UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, *et al.*, Plaintiffs, v. TOM VILSACK, Secretary of the U.S. Department of Agriculture, *et al.*, Federal Defendants.	Civ. No. 1:13-cv-00639-MCA-RHS

FEDERAL DEFENDANTS' REPLY IN REPONSE TO PLAINTIFFS' SEPTEMBER 24, 2013 "OPPOSITION TO DEFENDANT-INTERVENORS' JOINT MOTION TO COMPLY WITH THE COURT'S SCHEDULING ORDER" [ECF NO. 169]

I. INTRODUCTION

Plaintiffs' petition seeks judicial review based on an Administrative Record of the Food Safety and Inspection Service's ("FSIS") grants of inspection under the Federal Meat Inspection Act ("FMIA") to two commercial horse slaughter facilities, the Valley Meat facility and the Responsible Transportation facility.[1] On September 12, 2013, Plaintiffs and Plaintiff-Intervenor filed their opening briefs on the merits. ECF Nos. 152, 153. Without filing a motion to supplement the Administrative Record, Plaintiffs' and Plaintiff-Intervenor's briefs extensively rely on material that is not part of the Administrative Record. *See* Def.-Intervenors' Joint Mot.

[1] Plaintiffs have not yet formally moved the Court to amend their Complaint (which is more properly considered a Petition for Review, *see* Fed. Defs.' Resp. to Pls.' "First Am. Compl." ECF No. 139) to expand their NEPA challenges to FSIS's grant of inspection to the Rains Natural Meat facility in Missouri, although the Court has granted a temporary restraining order as to this facility. *See* ECF No. 168. Assuming Plaintiffs' challenges to Rains Natural Meats is properly before the Court, Federal Defendants have lodged the Administrative Record for Rains Natural Meats, which includes the existing Administrative Record (*see* ECF No. 136) as well as documents specific to Rains Natural Meats' application for a grant of inspection, lodged today.

to Comply with the Court's Scheduling Order, ECF No. 155 at 2-4. This despite the Plaintiffs properly insisting that the matter be resolved based on the Administrative Record. *See* ECF No. 133 at 2 ("Plaintiffs request that, consistent with *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994), the parties agree to *limit their briefing to the federal defendants' decision making as documented in the administrative record*.") (emphasis added). Defendant-Intervenors filed a motion to strike reference to the materials outside the Administrative Record. ECF No. 155. Federal Defendants did not oppose.

Because Plaintiffs' and Plaintiff-Intervenor's use of extra-record material in their briefs on the merits and about-face on *Olenhouse* is plainly improper, Federal Defendants file this reply brief in partial support of Defendant-Intervenors' motion to strike.

II. ARGUMENT

A. Judicial Review Is Limited To The Administrative Record

It is uncontroverted that this action seeks judicial review of agency actions pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Amended Order, ECF No. 125 at 2 ("Plaintiffs[] challenge agency action under the APA"). In the Tenth Circuit, these cases are "treated in the district court as an appeal." *Sierra Club v. United States Dep't of Energy*, 255 F. Supp. 2d 1177, 1181 (D. Colo. 2002) (citing *Olenhouse*, 42 F.3d at 1580). *See also* Order, ECF No. 137 at 2 (stating that, "[c]onsistent with *Olenhouse*," Plaintiffs' claims "will be processed as an appeal"). This standard requires agency action to "be reviewed on the basis articulated by the agency and on the evidence and proceedings before the agency at the time it acted." *American Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985); *accord Olenhouse*, 42 F.3d at 1579-80. "[T]he focal point . . . should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973)

(per curiam); s*ee also Olenhouse*, 42 F.3d at 1579 ("The . . . reliance on arguments, documents, and other evidence outside the administrative record is . . . [an] illicit procedure . . . to determine the issues for review."); *American Mining*, 772 F.2d at 626 (stating that "the agency's action must be reviewed on the basis articulated by the agency and on the evidence and proceedings before the agency at the time it acted [and a]ggressive use of extra-record materials also would run directly counter to the admonitions of the Supreme Court").

Consistent with the principles of record review, the administrative record lodged by the agency is entitled to a "presumption of regularity." *Citizens For Alternatives To Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1251-56 (D. Colo. 2010); *see also Wilderness Workshop v. Crockett*, No. 1:11–cv–1534–AP, 2012 WL 1834488, at *2 (D. Colo. May 21, 2012) ("Absent argument to the contrary, [the Court] assume[s] Defendants' designation of the record . . . is consistent with their established procedures and [the Court] presume[s] the record to be properly designated").

Before the Court may consider documents or materials not included in the administrative record, the petitioner bears the sizeable burden of presenting "clear evidence" that materials not included in the record were actually considered by the decision-maker, and thus should be included in the record via "completion," or that the materials fall within one of the narrow exceptions to record review, and thus should be included in the record via "supplementation." *Wildearth Guardians*, 713 F. Supp. 2d at 1253-54 (discussing distinction between completing the record and supplementing the record). A reviewing court should consider supplemental material only in "extremely limited circumstances." *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (internal marks and citation omitted).

While formulations of the exceptions to the administrative record review rule have varied, the Tenth Circuit recognizes that supplementation may be appropriate where the "agency ignored relevant factors it should have considered. . . ." *Lee*, 354 F.3d at 1242. The Tenth Circuit has also consistently recognized an exception for accepting further explanation *from the agency* when "the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials." *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1028 n.1 (10th Cir. 2001) (citing *Am. Mining Cong.*, 772 F.2d at 626); *City of Colo. Springs v. Solis*, 589 F.3d 1121, 1134-35 (10th Cir. 2009) (considering letter from decision-maker post-dating decision).

Placing before the Court documents not determined to be part of the administrative record through the process of completion or supplementation impermissibly invites the court to conduct its review on "a new record made initially in the reviewing court." *Wildearth Guardians*, 713 F. Supp. 2d at 1252 (quoting *Camp*, 411 U.S. at 142).

B. Plaintiffs Failed To File A Motion To Supplement The Administrative Record

Defendant-Intervenors' motion to strike the extensive references to extra-record evidence in Plaintiffs' and Plaintiff-Intervenor's briefs on the merits should be granted in the first instance because Plaintiffs failed to file a motion to supplement the Administrative Record. Plaintiffs thus have failed to carry their burden of overcoming the presumption of regularity to which the Administrative Record is entitled.

It is well-established that when a party believes the administrative record lodged by the agency is incomplete, it must affirmatively move to supplement the record if it wants the court to consider extra-record material. *See e.g. Portland Audubon Soc'y. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). This process insures that judicial review is properly limited

to the administrative record until the party has provided "clear evidence" sufficient to overcome the presumption of a properly designed record." *Wildearth Guardians*, 713 F. Supp. 2d at 1253. Allowing Plaintiffs to effectively supplement the Administrative Record by unilaterally referencing extra-record materials in their merits briefs subverts this process and invites judicial review beyond the Administrative Record. Courts therefore routinely reject attempts by parties to unilaterally submit materials with their briefing papers in an administrative record review case without prior leave from the court. *See Cabinet Resource Group v. U.S. Forest Serv.*, No. CV 00-225-M-DWM, 2004 WL 966086, at *11 (D. Mont. Mar. 30, 2004).

Plaintiffs suggest that their failure to file a motion to supplement should be excused because the extra-record materials they cite are "already in the record before the Court," Pls.' Opp'n, ECF No. 169 at 3, and "have already been considered by the Court," *id.* at 5. This argument, however, conflates the judicial record with the administrative record, and ignores the posture of the prior proceeding in this matter. This Court previously heard and resolved Plaintiffs' emergency motions for injunctive relief. ECF No. 125. In that proceeding, the Court was properly entitled to consider extra-record evidence of irreparable injury. *See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001); *Ctr. for Biological Diversity v. Wagner*, CIV 08-302-CL, 2009 WL 2176049 (D. Or. June 29, 2009) *report and recommendation adopted*, CIV. 08-302-CL, 2009 WL 2208023 (D. Or. July 22, 2009 ("Extra-record evidence may also be considered in relation to a request for injunctive relief."). Contrary to Plaintiffs' mischaracterization, this Court considered Plaintiffs' extra-record materials only in determining whether Plaintiffs had established irreparable injury. *See* ECF No. 125 at 5-6. The Court made no mention of Plaintiffs' extra-record material is assessing the likelihood of success on the merits. *Id.* at 2-5.

At this juncture, where the Court is conducting review on the merits, the Court is constrained -- absent proof that an exception applies -- to the Administrative Record on which FSIS based its decision. *Olenhouse*, 42 F.3d at 1579-80. And, Plaintiffs are obligated -- prior submission of the materials notwithstanding -- to prove by affirmative motion that the proffered materials should be supplemented to the Administrative Record. Because Plaintiffs have failed to file a proper motion to supplement, Defendant-Intervenors' motion to strike is well-founded and should be granted.

C. Plaintiffs Have Not Met Their Burden Of Demonstrating That Supplementation Of The Administrative Record Is Warranted

Although they failed to file a motion to supplement, Plaintiffs assert for the first time in their opposition to Defendant-Intervenors' motion to strike that the extra-record materials they have cited are admissible under the exception to the administrative record review rule for relevant materials that the agency should have but failed to consider. Pls.' Opp'n, ECF No. 169 at 3. Even if the Court excuses Plaintiffs' failure to file a motion to supplement, Plaintiffs' argument that the extra-record materials are properly part of the record fails. First, Plaintiffs have failed to show that the materials are relevant to the Court's review of challenged agency actions. Second, to the extent the materials are relevant, supplementation is not appropriate because materials relating to the same issues as the proffered information is already in the Administrative Record.

The Tenth Circuit recognizes that "[a] reviewing court may go outside of the administrative record only for limited purposes," including to "determin[e] whether the agency considered all relevant factors," *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10th Cir. 1991). But Plaintiffs fail to acknowledge that, before supplementation can be considered, Plaintiffs must adduce by "clear evidence" that the record lodged by the agency is

inadequate, and must demonstrate that the evidence they seek to have the Court consider is relevant to the agency action they challenge.[2] This they cannot do.[3]

First, Plaintiffs fail to carry their burden of demonstrating that the extra-record materials submitted with their merits brief are relevant to the Court's review of FSIS's grants of inspection to the Valley Meat and Responsible Transportation facilities. Plaintiffs' proffered extra-record material generally testifies to water quality violations and other alleged environmental impacts associated with other commercial horse slaughter operations run by different proprietors in the past. Pls.' Opp'n, ECF No. 169 at 6, n.3. The evidence before the Court, however, makes clear that this information is not relevant to the potential environmental impacts of the currently

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[2] Indeed, Plaintiffs appear to assume that their extra-record materials are appropriately before the Court unless Defendants can proffer a basis for their exclusion. *See* Pls.' Opp'n, ECF No. 169 at 5 ("Defendants Have No Basis to Exclude . . .").

[3] Plaintiffs attempt to turn *Olenhouse* on its head, asserting that "*Olenhouse* does not similarly prohibit plaintiffs from relying on extra-record evidence." Pls.' Opp'n, ECF No. 169 at 4 (citing 42 F.3d 1575). *Olenhouse* embodies the procedures for courts to ensure that courts limit their review of agency actions to the administrative record, and in no way excuses Plaintiffs from overcoming the presumption that the Administrative Record here is properly designated, as the Tenth Circuit has reiterated. *See, e.g.*, *Kane County Utah v. Salazar*; 562 F.3d 1077, 1086 (10th Cir. 2009) ("*Olenhouse* prohibited . . . a district court's 'reliance on arguments, documents and other evidence outside the administrative record'") (quoting *Olenhouse*, 42 F.3d at 1579); *S. Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 744 (10th Cir. 2005) ("Accordingly, the court limited its review to the administrative record and applied the arbitrary and capricious standard of review under the [APA], as construed by this Court in *Olenhouse*.") (citing with approval *S. Utah Wilderness Alliance v. Bureau of Land Management*; 147 F. Supp. 2d 1130, 1134-36 (D. Utah 2001)). In the district court decision that the Tenth Circuit cited with approval in *Southern Utah*, the court rejected the plaintiffs' position "that they are entitled to a trial *de novo*," noting that *Olenhouse* "made clear that this is not how review of agency action under the APA works" and that "[t]he court's review must be framed by the record that was before the administrative agency, not by evidence or arguments adduced by the litigants after the fact." *Id.* at 1136 (citations omitted). *See also New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 2004 WL 3426421, *6 (D.N.M. Aug. 31, 2004) ("The record that was before the administrative agency, not evidence or arguments that the litigants adduce after the fact, must frame the court's review.") (citing *Olenhouse*, 42 F.3d at 1576); *Lee e*, 220 F. Supp. 2d at 1239 (in NEPA challenge, stating that "[t]his Court has entered an order striking [the plaintiffs'] declaration based on the fact that it is not part of the administrative record and, as a consequence, it is beyond the purview of this *Olenhouse* appeal"), *aff'd Lee*, 354 F.3d at 1242.

proposed operations of the challenged Valley Meat and Responsible Transportation facilities. Before the Court is the declaration of Dr. Daniel Engeljohn, Assistant Administrator for the Office of Field Operations for the FSIS, who explains that the horse slaughter operations at the Dallas-Crown facility in Kaufman, Texas, the BelTex facility in Ft. Worth, Texas, and the Cavel facility in Dekalb, Illinois, upon which Plaintiffs' extra-record material focus, are not comparable to the Valley Meat or Responsible Transportation facilities at issue here. *See* ECF No. 66-1 ¶ 20 (advising that "the situations regarding discharge at Dallas-Crown, BelTex, and Cavel are very different from those at Valley Meat and Responsible Transportation and any attempt to predict what might occur at the latter two plants based on the experiences of the former three is highly speculative."). Dr. Engeljohn explains that the Dallas-Crown, BelTex, and Cavel facilities all discharged waste water in municipal waste systems, while the Valley Meat and Responsible Transportation facilities discharge into their own septic tanks and lagoon systems to treat waste water on-site. *Id.* ¶¶ 20, 23. Moreover, bio-material from slaughter operations is not discharged into the waste-water system; rather, those materials will be denatured to prevent possible human use and placed in specially-marked containers identified for inedible products and sent to an off-site rendering facility for appropriate destruction. *Id.* ¶ 23. Plaintiffs' experiences with, and evidence of, the operations at the Dallas-Crown, BelTex, and Cavel facilities are thus not relevant to FSIS's determination that the grants of inspection for Valley Meat and Responsible Transportation would have no significant impacts on the environment. Because the proffered extra-record material is not relevant to the agency action under review, it is not appropriate for supplementation of the Administrative Record.

Supplementation of the Administrative Record with Plaintiffs' proffered evidence concerning the operation of other horse slaughter facilities in the past is also inappropriate

because information on the past operations is already in the Administrative Record. Plaintiffs previously submitted to FSIS, and FSIS included in the Administrative Record, substantially the same information regarding the past operations of other horse slaughter facilities that Plaintiffs are now attempting to add to the Record through references in their merits brief. *See* AR0000390-94 (describing impacts of Beltex, Dallas-Crown, and Cavel facilities); AR0000429-31 (reporting Plaintiffs' experiences with Dallas-Crown facility in Kaufman, Texas); AR0000410-22 (describing impacts and operations at Dallas-Crown facility); AR0000433-37(magazine article describing operation of Dallas-Crown facility in Kaufman, Texas). [4] Supplementation of the Administrative Record with information already in the record is plainly inappropriate. In *Southwest Center for Biological Diversity v. U.S. Forest Service*, for example, plaintiffs submitted with their merits briefing maps and declarations concerning the habitat type in the challenged project area and proximity of the challenged timber sale to the territory of the Mexican Spotted Owl. 100 F.3d 1443, 1451 (9th Cir. 1996). The Court found that, because the information in the documents could "be extracted from" the materials already in the administrative record, supplementation was inappropriate. *Id.* The Court emphasized that "[a]lthough the documents [plaintiff] seeks to include 'might have supplied a fuller record,' they do not 'address issues not already there.'" *Id.* (quoting *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986)).

In sum, Plaintiffs do not meet their burden for supplementation with the extra-record materials regarding environmental violations at other facilities because that information is irrelevant to claims related to consideration of the Valley Meat and Responsibility Transportation

[4] Plaintiffs clearly demonstrated an ability to provide the Agency with information they deemed relevant to consideration of the applications for grants of inspection. Had they wished to have the decision-makers, and ultimately this court, consider further information they could have included it with their earlier submittals.

facilities. Nor do they meet their burden for supplementation to include additional information on past operations of other horse slaughter facilities when there already is such information in the Record. Thus, Defendant-Intervenors' motion should be granted as to Plaintiffs' impermissible reliance on these materials.

D. Dr. Engeljohn's Declaration Is Properly Before The Court

In their opposition to the Defendant-Intervenors' motion to strike, Plaintiffs suggest that the Defendant-Intervenors have moved to strike the Declaration of FSIS Assistant Administrator Dr. Engeljohn, which was submitted to the Court in support of Defendants' Opposition to Plaintiffs Motion for Preliminary Injunction. ECF No. 66-1. While Federal Defendants do not understand Defendant-Intervenors' motion to have been directed at the Declaration of Dr. Engeljohn, that declaration is properly before the Court, to the extent that the Court requires an explanation of FSIS's decision-making process.

For more than forty years, the Supreme Court has held that courts may obtain additional explanation *from the agency* (not plaintiffs) when the administrative record does not sufficiently explain the decision-making process. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (holding that a district court may require some explanation from administrative officials in order to determine if an agency's action was justifiable under the applicable standard); *Camp*, 411 U.S. at 143 (in attempting to discern the rationale of an agency that fails to explain fully an administrative act such that judicial review is frustrated, the Court may rely on affidavits from agency decisionmakers). The Tenth Circuit has upheld application of this exception. *Lewis v. Babbitt*, 998 F.2d 880, 882 (10th Cir. 1993) (district court properly "relied on the agency's affidavits by using them to explain the administrative record rather than as a substitute for it."). Indeed, contrary to Plaintiffs' attempt to twist *Olenhouse*, the *Olenhouse*

Court itself endorsed the procedure of allowing the federal agency to supplement the administrative record: "If the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decisionmaking, the reviewing court may supplement the record or remand the case to the agency for further proceedings." 42 F.3d at 1575 (citing, inter alia, *Camp v. Pitts*, 411 U.S. at 143).

This well-established exception to the Administrative Record rule allowing the agency to explain its rationale applies to Dr. Engeljohn's Declaration, if the Court determines that the Administrative Record is unclear and needs such further explanation. Although Federal Defendants do not believe that NEPA applies to FSIS's decisions to grant inspections under the FMIA, FSIS determined that, to the extent NEPA is applicable, its grants of inspection for Valley Meat and Responsible Transportation would fall under a NEPA "categorical exclusion" or "CE." AR0002466. A CE is a pre-defined "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in [NEPA] procedures adopted by a Federal agency. . . ." 40 C.F.R. § 1508.4.[5] For a specific project, an agency determines if it fits within the parameters of the actions covered by the CE. In utilizing a CE, an agency's obligations to document its decisions are necessarily minimal. *See, e.g.*, *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) ("In many instances, a brief statement that a categorical exclusion is being invoked will suffice."); 40 C.F.R. § 1500.4(p) ("Agencies shall reduce excessive paperwork by . . . [u]sing categorical exclusions"). Under these circumstances it is appropriate for the Court to accept the

[5] Contrary to Plaintiffs' characterizations, a categorical exclusion is an important element of the NEPA framework rather than an exception to NEPA review. *See, e.g.,* 40 C.F.R. § 1507.3(b)(2)(ii).

declaration of the agency decisionmaker, Dr. Engeljohn, to more fully explain the decision. *See, e.g., Bullwinkel v. Dept. of Energy*, 899 F. Supp. 2d 712, 727 (W. D. Tenn. 2012) (considering declaration explaining agency's consideration of categorical exclusion); *Berryessa for All v. U.S. Bureau of Reclamation*, No. C 07-0259 SI, 2008 WL 2725814, at *7 (N.D. Cal. July 10, 2008) (same).

III. CONCLUSION

For the reasons set forth herein, Defendant-Intervenors' motion to strike Plaintiffs' and Plaintiff-Intervenor's extensive references to extra-record material in their briefs on the merits should be granted. To the extent that Defendant-Intervenors' motion to strike includes the Declaration of Daniel Engeljohn, it should be denied.

Respectfully submitted this 24th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2013, I filed through the United States District Court ECF System the foregoing document to be served by CM/ECF electronic filing on all counsel of record.

/s/Alison D. Garner
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U.S. Department of Justice