IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Plaintiffs,

v.

GINA RAIMONDO, *et al.*,

Defendants, and

MAINE LOBSTERMEN'S ASSOCIATION, INC., *et al.*,

Defendant-Intervenors.

Civil Action No. 1:18-cv-0112-JEB

INTERVENOR DEFENDANTS' MAINE LOBSTERMEN'S ASSOCIATION AND MASSACHUSETTS LOBSTERMEN'S ASSOCIATION OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE

I. INTRODUCTION

The Court previously vacated and remanded "[t]he portion of the 2014 Biological Opinion on the American lobster fishery pertaining to the North Atlantic right whale" because the Federal Defendants (collectively "NMFS") did not include an incidental take statement ("ITS") as required by the Endangered Species Act ("ESA"). Dkt. 124 at 1. As the Court stated in its remedy order, "'the ESA and accompanying regulations plainly require an ITS,' yet NMFS did not provide one." Dkt. 125 (quoting Dkt. 91 at 15, 17). On remand, it is undisputed that NMFS has now provided the missing ITS in its new 2021 Biological Opinion ("2021 BiOp"). Dkt. 141-1 at 25-33.

Plaintiffs (collectively "CBD") contend that this new ITS is not "lawful." Dkt 142 at 1. However, CBD has not challenged the new ITS or the 2021 BiOp by filing a new complaint.

Whether the new ITS is "lawful" must be evaluated in a challenge filed under the Administrative Procedure Act ("APA") based on the entire administrative record, not excerpted documents and websites selected by CBD. Without an operative complaint or administrative record, CBD's motion to enforce improperly attempts an end-run around these basic requirements for review of agency action.

Moreover, "a motion to enforce a judgment gets a plaintiff only 'the relief to which [the plaintiff] is entitled under [its] original action and the judgment entered therein.'" *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005) (brackets in original; citation omitted). The prior judgment required NMFS to produce an ITS and ordered the 2014 Biological Opinion ("2014 BiOp") to be vacated as of May 31, 2021. NMFS has produced an ITS and the 2014 BiOp has been vacated. No further relief can be afforded by the prior judgment.

For these reasons, as explained further below, the Court should deny CBD's motion to enforce. If CBD believes the new ITS is not lawful, it must challenge that new agency action based on the supporting administrative record.

II. BACKGROUND

1. CBD's complaint in this case challenged the 2014 BiOp under the APA on the ground that it "does not include the required incidental take statement." Dkt. 1 at ¶ 6. CBD's complaint asked for "declaratory relief that NMFS is in violation of the ESA, MMPA, and APA" and for "an order requiring NMFS to complete new ESA consultation by a date certain." *Id.* at ¶ 9.

2. The Court agreed with CBD that an ITS is required: "The ESA and its regulations require an ITS when the taking of an endangered species is anticipated. Take was anticipated here, and NMFS did not produce an ITS. The 2014 BiOp therefore violates the ESA." Dkt. 91 at 15. The Court then ordered briefing on the appropriate remedy in light of this violation.

3. Following briefing on the remedy, the Court vacated the 2014 BiOp, but stayed the vacatur until May 31, 2021, and remanded the decision to NMFS. Dkt. 124.

4. On May 27, 2021, NMFS issued the 2021 BiOp. Dkt. 141-1 at 4. The 2021 BiOp includes an ITS for marine mammals, including the North Atlantic right whale. *Id*. at 25-33. The ITS estimates the "total take" of North Atlantic right whales, provides reinitiation triggers for the North Atlantic right whale, and provides reasonable and prudent measures to reduce take for the North Atlantic right whale. *Id*.

III. ARGUMENT

CBD's motion to enforce should be denied because the motion seeks relief beyond the Court's original ruling. There is no dispute that "[d]istrict courts have the authority to enforce the terms of their mandates," *Flaherty v. Pritzker*, 17 F. Supp. 3d 52, 55 (D.D.C. 2014), and that a court "should grant a motion to enforce if a 'prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it,'" *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) (quoting *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004)). On the other hand, "if a plaintiff 'has received all relief required by that prior judgment, the motion to enforce [should be] denied.'" *Id.* (quoting *Heartland Hosp.*, 328 F. Supp. 2d at 11) (brackets in original).

Here, CBD has received the relief required by the prior judgment. The Court found that NMFS's "failure to include an ITS in its 2014 BiOp" violated the ESA. Dkt. 91 at 19. The Court vacated the 2014 BiOp. Dkt. 124. On remand, NMFS produced the 2021 BiOp, which includes the ITS that was missing in the 2014 BiOp. CBD has received "all relief required by th[e] prior judgment." *Sierra Club,* 61 F. Supp. 3d at 39.

CBD does not dispute that NMFS produced an ITS but now seeks to challenge the substance of the ITS, claiming that the ITS is not "lawful." Courts have routinely rejected similar motions, explaining that the proper course for challenging the substance of a *new* agency action is to file a *new* complaint. For example, in *Flaherty*, the district court previously entered a summary judgment order requiring NMFS to take specific actions by a certain date. 17 F. Supp. 3d at 57. After NMFS completed those actions, the plaintiffs filed a motion to enforce the prior

judgment, arguing that "the agency has failed to remedy their substantive violations with the law." *Id*. The court denied the motion, explaining that plaintiffs' "argument fails to recognize the limits on this Court's authority as well as the respective roles of the executive and judicial branches of our government." *Id*. The court further explained that, when reviewing agency action, a district court sits in an appellate capacity, identifies errors, and remands to the agency—it does not dictate the substance of agency action on remand. *Id*. at 57–58. Instead, the proper recourse for the plaintiffs was to assert their new challenges as new claims in a new complaint. *Id.* at 59.

Numerous other courts have rejected similar motions. In *Heartland Regional Medical Center*, the D.C. Circuit affirmed the denial of a motion to enforce that challenged the substance of the remand decision, explaining that "whether or not the agency's post-*Heartland I* rejection of the alternatives was arbitrary is a determination that must be made in Heartland's separate APA action challenging HHS's post-remand decisions." 415 F.3d at 30. Similarly, in *Resolute Forest Products, Inc. v. U.S. Department of Agriculture*, the court rejected a motion to enforce following an agency remand because "[e]ven if Resolute could identify issues with the new *de minimis* threshold, the proper means of attacking any such infirmity would be via a new suit bringing a timely APA claim." 427 F. Supp. 3d 37, 43 (D.D.C. 2019). Likewise, in *Ferring Pharmaceuticals, Inc. v. Azar*, the court rejected post-remand enforcement challenges to a remand decision, explaining that "[i]f there is a post-remand arbitrary and capricious, or otherwise invalid, final agency action that Ferring wishes to challenge, it may do so, but not through a motion to enforce the Court's prior judgment." 296 F. Supp. 3d 166, 181 (D.D.C. 2018). Here too, the proper course is for CBD to file an APA action challenging the post-remand decision rather than through a motion to enforce a judgment that has already been satisfied.

Moreover, CBD's efforts to reinterpret the Court's prior orders as dictating the substance of the new ITS conflict with settled principles of judicial review of agency action. The "remanding court may not dictate to the agency the methods, procedures, or time dimension, for

its reconsideration" and may not "demand that an agency reach any particular result." *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 136 (D.D.C. 2018) (internal quotation marks and citation omitted); *see Nat'l Tank Truck Carriers, Inc. v. U.S. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990) ("We will not, indeed we cannot, dictate to the agency what course it must ultimately take."); *Heartland Hosp.*, 328 F. Supp. 2d at 14 (quoting 5 U.S.C. § 706(2)) (explaining that the APA "allows courts only to 'hold unlawful and set aside' illegal agency action."). NMFS responded to the Court's prior orders as directed, and although CBD may disagree with the substance of NMFS's decision, that is no basis for adjudicating its disagreement in the absence of formal claims.

Finally, CBD improperly asks the Court to review the substance of the new ITS without any administrative record. "[T]he APA requires review of 'the whole record'" that was before the agency when the agency's decision was made. *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (quoting 5 U.S.C. § 706). "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1945). Reviewing agency action "based only on 'litigation affidavits' rather than on any direct evidence before the agency" is improper. *Heckler*, 749 F.2d at 792–93 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971)).

The Court plainly does not have the whole record (or any record) of what was before the NMFS when it issued the 2021 BiOp (which includes the ITS) because CBD has yet to challenge the 2021 BiOp. Instead, CBD provides a declaration from its counsel that simply provides a partial copy of the 2021 BiOp along with citations to websites and to a December 2020 petition filed by CBD, which relies on "new," i.e., post-Remedy Order information, to support CBD's misleading factual assertions.[1] CBD's self-selected materials are not the "whole record" (and

[1] *See* CBD Motion, Dkt. 141 at 5 & n.3.

may not even be part of the record at all) and, in any event, provide no basis for the Court to issue a ruling on the merits of one aspect of the 2021 BiOp, as CBD requests.

IV. CONCLUSION

In sum, if CBD is "dissatisfied" with the outcome of this remand, it "always ha[s] the option to seek review on the ground that [NMFS's] actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Bennett v. Donovan*, 703 F.3d 582, 589 (D.C. Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)). CBD may not, however, short circuit that established process for judicial review of agency action and challenge the substance of the new 2021 BiOp on the basis of litigation affidavits or under the guise of a motion to enforce a judgment that has already been satisfied. For the foregoing reasons, CBD's motion to enforce should be denied.

DATED: July 9, 2021

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CERTIFICATE OF SERVICE

I, Crystal Smith, hereby certify that on July 9, 2021, I caused a true and correct copy of the foregoing Opposition to Plaintiffs' Motion to Enforce to be filed with the Clerk of the Court through the CM/ECF system which will send notification of such filing to all counsel of record.

Crystal Smith