UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND, et. al.,	)	
	)	
v.	)	
	)	**Case No. 14-cv-1462 (CKK)**
TOM VILSACK, Secretary U.S. Department of Agriculture, et al.	)	
	)	
Defendants.	)	
	)	

OPPOSITION TO MOTION TO COMPEL ADMINISTRATIVE RECORD

The issue presented in this action is whether the renewal of an existing license under the Animal Welfare Act ("AWA") is a purely administrative matter or whether a licensee seeking to renew an existing license must be evaluated in the same manner as an applicant applying for an initial license. The agency's regulations provide that it is the former. They provide that the USDA "*will* renew a license" after the applicant meets three administrative requirements for renewal. 9 C.F.R. § 2.2(b) (emphasis added); *id.* § 2.5(b). Therefore, because renewal is a purely administrative process under the applicable regulations, the administrative record "before the agency" for the purpose of a license renewal is limited to documentation showing that the licensee met the three administrative requirements for renewal. That is the record that Defendants designated pursuant to Local Rule 7(n).[1]

Plaintiffs contend that the administrative record is inadequate because they have a different interpretation of the statute and its enforcement. They contend that the AWA requires licensees

[1] Under the regulations, there is a separate and distinct process for taking enforcement action against a licensee that can result in the suspension or revocation of a license. That is not a purely administrative process, but is subject to explicit due process protections, including notice and an opportunity for a hearing. *See* 7 U.S.C. § 2149(a).

to undergo the same process for renewal as they undergo to obtain their initial licenses. Plaintiffs thus contend that the agency's regulations are not a permissible construction of the statute and that by following those regulations – what Plaintiffs call, in this case, the "rubber-stamping [of] the renewal of the Zoo's license each year" – the agency has violated the AWA, acted arbitrarily and capriciously, and abused its discretion. (Am. Compl. ¶ 9).

Thus, although framed as a "motion to compel the complete administrative record," the issue presented in Plaintiffs' motion is, at the threshold, the same legal issue as presented in Defendants' pending motion to dismiss. The threshold question presented in that motion, as here, is whether the referenced regulations that *require* renewal if certain administrative requirements are met are a permissible construction by the agency of the AWA. This is purely a question of law, *see American Bankers Association v. Nat'l Credit Union Administration*, 271 F.3d 262 (D.C. Cir. 2001), that the Court should decide before ordering any supplementation of the record. *See id.* at 266-67.

Indeed, the adequacy of the administrative record as currently designated is dependent on the Court's determination of this threshold question. If the Court agrees that the agency's regulations on renewal are a permissible construction of the AWA, then renewal is a purely administrative matter as provided in the agency regulations, and the agency properly considered only the applicable administrative requirements in making the renewal decision (which, in turn, means that the administrative record has been properly designated). If the Court disagrees with Defendants' position, then rather than compel a supplementation of the record, the more appropriate remedy likely would be to remand the matter to the agency for further consideration in accordance with the Court's ruling (in which case any resulting administrative record would likely

be more expansive than the record that has been designated). The Court, therefore, should deny the motion to compel as premature or hold it in abeyance pending resolution of the pending motion to dismiss.

ARGUMENT

The applicable administrative record in a given proceeding has been defined by courts as "all documents and materials that the agency directly or indirectly considered" in making the challenged decision and nothing "more nor less." *See, e.g., Am. Petroleum Tankers v. US*, 952 F. Supp. 2d 252, 260 (D.D.C. 2013). "[A]bsent clear evidence, an agency is entitled to a strong presumption of regularity that it properly designated the administrative record." *Id.* at 261.

Moreover, "[i]n seeking to force the Defendants to supplement the Administrative Record with documents that were purportedly before the agency, the Plaintiff cannot merely assert that the documents 'are relevant, were possessed by the entire agency at or before the time the agency action was taken, and were inadequately considered.'" *Id.* at 262. In addition to articulating "'when the documents were presented to the agency, to whom, and under what context,'" the Plaintiff "must offer 'reasonable, non-speculative' grounds for their belief that the documents were directly or indirectly considered" by the agency decisionmaker *Id.*

The final agency decision challenged in this action is the renewal in May 2014 of Cricket Hollow's existing license.[2] USDA renewed Cricket Hollow's license because Cricket Hollow met

2 The only renewal decision that is properly before the Court is the recent renewal in or about May 2014. (Am. Compl. ¶¶ 126-129). Because the license as renewed in May 2014 is the operative license, any purported challenge to prior renewal decisions (*id.* ¶¶ 130-133) would be moot at this time and not subject to review by the Court. *See Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) ("The rule against deciding moot cases forbids federal courts from rendering advisory opinions or "'deciding questions that cannot affect the rights of litigants in the case before them.'"). In any event, the administrative record for those prior renewal decisions, made in

the three administrative requirements for renewal set forth in the applicable regulations. This fact is not disputed. Plaintiffs do not contend that Cricket Hollow failed to meet the three administrative requirements for renewal. Nor do they allege that the USDA based its renewal decision on anything other than Cricket Hollow's having met the three administrative requirements set in the regulations. To the contrary, Plaintiffs claim error by the agency *because* the agency followed its regulations and based the renewal of Cricket Hollow's existing license solely on the satisfaction of administrative requirements, and without making a determination whether Cricket Hollow was in fact in compliance with the AWA at the time of renewal.

This is apparent from several allegations in the Complaint. The Complaint quotes from a June 2014 letter from the agency to allege that USDA renewed Cricket Hollow's license because the agency "found that the Zoo had 'met the AWA regulatory requirements for renewal of its license by submitting a renewal application and applicable fees on or before the expiration date of its current license,' and that '[t]herefore, [the Zoo's] license was renewed." (Am. Compl. ¶ 118) "As demonstrated by [the] letter referenced in paragraph 118," the Complaint further alleges, "when deciding whether to renew a facility's license under the AWA the USDA does not consider any evidence that the facility is in violation of the statute or the agency's implementing standards." (Am. Compl. ¶ 123) By way of further example, the Complaint alleges:

> USDA APHIS Eastern Region Director Elizabeth Goldentyer also made clear in a declaration filed in litigation in the District Court of the Eastern District of North Carolina that when deciding whether to renew an AWA license the USDA does not consider evidence that a facility is violating the AWA standards, and that such evidence is completely irrelevant to such decisions. According to Dr. Goldentyer, "there is no demonstration of compliance required to renew an

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accordance with the same regulations at issue here, would involve the same types of documents that have been designated here as the administrative record of the May 2014 renewal decision.

> existing license," and public complaints "are not reviewed or considered during the license renewal process."

(Am. Compl. ¶ 124) Thus, the premise of Plaintiffs' legal theory is that the renewal decision was based only on administrative criteria, which Plaintiffs contend is error.

The Plaintiffs appear not to dispute, therefore, that USDA neither "directly" considered matters other than the three administrative requirements for renewal in making the May 2014 renewal decision, nor "indirectly considered" other information in making the renewal decision that it failed to include in the record that has been designated. *Am. Petroleum Tankers,* 952 F. Supp. 2d at 260 (the applicable record includes "all documents that the agency directly or indirectly considered . . . [and nothing] more nor less").

A plaintiff moving to compel supplementation of the record as to documents that it contends were "indirectly" considered must establish that "the documents 'were sufficiently integral to the final analysis that was considered by the [agency decisionmaker], and the [agency decisionmaker's] reliance thereon sufficiently heavy, so as to suggest that the decisionmaker constructively considered' these documents." *Id.* at 263. Plaintiffs "must offer 'reasonable, non-speculative' grounds for their belief" that the documents were indirectly considered by the agency decisionmaker. *Id.* at 262.

Plaintiffs have failed to meet this standard. Although they have alleged that the agency *possessed* other information regarding Cricket Hollow Zoo, Plaintiffs have not established that any other information was in any way "integral" to the renewal decision. To the contrary, the agency regulations on renewal provide that the USDA "will renew" an existing license after the applicant meets three administrative requirements for renewal. 9 C.F.R. § 2.2(b); *id.* § 2.5(b). Although Plaintiffs allege that those regulations conflict with the AWA, and that other information is

relevant to renewal under Plaintiffs' interpretation of the statute, that is a threshold legal question for the Court, not a basis to compel supplementation of the administration record at this juncture in the case.

The fact that renewal is mandatory under the regulations once the administrative requirements are satisfied distinguishes this case from *Swedish American Hospital v. Sebelius,* 691 F. Supp. 2d 80, 88 (D.D.C. 2010), cited in Plaintiffs' motion. As is relevant to Plaintiffs' argument, two issues were presented in that case: (1) whether an agency regulation that caps the amount of reimbursement to health care providers for certain expenses related to the training of hospital residents was a permissible construction of the applicable statute and (2) whether the agency's determination under that regulation to adjust downward a provider's resident cap level to omit consideration of residents trained by a predecessor hospital was arbitrary or capricious. *Id.* at 82-83, 87. The court compelled the production of the administrative record as to the latter issue because the regulation was subject to conflicting interpretations as to whether the downward adjustment was appropriate and the court could not evaluate whether the agency's decision was arbitrary or capricious without "assess[ing] whether the Secretary 'examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Id.* at 88.

Here, in contrast, the challenged regulation does not give the agency any alternative but to renew a license once the administrative requirements were satisfied. Thus, although Plaintiffs contend that they are challenging the agency's compliance with its regulation as arbitrary and capricious and an abuse of discretion (motion to compel at 10), that argument here boils down to a challenge to the regulation itself, not the agency's adherence to it. The regulation provides that

the agency "will renew" a license if the administrative requirements for renewal are met, 9 C.F.R. § 2.2(b); *id.* § 2.5(b), and an agency does not act arbitrarily and capriciously, or abuse its discretion, by making a decision mandated by its regulations. Plaintiffs' complaint, therefore, is a facial attack on the regulation, not an attack on the agency's decision-making process in applying the regulation, as was the case in *Swedish American.* This case, therefore, is governed by *American Bankers Association v. Nat'l Credit Union Administration,* 271 F.3d 262 (D.C. Cir. 2001), which held that a plaintiff's challenge to an agency regulation as violating the underlying statute "can be resolved with nothing more than the statute and its legislative history." *Id.* at 266-67.

Ultimately, Plaintiffs are conflating two distinct procedures under the agency's regulations: the administrative procedure for renewal (a purely administrative process) and the statute's discretionary enforcement procedures for a licensee's (or a non-licensee's) failure to comply with the AWA (which are subject to due process protections).[3] This case, however, does not seek to compel the agency to institute an enforcement action against Cricket Hollow. Nor would such a claim be viable under the APA. *See Norton v. South Utah Wilderness Alliance,* 542 U.S. 55, 61, 64 (2004) (section 706(1) permits a challenge to an agency's inaction "only where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required* to take") (emphasis in original).

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3 The second clause of 9 C.F.R. § 2.1(e) relates to the provision of the statute regarding "suspension or revocation" of an existing license, which requires notice and an opportunity for hearing. *See* 7 U.S.C. § 2149(a) ("If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator . . . , has violated or is violating any provision of this Act . . ., or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.").

Although Plaintiffs contend that allegations have been made against Cricket Hollow concerning its alleged lack of compliance (*e.g.,* Exhibits D-F of the motion to compel), such allegations are not a basis to deny renewal under the agency's regulations. As argued in Defendants' motion to dismiss (ECF No. 16, Mem. in Support, at 12), renewal is not an "issuance" of a license but merely a procedural mechanism allowing for an issued license to remain "valid and effective." *See* 9 C.F.R. § 2.5(a) (establishing, in relevant part, that issued licenses remain "valid and effective" as long as they are timely renewed). Under the agency's regulations, the presence of an investigation into allegations of non-compliance does not render a license invalid or ineffective. A license does not become invalid or ineffective until it has been suspended, revoked or terminated, *see* 9 C.F.R. § 2.5(a)(1), (3), which can occur only after notice and an opportunity for hearing (*supra* note 3). Allegations of non-compliance by themselves are insufficient.[4]

The decision relied on by Plaintiffs, *Ray v. Vilsack*, 2013 U.S. Dist. LEXIS 145384 (E.D.N.C Oct. 8, 2013), does not compel a different conclusion. The Court did not hold in that case that supplementation of the administrative record was necessary to determine the threshold legal question as to whether the agency's regulations regarding renewal were a permissible construction of the AWA, which was still before the Court. The court instead compelled the production of the administrative record based on a contingency – namely, the possibility that the court were to "find that the current renewal process is not consistent with the AWA," in which

4 According to Plaintiffs' own allegations, the information of alleged non-compliance that USDA received about Cricket Hollow has not been ignored. According to Plaintiffs' allegations (motion to compel at 8 and Am. Compl. ¶ 115), USDA has opened an investigation of Cricket Hollow. Before a license may be suspended or revoked, however, the licensee is entitled to certain due process protections, including notice and opportunity to be heard. *See* 7 U.S.C. § 2149(a). Such an enfocement proceeding is distinct from the purely administrative process provided for in the regulations for the renewal of an existing license.

case, it would "need to review everything that was 'before the secretary' not only the few documents the agency 'relied on' in making its decision." *Id.* at 3-4.

Defendants respectfully submit that the court in *Ray v. Vilsack* improperly skipped several steps in the APA judicial review process by ordering the agency to produce a record that was not part of the challenged decisionmaking process (whether directly or indirectly) under the applicable regulations. As discussed above, the first step in that process is to decide whether the agency complied with its regulations (an issue that is not disputed here) and, if so, whether those regulations constitute a permissible construction of the AWA. Because those regulations frame the agency decisionmaking process for renewal decisions, they necessarily establish what properly constitutes the administrative record for such a decision. Only if those regulations are invalidated would it be proper for the Court to take the next step – a step that most likely would require a remand to the agency (in which case, the resulting administrative record may be more expansive). But to do so now would be to put the cart before the horse. Defendants suggest that the more appropriate course would be first to resolve the threshold legal question, which is the approach followed in *Animal Legal Defense Fund v. USDA*, Memorandum Opinion (March 25, 2014), at 13, Case No. 13-20076 (S.D. Fla.), a decision attached to the pending motion to dismiss.

Finally, contrary to the suggestion by Plaintiffs, the Court's order of January 22, 2015, was not a determination of the scope of the administrative record (motion to compel at 2-3), but simply held that Local Rule 7(n) was triggered by Defendants' motion to dismiss. Moreover, Defendants' statement in its filing regarding the Local Rule 7(n) issue that "[i]f the Court disagrees with Defendants' position, then any such record would be potentially more expansive" (motion to compel at 3) pertained to the legal position in the motion to dismiss, not to Defendants' position on

the Local Rule 7(n) issue. Defendants argued that "[i]f this Court agrees with Defendants' position [in the motion to dismiss], then the case should be dismissed" without the need for an administrative record because the allegations in the Complaint establish that Cricket Hollow met the three administrative requirements for renewal set forth in the regulations. (ECF No. 22 at 4) Thus, Defendants argued that the motion to dismiss – which was limited to allegations in the Complaint – was not the type of "dispositive motion" contemplated by Local Rule 7(n).

The Court found that Local Rule 7(n) applied to the motion to dismiss and required Defendants to designate the applicable record as required by that rule. Pursuant to the Court's order, Defendants have now designated the applicable record, which consists of the documents submitted by Cricket Hollow to satisfy the administrative requirements for renewal and the agency's issuance of a renewed license based on the satisfaction of those administrative requirements – facts that already are alleged in the Complaint.

To the extent Plaintiffs' motion to compel makes arguments regarding Plaintiffs' interpretation of the AWA as regards the issue of renewal (motion to compel at 3-5), Defendants refer the Court to their pending motion to dismiss in response to those arguments.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel should be denied or, alternatively, held in abeyance pending resolution of the pending motion to dismiss.

Respectfully submitted,

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