

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United Food and Commercial Workers
Union, Local No. 663, et al.,

Plaintiffs,

v.

Case No. 19-cv-2660 (JNE/TNL)
ORDER

United States Department of Agriculture,

Defendant.

Plaintiffs in this case are challenging the validity of a United States Department of Agriculture (“USDA”) rulemaking that will eliminate evisceration line speeds in some pork processing plants. *See* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019) (“Final Rule”).¹ On May 15, 2020, the USDA moved to stay summary judgment proceedings and for a remand so that it could reconsider the Final Rule. After that motion was fully briefed, and a few days prior to the scheduled hearing on that motion, Plaintiffs moved for summary judgment. The Court then cancelled the scheduled hearing and considered the motion on the parties’ submissions. For the reasons discussed below, the Court will deny USDA’s request for a stay, but will consider the propriety of a voluntary remand without vacatur alongside Plaintiffs’ recent motion for summary judgment.

¹ The Final Rule was promulgated by the Food Safety and Inspection Service, an agency within USDA.

When an agency action is challenged, “the agency may request a remand (without confessing error) in order to reconsider its previous position” and “the reviewing court has discretion over whether to remand.” *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). A remand “may conserve judicial resources” by allowing “agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.” *Id.*; *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *see U.S. Steel Corp. v. Envtl. Prot. Agency*, 649 F.2d 572, 577 (8th Cir. 1981) (finding an agency final rule procedurally invalid and remanding without vacatur for the agency to fix the errors).

To obtain a remand, the agency must “profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.” *Limnia, Inc. v. U.S. Dept. of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (holding that the district court abused its discretion by granting a remand when the agency did not intend to revisit its original decision). Even if the agency meets this threshold requirement, the court will deny a remand if it would “unduly prejudice the non-moving party” or if the request is frivolous or in bad faith. *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) (per curiam). On remand, the agency may defend the original action on the grounds it provided when it took the action, but it may only offer new grounds if it takes a new action. *See Dept. of Homeland Sec’y v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907–08 (2020).

Here, USDA has requested an opportunity to reconsider the comments it received regarding worker safety and, at a minimum, to publish a supplemental response to those

comments. Def.'s Mem., at 13, ECF No. 42. It also wishes to offer "new justifications" and "deal with the problem afresh." Def.'s Reply, at 5, ECF No. 62 (quoting *Regents*, 140 S. Ct. at 1908). However, as the Supreme Court has recently clarified, an agency may not simply offer new reasons for a prior action; to provide new reasons, it must take an entirely new action and follow any procedural requirements. *Regents*, 140 S. Ct. at 1908.

In light of this recent Supreme Court precedent and the current procedural posture of this case, the Court will consider the propriety of a remand in conjunction with Plaintiffs' recently filed motion for summary judgment. Furthermore, by considering both issues in a single proceeding, the Court will be better equipped to adequately assess whether the administrative record is incomplete, whether a further explanation by the agency would be helpful, and whether a remand would promote judicial efficiency. *See, e.g., Black Warrior RiverKeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289 (11th Cir. 2015) (remanding because the court could not determine whether the agency's conclusion was unlawful on the record before the court); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 42 (D.D.C. 2013) (remanding so the agency could supplement an incomplete or incorrect record); *Conservation Law Found. v. Ross*, Civil Action No. 18-1087 (JEB), 2019 WL 1359284, at *2 (D.D.C. Mar. 26, 2019) (considering the efficiency of a remand). Accordingly, the Court will deny USDA's request for a stay and consider the issue of a remand in the context of summary judgment proceedings. *See, e.g., Util. Solid Waste Activities Grp.*, 901 F.3d at 436 (considering an abeyance and remand request alongside the parties' merits arguments). The parties may address

additional arguments related to a remand, if any, in their briefing on the pending summary judgment motion.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendant's Motion to Stay Summary-Judgment Proceedings and for Voluntary Remand [ECF No. 40] is DENIED IN PART.
2. The Court will consider Defendant's remand request when it considers Plaintiffs' Motion for Summary Judgment [ECF No. 67].

Dated: July 22, 2020

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge