UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 227, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	No. 1:20-cv-2045-TJK

PLAINTIFFS' OPPOSITION TO MOTION FOR VOLUNTARY REMAND

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INTRODUCTION

Plaintiffs United Food and Commercial Workers Union, Local No. 227, *et al*. (collectively UFCW) brought this lawsuit on behalf of its members who work on processing lines in poultry plants that received waivers from defendant United States Department of Agriculture (USDA), which allowed those plants to increase their line speeds by 25 percent above the maximum set by regulation. In fashioning its waiver program, USDA ignored comments from UFCW and worker advocates, a slew of medical and epidemiological evidence, and its own prior findings, all of which recognized that faster line speeds increase the health and safety risks faced by workers on the line. Instead, in a sharp and unexplained departure from its prior position—including the position that USDA had taken just a few years earlier when it established through notice-and-comment rulemaking the current line-speed maximum for poultry plants—the agency washed its hands of any consideration of worker health and safety concerns, stating that it "has neither the legal authority nor the expertise to regulate or enforce workplace standards for establishment employees." *See* 83 Fed. Reg. 49,048, 49,057 (Sept. 28, 2018) (2018 Waiver Notice).

This lawsuit has now been pending for nearly a year and a half. Having failed in its attempt to dismiss the action on standing grounds, having delayed completion of the administrative record, and having arrived at the cusp of merits briefing, USDA now seeks to inject further delay in reaching the merits by requesting a voluntary remand without vacatur. The agency's remand motion is based on the facts that, last March, a Minnesota district court ruled that USDA acted arbitrarily and capriciously in refusing to consider worker safety in adopting a rule exempting certain swine slaughter facilities from line-speed limits and that, in November 2021, USDA announced a new line-speed waiver program for swine facilities to substitute for the regulation that the Minnesota court set aside. *See* USDA Constituent Update, Time-Limited Trial for NSIS

Establishments (Nov. 12, 2021), https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-november-12-2021 (NSIS Time-Limited Trial Notice).

Neither of these two developments provides a basis to remand in this action, relating to waivers granted to different facilities pursuant to a different program. USDA has not confessed error and has not committed to taking any action to address worker safety in poultry plants if this Court were to grant its request for a voluntary remand. Indeed, USDA will not even commit to a firm deadline for deciding whether to take action on remand, notwithstanding the agency's apparent acceptance that it has the authority to consider worker safety when waiving line-speed limits, as it has now done with respect to swine plants. In lieu of a deadline for action, USDA suggests that it "hopes" to complete its review within six months and proposes only that it file a status report on its progress after five months. Def. Mem. of Points and Authorities in Support of Mot. for Voluntary Remand at 8–9 (USDA Mem.), ECF 26; Proposed Order, ECF 26-1. Meanwhile, UFCW members will continue to work on poultry lines at plants operating under dangerous line-speed waivers, issued without any consideration for worker health and safety, and thus unlawfully, throughout the indefinite remand period and without any assurance that USDA will make any change at all.

The Court should deny USDA's motion and allow this case to proceed to merits briefing. A voluntary remand would indefinitely preserve the dangerous, unlawful status quo, without any firm commitment by USDA to do *anything* other than conduct a "review." USDA cites no case in which a court has granted a request for a voluntary remand that would allow an ongoing health and safety risk to continue during the remand period, particularly where, as here, the agency has given no assurance that it will take action to address the plaintiff's concerns.

Beyond the harm to UFCW and its members, the equities do not support a voluntary remand. This case is not one where the agency discovered a mistake or has acknowledged error with respect to the challenged action. The risks to workers from allowing increased line speed was raised prominently in the administrative record, and USDA, having refused to address those concerns, has no basis for requesting a delay to allow it to think about whether to maybe (or maybe not) reconsider its stance. Moreover, USDA fails to explain adequately its decision to wait until literally days before the parties were scheduled to submit a merits briefing schedule to raise the prospect of a voluntary remand. Before this lawsuit was even filed, the Minnesota court had indicated that USDA had acted arbitrarily in failing to consider worker-safety concerns when the court denied the agency's motion to dismiss, and it confirmed that conclusion when it issued its summary-judgment decision more than eight months ago; there is no reason that USDA could not have begun its "review" of the worker-safety issues raised by the line-speed waivers at issue in this case well before now. Moreover, a stay of this case is not needed to enable USDA to consider its regulatory options. Thus, because USDA has not committed to rescinding the unlawful waiver program, UCFW should be permitted to litigate its claims—now pending for 18 months—on the merits. USDA's request to postpone resolution of UFCW's claims should be denied.

If, despite the prejudice to UFCW workers and the agency's lack of commitment to take action, the Court decides to grant the remand motion, it should impose conditions that would protect UCFW workers against even further agency delay. The Court should retain jurisdiction, require USDA to file status reports at 45-day intervals, and direct that this case be returned to active status on June 1, 2022. Granting USDA's motion absent a clear and firm deadline would effectively function as a dismissal of UFCW's claims (indeed, USDA suggests outright dismissal as an option) to the detriment of the workers whose safety continues to be at risk.

BACKGROUND

Regulation of Poultry Plants. USDA, through its Food Safety Inspection Service (FSIS), regulates poultry line speeds pursuant to the Poultry Products Inspection Act (PPIA or Act), 21 U.S.C. § 451 *et seq*. FSIS regulations establish several types of inspection systems for different types of poultry plants and set a maximum line speed for each system. 9 C.F.R. §§ 381.67, 381.69, 381.76(b)(1), 381.76(b)(3)(ii)(*b*), 381.76(b)(4)(iv). The maximum line speed, measured in "birds per minute" (or bpm), helps to act as a brake on the pace of the work throughout the poultry processing line because "work pace in processing departments is influenced by inspection line speed." Final Rule, Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,566, 49,598 (Aug. 21, 2014) (NPIS Final Rule).

In 2014, FSIS adopted a rule creating the New Poultry Inspection System (NPIS). Under NPIS, plants—including the plants at issue in this case—cannot exceed a line speed of 140 bpm. 9 C.F.R. § 381.67(a). Throughout the notice-and-comment rulemaking process, FSIS recognized that the maximum line speed that it would establish for the NPIS inspections would have an effect on the safety of poultry plant workers, and it took worker safety into account in establishing the rule. *See* Proposed Rule, Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408, 4423 (Jan. 27, 2012) (NPIS Proposed Rule) (stating that "FSIS recognizes that evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety"); Notice, Extension of Comment Period, Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 24,873, 24,875 (Apr. 26, 2012) (explaining that FSIS had "consider[ed] the potential effects on [worker] safety" and that it was "interested in comments on the effects of line speed and worker safety").

FSIS initially proposed setting the maximum line speed at NPIS plants at 175 bpm, *see* NPIS Proposed Rule, 77 Fed. Reg. at 4423, but it received extensive comments from groups that

"were concerned that an increase in production line speed would lead to increased rates of musculoskeletal disorders, other traumatic injuries, and potentially adverse health effects of psychological and emotional stress among industry workers, particularly in processing jobs involving highly repetitive knife use." NPIS Final Rule, 79 Fed. Reg. at 49,598. In response, FSIS acknowledged that "[i]ncreasing line speed in processing, without changing other factors, could result in an increase of work pace for establishment employees," which, in turn, could, "increase risk of injuries and illnesses among establishment employees." *Id.* In the end, FSIS did not adopt the 175 bpm maximum line speed it had proposed, but rather capped the line speed at 140 bpm. *See id.* at 49,591.

FSIS adopted the waiver program at issue in this case four years later. Under the 2018 waiver program, NPIS plants can apply for waivers allowing them to operate poultry lines at up to 175 bpm. 2018 Waiver Notice, 83 Fed. Reg. 49,048. Participating plants *must* operate at least one line above the 140-bpm regulatory maximum. *Id*. at 49,051. UFCW and other commenters again urged FSIS not to permit plants to operate at higher line speeds because of the physical harms that it would cause to plant workers. *Id*. at 49,056–57. This time, however, FSIS ignored worker-safety concerns entirely, instead responding to commenters' concerns with the statement that the agency "has neither the legal authority nor the expertise to regulate or enforce workplace standards for establishment employees." *Id.* at 49,057.

From October 2018 to April 2020, FSIS issued 53 line speed waivers to poultry facilities under its waiver program, including 10 waivers to plants where UFCW members work. *See* Exhibit A, Declaration of Paul Kiecker ¶ 5 (Kiecker Decl.), ECF 26-2; Memorandum Opinion and Order at 4–5, ECF 14. Thus, of the 135 NPIS plants in the United States, *see* Modernization of Poultry Slaughter Inspection, https://www.fsis.usda.gov/inspection/inspection-programs/inspection-

poultry-products/modernization-poultry-slaughter, nearly 40 percent have received waivers that require them to operate lines above the regulatory maximum.

Regulation of Swine Plants. Pursuant to the Federal Meat Inspection Act, 12 U.S.C. § 601 *et seq*., FSIS regulates swine processing facilities in a manner similar to its regulation of poultry facilities, including through the establishment of an inspection system at swine plants. *See* 12 U.S.C. §§ 603–604; *see generally United Food & Com. Workers Union, Loc. No. 663 v. USDA*, 532 F. Supp. 3d 741, 749–50 (D. Minn. 2021). Prior to 2019, swine facilities were limited by regulation to operating their lines at a maximum of 1106 hogs per hour (hph). In that year, FSIS adopted the New Swine Inspection System (NSIS), which entirely eliminated line-speed limits at swine plants. *See* Final Rule, Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019). FSIS received "comments from worker advocacy organizations, labor unions, consumer advocacy organizations, an environmental advocacy organization, and private citizens asserted that revoking maximum line speeds will increase risks to worker health and safety in establishments that operate under NSIS." *Id*. at 52,314. As it had done with respect to its line-speed waiver program for poultry plants, FSIS responded with the statement that it "has neither the authority nor the expertise to regulate issues related to establishment worker safety." *Id*. at 52,315.

On behalf of its workers at swine facilities, UFCW challenged the elimination of line-speed limits for NSIS facilities in the United States District Court for the District of Minnesota. In April 2020, the court denied USDA's motion to dismiss for failure to state a claim, explaining that the agency's "disregard [of] the rule's effects on worker safety" was not "adequately justified." *United Food & Com. Workers Union, Loc. No. 663 v. USDA*, 451 F. Supp. 3d 1040, 1055–56 (D. Minn. 2020). In March 2021, the Minnesota court concluded that FSIS's elimination of line-speed limits

was arbitrary and capricious because "the Final Rule contains no discussion, analysis, or evaluation of worker safety comments." 532 F. Supp. 3d at 773. The court noted in particular that FSIS had failed to explain how its position that it lacked legal authority to address worker safety "squared with its previous decision [in the NPIS Final Rule] to maintain poultry line speed limits for worker safety reasons." *Id*. at 775. The court accordingly vacated the rule eliminating line-speed limits for swine facilities, a remedy that the court stayed for 90 days to "allow the agency to decide how to proceed in light of this opinion and give regulated entities time to prepare for any operational change." *Id*. at 782. After the district court and the Eighth Circuit denied plants' request for a further stay of vacatur, Order, *United Food & Com. Workers Union, Loc. No. 663 v. USDA*, No. 19-2660 (D. Minn. June 16, 2021), ECF 189; Order, *United Food & Com. Workers Union, Loc. No. 663 v. USDA*, No. 21-2220 (8th Cir. July 15, 2021), the Minnesota court's vacatur went into effect on June 29, 2021, at which time all NSIS facilities were required to revert to a maximum line speed of 1106 hph.

On November 12, 2021, FSIS announced a new waiver program for swine facilities, under which it would accept applications from NSIS plants to participate in "a 'time-limited trial' that will enable establishments to experiment with ergonomics, automation, and crewing to create custom work environments that will protect food and worker safety while increasing productivity." NSIS Time-Limited Trial Notice. Under this trial program, "participating establishments will be permitted to operate at an increased line speed for a period of up to one year during which time they will collect data that measures the impact of line speed on workers." *Id*. To participate in the trial, "an NSIS establishment must implement worker safety measures included in an agreement with the workers' union or worker safety committee that represents their employees." *Id*.; *see also* Kiecker Decl. ¶ 8, ECF 26-2. According to FSIS, worker health and safety data obtained from the

trial "will be used to inform any future rulemaking regarding NSIS, and will also be shared with" the Occupational Safety and Health Administration (OSHA). Kiecker Decl. ¶ 10, ECF 26-2.

The Present Litigation. In July 2020, UFCW filed this action under the Administrative Procedure Act (APA) asking the Court to set aside the poultry line-speed waiver program and associated waivers as unlawful and arbitrary. USDA filed a motion to dismiss in October 2020, arguing that UFCW lacked standing and that worker safety concerns fall outside of the zone of interests of the federal poultry inspection statute. ECF 9. This Court denied the motion to dismiss on August 20, 2021, concluding that the allegations and evidence that UFCW submitted "bear out the connection between faster line speeds, increased repetitive motions, and a substantial increased risk of injury," Memorandum Opinion and Order at 7, ECF 14, and that UFCW's worker-safety interests are "aligned" with the interest in food safety, *id*. at 12.

LEGAL STANDARD

"[A] voluntary remand request made in response to a party's APA challenge may be granted only when the agency intends to take further action with respect to the *original agency decision on review*. Otherwise, a remand may instead function … as a dismissal of a party's claims." *Limnia, Inc. v. United States Dep't of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017). Although an agency "need not 'confess error or impropriety in order to obtain a voluntary remand,'" *Clean Wisconsin v. EPA*, 964 F.3d 1145, 1175 (D.C. Cir. 2020) (quoting *Limnia*, 857 F.3d at 387), the court must "consider whether the agency has provided a reasoned explanation for a remand," *Cadillac of Naperville, Inc. v. NLRB*, 14 F.4th 703, 719 (D.C. Cir. 2021), or "committed to a course of action," *Clean Wisconsin*, 964 F.3d at 1175. Even then, a remand is inappropriate where it "would unduly prejudice the non-moving party" or where "the agency's request appears to be frivolous or made in bad faith." *Utility Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436

(D.C. Cir. 2018); *see also Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying motion to remand where it appeared to be a "tactic[] … to avoid judicial review").

ARGUMENT

I. USDA fails to satisfy the standard for a voluntary remand without vacatur.

USDA has moved the Court for a voluntary remand without vacatur and seeks an indefinite stay of this case while it considers whether to address the waiver program and waivers challenged in this case. USDA's motion is clear that the agency is not committing to take any action, much less to a timeline for doing so. And although USDA suggests that it hopes to complete the initial stage of review within six months or so, it gives no indication of when it would implement any action it might then decide upon, assuming that it decides upon any at all. Because of the prejudice to plaintiffs, the lack of agency commitment, the absence of any acknowledgement of error, and the timing of the motion, USDA's motion should be denied.

A. Because USDA has made no commitment to act, a voluntary remand would harm UFCW and its members.

UFCW filed this action to protect its members who work on poultry processing lines from the harmful effects that increased line speeds would have on their health and safety. The first two line-speed waivers implicated by this lawsuit were issued more than two years ago, and the remaining eight waivers will have their two-year anniversary in April 2022. Because UFCW members have been working at, and continue to work at, increased line speeds, UFCW has a significant interest in obtaining prompt resolution of this lawsuit. Remanding this action would delay resolution of UFCW's claims and prolong the period of danger for UFCW's members.

Courts in this circuit have consistently declined agencies' requests for a voluntary remand without vacatur where a remand would harm the plaintiffs' interests. For example, in *Chlorine Chemistry Council v. EPA*, the D.C. Circuit noted that it denied a motion for voluntary remand where the EPA "made no offer to vacate the rule" and, thus, "would have left petitioners subject to a rule they

claimed was invalid." 206 F.3d 1286, 1288 (D.C. Cir. 2000). *See also Utility Solid Waste Activities Group*, 901 F.3d at 437 (denying EPA's request for a voluntary remand where "remand would prejudice the vindication of [the petitioners'] claim"); *American Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95, 99 (D.D.C. 2019) (stating that the court "decline[d] to exercise its discretion to grant EPA's remand request because doing so would unduly prejudice" the intervenors' interests). Consistent with these cases, the case that USDA cites for the principle that a voluntary remand should not prejudice the plaintiff granted remand only after finding that "the remand would not unduly prejudice" the plaintiff in that case. *See Clark v. Vilsack*, No. CV 19-394 (JEB), 2021 WL 2156500, at *1 (D.D.C. May 27, 2021).

Courts have found an absence of prejudice where the challenged agency action is enjoined or otherwise without effect during the remand period. *See*, *e.g.*, *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70 (D.D.C. 2015) (granting voluntary remand where the rule was preliminarily enjoined); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 25 (D.D.C. 2008) (remanding where "the permit's suspension [by the agency] in effect removes the potential harm created by Intervenors in the areas under the Corps' jurisdiction."). Here, however, USDA's motion would allow the existing line-speed waivers to remain in place, and UFCW members would continue working on poultry lines operating at speeds that put their health and safety at risk. Notably, USDA cites no case in which a court granted a voluntary remand without vacatur where health and safety risks would remain in place while the agency reconsidered its position.

USDA has no adequate response on the issue of prejudice. Noting that it "hopes" to complete remand proceedings within six months, USDA asserts that a remand "would likely not take substantial longer than summary judgment, and may indeed be faster." USDA Mem. 8. That statement might have force if USDA had made a commitment to rescinding the challenged waiver program and waivers. But USDA has refused to do so. Rather, USDA makes clear that a possible outcome of remand proceedings

would be that the existing waivers will "continue." *Id*. at 7. Thus, USDA's assertion that "whatever the agency decides on remand, it is undisputable that it will materially alter the present dispute," *id*. at 8, is unsupported by the relief it seeks and the intention it describes. Moreover, notwithstanding the agency's obligation to consider the issue of worker safety at *swine* facilities in light of the Minnesota district court's decision, USDA does *not* confess error with regard to its failure to address worker safety concerns when adopting its line-speed waiver program for *poultry* plants. Neither UFCW nor this Court therefore has assurance that the agency will take action on remand to alleviate the health and safety risks caused by its line-speed waivers more quickly than resolution of this litigation would.

Compounding the prejudice to UFCW, in addition to not committing to take action at all, USDA does not commit to completing its consideration by a date certain. USDA's proposed order specifies only that it will file a status report after five months. ECF 26-1. USDA states that it hopes or intends to complete its "review" "to determine whether [the challenged waivers] should be retained, revoked, or modified" within six months, *see* USDA Mem. at 1, but it does not suggest any timeframe for revoking or modifying any waivers. Thus, USDA is wrong to say that a remand without vacatur will be faster than proceeding to summary judgment briefing. If UFCW prevails on summary judgment, USDA will be required to take action. If USDA is granted a voluntary remand without vacatur, it may decide to do nothing at all or may adopt a program that allows the waivers to remain in place far beyond the six months period that it suggests for its initial consideration. All the while, workers would face continued risks to their health and safety without any avenue for judicial redress.

USDA also suggests that UFCW would not be prejudiced because the Court might remand without vacatur if UFCW prevailed on summary judgment. *See* USDA Mem. 9. That speculation is baseless. In this circuit, "unsupported agency action normally warrants vacatur," but courts have discretion to remand without vacatur based on "the seriousness of the order's deficiency and the disruptive consequences of an interim change that may itself be changed." *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (cleaned up).

In the context of swine, the Minnesota district court applied this circuit's standard and rejected USDA's argument for a remand without vacatur, explaining that the agency's deficiencies were serious because "FSIS failed to engage in reasoned decision-making by offering conclusory explanations, changing its position without acknowledging that reversal, and failing to meaningfully respond to comments supported by data," and because any disruption to the industry did not support leaving the rule in place. *UFCW*, 532 F. Supp. 3d at 779–81 (D. Minn. 2021). The case for vacatur is even stronger here. With respect to the deficiencies in the agency action, USDA's failure to consider worker safety concerns in creating its waiver program for poultry plants is exactly the same deficiency that was at issue in the Minnesota case. But the disruption to the poultry industry is far less severe because USDA purported to justify its waiver program as a *temporary* measure to gather data to inform a future rulemaking. *See* Kiecker Decl. ¶ 5, ECF 26-2. USDA thus foreclosed any reliance interests that the plants might otherwise have in indefinite continuation of the waivers. Finally, although USDA correctly notes that the Minnesota court stayed its vacatur for 90 days, *see* 532 F. Supp. 3d at 781–82, the court granted that short transition period in lieu of a remand without vacatur. That action does nothing to support USDA's request for an indefinite stay of litigation, during which existing line speed waivers would remain in effect.

B. Other considerations make a voluntary remand inappropriate.

The prejudice to UFCW is sufficient reason to deny USDA's motion for a voluntary remand. The context and timing of USDA's request, however, provide additional reasons for rejecting the agency's last-minute gamble to avoid having to defend its line-speed waiver policy.

First, "this is not a case where the agency merely overlooked an issue." *American Waterways Operators*, 427 F. Supp. 3d at 100. The effect of faster line speeds on worker health and safety was a prominent issue in the 2014 NPIS rulemaking and in proceedings that led to the establishment of USDA's line-speed waiver program in 2018. Numerous commenters, including UFCW, urged USDA

to address worker health and safety concerns in fashioning its programs. USDA refused to address those comments, summarily concluding that it lacked the authority to address worker health and safety concerns without addressing its prior consideration of worker health and safety in establishing poultry line-speed limits. By asking for a voluntary remand, USDA "would simply like a second bite at the apple." *Id*. at 98.

Second, although USDA seeks remand based on the time-limited trial it adopted for swine facilities its response to *UFCW*, "the agency admits no error" with respect to its failure to consider worker safety concerns in establishing its poultry-line speed waiver program. *Id*. at 98. Indeed, USDA does not attempt to distinguish the Minnesota decision or suggest that the court's ruling is the type of "intervening event[]" that can ordinarily justify a voluntary remand. *See Utility Solid Waste Activities Gr.*, 901 F.3d at 436 (internal quotation marks omitted) Where the agency "has neither conceded the record's infirmity nor identified any intervening events," and has said "virtually nothing about why it has chosen not to defend [its action] or how it would proceed upon remand," an indefinite remand that results in prejudice to the plaintiff is inappropriate. *Cf. Clean Wisconsin*, 964 F.3d at 1175 (treating request for remand as a "concession that its explanations fall short" and remanding for "expeditious[]" action after finding an absence of prejudice).

Finally, the timing of USDA's motion for voluntary remand, while perhaps falling short of bad faith, suggests a "tactic[] … to avoid judicial review," *Lutheran Church-Missouri Synod*, 141 F.3d at 349, while leaving the challenged action in place. The Minnesota court issued its decision on March 31, 2021, and USDA announced its time-limited trials for swine facilities on November 12, 2021—approximately seven months later. *See* Kiecker Decl. ¶ 9. According to USDA, it used that entire seven-month period "to develop" the time-limited trial, engaging in "extensive coordination between FSIS and OSHA, as well as between processing facilities and their unions." *Id*. ¶ 12. USDA surely understood that the same legal infirmity that doomed its rule eliminating line speeds at swine facilities—the failure to address adequately the worker health and safety concerns raised by

commenters—was present in this case, given that the agency's explanation for declining to address worker health and safety concerns was nearly identical in both proceedings. USDA does not explain, however, why it failed to use that seven-month period to also address worker health and safety concerns in poultry plants that had received line-speed waivers. Perhaps USDA was gambling on this Court granting its motion to dismiss, which would have allowed the agency to wash its hands of the harm to poultry workers created by its line-speed waiver program. But having lost that gamble, USDA should not be permitted to inject further delay into the completion of this litigation through an indefinite, open-ended remand in which the agency provides no assurance that it will modify its waiver program in any material way. Importantly, USDA does not contend that a voluntary remand is necessary for it to take action that might "render the present dispute moot" or "eliminat[e] the harm that UFCW claims from the increase in the line speed." USDA Mem. 7–8.

For these reasons, in addition to the undue prejudice that UFCW would suffer by grant of USDA's motion and USDA's lack of commitment to action, the Court should deny the motion for voluntary remand.

II. If the Court grants the motion, it should retain jurisdiction and establish a date certain for returning this litigation to active status.

UFCW urges this Court to deny the motion for voluntary remand outright. Nonetheless, if—despite the prejudice to UFCW's members, the agency's lack of commitment to take action, and other considerations weighing against USDA's request—the Court decides to the grant the motion, this Court "has discretion to retain jurisdiction" while the agency conducts remand proceedings. *Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, No. CV 20-103 (RDM), 2021 WL 14929, at *2 (D.D.C. 2021). The Court should do so. To remand without retaining jurisdiction would improperly "function … as a dismissal of a party's claims." *Limnia, Inc*., 857 F.3d at 386. Although USDA suggests dismissal as an option, it does not object to the Court's retention of jurisdiction. *See* USDA Mem. 17.

In addition, the Court should reject USDA's request that the only requirement imposed be a single status report after five months to update the Court on its progress, and no end date by which the agency must complete remand proceedings. If the Court grants the motion for voluntary remand, it should direct USDA to file status reports at 45-day intervals to ensure that the agency is actively working to reconsider its line-speed waiver program. Further, the Court should establish a firm deadline by which USDA must take action and provide that this litigation will automatically return to active status if existing poultry line-speed waivers remain in effect as of that deadline. UFCW proposes that this case automatically return to active status on June 1, 2022, and that the Court set a schedule for cross-motions for summary judgment that will apply absent a successful motion by USDA demonstrating good cause to extend the remand period further.

CONCLUSION

For the forgoing reasons, the motion for voluntary remand should be denied. In the alternative, if the Court grants the motion, it should require USDA to file status reports at 45-day intervals and direct that the case will be returned to active status on June 1, 2022.

Date: December 9, 2021

Respectfully submitted,

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