by-carcass inspection cannot be performed at the speeds presented, or the establishment is not maintaining process control. *Id.* at 52,312.

In the Final Rule, the Agency addressed various comments regarding worker safety. *See id.* at 52,314–15. Although the Agency "agree[d] that safe working conditions in swine slaughter establishments are important," it explained that it "has neither the authority nor the expertise to regulate issues related to establishment worker safety." *Id.* at 52,315. The Agency

[3] The Final Rule includes two mandatory provisions that apply to all swine slaughter establishments: development and implementation of sanitary dressing and microbiological sampling plans. *See* 84 Fed. Reg. at 52,322–23. Plaintiffs do not challenge these universal requirements.

pointed out that the FMIA authorizes it to protect consumer health and welfare, and that under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, OSHA has the statutory and regulatory authority to assure safe working conditions and promote workplace safety. 84 Fed. Reg. at 52,315. Nevertheless, the Agency acknowledged efforts to cooperate with OSHA to promote the latter's workplace safety mission. *Id.* For example, the Agency worked with OSHA to develop a poster that provides information on worker injuries and conditions, and the right to report these issues without retaliation. *Id.* And the Final Rule requires NSIS establishments to submit yearly attestations that they have a program to monitor and document work-related conditions, which the Agency will forward to OSHA for its use. *Id.* In addition, the Agency has a longstanding Memorandum of Understanding with OSHA regarding training Agency workers to recognize workplace hazards and refer them to OSHA. *Id.*

As part of its cost-benefit analysis for the Final Rule, the Agency predicted that, due to economic constraints, only high-volume establishments that exclusively slaughter market hogs will opt to use NSIS. *Id.* at 52,322. Forty such establishments existed in 2016, including the five HIMP establishments. *Id.* As of May 13, 2020, seven of these 40 establishments have converted to NSIS.[4] Sidrak Decl. ¶ 5. Six of the seven current NSIS establishments operated without evisceration-line speed limits before adopting NSIS, and had done so for many years. *See* 84 Fed. Reg. at 4787; Sidrak Decl. ¶ 6. The remaining establishment—the Seaboard Foods

[4] As of May 13, 2020, five other establishments have informed the Agency that they plan to convert from the traditional inspection system to NSIS. *See* Sidrak Decl. ¶ 7. The Agency does not know the projected timeline for these conversions, however, and its policy is not to release the names of such establishments without first seeking their consent. *See id.*

facility in Guymon, Oklahoma—was previously subject to evisceration-line speed limits, including a maximum speed of 1,106 head per hour when operating with seven post-mortem Agency inspectors present on the line, and is no longer subject to those limits because it has converted to NSIS. Sidrak Decl. ¶ 6.

II. Procedural Background

This lawsuit was filed on October 7, 2019. *See generally* Compl. for Decl. and Inj. Relief, ECF No. 1 ("Compl."). Plaintiffs are an international labor union and three of its local affiliates: United Food and Commercial Workers Union, Local No. 663 ("Local 663"); United Food and Commercial Workers Union, Local No. 440 ("Local 440"); United Food and Commercial Workers Union, Local No. 2 ("Local 2"); and United Food and Commercial Workers Union, AFL-CIO, CLC (collectively, "Plaintiffs" or "UFCW"). *Id.* ¶¶ 10–13. These unions represent swine slaughter establishment workers. *Id.* ¶ 1.

Local 2 allegedly represents approximately 2100 workers at Seaboard Foods in Guymon, Oklahoma, which now operates under NSIS. In addition, UFCW allegedly has approximately 31,000 members who work at 17 of the 40 establishments that the Agency assumed will implement NSIS for the purpose of its cost-benefit analysis. *Id.* ¶ 13.

Plaintiffs' complaint asserts that the Final Rule harms them (1) by "permitting . . . employers to increase line speeds without limit, putting their members at [a] substantially increased risk of injury," *id.* ¶ 72, and (2) by reducing the number of Agency inspectors on evisceration lines, which purportedly reduces the possibility that an inspector will observe dangerous conditions and halt the line to protect worker safety, *id.* ¶ 73. The complaint contains three causes of action under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

See Compl. ¶¶ 74–83. Count One challenges the Agency's revocation of the maximum evisceration-line speed requirement with respect to NSIS establishments. *Id.* ¶¶ 74–77. Counts Two and Three challenge the Agency's reduction in the number of inspectors stationed on evisceration lines in NSIS establishments. *See id.* ¶¶ 78–83.

On December 6, 2019, Defendant moved to dismiss the complaint for lack of Article III standing and failure to state a claim. *See* ECF No. 15. On April 1, 2020, the Court granted Defendant's motion with respect to Counts Two and Three, holding that Plaintiffs "have not established an injury related to the reduction in federal inspectors" at slaughter establishments that opt to use NSIS. *See* Order at 12–14, ECF No. 30 ("MTD Order"). The Court denied Defendant's motion with respect to Count One, however, allowing Plaintiffs' lawsuit to proceed in challenging the Final Rule's revocation of maximum evisceration-line speeds for NSIS establishments. *See id.* at 8, 14, 17, 22–23.

LEGAL STANDARD

"A district court has broad discretion to decide whether and when to grant an agency's request for a voluntary remand." *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 381 (D.C. Cir. 2017).[5] Courts "generally grant" such requests "so long as 'the agency intends to take further action with respect to the original agency decision on review.'" *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *Limnia*, 857 F.3d at 386); *see Edward W. Sparrow Hosp. Ass'n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C. 2011) (noting that

[5] Defendant is aware of no Eighth Circuit cases, and only one case from this District, involving a motion for voluntary remand. *See Waterlegacy v. EPA*, 300 F.R.D. 332, 345–47 (D. Minn. 2014) (granting a voluntary remand without vacatur). For that reason, this memorandum relies primarily on the D.C. Circuit's robust body of voluntary-remand caselaw (as the *Waterlegacy* court did).

motions for voluntary remand are "usually granted"). This practice is rooted in judicial deference to an agency's inherent authority to reconsider its own decisions and an interest in conserving the court's and the parties' resources. *See, e.g.*, *Citizens Against Pellissippi Pkwy. Extension, Inc. v. Mineta*, 375 F.3d 412, 416–18 (6th Cir. 2004); *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73–74 (D.D.C. 2015). A court will refuse voluntary remand, however, "if the agency's request appears to be frivolous or made in bad faith." *Utility Solid Waste*, 901 F.3d at 436. In addition, the court may refuse voluntary remand upon a showing that "remand would unduly prejudice the non-moving party." *Id.*; *see Am. Waterways Operators v. Wheeler*, No. 18-cv-02933, 2019 WL 6828131, at *3–*4 (D.D.C. Dec. 13, 2019).

ARGUMENT

I. Courts Routinely Grant Motions for Voluntary Remand, and There Is Every Reason to Do So Here.

Motions for voluntary remand are "commonly granted even when they are opposed." *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013). Here, Defendant moves for a voluntary remand (without vacatur) to allow it to reconsider public comments it received regarding the potential impacts of increased evisceration-line speeds on the safety of swine slaughter establishment workers. *See* Mot. at 1. This motion should be granted out of respect for the Agency's inherent authority to reconsider its own decisions and in order to conserve the court's and the parties' resources.

A. The Agency Has Inherent Authority to Reconsider Its Own Decisions and Voluntary Remand Would Conserve the Court's and the Parties' Resources.

It is "generally accepted" that "an administrative agency has the inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002) (citing

numerous cases). This authority includes the right to seek voluntary remand of a challenged agency decision, even when the agency does not confess error. *See, e.g.*, *Utility Solid Waste*, 901 F.3d at 436 (citing *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009). A voluntary remand "is usually appropriate" where the agency articulates a "substantial and legitimate" concern about some aspect of the challenged decision. *SKF USA*, 901 F.3d at 1029; *see, e.g.*, *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008).

This principle holds true where the concern is first identified during litigation by the plaintiff or the court. *See, e.g.*, *FBME Bank*, 142 F. Supp. 3d at 73–74 (granting a voluntary remand where the agency requested an opportunity to address concerns identified in the court's preliminary-injunction order); *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (granting a voluntary remand where an appellate decision in the same litigation raised concerns about the agency's action but did not invalidate it); *see also Pellissippi Parkway*, 375 F.3d at 416 (noting that it can be "an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action").

In its order dismissing two of Plaintiffs' claims, the Court expressed concerns about whether the Agency adequately considered and responded to public comments regarding the Final Rule's potential effects on worker safety. *See* MTD Order at 19–23. The order describes the Agency as declining to consider these comments on the ground that it lacks the authority to regulate worker safety. *Id.* at 20. The Court stated that even if the agency cannot regulate worker safety directly, it can still "consider[] the collateral effects its rulemaking might have on workers," *id.* at 22; and suggested that the Agency reversed its position on this point without

acknowledging that reversal, *id.* at 19–20. In addition, the Court questioned whether the Agency's establishment of a new safety-related attestation requirement in the Final Rule is consistent with the Agency's position that it lacks statutory authority to directly regulate worker safety. *Id.* at 21.

In light of the Court's discussion of these issues, Defendant seeks a voluntary remand to allow the Agency to reconsider the public comments it received regarding the potential impacts of increased evisceration-line speeds on the safety of swine slaughter establishment workers. The Agency intends, at a minimum, to publish a supplemental response to these comments in the Federal Register. *Cf.* Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Regional Haze State Implementation Plan, 79 Fed. Reg. 24,340 (Apr. 30, 2014) (supplemental response issued after the Third Circuit granted the agency's motion "for a voluntary remand, without vacatur, to more adequately respond to certain public comments"); Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69,012 (Oct. 5, 2016) (similar supplemental response to public comments issued on remand from a district court). During the 120-day course of this remand, this Court should stay summary-judgment proceedings to allow such reconsideration while retaining jurisdiction of the case. *See, e.g.*, Order, *Organic Trade Ass'n v. USDA*, No. 1:17-cv-01875, Dkt. #112 (D.D.C. Mar. 12, 2020) (hereinafter "*Organic Trade Ass'n* Order") (granting a voluntary remand for a fixed period to allow the agency to reconsider one aspect of its decision, and retaining jurisdiction of the case during the remand); *Conservation Law Found. v. Ross*, No. 18-cv-1087, 2019 WL 1359284, at *3 (D.D.C. Mar. 26, 2019) (same).

Granting Defendant's motion would conserve this Court's and the parties' resources. *See, e.g.*, *Pellissippi Parkway*, 375 F.3d at 417; *Sierra Club*, 560 F. Supp. 2d at 24–25. Without a voluntary remand, the parties would be required to brief summary judgment on the current record, and the Court would issue a final judgment. If Plaintiffs' claim were successful and affirmed on a potential appeal, the Agency would reconsider the public comments regarding increased line speeds and worker safety; and if Plaintiffs remained unsatisfied after the Agency's reconsideration, they would likely file a subsequent lawsuit. Granting a voluntary remand will obviate the need for any subsequent lawsuit and might even obviate the need for summary-judgment proceedings in this case; the Agency will reconsider the relevant comments *now*, and if Plaintiffs are unsatisfied with the result, they may continue to litigate this case after the remand. *See, e.g.*, *Conservation Law Foundation*, 2019 WL 1359284 at *2 (granting a voluntary remand that would likely spare "[a] full round of summary-judgment briefing and the Court's subsequent opinion"); *Sierra Club*, 560 F. Supp. 2d at 24–25 ("Remand in this case will serve the interest of allowing the [agency] to cure its own potential mistake rather than needlessly wasting the Court's and the parties' resources.").

B. The Requested Remand Would Necessarily Be Without Vacatur.

Courts that grant a motion for voluntary remand ordinarily do so without vacatur. *See, e.g.*, *Utility Solid Waste*, 901 F.3d at 437–38 & n.6; *SKF USA*, 254 F.3d at 1027–30; *Sierra Club*, 506 F. Supp. 2d. at 26. Some courts have held that remand with vacatur is categorically unavailable before the court issues a ruling on the merits—even if the agency confesses error and requests vacatur. *See Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135–36 (D.D.C. 2010). Other courts have granted an agency's motion for voluntary remand with

vacatur prior to ruling on the merits. *See Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1240–1243 (D. Colo. 2011). But the present case does not implicate this division of authority. *Cf. Waterlegacy*, 300 F.R.D. at 345 (noting the division of authority but finding it unnecessary to pick a side).

Regardless of whether a court may *ever* vacate a rule at this stage of the litigation, it is clear that a court cannot do so over an agency's objection and absent a confession of error. *See American Forest*, 946 F. Supp. 2d at 42. Here, the agency has not confessed error or requested vacatur, the administrative record has not yet been filed, and the Court has not yet received summary-judgment briefing. "It would be premature to decide the merits" under these circumstances. *See id.* Accordingly, "the Court . . . has only two options at this time: either to grant [the Agency]'s motion for voluntary remand without vacatur or to deny [the Agency]'s motion and proceed to the merits." *Id.*

II. This Case Presents No Extraordinary Circumstances That Would Justify Denial of the Agency's Request for a Remand.

Although courts generally grant an agency's motion for voluntary remand, such motions have been denied in extraordinary circumstances. First, a motion for voluntary remand should be denied if it "appears to be frivolous or made in bad faith." *Utility Solid Waste*, 901 F.3d at 436 (citing *Lutheran Church–Mo. Synod v. FCC,* 141 F.3d 344, 349 (D.C. Cir. 1998)). Second, the court may refuse voluntary remand upon a showing that "remand would unduly prejudice the non-moving party." *Id.*; *see, e.g.*, *American Waterways*, 2019 WL 6828131, at *3–*4. Neither of these unusual circumstances is present here.

A. Defendant's Motion Is Motivated by Legitimate Concerns and Is Made in Good Faith.

Defendant's motion is not frivolous or made in bad faith. To the contrary, it is motivated by a sincere desire to address the concerns expressed in the Court's motion-to-dismiss order without unnecessary litigation. And it is perfectly appropriate for an agency to request a voluntary remand in light of concerns expressed by challengers or the Court during litigation. *See American Forest*, 946 F. Supp. 2d at 43 (explaining that motions for voluntary remand "are desirable even where they are driven by the litigation in which they are made"); *see also, e.g.*, *Pellissippi Parkway*, 375 F.3d at 416; *FBME Bank*, 142 F. Supp. 3d at 73–74.

Defendant's motion is also timely. Defendant informed Plaintiffs of its intent to seek a voluntary remand on May 1, 2020—nearly four weeks before the pretrial conference scheduled by this Court—and is filing this motion nearly two weeks before that conference, *see* Notice of and Order for Pretrial Scheduling Conference, ECF No. 31. *Cf. Lutheran Church*, 141 F.3d at 349 (denying a "novel, last second motion to remand" that was filed "[a]lmost two months after [the court] heard argument" on the merits); *Miss. River Transmission Corp. v. FERC*, 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992) (denying a motion filed two days before appellate argument).

B. Granting Defendant's Motion Would Not Unduly Prejudice Plaintiffs.

Following this Court's partial grant of Defendant's motion to dismiss, Plaintiffs' sole remaining claim is that USDA failed to consider whether revoking the line-speed requirement might harm slaughter establishment workers. *See* Compl. ¶¶ 74–77. If this claim were to succeed, the Court would remand the Final Rule with instructions for the Agency to reconsider that aspect of its decision. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658

(2007); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Such reconsideration is what Defendant is voluntarily offering to provide now. The only difference is that Plaintiffs might obtain vacatur of the aspects of the Final Rule that they are challenging after a judgment on the merits. In this case, however, remand without vacatur is the only remedy they are likely to receive. *See American Forest*, 946 F. Supp. 2d at 47 (recognizing that a likelihood "that the rule would not be vacated in any case" limits the potential for prejudice stemming from a voluntary remand); *Sierra Club*, 560 F. Supp. 2d at 26 (granting an opposed motion for voluntary remand because agency reconsideration was "a development along the lines of the relief that plaintiffs [were] seek[ing]").

Moreover, Plaintiffs will still be able to challenge the evisceration-line speed requirement—the only aspect of the Final Rule that they have standing to challenge, *see* MTD Order at 14—and argue for its vacatur after the remand. Deferring this challenge by roughly four months will not unduly prejudice Plaintiffs. *See Conservation Law Foundation*, 2019 WL 1359284, at *3 ("[T]he limited temporal period of the remand . . . minimizes prejudice.").

1. Defendant is voluntarily offering to provide the relief that Plaintiffs would likely obtain if they were to prevail on the merits of their remaining claim—i.e., remand without vacatur.

"An inadequately supported rule . . . need not necessarily be vacated." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (alteration in original) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)). Although "vacatur is the normal remedy" for inadequately supported agency action, *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014), the decision whether to vacate depends on two factors: "(1) 'the seriousness of the . . . deficiencies' of the action, that is, how likely it is 'the [agency]

will be able to justify' its decision on remand; and (2) the disruptive consequences of vacatur." *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) (alterations in original) (quoting *Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027, 1048–49, *modified on reh'g on other ground,* 293 F.3d 537 (D.C. Cir. 2002)). Courts frequently order remand without vacatur where an agency has failed to adequately consider or explain some aspect of its decision, but may be able to do so on remand. *See, e.g.*, *Fox Television*, 280 F.3d at 1048 (ordering remand without vacatur because the court could not "say with confidence that the Rule is likely irredeemable"); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995); *Allied-Signal*, 988 F.2d at 151; *Int'l Union, United Mine Workers of Am. v. Fed'l Mine Safety & Health Admin.*, 920 F.2d 960, 966 (D.C. Cir. 1990); *see also Heartland Regional*, 566 F.3d at 199 (explaining that remand without vacatur is appropriate where the agency fails "adequately to explain . . . one aspect of an otherwise permissible rule").

Here, the alleged deficiency in the Agency's rulemaking procedure certainly cannot justify vacating the entire Final Rule. As Defendant has explained, the key elements of the Final Rule include: (1) requiring establishment employees to perform sorting and trimming activities prior to Agency inspections; (2) reducing the number of Agency inspectors stationed on the evisceration line; and (3) revoking maximum evisceration-line speeds and permitting establishments to set their own line speeds based on their ability to maintain process control. *See supra* pp. 5–6; Memo. in Support of Def.'s Mot. to Dismiss at 9, ECF No. 16. The alleged failure to consider the Final Rule's collateral effects on worker safety casts no doubt whatsoever on the validity of the first two elements. Indeed, Plaintiffs have not even challenged the sorting and trimming requirements, and the Court has already held that

Plaintiffs are not injured by the reduction in federal inspectors stationed on the evisceration line.

Neither does the alleged deficiency justify vacating the Final Rule's revocation of maximum evisceration-line speeds. Even assuming that the Agency failed to adequately consider public comments about how this aspect of the Final Rule might impact the safety of swine slaughter establishment workers, *see* MTD Order at 20–23, the Agency can correct that procedural issue by reconsidering the relevant comments on remand. The Court's related concerns that the Agency may have reversed its position on whether it can regulate worker safety without acknowledging that reversal, *see id.* at 19–20, and that the Agency's position may be inconsistent with its establishment of a new safety-related attestation requirement, *id.* at 21, can similarly be addressed through further explanation. Thus, even if Plaintiffs' claim is successful, vacatur would be inappropriate because the Agency can very likely justify its position on remand. *See Fox Television*, 280 F.3d at 1048–49 (remanding without vacatur because the court did not find it "unlikely that the [agency] will be able to justify a future decision to retain the Rule").

In addition, the potential for disruptive consequences counsels against vacatur. *See generally* Pugliese Decl. First, swine slaughter establishments that opt in to NSIS may spend tens, or even hundreds of thousands of dollars reconfiguring their facilities. *See* 84 Fed. Reg. at 52,320. If the Final Rule were vacated, any establishments that had converted to NSIS from the traditional inspection system at that time[6] would incur significant costs to revert to the traditional inspection system, plus the additional cost of later re-implementing NSIS (assuming

[6] To date, there is only one such establishment. *See* Sidrak Decl. ¶ 6.

the Agency would reissue the Final Rule after reconsidering the relevant issues). *See* Pugliese Decl. ¶ 6. And establishments contemplating a conversion to NSIS—which could be in the midst of renovations—would face significant uncertainty about how to structure their facilities during the period between vacatur and reissuance of the Final Rule. *See id.*

Second, because establishments that adopt NSIS are likely to hire six to eleven additional employees per line, per shift, 84 Fed. Reg. at 52,324, NSIS establishments would likely lay off workers if forced to revert to the traditional inspection system. *See* Pugliese Decl. ¶ 8. With unemployment rates near historic highs, the impact of such layoffs would be significant. *Id.* And because NSIS requires fewer Agency inspection personnel on the evisceration line than the traditional inspection system does, 84 Fed. Reg. at 52,338, the Agency would have to hire or reassign additional food-safety inspectors to staff such establishments. *See* Pugliese Decl. ¶ 7. This process would likely take several months. *Id.* In sum, an interim vacatur would cause significant disruptions for slaughter establishments, their employees, the Agency, and its employees.

For these reasons, even if Plaintiffs succeed on their remaining claim, the Court would likely remand the Final Rule, without vacatur, for the Agency to reconsider how revoking the line-speed requirement might affect worker safety. Allowing the Agency to avoid unnecessary litigation by voluntarily providing this remedy now would not unduly prejudice Plaintiffs. *See American Forest*, 946 F. Supp. 2d at 47; *Sierra Club*, 560 F. Supp. 2d at 26.

2. Deferring Plaintiffs' opportunity to seek vacatur of the Final Rule for roughly four months will not cause them undue prejudice.

Even assuming that vacatur of the line-speed requirement might be in play if Plaintiffs were to prevail on summary judgment, Defendant's motion should still be granted. Granting

the motion will not prevent Plaintiffs from challenging the Final Rule's revocation of maximum evisceration-line speeds and seeking its vacatur; it will only postpone their challenge by about four months. Plaintiffs nevertheless suggest that this delay would prejudice them because some of their members will continue to work at an NSIS establishment during that time.

In its previous order, this Court found that Plaintiffs' allegations of injury associated with higher line speeds, accepted as true, were adequate to survive a motion to dismiss. *See* MTD Order at 8–12. But there is a sizable gap between that finding and Plaintiffs' position that their members will face a substantial risk of injury if summary-judgment proceedings are stayed for 120 days. While "mere allegations" of injury are sufficient at the pleading stage, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), the allegations in the complaint fall far short of demonstrating that Plaintiffs' members will actually face a substantial risk of injury if Defendant's motion is granted. *See American Forest*, 946 F.2d at 44 (rejecting assertions of undue prejudice for lack of evidence). Indeed, Plaintiffs' failure to seek preliminary injunctive relief from this Court undercuts the notion that their members face an imminent risk of injury as long as the Final Rule remains in place.

Six of the seven establishments that currently use NSIS have operated without any evisceration-line speed limit for many years. *See* 84 Fed. Reg. at 4787 (noting that the HIMP establishments have been operating without such limits since 2001); Sidrak Decl. ¶ 6. And even if the Final Rule were vacated, these six establishments would continue to operate in this manner. These plants have not seen an increase in establishment-worker injuries. The Agency assessed worker injury rates between HIMP and traditional establishments in the Proposed

Rule, and its preliminary analysis showed that the HIMP establishments had lower mean injury rates than traditional establishments. *See* 83 Fed. Reg. at 4796. Although Plaintiffs claim that the Agency's analysis was flawed, their allegations do not demonstrate that the HIMP establishments had a significantly higher rate of worker injuries than traditional establishments—much less that there is a causal link between lack of evisceration-line speed limits and worker injuries. *See* Compl. ¶ 47 (asserting that it "was 'impossible for [the Agency] to draw any statistically valid conclusion about worker injury rate differences in HIMP versus traditional plants' based on the data it studied") (citation omitted); *see also* Sidrak Decl. ¶ 14 ("I am aware of no establishment employee injuries under NSIS that resulted from establishments operating at line speeds faster than those allowed under traditional inspection.").

There is only one swine slaughter establishment that was previously subject to an evisceration-line speed limit and is no longer subject to that limit because it converted to NSIS. That establishment is the Seaboard Foods facility in Guymon, Oklahoma. *Id.* Plaintiffs have alleged that UFCW Local No. 2 represents employees at the Guymon establishment, *see* Compl. ¶ 12, although they have not identified any of them.

Assuming that at least some members of Local 2 work on the evisceration line at the Guymon establishment, there is little reason to think they will be impacted by the Final Rule's revocation of the line-speed limit, particularly in the next few months. To begin with, the Guymon establishment does not operate its evisceration line at speeds above 1,106 head per hour continuously or reach that speed during every shift. *See* Sidrak Decl. ¶ 8; *see also* 84 Fed. Reg. at 52,314 (noting that the evisceration-line speeds at the HIMP pilot establishments ranged from 885 head per hour to 1,295 head per hour). By way of comparison, the average

evisceration-line speed at the five HIMP establishments was below 1,106 head per hour. 84 Fed. Reg. at 52,314. And several slaughter establishments have recently reduced their evisceration-line speeds because of the impacts of COVID-19. *See* Sidrak Decl. ¶ 9. Thus, although the Guymon establishment is no longer subject to an evisceration-line speed limit, it is far from clear that it will routinely operate its evisceration line at speeds above 1,106 head per hour in the next few months.

What is more, Plaintiffs' theories of how workers might be injured by evisceration-line speed increases rest on faulty assumptions about how NSIS facilities operate. Plaintiffs allege that their members are "at significant risk of lacerations or other injuries caused by knives and blades." Compl. ¶ 29. But employees working on an evisceration line use knives or other sharp instruments only to make incisions into mandibular lymph nodes and to trim visible defects off carcasses and animal parts. *See* 84 Fed. Reg. at 52,301–02; Sidrak Decl. ¶ 12. "Most processing of carcasses and parts by establishment employees using sharp instruments such as knives and saws occurs on processing lines, not evisceration lines." Sidrak Decl. ¶ 12. The Agency "does not and has never regulated the speed of processing lines, either under NSIS or under the traditional inspection system." *Id.* And because most market hogs are chilled in a cooler for 24 hours between evisceration and processing, the speed of an establishment's evisceration line can have no effect on the speed of its processing line. *Id.* ¶ 13.

Plaintiffs further allege that the risk of lacerations or similar injuries "increases when line speeds increase, as workers are placed close together and/or are using sharp knives more quickly." Compl. ¶ 29. But the speed at which establishment employees must work is not necessarily correlated with evisceration-line speeds. The rate at which any individual employee

on the evisceration line will work depends on the relationship between the line speed and the total number of workers on the line. *See* 83 Fed. Reg. at 4796; Sidrak Decl. ¶ 10. Thus, an establishment's line speed alone—be it 227 head per hour, 859 head per hour, 1,106 head per hour, or more, *see supra* p. 4—says little about how quickly employees are working. And establishments typically hire six to eleven additional employees per evisceration line, per shift when they convert to NSIS. *See* 84 Fed. Reg. at 52,324.

Nor do the evisceration-line workers at the Guymon establishment necessarily work in closer proximity to one another than they previously did under the traditional inspection system. "Establishments that adopt NSIS typically reconfigure their evisceration lines to account for changes such as a decreased number of [Agency] online inspectors." Sidrak Decl. ¶ 11. "As a result, an establishment that converts to NSIS may provide more space for each worker on the evisceration line than it provided under the traditional inspection system." *Id.*; *see* 84 Fed. Reg. at 52,300, 52,320 (acknowledging that establishments may reconfigure their evisceration lines when converting to NSIS); *see also* Compl. ¶ 12 (referencing the Guymon establishment's "plan to expand its facilities in a manner that would allow it to increase the line speed."). For all these reasons, postponing summary-judgment proceedings for four months will likely have little, if any, practical effect on Plaintiffs' members.

This is not the extraordinary case in which an agency's motion for voluntary remand should be denied on grounds of undue prejudice to the non-movant. *Cf. American Waterways*, 2019 WL 6828131, at *3–*4 (denying a request for voluntary remand because it would have disrupted a major state project that had been initiated in reliance on the agency decision; imperiled environmental progress; and left regulated parties uncertain as to their compliance

obligations). Plaintiffs' opposition to Defendant's motion is understandable; Plaintiffs might well have a better chance of prevailing at summary judgment if the agency were blocked from reconsidering and further explaining its position. *Cf. Pellissippi Parkway*, 375 F.3d at 418 (acknowledging a plaintiff's strategic interest in forcing the agency to litigate on the existing record). But APA litigation should not be "turned into a game in which an agency is 'punished' for [alleged] procedural omissions by being forced to defend them well after the agency has decided to reconsider." *Id.* at 416; *see American Forest*, 946 F. Supp. 2d at 44–47 (rejecting plaintiff's claim that a voluntary remand for further explanation unfairly prevented it from litigating on the existing record). Courts frequently grant motions for voluntary remand over the non-movant's opposition out of respect for the agency's inherent authority to reconsider and for the purpose of conserving the court's and the parties' resources. *See, e.g.*, *Conservation Law Foundation*, 2019 WL 1359284 at *3–*4; *FBME Bank*, 142 F. Supp. 3d at 74–76; *American Forest*, 946 F. Supp. 2d at 42–47; *Sierra Club*, 560 F. Supp. 2d at 25–26. This case does not present the extraordinary circumstances that would justify a contrary result.

CONCLUSION

For the foregoing reasons, Defendant's motion for voluntary remand should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

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