UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 663; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 440; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 2; and UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO, CLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Case No. 0:19-cv-02660-JNE-TNL

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

INTRODUCTION

In 2018, citing peer-reviewed studies and government publications, scientists, workers, and worker advocates explained to Defendant United States Department of Agriculture (USDA) that eliminating line-speed maximums in swine-slaughter plants as part of its proposed "New Swine Slaughter Inspection System" (NSIS) would put the health and safety of plant workers at risk. In issuing the Final Rule at issue in this litigation, USDA acknowledged these comments, but proceeded with the Rule nonetheless. Rather than addressing the data that showed

higher line speeds increase the risk to workers of musculoskeletal injuries, burns, and lacerations, USDA stated that worker safety concerns were irrelevant to the agency's decision to eliminate line-speed maximums and were the exclusive responsibility of the Occupational Safety and Health Administration (OSHA). USDA has maintained that position throughout this litigation.

Eight days after the Final Rule was issued, and months before any plant was scheduled to convert to NSIS, Plaintiffs—labor unions that represent workers at 18 of the 40 plants USDA stated it anticipated would adopt NSIS—filed this action, arguing that USDA's rejection of worker safety concerns reflected arbitrary and capricious decisionmaking. Compl. (ECF 1) at ¶¶ 74–77.[1] Plaintiffs maintain that USDA's action, taken despite "overwhelming record evidence that indicates that faster line speeds subject workers to substantially increased risk of injury," requires that the entire Final Rule be set aside. *Id.* at ¶¶ 74, 77. As Plaintiffs informed USDA in April, they are prepared to move for summary judgment on this claim as soon as the agency produces the certified administrative record.

Now, after this Court's decision denying the bulk of USDA's motion to dismiss stated that the agency's basis for declining to consider the impacts of its

[1] Plaintiffs' complaint stated that UFCW members worked at 17 of the 40 plants. *See* Compl. at ¶ 13. Subsequent review of UFCW records confirmed the International represents workers at 18 of the 40 plants. *See* Decl. of Richard Dennis Olson ¶ 5.

actions on worker safety "was not a rational explanation," April 1 Order (ECF 30) at 22, USDA asks this Court to stay this litigation for four months and remand the Rule. The agency asks the Court to exercise its discretion to do so *not* so the agency can consider whether worker safety concerns necessitate altering or revising the Rule, but so the agency can provide a new explanation for the Rule it adopted.

Such a request does not meet the threshold standards for a voluntary remand. To obtain a remand, "the agency ordinarily does at least need to profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Limnia, Inc. v. United States Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (Kavanaugh, J.). An agency may not obtain a remand simply because it "seek[s] to defend the agency's decision on grounds not previously articulated by the agency." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001). "[T]he premise—and promise—of a voluntary remand is that an agency will consider changing a policy that would otherwise be 'final.'" Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 Admin. L. Rev. 361, 371 (2018).

But nowhere in USDA's 25-page motion or its supplemental declarations does USDA even *hint* that it is open to "reconsidering" the challenged agency action—either the adoption of NSIS as a whole or the elimination of maximum line speeds. To the contrary, USDA is upfront with the Court that it will *not* change

"the substance of the agency's decision." Def.'s Mem. (ECF 42) at 2; *see also id.* at 17 (arguing "Plaintiffs will still be able to challenge the evisceration-line speed requirement" after remand). And although USDA stated that it had not considered the evidence about the effect on worker safety when it issued the Final Rule, its motion is based on a new conclusion: that increased line speeds do not pose a risk to workers. *Id*. at 21–24; Sidrak Decl. (ECF 44) at ¶ 4 (declaration from a USDA veterinarian opining that NSIS does not pose an increased risk to worker safety).

To the extent that the agency wants the opportunity to justify its rule on the ground that it "disagrees" as to the impact of increased line speeds on worker safety, *see id.*, voluntary remand to provide that opportunity would not be appropriate. To the contrary, where an agency seeks to raise new grounds to support a challenged rule, "the obligation of the reviewing court is …well-settled" under the *Chenery* doctrine: The court is to "decline to consider the agency's new justification for the agency action" and proceed to the merits based on the existing record. *SKF*, 254 F.3d at 1028 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Having reviewed the Court's opinion addressing the explanation that USDA *did* give, the agency "would simply like a second bite at the apple." *Am. Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95, 98 (D.D.C. 2019) (denying remand request where the agency sought to address concerns that were before it in the initial rulemaking). There is no precedent for granting a voluntary remand

in such a situation—particularly where, as here, the remand sought would unduly prejudice Plaintiffs and their members. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (declining to grant remand where it "would prejudice the vindication of [petitioners'] claim"). The evidence in the record shows that eliminating line-speed maximums increases the risk to worker safety, and one plant where Plaintiffs' members work has already converted to NSIS—and that one plant has already increased its line speeds. Given how many of the 40 plants USDA identified as likely to convert have done so or formally expressed an intent to do so in NSIS's first few months, it is likely that one or more of the remaining thirteen non-HIMP plants where Plaintiffs' members work will adopt NSIS in the period of delay that would be caused by a four-month stay and remand.

Further, USDA's suggestion that COVID-19 eliminates the risk of injury to Plaintiffs' members during this time period is wholly unsupported. Consistent with USDA's repeated statements indicating an expectation that, to the extent that they close or slow, pork processing plants will return to full capacity as soon as possible. Even now, there are NSIS plants operating at line speeds faster than those allowed under the preexisting regime.

To the extent USDA argues that any harm NSIS causes to Plaintiffs' members will occur even if Plaintiffs prevail on summary judgment, that

argument is both premature and incorrect. In their complaint, Plaintiffs seek vacatur of the Final Rule, which is the default remedy under the Administrative Procedure Act (APA). In considering USDA's motion, the Court should presume that Plaintiffs will be entitled to that relief. The Court should thus deny USDA's motion for a stay and voluntary remand, and instead allow briefing on Plaintiffs' motion for summary judgment, which has already been delayed by the agency's delayed production of the certified administrative record. (Plaintiffs expect to file that motion before the scheduled hearing date for this motion.) Given that USDA's motion to stay and remand addresses many of the issues that would be considered by the Court at summary judgment, including Plaintiffs' injury and the appropriate remedy should Plaintiffs prevail on the merits, the Court should reject the request for delay, and instead allow the case to proceed promptly to summary judgment.

BACKGROUND

I. *Procedural Background*

In February 2018, USDA published a notice of proposed rulemaking to establish the "New Swine Slaughter Inspection System," referred to as NSIS. Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780 (Feb. 1, 2018) ("Proposed Rule"). A major element of the proposal was the revocation of line-speed limits, which would allow slaughterhouses to run their lines as fast as they

deemed appropriate. *Id.* at 4781. In the proposal, USDA sought comment on the impact of the proposed changes on the health and safety of plant workers. *Id.* at 4796. In response, workers and worker advocates, public health professionals, and respected scientists submitted comments opposing the proposal and explaining that NSIS would significantly increase the risk of injury for workers in swine-slaughter plants. *See* Compl. at ¶¶ 2, 41–45 (collecting comments). These commenters cited peer-reviewed studies and expert analysis showing that increased line speeds would lead to a rise in the already high rates of injuries in packinghouses, which include amputations, muscle tears, joint pain, and daily cuts and lacerations. *Id.*

On October 1, 2019, USDA issued the Final Rule establishing NSIS, largely as proposed. Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019). Although "commenters noted that eliminating the line speed limits would be harmful to workers, increase injury rates, and reduce the quality of meat products," April 1 Order at 5 (citing *id.* at 52,312), the agency did not substantively address these concerns—instead asserting that it had "neither the authority nor the expertise to regulate issues related to establishment worker safety," 84 Fed. Reg. at 52,315, and "that it was compelled by law to only regulate food safety, not establishment worker safety," April 1 Order at 5 (citing 84 Fed. Reg. at 52,315). At the same time, the Final Rule included a provision requiring NSIS establishments

to submit an annual worker safety attestation that would be forwarded to the Occupational Safety and Health Administration (OSHA). 84 Fed. Reg. at 52,312.

Eight days later, Plaintiffs, three local unions that represent workers at swine-slaughter establishments and their parent international union (UFCW International), filed this action, arguing, among other things, that the agency's dismissal of worker safety concerns reflected arbitrary and capricious decisionmaking. *See* Compl. (ECF 1). On December 6, 2019, USDA filed a motion to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6). On April 1, 2020, this Court granted the motion in part, but denied USDA's motion to dismiss Plaintiffs' claim that the elimination of line speed limits was arbitrary and capricious. In so doing, the Court identified serious shortcomings in the agency's reasoning, pointing out "internal inconsisten[cies]," "circular logic," and the "conclusory fashion" in which the agency addressed worker safety issues. April 1 Order at 20–22. The Court held, as a matter of law, that the agency's explanation for "declining to consider" the effects of NSIS on workers "was not a rational explanation." *Id.* at 22.

USDA sought an extension of its time to answer, citing counsel's workload. ECF 33. Plaintiffs consented to this request, but informed USDA's counsel that they were prepared to move forward with summary judgment briefing promptly, and sought to confer on a schedule for production of the administrative record and

briefing schedule. Decl. of Adam R. Pulver ¶ 4. Plaintiffs renewed their request to confer throughout April, explaining that Plaintiffs' desire to proceed to summary judgment quickly was an attempt to avoid the inefficiency of separate motions for a preliminary injunction and for summary judgment. *Id.* at ¶¶ 7, 9. On May 1, 2020, counsel for USDA informed Plaintiffs' counsel of the intent to file the instant motion and stated that, as a result of COVID-19, USDA could not produce the administrative record before June 30, 2020. *Id.* at ¶ 10.

II. Factual Developments

Since briefing on USDA's motion to dismiss, there have been a number of factual developments relevant to the pending motion. First, in its motion to dismiss, USDA argued that Plaintiffs lack standing because "it is unknown whether any of the establishments at which Plaintiffs' members are employed will adopt the new inspection system." Mem. of L. in Supp. of Mot. to Dismiss (ECF 16) at 18. USDA now concedes that one non-HIMP establishment where Plaintiffs' members are employed converted to NSIS in March 2020, and is thus "no longer subject to an evisceration-line speed limit." Def.'s Mem. at 22–23. Plaintiff United Food and Commercial Workers Union, Local No. 2, (and Plaintiff UFCW International, in turn) represents approximately 2,000 workers at that plant, the Seaboard Foods swine slaughter establishment in Guymon, Oklahoma (the Guymon plant). Decl. of Martin Rosas ¶ 4; Decl. of Jose Quinonez ¶¶ 1–4; Olson

Decl. ¶ 4, Ex. A. These UFCW members work in all aspects of production, including on the "kill" floor and in evisceration. Rosas Decl. ¶ 6; Quinonez Decl. ¶ 1. Additionally, in connection with the instant motion, USDA has revealed that another six plants (five of which were participants in the "HIMP" pilot) have already converted to NSIS, Sidrak Decl. ¶ 5,[2] and that "five other swine slaughter establishments have informed FSIS that they plan to convert to NSIS," though it refuses to identify these plants, *id.* at ¶ 7. Taken together, this means that, in a matter of months, twelve of the forty plants that USDA indicated it expected to adopt NSIS in the Final Rule, 84 Fed. Reg. at 52,335, have already either done so, or indicated they intend to do so.

USDA also notes that some pork processing facilities have reduced their production rates as a result of the COVID-19 pandemic. *See* Def.'s Mem. at 23. Even so, according to USDA data, from April 6 through April 30, the U.S. pork processing industry operated at approximately 78 percent of its normal capacity. *See* USDA Economic Research Service, Situation and Outlook Report, LDP-M-311, May 18, 2020 at 18, https://www.ers.usda.gov/webdocs/outlooks/98463/ldp-m-311.pdf?v=8547.6. Indeed, NSIS plants, including the Guymon plant, are

[2] UFCW International represents the workers at three of these five plants. *See* Olson Decl. ¶ 5 (noting representation of workers at JBS-Swift in Beardstown, IL; Wholestone Farms Cooperative in Fremont, NE; and Smithfield Packaged Meats in Los Angeles, CA).

currently running lines at rates above 1,106 head per hour, the maximum authorized under the pre-NSIS regime. *See* Decl. of Sergio Ruiz Rivas ¶ 8; Quinonez Decl. ¶ 16. USDA has also taken actions to encourage swine slaughter establishments, as well as other meatpacking facilities, to remain open and at their normal production rates.[3] USDA's Economic Research Service indicates that the downward trend in processing-capacity utilization related to COVID-19 has already reversed, Situation and Outlook Report at 18, and indeed predicts that by the second quarter of 2021, plants will see "higher year-over-year production," *id.* at 19. Meanwhile, USDA continues to take the position that "worker safety [is] OSHA's responsibility." Letter from 29 Senators to USDA Secretary Perdue, May 15, 2020), https://www.agriculture.senate.gov/meatpacking-letter-5-15-2020

[3] *See*, *e.g.*, USDA, Press Release, "America's Meatpacking Facilities Practicing Safe Reopening to Ensure a Stable Food Supply," May 8, 2020, https://www.usda.gov/media/press-releases/2020/05/08/americas-meatpacking-facilities-practicing-safe-reopening-ensure ("applauding" the reopening of fourteen plants); Alex Gangitano, *Agriculture secretary expects meatpacking plants to fully reopen within 10 days*, The Hill, May 6, 2020, https://thehill.com/homenews/administration/496466-agriculture-secretary-expects-plants-to-fully-reopen-in-week-to-10; *see also* USDA, Coronavirus Disease (COVID-19), Food Supply Chain, https://www.usda.gov/coronavirus/food-supply-chain (noting USDA will "if necessary" order meat and poultry processors to continue operations); Letter from Secretary Sonny Purdue to Stakeholders, May 5, 2020, https://www.usda.gov/sites/default/files/documents/stakeholder-letters-covid.pdf (directing plants that reduce operations or close to "resume operations as soon as they are able").

(Senators' Letter) (noting that, in a briefing with respect to COVID-19, USDA officials "repeatedly said that worker safety was OSHA's responsibility," as they did in the Final Rule).

LEGAL STANDARD

The Eighth Circuit has not identified a standard to govern agency motions for stay and voluntary remand.[4] In an unpublished decision, though, one court in this district denied a motion for voluntary remand and to stay summary judgment briefing on grounds that the motion was untimely and would "not necessarily resolve the dispute among the parties," and because the agency "neither confessed error nor explained how it [would] change its decisions." *Minn. Ctr. for Enviro. Advocacy v. EPA*, Civil No. 03-5450 (DWF/SRN), ECF 59 (D. Minn. May 6, 2005) (attached as Exhibit 2 to Pulver Decl.). That decision is consistent with the law on voluntary remands in other circuits. As the D.C. Circuit has explained, although "[a] district court ha[s] broad discretion to decide whether and when to grant an agency's request for a voluntary remand, … a voluntary remand is typically appropriate *only* when the agency intends to revisit the challenged agency decision on review." *Limnia*, 857 F.3d at 381 (emphasis added); *see also* Wright & Miller, 33

[4] Several decisions address voluntary remands in the Social Security context, *see, e.g.*, *Stoddard v. Astrue*, Civ. No. 09-1655 (PJS/FLN), 2010 WL 3385067 (D. Minn. Aug. 9, 2010), but those decisions involve a statutory remand provision contained in the Social Security Act, 42 U.S.C. § 405(g), that is not applicable here.

Fed. Prac. & Proc. Jud. Rev. § 8383 (2d ed.) (citing *Limnia* standard). 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 does not meet the threshold requirements for a voluntary remand without vacatur.

To obtain a voluntary remand, an agency must first show an "intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Limnia*, 857 F.3d at 387. USDA does not do so here. To the contrary, the agency explicitly states that it does *not* intend to revisit the "substance of the agency's decision." Def.'s Mem. at 2. Its request for time to allow it to "reconsider" worker comments is thus mere pretense. Because USDA has failed to meet this threshold requirement, the Court need go no further to deny USDA's motion.

USDA's statement that Plaintiffs "will still be able to challenge the evisceration-line speed requirement … and argue for its vacatur after remand," Def.'s Mem. at 17, makes plain that it simply wants to provide a *new reason* for its

Final Rule: It will apparently state that it "disagree[s]" with the contention that "NSIS will result in more injuries to establishment workers," Sidrak Decl. ¶ 4. *See also* Def.'s Mem. at 23–24 (arguing that NSIS will not increase risk of injury to workers).[5] Where, as here, the agency seeks to defend the Final Rule on grounds not previously articulated by the agency, "the obligation of the reviewing court is … well-settled": "courts decline to consider the agency's new justification for the agency action, and …. affirm or reverse [the agency action], with or without a remand." *SKF*, 254 F.3d at 1028. A stay and voluntary remand is thus inappropriate, as it would accomplish nothing but delay.

None of the cases cited by USDA indicate otherwise. In all but one, the agency sought remand explicitly so that it could consider *altering* the rule at issue. In *FBME Bank Ltd. v. Lew*, 145 F. Supp. 3d 70 (D.D.C. 2015), for example, the agency sought a remand "to undertake[] a new notice-and-comment process and reevaluate[] *potential alternatives*" to the rule at issue—while a preliminary injunction against that rule remained in place. *Id.* at 73 (emphasis added). In *ASSE International, Inc. v. Kerry*, 182 F. Supp. 3d 1059 (C.D. Cal. 2016), the motion for a voluntary remand of a sanctions order was unopposed, in light of the fact that the

[5] Even if remand were appropriate to allow an agency to provide a new reason for its settled decision, *but see infra* at 15–16, remand so the agency could formally espouse this position would be futile: the decision to eliminate line-speed maximums is arbitrary and capricious in light of the record evidence establishing that increasing line speeds will increase risk of harm to workers.

agency explicitly stated that "it intend[ed] to vacate the sanctions" and reconsider whether its order was appropriate in light of an intervening appellate decision. *Id.* at 1063–64. *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008), involved a request for remand in light of intervening factual events that might cause the agency to revoke the permit challenged in the case. And although it is not apparent from the face of the brief order USDA cites in *Organic Trade Ass'n v. USDA*, No. 1:17-cv-01875 (RMC), ECF 112 (D.D.C. Mar. 12, 2020) (Pulver Decl., Ex. 3), the agency's request for remand in that case was based on its discovery of an error in the calculations upon which it based the challenged rule, which it acknowledged might require "adjustments to the rule and further administrative proceedings." Def.'s Mot. to Stay Summ. J. & for Voluntary Remand, *Organic Trade Ass'n v. USDA*, No. 1:17-cv-01875 (RMC), ECF 102 (D.D.C. Jan. 3, 2020) (Pulver Decl., Ex. 4 at 1). In stark contrast to the agency position in these cases, USDA has indicated here that it will *not* change the "substance" of the rule. *See* Def.'s Mem. at 2.

The only case USDA cites where the agency seeking remand was not open to reconsidering its action is *Conservation Law Foundation v. Ross*, Civ. No. 18-1087 (JEB), 2019 WL 1359284 (D.D.C. Mar. 26, 2019). But even there, the agency was not seeking the opportunity to provide a *new* reason for its action; rather, the agency sought the opportunity to further explain the reason it gave contemporaneously

with issuing the rule. There, in the preamble to the final rule, the agency had concluded that the rule did not trigger the Endangered Species Act's formal consultation requirements. *Id.* at *1. Acknowledging that it did not provide a clear enough explanation as to how it reached that conclusion, the agency sought a 30-day remand to do so. *Id.* The district court held that a remand was appropriate because the agency was *not* seeking to advance a new justification for its action. *Id.* at *3. In so doing, it relied on the D.C. Circuit's decision in *Alpharma, Inc. v. Leavitt*, 460 F.3d 1 (D.C. Cir. 2006), which distinguishes between "rationalizations offered for the first time in litigation" and "amplified articulation" of the reasons provided contemporaneously with a rule. *Conservation Law Fnd.*, 2019 WL 1349284 at *3 (quoting 460 F.3d at 6–7); *see also Vanda Pharm., Inc. v. Food & Drug Admin.*, No. CV 19-301 (JDB), 2020 WL 516561, at *5 (D.D.C. Jan. 31, 2020) (distinguishing between an "amplified articulation" and a "new reason").

Here, the agency is not seeking to amplify an articulated reason but rather to provide a new reason.[6] "The key distinction is the difference between a post hoc *rationalization*, which is a new rationale for an agency action, and a post hoc *explanation*, which is an agency's discussion of the previously articulated rationale

[6] USDA does not seek a remand to amplify its previously articulated rationale that it "lack[ed] authority to consider worker safety" in adopting NSIS. April 1 Op. at 21. Were it to do so, any request for a remand to amplify this explanation would be appropriately denied as futile because this position is wrong as a matter of law. *See* Pls.' Opp. to Def.'s Mot. to Dismiss (ECF 21) at 42–46.

for the challenged action. Post hoc rationalizations are precluded; post hoc explanations are not." *Norair Eng'g Corp. v. D.C. Water & Sewer Auth.*, 2020 WL 2541935, at *9 (D.D.C. Feb. 26, 2020) (quoting *Nat'l Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1204 (D.D.C. 1996)).

In short, because the agency has not expressed an intent to reconsider the agency action at issue, or even to provide a fuller explanation of a rationale provided in the Final Rule, it has not met the threshold requirements for voluntary remand.

II. Discretionary factors weigh against a voluntary remand.

"An agency's professed intent to revisit the challenged decision is a necessary condition to obtain remand, but it is not always a sufficient condition." *Am. Waterways Operators*, 427 F. Supp. 3d at 98–99 (citing *Limnia*, 857 F.3d at 387). A court retains "considerable discretion" over whether to grant a remand based on a variety of equitable factors, including prejudice to the non-moving party and timeliness. *Id.* at 99 (citations omitted); *see also Minn. Ctr. for Enviro. Advocacy*, Pulver Decl. Ex. 2 at 2-3. Those equitable factors weigh against remand here.

A. A remand and stay would unduly prejudice Plaintiffs' members by putting them at increased risk of bodily harm.

Voluntary remand is particularly inappropriate where it would leave non-movants "subject to a rule they claimed was invalid." *Chlorine Chemistry Council v.*

EPA, 206 F.3d 1286, 1288 (D.C. Cir. 2000); *see, e.g.*, *Conservation Law Fdn. v. Pritzker*, 37 F. Supp. 3d 254, 271 (D.D.C. 2014) (denying request to remand without vacatur based on "the danger of leaving the current rule in place"). Such is the case here, where Plaintiffs' members will be exposed to increased risk of injury to their physical health and safety while the challenged rule is in place.

First, while USDA argues that NSIS "necessarily" must remain in place while the agency seeks to add additional explanation for the Final Rule, Def.'s Mem. at 14–15, its motion relies heavily on cases where, either by agreement or court order, the challenged rule was *not* being applied in a manner that could harm the challengers during any remand period. For example, in *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70 (D.D.C. 2015), *cited in* Def.'s Mem. at 11, 12, 16, 25, the court granted a motion for voluntary remand of a final regulation only after explicitly noting that the remand "would *not* leave [the plaintiff] subject to a rule it claims is invalid" because a preliminary injunction was in place and would remain in place during the remand. 142 F. Supp. 3d at 75. In *ASSE International*, 182 F. Supp. 3d at 1064–65, *cited in* Def.'s Mem. at 12, the agency represented that it would vacate the challenged decision pending remand, and the Court ordered remand with vacatur. And in *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, *cited in* Def.'s Mem. at 12, 14, 17, 20, 25, and *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412 (6th Cir. 2004), *cited in* Def.'s Mem. at 11, 12, 14, 16, 25, the agency, before

the remand, had already suspended and withdrawn, respectively, the agency actions at issue. That courts exercised their discretion to grant voluntarily remand in those very different scenarios does not support USDA's request here.

Second, leaving the rule in place, while delaying this case for a minimum of four months, would harm Plaintiffs' members by placing them at an increased risk of bodily injury. USDA makes three arguments to the contrary: (1) that line speed increases do not actually increase risk of worker harm; (2) that "there is little reason to think" Plaintiffs' members will be impacted by NSIS; and (3) that Plaintiffs would not be able to obtain vacatur if they won this case, so this is all meaningless anyway. None of these arguments is supported by the record or the law.

1. Increased line speeds increase risk of worker injury.

Arguing that Plaintiffs have produced insufficient evidence to show that eliminating line speeds will increase their risk of injury, USDA attempts to litigate the merits of the case at the same time it requests a stay of summary-judgment briefing. Even at this stage, however, the record provides an adequate basis for the Court to conclude that increased line speeds increase risk of worker injury. As the Court noted in ruling on USDA's motion to dismiss, "Plaintiffs' theory of harm hardly requires speculation: slaughterhouse workers, operating in close quarters and using sharp objects to trim meat from carcasses, will face higher rates of injury

when working at faster speeds." April 1 Order at 10. Indeed, Plaintiffs have pointed to highly credible evidence in the administrative record that supports this theory. *Id.* (citing Compl. ¶¶ 28, 29). One epidemiologist and professor of occupational health provided citations to her own peer-reviewed research on lacerations at pork processing plants, and stated that her "conclusion from conducting this detailed research is there is no doubt that increasing line speed will increase laceration injuries." Professor Melissa J. Perry, Comments to Proposed Rule (May 8, 2018), https://www.regulations.gov/document?D=FSIS-2016-0017-83467. Other experts addressed in detail the impact of line speed increases on repetitive stress injuries. *See, e.g.*, American Public Health Ass'n Occupational Health & Safety Section, Comments to Proposed Rule (APHA Comments) (May 2, 2018), https://www.regulations.gov/document?D=FSIS-2016-0017-61127 (summarizing and attaching multiple peer-reviewed studies). *See also* Decl. of Amanda Miranda ¶¶ 17–18 (worker explaining how line speeds impact injury rates); Decl. of Elizabeth Bell ¶ 8 (same).

USDA does not even acknowledge this evidence. Instead it relies solely on the since-discredited analysis contained in the Proposed Rule and an extra-record declaration to argue that line speed increases will not increase risks to workers. The court should not give any credit to these sources.

First, USDA claims that its "preliminary analysis" of plants that participated in the HIMP pilot program showed "lower mean injury rates than traditional establishments." Def.'s Mem. at 21–22. USDA itself, however, disavowed reliance on this preliminary analysis in the Final Rule, *see* 84 Fed. Reg. at 52,305—and for good reason.[7] As experts explained, this "preliminary analysis," which did not undergo peer review or any other validation, has so many flaws that it lacks any scientific value: It is based on a small sample size, contains incoherent statistical analysis, and "inappropriately assumed that HIMP plants and comparison plants were comparable in every way except for their HIMP status." Celeste Monforton & Phillip W. Vaughan, *Review of the Analysis Prepared by the Food Safety Inspection Service (USDA/FSIS) of Plant Employee-Injury Rates at Swine Slaughtering Operations*, https://www.nelp.org/wp-content/uploads/Monforton-Vaughan-Review-

[7] Not only was this preliminary analysis unsound methodologically, the agency failed to make public sufficient data to scrutinize it at the Proposed Rule stage, as pointed out by numerous commenters. *See, e.g.*, APHA Comments at 4. Should USDA obtain a remand and then purport to rely on this preliminary analysis, this would lead to an *additional* procedural claim based on this failure. *See, e.g.*, *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) ("It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."). Reliance on that analysis would also indicate arbitrary and capricious decisionmaking in light of the analytical and statistical flaws in the analysis discussed herein.

USDA-FSIS-Injury-Data.pdf;[8] *see also* APHA Comments at 5 (explaining that no meaningful conclusions can be drawn from comparing HIMP to non-HIMP plants because "[t]here are simply too few observations in the dataset to make meaningful comparisons").

USDA suggests that even if its analysis was flawed, Plaintiffs have a burden to "demonstrate that the HIMP establishments had a significantly higher rate of worker injuries than traditional establishments." Def.'s Mem. at 22. But Plaintiffs may show that the elimination of line speed maximums increases their risks in other ways—and they have, via peer-reviewed studies and expert opinions that consistently show that increased line speeds cause increases in repetitive stress injuries and lacerations. Moreover, given the small sample size, incomplete data, and the fact that the HIMP plants were not randomly selected, *any* conclusion based solely on a comparison of HIMP to non-HIMP plants would be evidentiarily meaningless—no matter what it showed. *See* APHA Comments at 5.

[8] Although this analysis was not submitted during the comment period, it was submitted as part of a request to reopen the comment period, and as part of the Executive Order 12866 regulatory review process. *See* Final Rule, 84 Fed. Reg. at 52,305 (acknowledging requests to reopen); Letter from National Employment Law Project and United Food and Commercial Workers Union, Mar. 19, 2019, https://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=4738. It is thus part of the administrative record that was before the agency when it made its decision. *See Rochling v. Dep't of Veterans Affs.*, 725 F.3d 927, 936 (8th Cir. 2013).

The closest USDA comes to challenging the conclusions of ergonomic and occupational health and safety experts, published in leading journals and submitted to the agency in comments on the Proposed Rule, is the Sidrak Declaration. Dr. Sidrak, a veterinarian and policymaker at USDA, opines that he "disagree[s]" with the contention that line speed increases "will result in more injuries to establishment workers," Sidrak Decl. ¶ 4. The Court should disregard this opinion for several reasons.[9]

To start, extensive evidence in the record shows the harm that line speed increases cause to workers. USDA cannot properly attempt to rebut that evidence by introducing evidence outside the record. The rule prohibiting reliance on extra-record evidence in APA cases applies to motions for voluntary remand, and supplemental agency declarations may only be considered if they fall under one of the exceptions to that rule. *See N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV 02-0199 JB/LCS, 2004 WL 3426421, at *7 (D.N.M. Aug. 31, 2004) (striking references to declarations submitted in connection with agency motion for voluntary remand). As the Eighth Circuit has explained, "these exceptions apply only under extraordinary circumstances, and are not to be casually invoked

[9] Plaintiffs do not dispute that Dr. Sidrak may be a competent declarant as to some of the facts in his declaration, for example, information as to which plants have converted to NSIS. *See* Sidrak Decl. ¶¶ 5-6.

unless the party seeking to depart from the record can make a strong showing that the specific extra-record material falls within one of the limited exceptions." *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004). USDA has not claimed that any exception applies here, and none does. The agency had ample opportunity to address worker safety concerns in the Final Rule, and it expressly chose not to do so.

The Court should disregard Dr. Sidrak's opinion for the independent reason that it is inadmissible lay testimony. USDA has wisely not offered Dr. Sidrak, a veterinarian, as an expert in occupational health and safety.[10] Rather, his opinion is "based upon [his] personal knowledge and upon facts made known to [him] in [his] capacity at FSIS." Sidrak Decl. ¶ 3. However, "[a]dmissibility of opinion testimony by lay witnesses is … limited by [Federal Rule of Evidence] 701, which requires that the testimony be based on first-hand knowledge." *United States v.*

[10] Even if they had, it is unlikely that a veterinarian would be qualified to opine on the impacts of the elimination of line speed maximums on human worker safety under Federal Rule of Evidence 702. *See, e.g.*, *In re ResCap Liquidating Trust Litig.*, --- F. Supp. 3d ---, No. 13-cv-3451 (SRN/HB) 2020 WL 209790, at *8 (D. Minn. Jan. 14, 2020) (quoting *Hale Cty. A & M Transp. v. City of Kansas City*, 998 F. Supp. 2d 838, 843 (W.D. Mo. 2014)) (courts "must 'ensure that an expert witness does not opine on subjects beyond his expertise'"). Additionally, given Dr. Sidrak's role at USDA in devising and implementing the program at issue, his testimony in support of that program would be entitled to little weight. *See, e.g.*, *Just Enterprises, Inc. v. (888) Justice, Inc.*, No. 06-5023-CV-S-JCE, 2008 WL 2625520, at *8 (W.D. Mo. Apr. 21, 2008) (disqualifying proffered expert where "any opinion he might render would be completely inappropriate and so tainted by his bias that it would serve utterly no purpose in aiding" factfinder).

Cortez, 935 F.2d 135, 139 (8th Cir. 1991). Dr. Sidrak's Declaration offers no basis to conclude that his opinion regarding the effect of line speed on worker injury is based on first-hand knowledge.

Further, "[w]hat is essentially expert testimony, … may not be admitted under the guise of lay opinions." *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). "A party cannot use lay opinion testimony 'to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.'" *Indus. Risk Insurers v. D.C. Taylor Co.*, No. 06-CV-171-LRR, 2008 WL 11509790, at *7 (N.D. Iowa May 23, 2008) (quoting *United States v. Espino*, 317 F.3d 788, 797 (8th Cir. 2003)); *see also Blandin Paper Co. v. J&J Industrial Sales, Inc.*, No. Civ. 02-43858 ADM/RLE, 2004 WL 1946388, at *3 (D. Minn. Sept. 2, 2004) (rejecting lay testimony that "would go well beyond the knowledge of the average individual"). Dr. Sidrak's "disagreement" with occupational health and safety experts as to the likely impact of line speed increases under NSIS on worker safety is just such a "specialized explanation."

Finally, on their merits, the statements in the Sidrak Declaration and relied on by USDA, Def.'s Mem. at 23–24, do not establish that Plaintiffs' members are not at an increased risk of injury in plants that adopt NSIS. Dr. Sidrak's arguments boil down to two assertions: (1) not *every* worker at an NSIS plant will be at an increased risk of injury because they do not all use knives and saws, and (2) it is

possible that plants could do things that minimize the impact of higher line speeds. As to the former, Plaintiffs have established that their members work with knives, saws, and other sharp instruments that pose dangers of lacerations. *See* Quinonez Decl. ¶¶ 9–10; Rosas Decl. ¶ 6; Miranda Decl. ¶¶ 8–10, 15-18; Decl. of Marty Stein (Stein Decl.) ¶ 9; Decl. of David Eric Carrasco ¶¶ 4-5; Bell Decl. ¶¶ 5-8, 11. Moreover, the record includes evidence that increased line speeds increase risk of not only lacerations, but also repetitive stress injuries that are not limited to workers that use knives. *See, e.g.*, APHA Comments at 2–3 (noting increased rates of repetition increase risk of musculoskeletal injuries). Plaintiffs' members are at risk of these injuries as well. *See*, *e.g.*, Quinonez Decl. ¶¶ 11-12; Miranda Decl. ¶¶ 12-14, 17; Carrasco Decl. ¶ 8, 11; Stein Decl. ¶¶ 10, 14; Bell Decl. ¶9. Neither USDA nor Dr. Sidrak addresses these injuries at all. As to the second argument, although employers *could* do things to ameliorate the harm that fast line speeds cause to workers, workers' experience indicates that they have not done so; as one worker at the Seaboard plant in Guymon states, "[a]s the plant increased line speeds in 2020 it did not change hours or hire more workers. We are the same number of people doing the same job at a faster rate, handling a larger volume of product." Quinonez Decl. ¶ 14. And consistent with the expert materials in the record, Plaintiffs' members note that the faster the lines move, the more they and their coworkers are injured. *See* Quinonez Decl. ¶¶ 12–13; Bell Decl. ¶¶ 8, 10-11, 14; Stein

Decl. ¶¶ 7, 8-10, 14; Carrasco Decl. ¶¶ 8-12, 14. Under NSIS, higher line speeds are allowed than were under preexisting regulations; that change increases the risk of worker injury.

2. Plaintiffs will likely be impacted in the four-plus month delay sought.

As the Court noted in its April 1 Order, a plaintiff may establish harm by pointing to "the predictable effect of Government action on the decisions of third parties." *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (quoted in April 1 Order at 9). This principle is not limited to the motion-to-dismiss context; the *Department of Commerce* case itself found such a predictable effect was sufficient to demonstrate injury at the trial stage. Here, the predictable effect of the Final Rule is that slaughterhouses will adopt NSIS and "will increase line speeds above the current maximum." April 1 Order at 9. This predictable outcome is "supported by FSIS's own findings, comments from the meatpacking industry, and actions that plant operators are taking to implement line speed increases." *Id.* at 9–10.

New evidence provides further support that plants where Plaintiffs' members work will increase their line speeds. As noted above, one plant where Plaintiffs' members work, the Guymon plant, has already converted to NSIS; it is now free to increase its line speed above the former maximum rate of 1,106 head per hour. Def.'s Mem. at 23. While USDA suggests that "there is little reason to think" that the plant will do so during the period of remand, *id.* at 22, it cites no

evidence to support this speculation. To the contrary, as attested to by a worker at that plant, the plant has already increased its line speed to approximately 1,200 hogs per hour. Quinonez Decl. ¶ 8. USDA's argument that "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*," Def.'s Mem. at 22 (emphasis added), implicitly concedes that the plant does so some of the time. Whenever it does, Plaintiffs' members who work on that line are at increased risk of harm.

It is not just the harm to workers at the Guymon plant that is relevant, though. UFCW members work at thirteen of the other thirty-three high-volume establishments that USDA expects to convert to NSIS that have not yet. *Compare* Olson Decl. ¶ 5 (listing UFCW plants) *with* Sidrak Decl. ¶ 5 (listing plants that have already adopted NSIS). While USDA acknowledges five of the thirty-three plants have affirmatively notified the agency they intend to convert to NSIS, it refuses to identify these plants, and has taken the position that any discovery on this issue is "wholly improper," Pulver Decl. ¶11. Accordingly, the Court should presume for purposes of this motion that they include plants where UFCW members work, and thus additional UFCW members are at risk of harm. Given that twelve of forty plants have expressed an intent to convert to NSIS within the program's first few

months, it is likely that at least one other facility where Plaintiffs' members' work will do so in the future.

The likelihood of harm during the delay caused by remand is confirmed by the declaration submitted by USDA official Andrew Pugliese, who has opined that there would be "major disruptive consequences" if the Final Rule were enjoined or vacated. Pugliese Decl. (ECF 43) at ¶ 5. Although no motion for a preliminary injunction is pending, he asserts that a preliminary injunction would "prohibit[] additional establishments from switching to NSIS" and prevent plants from adopting a "more efficient production process." *Id.* at ¶ 9. In the Final Rule, USDA stated that an "increase in line speed is synonymous with an increase in industrial efficiency." 84 Fed. Reg. at 52,335. Both Mr. Pugliese's declaration and the Final Rule thus contradict USDA's suggestion that there is "little reason" to believe plants will increase their line speeds in the coming months; the Pugliese Declaration suggests the opposite.

USDA also notes that unspecified establishments have reduced their line speeds due to COVID-19. But as UFCW members note, plants—including NSIS plants—have already begun to return their line speeds to rates that exceed those which would have been allowed under the preexisting regulations. *See* Rivas Decl. ¶¶ 7–8 (noting line speeds at former-HIMP, now-NSIS facility in Beardstown, IL); Quinonez Decl. ¶ 16 (noting line speeds at Guymon establishment). Moreover, the

question is not just what line speeds are currently, but what they will be over the period of delay remand would bring. As noted above, USDA has made clear that it expects meatpacking plants to reopen and return to full production as soon as possible. Given USDA's own predictions that, despite COVID-19, production rates will *increase* year-over-year by the second quarter of 2021, *see* Situation and Outlook Report, *supra*, at 19, it is likely that additional NSIS plants will be operating under higher line speeds and, as a result, putting their workers at increased risk of injury, during the remand period.

USDA argues that Plaintiffs' decision not to seek preliminary relief suggests that they are not at risk of being injured over the next several months. Def.'s Mem. at 21. There is no support, of course, for the proposition that the failure to move for preliminary relief constitutes a concession with respect to the immediacy of harm. Regardless, plants that intended to convert to NSIS were not required to notify USDA of their intent to do so until March 30, 2020. Shortly after that date, and after learning that the Guymon plant had expressed such an intent to USDA, Plaintiffs informed Defendant that they sought to move for summary judgment promptly to eliminate the need and duplication of a motion for preliminary relief shortly after harm became imminent. *See* Pulver Decl. ¶¶ 4, 9.

Finally, the Court may note that USDA's request for a 120-day stay in order for it to "reconsider" its explanation for the Final Rule could actually result in a

much longer delay. If the agency were to provide a new justification for the Final Rule, Plaintiffs might need to file (or seek leave to file) an amended and supplemental complaint incorporating the agency's "reconsideration," *see, e.g.*, *Jurewicz v. U.S. Dep't of Agriculture*, 741 F.3d 1326, 1330 (D.C. Cir. 2014) (noting amended complaint filed after voluntary remand); *Hill v. Geren*, 597 F. Supp. 2d 23, 25 (D.D.C. 2009) (same). Even if the agency consented to such a filing, the agency would have the opportunity to answer or move to dismiss yet again; the process that started in October 2019 would simply begin more than a full year later. Summary-judgment briefing may not be ripe until a year from now. There is ample reason to believe that Plaintiffs' members will be harmed if NSIS is allowed to remain in place over the next year.

3. Plaintiffs, if they prevail, will be entitled to the remedy of vacatur.

USDA's argument that this Court would not be able to grant any relief other than remand, Def.'s Mem. at 17–18, is both premature and incorrect. Vacatur, not remand without vacatur, is the default remedy under the APA. *See FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), *cited in Hoban v. United States Food & Drug Admin.*, No. CV 18-269 (JNE/LIB), 2018 WL 3122341, at *3 (D.

Minn. June 26, 2018) ("We have made clear that when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated….")). This remedy is available "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998). Even where there is a possibility that an agency can correct mere "procedural" defects on remand, vacatur is the appropriate remedy where necessary "to prevent significant harm resulting from keeping the agency's decision in place." *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 80 (D.D.C. 2010) (citing *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995)).

Where courts make an exception to the usual remedy of vacatur, they generally look to the so-called *Allied-Signal* factors: "the seriousness of the deficiencies of the action" and "the disruptive consequences of vacatur." *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009) (cleaned up). Here, both *Allied-Signal* factors would weigh in favor of vacatur. As Plaintiffs will explain more fully in connection with their motion for summary judgment, no rational view of 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. Therefore, even after summary judgment, the agency would not be able to justify its decision on remand. Furthermore, USDA's argument that vacatur

would be disruptive to establishments that have already adopted NSIS weighs in favor of resolving this case sooner, without the delay it requests. Vacatur at the completion of summary-judgment briefing this summer would be far less disruptive than doing so in a year after remand. Given the equitable basis of the *Allied-Signal* exception, the nature of the "disruption" that USDA cites—preventing industry from benefitting from deregulation and seeing an increase in profit—is easily outweighed by the increased risk of injuries to workers that would result from keeping the rule in place. *See Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (noting remand without vacatur is appropriate when leaving the rule in place "will do no affirmative harm"); *cf. Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) ("As a general rule, we do not vacate regulations when doing so would risk significant harm to the public health or the environment.").

B. The timing of USDA's motion makes remand particularly inappropriate.

USDA has been aware of worker safety concerns with eliminating line speed maximums since at least February 2018, when it acknowledged, and sought comment on, those concerns in the Proposed Rule. It has been aware of Plaintiffs' arguments that its adoption of NSIS despite those concerns was arbitrary and capricious since this case was filed in October 2019. That USDA filed its motion only after the Court's denial of its motion to dismiss, and after Plaintiffs repeatedly

attempted to confer to agree on a briefing schedule for summary judgment, suggests that USDA "appears to be motivated solely by a desire to avoid judicial review of the challenged regulation." *Lewis v. Sec'y of Navy*, No. CV 10-0842 (RBW), 2014 WL 12787221, at *4 (D.D.C. Sept. 2, 2014).

USDA's suggestion that Plaintiffs are attempting to play "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," Def.'s Mem. at 25 (quoting *Pellissippi Parkway*, 375 F.3d at 418), does not remotely describe the situation at issue here, where Plaintiffs have brought a substantive challenge to USDA's failure to engage in reasoned decisionmaking and diligently sought to pursue their claim.[11]

"[C]ourts should treat voluntary-remand motions with skepticism whenever," as here, "the government fails to provide a substantive reason for the remand: in those cases, courts should fear gamesmanship and foot-dragging, with resulting unfairness to private parties." Revesz, 70 Admin. L. Rev. at 373–74. Here, where USDA seeks a remand without indicating it has any intention to reconsider *anything*, such skepticism is merited.

[11] As noted above, the facts in *Pellissippi Parkway*, in which the agency had filed a motion for voluntary remand or to dismiss the action as moot after it had *withdrawn* the challenged action, 375 F.3d at 314, are far afield from the facts here.

C. Voluntary remand would unduly delay this action without conserving judicial resources.

USDA argues that a remand is merited in order to "conserve this Court's and the parties' resources." Def.'s Mem. at 14. But a remand would *itself* be a waste of judicial resources. Where, as here, it would not "resolve the matter being litigated," "remand is inappropriate." *Minn. Ctr. for Enviro. Advocacy*, Pulver Decl. Ex. 2 at 3; *see also Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003) (finding district court's remand was an abuse of discretion, as "wasting judicial resources by remanding to [an agency] for it to do what it firmly states it may not and will not do is irrational").

Given that USDA has committed that it will not change the "substance" of its decision, and asserts that line speed increases do not increase risks to worker health and safety, there is no dispute that this case will not resolve the matter being litigated: Plaintiffs claim that the elimination of line-speed maximums is arbitrary and capricious in light of the unrebutted expert evidence in the record. Nothing that USDA proposes to do will resolve that claim. Indeed, USDA concedes as much, stating that a remand would "allow[] the parties and the Court to focus on the substance of the agency's decision." Def.'s Mem. at 2. Where a remand would result in the parties certainly returning to the court to rehash the same issues, judicial resources are not "conserved."

USDA's argument also makes little sense because the Court has already examined the agency's contemporaneous explanation for eliminating line speed maximums and found the agency's "decision to disregard worker safety arbitrary and capricious." April 1 Order at 22. There is no evidence that USDA could introduce at the summary-judgment stage that would make its "internal inconsistency" and "circular logic" in the Final Rule reasonable.

Moreover, USDA asks the Court to resolve several matters that would need to be addressed at summary judgment in this very motion. In support of its remand motion, USDA argues that NSIS will not increase Plaintiffs' members' risk of injury and that Plaintiffs will only be entitled to a limited remedy should they prevail on the merits; and it submits extra-record evidence on both of these points. To the extent that the parties and the Court are addressing these issues now, summary-judgment briefing would not require significant additional resources.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendant's motion to stay summary-judgment briefing and for voluntary remand.

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Respectfully submitted,

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