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 and VALLEY MEAT COMPANY, *et al.*, Intervenor-Defendants.	Civ. No. 1:13-cv-00639-MCA-RHS

FEDERAL DEFENDANTS' MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD WITH THE DECLARATION OF DR. DANIEL L. ENGELJOHN, Ph.D.[1]

INTRODUCTION

Federal Defendants hereby move to supplement the Administrative Record with the Declaration of Dr. Daniel L. Engeljohn, Ph.D., ECF No. 66-1. Dr. Engeljohn's Declaration falls under the well-established exception to administrative record review, allowing the Agency to submit additional explanatory information regarding its decisions to grant federal inspections for horse slaughter. The Engeljohn Declaration also falls under the exception allowing the agency to explain technical terms or complex subject matter. The Court should allow supplementation of the Administrative Record with the Engeljohn Declaration.

[1] Pursuant to Local Rule 7.1(a), Federal Defendants conferred by email with counsel for the parties on September 27, 2013 to obtain their position on this motion. Defendant-Intervenors Responsible Transportation, Valley Meat, Rains Natural Meats and Chevaline concur. Federal Defendants did not receive a response from the remaining Defendant-Intervenors, Plaintiffs or Plaintiff-Intervenor.

ARGUMENT

A. Judicial Review Is Generally Limited to the Administrative Record

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 v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994)). *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, a party must demonstrate 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 has 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).

The Tenth Circuit has also consistently recognized an exception allowing for supplementation in "complex" cases to explain technical information. *Am. Minning Cong.*, 772 F.2d at 626; *Custer Cnty. Action Ass'n*, 256 F.3d at 1028 n.1. This exception is designed for the agency to add explanation for its decision. *See Sierra Club-Black Hills Group v. U.S. Forest*

Serv., 259 F.3d 1281, 1289 (10th Cir. 2001) (allowing agency to add explanation). *See also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (an agency should take "whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.").

B. The Engeljohn Declaration Is Properly Before the Court

The Supreme Court has consistently held that courts may obtain additional explanation *from the agency* 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, 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).

Courts in the Tenth Circuit have also recognized an exception to record review that allows the agency to explain technical information or complex matters. *Am. Minning Cong.*, 772 F.2d at 626; *Custer Cnty. Action Ass'n*, 256 F.3d at 1028 n.1.

These well-established exceptions to the Administrative Record apply 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, Responsible Transportation, and Rains Natural Meats would fall under a NEPA "categorical exclusion" or "CE." AR0002466-76; AR0003281-89; AR0004868-78. 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. 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"). Dr. Engeljohn's declaration more fully explains how the Agency arrived at the conclusions in the CE decisions that the National Residue Plan will protect public health and safety, and that no extraordinary circumstances are present requiring preparation of a more detailed environmental analysis.

The Engeljohn Declaration also more fully explains the National Residue Plan for testing drug residues in animal carcasses, and explains how testing differs between equines and other

amenable species. Decl. ¶¶ 9-18. The Declaration also details the complex process for development of the National Residue Plan, which involved experts from numerous federal agencies. Decl. ¶ 12. These explanations of the National Residue Plan help explain the Agency's determination that the grants of inspection fall within the NEPA CE invoked by the Agency.

Under these circumstances it is appropriate for the Court to accept the declaration of the agency decisionmaker, Dr. Engeljohn, to more fully explain the decisions and to further explain complex matters and technical information. *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).

CONCLUSION

For the foregoing reasons, the Court should grant Federal Defendants' motion to supplement the administrative record with the Engeljohn Declaration.

Respectfully submitted this 27th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 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
ALISON D. GARNER
U.S. Department of Justice