

**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

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

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## INTRODUCTION

This case concerns a regulation (“Final Rule”) promulgated by the Food Safety and Inspection Service (“Agency”) that permits certain swine slaughter establishments to adopt a modernized food-safety inspection regime. Plaintiffs claim that the Agency violated the Administrative Procedure Act (“APA”) because it did not adequately consider public comments about the Final Rule’s potential collateral effects on worker safety. If Plaintiffs succeed on their claim, the proper remedy would be a remand for the Agency to reconsider these comments. The Agency does not confess error, but has offered to provide this remedy voluntarily instead of unnecessarily continuing to litigate whether it is required to do so. Defendant’s motion for voluntary remand 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. Such motions are routinely granted, even when opposed, and Plaintiffs have not shown the type of extraordinary circumstances that would justify requiring the Agency to continue litigating the adequacy of its initial treatment of the worker-safety comments after it has already agreed to reconsider them.

## ARGUMENT

### **I. USDA Satisfies the Threshold Requirements for a Voluntary Remand Without Vacatur.**

Plaintiffs argue that Defendant’s motion for a voluntary remand is improper for two reasons. *See* Pls.’ Opp. at 13–17. First, Plaintiffs assert that Defendant has not professed “an intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.” *Id.* at 13 (quoting *Limnia, Inc. v. U.S. Dep’t of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017)); *see id.* at 3–4; 13–16. Second, Plaintiffs claim that the Agency’s proffered

response to the worker-safety comments would be an impermissible “post hoc rationalization.” *Id.* at 16; *see id.* 4–5 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *id.* at 16–17. Neither argument has merit.

**A. *Limnia* Does Not Bar the Agency from Reconsidering the Final Rule’s Potential Effects on Establishment Worker Safety.**

Courts “generally grant” motions for voluntary remand “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). In some cases, the agency professes an intention to reverse its original decision. *See, e.g., ASSE Int’l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1063–64 (C.D. Cal. 2016). In others, the agency does not commit to reversing its decision, but requests a remand “to reconsider its previous position,” e.g., by “consider[ing] further the governing statute, or the procedures that were followed” in reaching that decision. *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *see, e.g., Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006) (granting a voluntary remand so that the agency could “conduct an additional investigation, or attempt a fuller explanation, concerning issues presented by the petitioner’s request for relief”); *Granholm ex rel. Mich. Dep’t of Nat. Res. v. FERC*, 180 F.3d 278, 280 (D.C. Cir. 1999) (discussing a voluntary remand in which the agency reconsidered its treatment of certain recommendations from state fish and wildlife agencies).

In *Limnia*, however, the agency did not “intend[] to take further action with respect to the *original agency decision on review.*” 857 F.3d at 386. The plaintiff, *Limnia*, filed suit challenging the Department of Energy’s (DoE) denial of its 2009 applications for a \$15 million government loan and a loan guarantee. *See id.* at 382. DoE sought a voluntary remand, “[b]ut

it did not do so in order to reconsider Limnia’s 2009 applications.” *Id.* at 387. Instead, DoE “offered to review any *new* applications Limnia chose to submit.” *Id.* (emphasis added). “[T]he District Court’s decision to grant [DoE]’s request [for a voluntary remand] and close the judicial action left Limnia . . . [w]ithout any means—judicial or administrative—to obtain review of [DoE]’s 2009 application decisions”; “Limnia’s position was the same as if its case had been dismissed on the merits.” *Id.* at 388. The D.C. Circuit held that the remand was improper because DoE never “profess[ed] an intention to reconsider, re-review, or modify the original agency decision that [was] the subject of the legal challenge.” *Id.* at 387.

The present case bears no resemblance to *Limnia*. The Agency seeks a voluntary remand and stay—not dismissal of the lawsuit—so that it may “reconsider the public comments it received regarding the potential impacts of increased evisceration-line speeds on the safety of swine slaughter establishment workers.” Def.’s Mem. at 13. On remand, the Agency may decide that the Final Rule should be modified, and it “intends, at a minimum, to publish a supplemental response” that substantively addresses the comments. *Id.* This plainly constitutes an “inten[tion] to take further action” with respect to the challenged rulemaking, *Utility Solid Waste*, 901 F.3d at 436. Compare *Nat’l Parks Conservation Ass’n v. EPA*, 803 F.3d 151, 157 (3d Cir. 2015) (voluntary remand properly allowed the agency to “consider and respond in greater detail” to certain public comments on the challenged rule), *with Limnia*, 857 F.3d at 387 (voluntary remand was improper because the agency refused to revisit the challenged adjudication). See also Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Regional Haze State Implementation Plan, 79 Fed. Reg. 24,340 (Apr. 30, 2014) (supplemental response to comments, published during the voluntary remand in

*National Parks Conservation Ass'n*).

There is no merit to Plaintiffs' claim that the Agency's professed intention to reconsider the worker-safety comments is "mere pretense," Pls.' Opp. at 13, or that its "primary goal on remand is to write a better decision for a predetermined outcome," Pls.' Notice of Suppl. Authority at 2, ECF No. 60 (quoting *Keltner v. United States*, No. 19-cv-663, 2020 WL 2957175, at \*13 (Fed. Cl. 2020)); *see also* Pls.' Opp. at 1–4, 14–15, 17, 30–31, 33–35 (suggesting that the Agency is not genuinely open to reconsidering the worker-safety issue). The Agency will reconsider the worker-safety issues with an open mind and may exercise its discretion to initiate additional regulatory action based on its reconsideration, provided that the limitations on the Agency's authority permit it. *See* Def.'s Mem. at 1, 13. Plaintiffs misunderstand Defendant's observation that "if Plaintiffs are unsatisfied with the result, they may continue to litigate this case after the remand," *id.* at 14; *accord id.* at 17, as a "disavow[al] [of] any intent to reconsider the agency action at issue," Pls.' [Second] Notice of Suppl. Authority at 2, ECF No. 61 (citing Def.'s Mem. at 17). The Agency need not confess error or commit to changing its original decision; it is enough that it intends to "re-review" an aspect of that decision. *Limnia*, 857 F.3d at 387; *see Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 42–44 (D.D.C. 2013) (granting a voluntary remand without vacatur where the agency conceded that its original explanation for a rule was inadequate but maintained that "a more detailed explanation on remand [would] remedy the deficiencies").

**B. The *Chenery* Doctrine Does Not Bar the Agency from Reconsidering the Final Rule's Potential Effects on Establishment Worker Safety.**

Next, Plaintiffs argue that the Agency's proffered reconsideration of the worker-safety comments would violate the *Chenery* doctrine. *See* Pls.' Opp. at 4–5, 16–17. *Chenery* stands for

the principle that courts “may not supply a reasoned basis for the agency’s action that the agency itself has not given,” nor may they “accept . . . counsel’s *post hoc* rationalizations for agency action.” *Citizens State Bank of Marshfield v. FDIC*, 718 F.2d 1440, 1445–46 (8th Cir. 1983) (first citing *Chenery*, 332 U.S. at 196, then quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). But this principle does not forbid an agency from reconsidering its decision and, if it reaffirms it, offering additional reasons for doing so. *See SKF USA*, 254 F.3d at 1028–29 (contrasting the “*Chenery* situation,” in which a litigating agency attempts to defend its decision by offering a *post hoc* rationalization, with a situation in which the agency “request[s] a remand (without confessing error)” to “consider further . . . the procedures that were followed” in arriving at the decision).

Plaintiffs contend that because the Agency did not substantively address the worker-safety comments when it initially promulgated the Final Rule, it may not address them on remand. *See* Pls.’ Opp. at 4–5, 16–17; Pls.’ [Second] Notice of Suppl. Authority at 1–2. But the distinction between an amplified explanation and a new justification, on which Plaintiffs rely, is only pertinent where an agency introduces additional evidence during litigation to provide “a fuller explanation of the agency’s reasoning *at the time of the agency action.*” *Dep’t of Homeland Security v. Regents of Univ. of Cal.*, No. 18-587 (U.S. June 18, 2020), slip op. at 13 (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)); *see, e.g., Sierra Club v. U.S. Army Corps of Eng’rs*, 771 F.2d 409, 413 (8th Cir. 1985). An agency is free to offer new justifications where, as here, it agrees to “deal with the problem afresh,” *Regents*, slip op. at 14 (quoting *Chenery*, 332 U.S. at 201). *See, e.g., Citizens Against Pellissippi Pkwy. Extension, Inc. v. Mineta*, 375 F.3d 412, 413–14 (6th Cir. 2004) (granting a voluntary remand so that the agency

could consider an issue that “it did not address in the preparation of [its original decision]”); *see also Utility Solid Waste*, 901 F.3d at 437; *SKF USA*, 254 F.3d at 1028–29.

Fundamental principles of administrative law compel this conclusion. A court engaged in arbitrary-and-capricious review “is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). If the court finds that an agency’s decision is inadequately supported—e.g., because the agency “has not considered all relevant factors”—“the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). On remand, the agency is generally free to either alter or reaffirm its original approach after reconsideration, so long as it “examine[s] the relevant data and articulate[s] a satisfactory explanation for its action.” *State Farm*, 463 U.S. at 30; *see Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (explaining that the *Chenery* doctrine “is not a time barrier which freezes an agency’s exercise of its judgment after an initial decision has been made”). Accordingly, the Agency has discretion to reconsider the worker-safety issue now, on a voluntary remand, just as it would if the case were remanded after judgment on the merits. And the Agency would not have to undertake “a new notice-and-comment process” in order to reach a new decision regarding comments it has already received, Pls.’ [Second] Notice of Suppl. Authority at 1–2. *See, e.g., Application of the Fair Housing Act’s Discriminatory Effects Standard to Insurance*, 81 Fed. Reg. 69,012 (Oct. 5, 2016) (reconsidering public comments on remand and reaffirming the agency’s original decision without engaging in a new round of notice-and-comment); *Approval and Promulgation of Air Quality Implementation Plans*, 79 Fed. Reg. at 24,340–47 (similar).

Plaintiffs also err in suggesting that an agency cannot use a voluntary remand “to address concerns that were before it in the initial rulemaking.” *See* Pls.’ Opp. at 4–5 (citing *Am. Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95 (D.D.C. 2019)). *But see, e.g., National Parks Conservation Ass’n*, 803 F.3d at 157. *American Waterways* is inapposite because it involved a statutory requirement that the agency make its decision “within 90 days” of receiving an application from a state. 427 F. Supp. 3d at 96, 100. The requested remand would have allowed the agency “to circumvent [this] statutory requirement” and take “a second bite at the apple.” *Id.* at 98, 100. There is no analogous statutory time limit here, so the Agency is free to reconsider its initial handling of the worker-safety comments. *See, e.g., Macktal v. Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002) (“It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.”) (citing numerous cases).

## **II. Granting a Voluntary Remand Would Conserve Judicial Resources and Meaningfully Advance Resolution of the Parties’ Dispute.**

Courts routinely grant voluntary remands in order to conserve judicial resources and advance resolution of the parties’ dispute. *See, e.g., National Parks Conservation Ass’n*, 803 F.3d at 157; *Conservation Law Found. v. Ross*, No. 18-1087, 2019 WL 1359284, at \*2–\*4 (D.D.C. 2019). *Contra* Pls.’ Opp. at 35 (claiming that “remand is inappropriate” unless it will “resolve the matter being litigated”). Granting Defendant’s motion for voluntary remand will accomplish both of these beneficial ends. *See* Def.’s Mem. at 13.

Plaintiffs allege that the Agency made three procedural errors in promulgating the Final Rule: (1) it “fail[ed] to consider an important aspect” of its decision to eliminate evisceration-line speed limits, i.e., potential collateral effects on worker safety; (2) it asserted that it lacks

authority to consider this issue; and (3) it “failed to acknowledge and explain its reversal of position as to its authority to consider harms to workers.” Compl. ¶¶ 74–77; *see id.* ¶¶ 3–5, 54–67; Pls.’ Opp. at 1–4, 7, 24; *see also* Order at 19, ECF No. 30 (“MTD Order”) (suggesting that the Agency erred by “declining to consider” “the collateral effects its rulemaking might have on workers.”). Further litigation of these three issues is unnecessary because the Agency has already agreed to fix its potential mistakes; if the requested remand is granted, the Agency will do exactly what it would do if Plaintiffs prevailed on the merits of their remaining claim: it will reconsider comments about the Final Rule’s potential collateral effect on worker safety, clarify the extent of its authority to address this issue, and take such further action as it deems appropriate, including, at a minimum, publishing a supplemental response to the comments in the Federal Register. *See* Def.’s Mem. at 1–2, 13.

Thus, even if the requested remand does not fully resolve the parties’ dispute, it will narrow the issues to be litigated; instead of ruling on potential procedural errors that the Agency has already agreed to address, the Court would consider the adequacy of the Agency’s substantive reconsideration of the worker-safety issue. *See id.* *Contra* Pls.’ Opp. at 35 (suggesting that after the remand, the parties would “certainly return[] to the court to rehash the same issues”). As Defendant has explained, allowing a voluntary remand might well prevent an additional lawsuit over the Agency’s substantive response to the worker-safety comments. *See* Def.’s Mem. at 14.

Plaintiffs’ position that a remand would “be a waste of judicial resources” rests on an inaccurate framing of the merits issue in this case. *See* Pls.’ Opp. at 35–36. Plaintiffs frame the “merits” as a substantive dispute about whether “increased line speeds increase the risk of

worker injury.” *Id.* at 19. In reality, the merits concern the procedural question whether the Agency failed to consider public comments related to worker safety. *See* MTD Order at 19–23; Compl. ¶¶ 74–77. The Agency has agreed to address this issue by reconsidering the comments and taking appropriate action in response.

Defendant is not “attempt[ing] to litigate” the faux-merits issue prior to remand, as Plaintiffs suggest. Pls.’ Opp. at 19; *see id.* at 21–27. Plaintiffs speculate that, on remand, the Agency will “state that it ‘disagree[s]’ with the contention that ‘[the New Swine Slaughter Inspection System (NSIS)] will result in more injuries to establishment workers.’” *Id.* at 14 (quoting Sidrak Decl. ¶ 4, ECF No. 44). Plaintiffs infer too much from Dr. Sidrak’s statement; in context, it indicated that the Final Rule will not necessarily require establishment workers “to perform the same tasks at higher speeds.” Sidrak Decl. ¶ 4. In any event, the statement does not represent the Agency’s considered response to the worker-safety issues it has offered to revisit, and this Court should reject Plaintiffs’ repeated attempts to treat it as such, *see* Pls.’ Opp. at 4, 14, 23–26.

In the event that Plaintiffs are unsatisfied with the Agency’s action on remand, the merits issue *still* would not be whether “increased line speeds increase the risk of worker injury,” Pls.’ Opp. at 19. Instead, it would be whether the Agency adequately considered the relevant issues and “articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” MTD Order at 18 (quoting *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1000 (8th Cir. 2018)). Plaintiffs suggest that there is no point in letting the Agency address the worker-safety comments because any explanation it could provide—even on remand after summary judgment—would necessarily

be inadequate. *See* Pls.’ Opp. at 32, 35–36. Again, Plaintiffs err by ignoring the principle that “if the agency has not considered all relevant factors,” “[t]he reviewing court is not generally empowered . . . to reach its own conclusions” about matters of policy. *Florida Power & Light*, 470 U.S. at 744; *see also* MTD Order at 18–19 (recognizing that the Agency “is entitled to make policy choices as it sees fit”).

Plaintiffs’ reliance on *Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003), *see* Pls.’ Opp. at 35, and *Keltner*, *see* ECF No. 60, is also misplaced. In *Chang*, the Ninth Circuit held that a remand for the agency to conduct a retroactivity analysis served no purpose because the agency had indicated that it would not conduct that analysis on remand. *See* 327 F.3d at 925. And in *Keltner*, the Court denied a motion for voluntary remand because the agency “ha[d] not explained *how* or *why* [it] would reconsider its decision, [so] there [was] a complete absence of a ‘substantial and legitimate’ reason to order a remand.” 2020 WL 2957175, at \*13. Here, by contrast, the Agency has clearly explained what it intends to reconsider on remand and why a remand would preserve resources and advance resolution of the dispute between the parties.

### **III. This Case Presents No Extraordinary Circumstances That Would Justify Denial of the Agency’s Motion for a Voluntary Remand.**

#### **A. Plaintiffs Will Not Be Unduly Prejudiced By the Requested Remand Because Defendant Is Voluntarily Offering to Provide the Relief They Would Likely Receive If They Were to Prevail on the Merits.**

Plaintiffs have no persuasive response to Defendant’s contention that even if they prevail on the merits, remand without vacatur is the only remedy they are likely to receive. *Compare* Def.’s Mem. at 17–20, *with* Pls.’ Opp. at 30–33. They cite no authority for their claim that “the Court should presume that [they] will be entitled to” vacatur of the *entire* Final Rule. *See* Pls.’ Opp. at 6. *But see* MTD Order at 14 (holding that Plaintiffs have standing only to

challenge revocation of the evisceration-line speed limits). Nor do they cite authority for their assertion that Defendant's argument about vacatur is "premature," Pls.' Opp. at 30. Assessing the likelihood of vacatur at this stage is not premature or otherwise improper; the issue clearly bears on the undue-prejudice inquiry, and therefore the propriety of granting a voluntary remand, and courts have considered it in this exact procedural posture. *See American Forest*, 946 F. Supp. 2d at 44–47 (analyzing the *Allied-Signal* factors and explaining that a likelihood that "the rule would not be vacated in any case" weighs in favor of granting an opposed motion for voluntary remand).

Next, Plaintiffs cite several cases for the undisputed proposition that vacatur "is the default remedy under the APA." *See* Pls.' Opp. at 31–32; Def.'s Mem. at 17. But they fail to rebut Defendant's point that "[c]ourts 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." Def.'s Mem. at 18. *Compare id.* (citing five cases), *with* Pls.' Opp. at 31–32 (ignoring them).

On the first *Allied-Signal* factor, Plaintiffs assert that the Final Rule is irremediably flawed. *See* Pls.' Opp. at 32–33. But this assertion rests on the same inaccurate framing of the merits as Plaintiffs' argument that remand would waste judicial resources. *See supra* pp. 8–9. The question is not whether, on remand, "the record evidence would allow the agency to conclude that there is *no health and safety risk* to workers associated with eliminating line speed maximums." Pls.' Opp. at 32 (emphasis added). Rather, the question is whether it would be rational for the Agency to reconsider the worker-safety comments on remand and still decide to remove line-speed limits. As Defendant has explained, the alleged procedural deficiencies

in the Agency's rulemaking process can likely be corrected on remand. *See id.* at 18–19.

With respect to the second *Allied-Signal* factor, Plaintiffs do not dispute that a temporary vacatur of the Final Rule would have major disruptive consequences for swine slaughter establishments and their employees, *see* Def.'s Mem. at 19–20. Instead, Plaintiffs suggest that the best way to mitigate these consequences would be to vacate the Final Rule as soon as possible. *See* Pls.' Opp. at 31–32. But this is merely a reassertion of their erroneous claim that the Final Rule's alleged flaws are irremediable; it is not responsive to the second *Allied-Signal* factor, which assesses the “disruptive consequences of an interim change that may itself be changed,” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

Because both *Allied-Signal* factors indicate that if Plaintiffs succeed on their remaining claim, remand without vacatur would be the appropriate remedy. This Court need go no further to conclude that the requested stay and remand would not unduly prejudice Plaintiffs.

**B. 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 would be appropriate if Plaintiffs were to prevail at summary judgment, the requested stay and remand should still be granted. This much is undisputed: Six of the seven NSIS establishments—including four at which Plaintiffs' members work—have operated without evisceration-line speed limits for many years and would continue to do so even if the Final Rule were vacated. *See* Def.'s Mem. at 8; Pls.' Opp. at 10; Olson Decl. ¶ 5, ECF No. 51. Only one establishment—the Seaboard Foods facility in Guymon, Oklahoma—is no longer subject to evisceration-line speed limits

because it has converted to NSIS under the Final Rule. *See* Def.'s Mem. at 8–9; Pls.' Opp. at 9.

Plaintiffs' burden is not merely to show that granting Defendant's motion would have an "impact" on some of their members, Pls.' Opp. at 27; it is to show actual harm that "clearly outweigh[s] [the] benefits" of granting the motion, *American Forest*, 946 F.2d at 44. Plaintiffs argue that despite the impacts of COVID-19, a "predictable effect" of granting the motion is that the Guymon establishment will operate its evisceration-line speeds above 1,106 head per hour at some points during the remand period. *See* Pls.' Opp. at 27–28. As Defendants have explained, however, an increase in evisceration-line speeds will not necessarily require employees at the Guymon establishment to work more quickly or in closer proximity to each other, *see* Def.'s Mem. at 23–24. And even assuming there would be a marginal increase in the risk to some employees at this facility over the next four months, a temporary exposure to a slight increase in risk does not clearly outweigh the benefits of a voluntary remand Defendant has identified. *See id.* at 14 (judicial efficiency and preservation of the parties' resources); *id.* at 19–20 (avoidance of disruptive consequences to industry and employees); *see also Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1293–98 (D.C. Cir. 2007) (Kavanaugh, J.) (explaining that much regulation slightly increases some individuals' risk of harm and rejecting the idea that a modest increase in risk amounts to an injury).

### **C. There Is No Merit to Plaintiffs' Other Equitable Arguments.**

Plaintiffs raise three other equitable arguments, none of which succeeds. First, they argue that voluntary remand is "inappropriate where it would leave non-movants 'subject to a rule they claimed was invalid.'" Pls.' Opp. at 17–18 (quoting *Chlorine Chemistry Council v. EPA*,

206 F.3d 1286, 1288 (D.C. Cir. 2000)). This argument might carry weight if Defendant's motion for remand sought to terminate the lawsuit, "function[ing], as it did in [*Limnia*], as a dismissal of a party's claims," *Limnia*, 857 F.3d at 386–87. See Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 Admin. L. Rev. 361, 367 (2018) (observing that many motions for voluntary remand have this feature). But the argument is inapt here because the requested remand would merely pause the litigation, leaving Plaintiffs free to continue pursuing their claims after a remand of limited duration. See, e.g., *American Forest*, 946 F. Supp. 2d at 43 (granting an opposed motion for voluntary remand without vacatur over the plaintiffs' argument that they would be prejudiced if the challenged rule were left in place for the duration of the remand period); see also *National Parks Conservation Ass'n*, 803 F.3d at 157; *Conservation Law Foundation*, 2019 WL 1359284, at \*3–\*4. For the same reason, Defendant's motion cannot possibly enable the Agency "to avoid judicial review of the challenged regulation," as Plaintiffs suggest. Pls.' Opp. at 34.

Plaintiffs also assert that Defendant's motion is untimely. See Pls.' Opp. at 33–34. They observe that Defendant filed its motion "after the Court's [partial grant] of its motion to dismiss, and after Plaintiffs repeatedly attempted to confer to agree on a briefing schedule for summary judgment," *id.*, but they have no authority for their claim that these facts make the motion untimely—and they plainly do not, see Def.'s Mem. at 16 (citing cases).

Plaintiffs' further suggestion that the motion's timing suggests bad faith, see Pls.' Opp. at 33–34, is completely unfounded. Defendant has candidly explained that its motion was motivated by concerns expressed in this Court's order partially granting its motion to dismiss. See Def.'s Mem. at 1, 12–13, 16. And Defendant has not "delayed production of the certified

administrative record,” as Plaintiffs suggest, Pls.’ Opp. at 6. This Court ordered the parties to meet-and-confer by May 7, 2020, in advance of a case-management conference on May 28, 2020. *See* Notice of and Order for Pretrial Scheduling Conference at 2, ECF No. 31. The parties did so, and agreed that “Defendant will serve the administrative record on Plaintiffs on or before June 30, 2020.” Stipulation re: Rule 26(f) Report and Pretrial Conference ¶ 3, ECF No. 38. It is perfectly appropriate for Defendant to seek a stay and voluntary remand well in advance of summary-judgment proceedings in order to conserve the Court’s and the parties’ resources and to advance resolution of this dispute by addressing alleged procedural deficiencies in its original decisionmaking process.

### CONCLUSION

For the foregoing reasons, as well as those presented in Defendant’s opening memorandum, Defendant’s motion for voluntary remand should be granted.

Dated: June 19, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 19, 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.

*/s/ Joseph J. DeMott* \_\_\_\_\_

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