UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-24793-CIV-COOKE/TORRES

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Defendants,

and

FESTIVAL FUN PARKS, LLC D/B/A MIAMI SEAQUARIUM,

Defendant-Intervenor.
_____/

DEFENDANTS' MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

Defendants, United States Department of Agriculture (USDA) and Elizabeth Goldentyer, in her official capacity (together with USDA, Defendants), by and through the undersigned Assistant United States Attorney, hereby move for an order remanding this case back to the USDA for reconsideration and issuance of a new decision with respect to the licensure of Miami Seaquarium under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq*. (AWA), and, in support thereof, state the following:

I. INTRODUCTION

In this case, the USDA, the agency charged with administering the AWA, faced a novel situation for which there is no law that controls: what, if anything, should the agency

do when one person licensed under the AWA acquires another person licensed under the AWA through a corporate merger.[1] In 2015, Festival Fun Parks, LLC d/b/a Palace Entertainment (FFP) acquired and merged with Marine Exhibition Corporation d/b/a Miami Seaquarium (MEC). Both FFP and MEC held valid AWA licenses at the time of the merger.[2]

There is no statute, regulation, or policy that controls when a licensee purchases another licensee. While the regulations did prescribe that "[n]o person shall have more than one [AWA] license," 9 C.F.R. § 2.1(b) (2015), the regulations merely preclude a person from holding more than one license but failed to prescribe any action should one person hold two licenses (e.g., whether the licenses automatically terminate or whether the regulatory violation is merely an enforceable offense). Accordingly, the agency retained discretion when responding to the novel factual situation in this case.

Rather than create a new practice, the agency decided to employ the additional site practice it used when a licensee sought to add a new site onto an existing license. The additional site practice did not control in this case because it was a practice used when an existing licensee sought to add a new—i.e., never before inspected or licensed—facility onto an existing license, not when a licensee sought to add a facility that is currently licensed and engaging in regulated activity.

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[1] "Person means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 9 C.F.R. § 1.1.

[2] The agency treated the merger as a sale—i.e., the agency considered the transaction to be a purchase of a licensed facility, Miami Seaquarium (which was licensed under MEC), by a licensed entity, FFP.

While it was the agency's intent to apply the additional site practice, that practice did not fit the novel factual situation at issue in this case. Under the additional site practice, no regulated activity may be conducted at a new site until the new site passes a full compliance inspection. In this case, Miami Seaquarium was already fully inspected, licensed, and conducting regulated activity at the time of the acquisition. In the end, the agency permitted both FFP's and MEC's AWA licenses to continue post-merger. And, while the agency did require an inspection before Miami Seaquarium was added onto FFP's AWA license, the agency did not conduct a full compliance inspection of Miami Seaquarium before Miami Seaqaurium was added onto FFP's AWA license.

This Court originally dismissed this case because there was no law to apply. In People for Ethical Treatment of Animals, Inc. v. United States Dep't of Agric., 851 F. App'x 896 (11th Cir. 2021), the Eleventh Circuit reversed and remanded, concluding that Plaintiffs' pleadings are sufficient to establish that it is at least plausible that Defendants had a policy that provides law to control in this case, without holding that there is such a policy, and that the undefined policy requires a full demonstration of compliance.

Defendants now move for a voluntary remand without vacatur so that the agency may conduct a full compliance inspection of Miami Seaquarium and issue a new decision with respect to the addition of Miami Seaquarium onto FFP's AWA license. Defendants seek this remand to avoid needless litigation as to what the additional site practice requires and whether it controls in this case. Rather than litigate whether there is law that controls and, if so, what that law requires, Defendants agree to conduct a full compliance inspection upon remand and

to issue a new licensing decision in this case based upon the results of a new full compliance inspection of Miami Seaquarium.

II. FACTUAL AND PROCEDURAL HISTORY

By way of the Complaint for Declaratory and Injunctive Relief [D.E. 1] (Complaint), Plaintiffs bring a challenge under the Administrative Procedure Act (APA) seeking to "challenge the decision by Defendant [USDA] to issue a new license to the Miami Seaquarium ([]Seaquarium[]) . . . as an additional site under the [AWA] license of [FFP]." Complaint ¶1.[3]

In the Complaint, Plaintiffs allege the following. "On July 1, 2014, [MEC] was sold in a stock transaction in which 100% ownership of the company transferred from MEC's parent company, Wometco Enterprises, Inc. ([]Wometco[]), to buyer [FFP]. MEC then became a wholly-owned subsidiary of [FFP] and merged into [FFP], at which time MEC ceased to exist as a corporate entity." Complaint ¶31. Prior to the merger, "MEC held a Class C exhibitor license (no. 58-C-0147), initially issued on April 21, 1978 . . . ." Id. ¶31. "[FFP] holds a Class C exhibitor license (no. 12-C-0052), initially issued on April 22, 2014 . . . ." Id. ¶60.

In the "Claim for Relief" contained in the Complaint, Plaintiffs argue that "[i]n licensing Seaquarium as a new site under [FFP's] license . . . Defendants acted in violation of the plain language of the AWA regulations . . . ." Id. ¶68. By way of relief, Plaintiffs seek a

[3] Plaintiffs simultaneously, and incongruously, allege that they challenge the decision "to issue a new license to the Miami Seaquarium" and the decision to add Miami Seaquarium "as an additional site under the [existing AWA] license of [FFP]."

declaration "that Defendants acted arbitrarily and capriciously . . . in licensing Seaquarium as a new site under [FFP's] license" and an order setting "aside as unlawful Defendants' decision to license Seaquarium as a new site under [FFP's] license." Id. p.16.

In response to the Complaint, Defendants filed Defendants United States Department of Agriculture and Elizabeth Goldentyer's Motion to Dismiss for Lack of Subject Matter Jurisdiction [D.E. 66] (Motion to Dismiss). In the Motion to Dismiss, Defendants explained the following.

> In this case, [USDA] faced an issue that it had not previously addressed and one that is not addressed in the AWA or the controlling regulations or policies: what, if anything, does the agency do when two corporate persons, each of whom hold a valid AWA license, merge, resulting in the surviving corporate person holding two valid AWA licenses. As the statute itself does not speak to this question and the agency's regulations prescribe that no person can hold more than one license, the agency exercised its discretion in this unique situation and decided to have one of the two issued licenses terminate and have the surviving license apply to both sites previously covered by the two issued licenses.
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> As the statute, regulations, and policies are silent as to the question at issue, there is no meaningful standard against which to judge the agency's decision in this case. The agency's decision was, therefore, committed to agency discretion by law, and there is no law to apply to Plaintiffs' purported APA challenge. Where, as is the case here, there is no law to apply, there is no subject matter jurisdiction under the APA and the case must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Motion to Dismiss p.2.

Defendants also acknowledged that, as there was no law to apply, "[r]ather than create a new procedure to address this unique situation, [USDA], instead, decided to follow its established practice for the addition of a second business site . . . ." Id. p.8. In the Motion to

Dismiss, Defendants explained the practice as follows: "The USDA requires a **satisfactory compliance inspection** at the new or additional site prior to regulated activity being conducted there under the existing . . . license . . . ." Id. p.6 n.3 (emphasis added).[4]

In Plaintiffs' Omnibus Opposition to Defendants' Motion(s) to Dismiss [D.E. 71] (Opposition), Plaintiffs did not argue that an undisclosed policy provides the law to apply in this case, which, as explained below, is the position adopted by the Eleventh Circuit. Rather, Plaintiffs argued that "the AWA, 7 U.S.C. § 2133, and AWA regulations, 9 C.F.R. § 2.5(d), apply to USDA's decision to license the facility as an additional site." Opposition p.15.

After briefing was completed, the Court granted the Motion to Dismiss, Order Granting In Part Motion to Dismiss [D.E. 117], and Plaintiffs appealed.

On appeal, the Eleventh Circuit reversed and remanded, concluding that Plaintiffs' allegations sufficiently establish that it is "plausible" that there is law to apply in this case and, therefore, the case may proceed. People for Ethical Treatment of Animals, Inc., 851 F. App'x at 901. The Eleventh Circuit, however, held that it "cannot conclude that [Plaintiffs have] failed to state a claim to relief that is plausible on its face" not because the AWA or AWA regulations provide law to apply; id. (conceding "that neither the statute nor the regulations speak to the specific circumstances in this case"); rather, the Eleventh Circuit concluded that

[4] In support of this position, Defendants cited to the regulatory history, which, when addressing the addition of the regulation that provides that licenses are issued for specific premises, 9 C.F.R. § 2.5(d), explained that "the Department is proposing that licenses will be issued to persons for specific premises and will not be transferable upon change of location or ownership without notice to the Area Veterinarian in Charge and **a satisfactory compliance inspection**." Animal Welfare Regulations, 52 Fed. Reg. 10298-01, 10299, 1987 WL 132591 (March 31, 1987).

"the plausible allegations of the agency's failure to comply with its **longstanding policy** that rise above mere 'labels' and 'conclusions,' together with the agency's apparent admission in the district court that such a policy exists, make dismissal at this stage premature." Id. (internal quotations marks omitted and emphasis added).[5] The Eleventh Circuit, however, did not conclude that there is such a policy, much less what that policy is or whether it applies in this case; rather, the Eleventh Circuit remanded because "[i]t is at least **plausible** . . . that the agency has a policy that the addition of a new site to an existing license requires a **full prelicensing inspection** to ensure compliance with all Animal Welfare Act requirements." Id. (emphasis added).[6]

III. ANALYSIS

Under the APA, "a court may set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996) (quoting 5 U.S.C. § 706(2)(A)). "To determine whether an agency decision was arbitrary and capricious, the reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. (internal quotation marks omitted). "The court's role

[5] The only "policy" Defendants admitted exist in the district court is the practice under which Defendants permitted an existing licensee to add a new site onto a license. Defendants never admitted that there was a written policy, much less that the practice controls in this case.

[6] While this is the current understanding of the Complaint post remand from the Eleventh Circuit, in the Complaint Plaintiffs repeatedly reference Defendants' obligations under the statute and regulations themselves and, in the lone "Claim for Relief," allege that "Defendants acted in violation of the plain language of the AWA regulations," not in violation of an unidentified policy.

is to ensure that the agency came to a rational conclusion, 'not to conduct its own investigation and substitute its own judgment for the administrative agency's decision.'" Sierra Club v. Van Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008) (quoting Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996)).

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, **the proper course**, except in rare circumstances, **is to remand to the agency for additional investigation or explanation**. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 105 S. Ct. 1598, 1607, 84 L. Ed. 2d 643 (1985) (emphasis added); see also Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers, 781 F.3d 1271 (11th Cir. 2015) (remanding to the agency "for a thorough reevaluation" where the agency admitted error); City of Pembroke Pines v. U.S. Immigr. & Customs Enf't, 141 F. Supp. 3d 1330 (S.D. Fla. 2015) (remanding for further consideration where the agency was unable to produce an administrative record).[7]

> Accordingly, **when an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand** in the absence of apparent or clearly articulated countervailing reasons. Otherwise judicial review is turned into a game in which an agency is "punished" for

[7] The Eleventh Circuit has "found the existence of **rare circumstances** and decided the issue in the first instance **only when 'the undecided issue was legal, not factual**.'" Stone & Webster Constr., Inc. v. U.S. Dep't of Labor, 684 F.3d 1127, 1137 (11th Cir. 2012) (quoting Calle v. U.S. Att'y Gen., 504 F.3d 1324, 1330 (11th Cir 2007) (emphasis added).

> procedural omissions by being forced to defend them well after the agency has decided to reconsider.

Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004) (emphasis added); see also Natural Res. Def. Council, Inc. v. U.S. Dep't of Interior, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002) ("Voluntary remand is consistent with the principle that '[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.'") (quoting Trujillo v. General Electric Co., 621 F.2d 1084, 1086 (10th Cir. 1980)); Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) ("We commonly grant such motions [for remand], preferring to allow 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."). "This weighty preference for remand extends to a procedural posture in which the agency voluntarily requests remand before the Court or the parties reach the merits of the dispute." City of Pembroke Pines, 141 F. Supp. 3d at 1333–34. Moreover, "[i]n circumstances like these, where it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process, the remedy of remand without vacatur is surely appropriate." Black Warrior Riverkeeper, Inc., 781 F.3d at 1290.

In this case, Defendants admit that "the USDA did not conduct a full inspection of Miami Seaquarium after it became aware that FFP acquired MEC and before FFP conducted regulated activities at Miami Seaquarium." Answer ¶66; see also Answer ¶37 ("the USDA did not measure the tank in 2015 as part of the new site inspection and, therein, did not analyze whether any such measurements would meet the minimum requirements at that

time."); cf. Defendants United States Department of Agriculture and Elizabeth Goldentyer Join in Defendant-Intervenor's Motion to Strike [D.E. 94] p.3 n.2 (acknowledging that "the case should be remanded to the agency for further consideration" should a full inspection be required (i.e., "[t]o the extent the Court finds that a license must issue")).

While Defendants have consistently maintained that the additional site practice does not control in this case, rather than waste the parties' and the Court's time and resources litigating whether that practice controls and, if so, what it requires, Defendants request that this case be remanded without vacatur so that the agency may conduct a full compliance inspection and issue a new decision based upon the results of the full compliance inspection.

Rule 7.1 Conference

Pursuant to the Local Rules for the Southern District of Florida, the undersigned conferred with counsel for both Plaintiffs and Intervenor. Plaintiffs' counsel represents that Plaintiffs oppose the relief sought herein. Intervenor's counsel represents that Intervenor does not oppose the relief sought herein.

WHEREFORE, for the foregoing reasons, Defendants move for an order remanding this case to the USDA without vacatur.

Respectfully submitted,

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