UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, THE HUMANE SOCIETY OF THE UNITED STATES, MARIN HUMANE SOCIETY, HORSES FOR LIFE FOUNDATION, RETURN TO FREEDOM, FOUNDATION TO PROTECT NEW MEXICO WILDLIFE, RAMONA CORDOVA, KRYSTLE SMITH, CASSIE GROSS, DEBORAH TRAHAN, BARBARA SINK, SANDY SCHAEFER, TANYA LITTLEWOLF, CHIEF DAVID BALD EAGLE, CHIEF ARVOL LOOKING HORSE and ROXANNE TALLTREE-DOUGLAS,

Plaintiffs,

v.

TOM VILSACK, Secretary U.S. Department of Agriculture; ELIZABETH A. HAGEN, Under Secretary for Food Safety, U.S. Department of Agriculture; and ALFRED A. ALMANZA, Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture,

Defendants.

Civil No. 1:13-CV-00639-MCA-RHS

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

I. INTRODUCTION

Plaintiffs do not oppose the Federal Defendants' motion to supplement the Administrative Record in this case as to paragraphs 1-19 of the declaration of Dr. Daniel L. Engeljohn, Ph.D., ECF No. 66-1 (the "Engeljohn Declaration"), since those paragraphs explain

technical topics relevant to the Agency's decisions at issue in this case. *Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1137-38 (10th Cir. 1991) ("A reviewing court may go outside of the administrative record . . . where necessary to explain technical terms or complex subject matter involved in the action.") (citing *Animal Defense Council v. Hodel*, 867 F.2d 1244, 1244 (9th Cir.1989)).[1] But Plaintiffs do oppose the addition of Paragraphs 20 through 26 of the Engeljohn Declaration because these sections are not an attempt to explain the Administrative Record or the decisions under review, but rather are a direct attempt to refute Plaintiffs' arguments in their motion for a preliminary injunction. Any doubt in this regard is resolved by a passing glance at the paragraphs themselves, each of which either directly cites Plaintiffs' briefs in the case or attempts to refute arguments raised in Plaintiffs' briefs.

Clear principles of administrative law bar the inclusion in the Administrative Record of arguments created *after* Federal Defendants' challenged decisions and actions have occurred and *after* litigation has commenced, and which are nothing more than responsive arguments to the claims raised by the Plaintiffs. Paragraphs 20-26 of the Engeljohn Declaration are not a proper or permissible supplement because those paragraphs represent USDA's obvious attempt to plug up deficiencies in the Administrative Record, because supplementation is not necessary for the Court to reach its decision, and because no exception exists to allow supplementation. For these reasons, the Court should not permit Federal Defendants to supplement the Administrative Record with those portions of the Engeljohn Declaration.

[1] *See* Engeljohn Declaration at ¶¶ 1-4 (stating Engeljohn's background and job responsibilities), ¶¶ 5-6 (discussing some statutory and regulatory provisions related to horse slaughter), ¶ 7 (stating the number of applications for horse slaughter inspections received by USDA and the identity of the applicants), and ¶¶ 8-19 (describing horse slaughter process and residue testing).

II. ARGUMENT

When reviewing agency action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2), the Court is generally limited to the "administrative record that was before the agency at the time of its decision" and "may not rely on litigation affidavits that provide *post hoc* rationalizations for the agency's action." *Lewis v. Babbitt*, 998 F.2d 880, 882 (10th Cir. 1993); *see also Wilderness Workshop v. Crockett*, No. 1:11-CV-1534-AP, 2012 WL 1834488, at *6 (D. Colo. May 21, 2012) ("[C]ourts have consistently recognized the impermissibility of post hoc rationalizations.").[2]

Consistent with one of the core purposes of NEPA, limiting judicial review to the Administrative Record ensures that "[Federal Defendants] adequately evaluate[d] their proposed course of action *before* they act[ed] and do not simply attempt to justify rash, uninformed actions through '*post hoc*' rationalizations once they are aware they are being sued." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 958 (7th Cir.2003) (citation omitted). Therefore, a party moving to supplement the record must prove that the proffered extra-record materials fit within one of the narrow exceptions to record review, and in general, supplementation should only be permitted in "'extremely limited circumstances.'" Federal Ds.' Mot. to Supplement Admin. R.

[2] While there are recognized exceptions by which parties may supplement the record, none of those exceptions apply to Paragraphs 20-26 of the Engeljohn Declaration. As explained more fully in Plaintiffs' Opposition to Defendant-Intervenors' Joint Motion to Comply with the Court's Scheduling Order, Sept. 23, 2013, ECF No. 169, at 3-8, one recognized exception permits the Court to consider Plaintiffs' extra-record materials consisting of evidence of past environmental harms caused by domestic horse slaughter operations that Federal Defendants should have considered, but ignored, prior to taking the challenged actions. *See Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1280 (D. Colo. 2010) ("By its very nature, evidence which the agency fails to consider is frequently not in the record. Accordingly, in order to allow for meaningful, in-depth, probing review, such extra-record evidence is often properly included in the Administrative Record.").

with Decl. of Dr. Daniel L. Engeljohn, Ph.D., Sept. 27, 2013, ECF No. 184 ("Motion to Supplement") at 3 (quoting *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004)).

The Tenth Circuit's long-established test for considering explanatory agency affidavits is set out in *Lewis*, which provides that a district court may properly rely on an agency's affidavits "to explain the administrative record rather than as a substitute for it." 998 F.2d at 882. *See also Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985) (extra-record materials explaining reasons for an agency's decision may be admissible where "the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials"); *Crockett*, 2012 WL 1834488, at *6 ("As a threshold matter, courts only consider supplementation of an administrative record when the proffered materials are necessary to explain the agency's action"; denying motion to supplement where there was no proof that documents were needed for meaningful review of agency actions); *see also* Motion to Supplement at 5 (conceding that the Engeljohn Declaration may supplement the Administrative Record only "*if* the Court determines that the Administrative Record is unclear and needs such further explanation." (emphasis added)).

Here, Paragraphs 20-26 of the Engeljohn Declaration do not offer any explanation. Instead, they offer argument and attempt to fill in gaps in the Agency's decisionmaking process. These paragraphs clearly do not address the Agency's decisionmaking process at the time of its actions, nor do they explain technical subject matter. They merely characterize and dismiss arguments made by Plaintiffs in the course of litigation. In fact, the Engeljohn Declaration repeatedly cites Plaintiffs' case filings. Engeljohn Declaration, ¶¶ 20, 22, 24.

Refuting arguments in Plaintiffs' litigation briefs is not an explanation of the Agency's prior decisions or an explanation of an unclear administrative record. *See Sierra Club v.*

Bosworth, 199 F. Supp. 2d 971, 986 n.11 (N.D. Cal. 2002) (granting plaintiffs' motion to strike paragraphs of agency employee's declaration as *post hoc* rationalizations and arguments supporting the challenged agency action) (citing *Alvarado Community Hospital v. Shalala*, 155 F.3d 1115, 1124 (9th Cir.1998) ("[E]xplanatory materials cannot be used to offer new rationalizations for agency action.")). Here, just as in *Sierra Club*, Federal Defendants cannot now offer statistics and "expert opinion" to refute Plaintiffs' evidence of environmental harm when the Administrative Record shows no contemporaneous consideration of that evidence. *See, e.g.*, Engeljohn Declaration at ¶ 25.

Further, while Paragraphs 20-26 briefly allude to the decision memoranda for Valley Meat ("VM") and Responsible Transportation ("RT"), they are primarily devoted to disputing Plaintiffs' evidence. These paragraphs cite no other Administrative Record materials, not even the Directive controlling horse slaughter inspections. Thus, the Engeljohn Declaration is certainly not an explanatory declaration, but rather demonstrates the Federal Defendants' latest arguments against Plaintiffs' NEPA challenges. But "[p]ost-decisional information cannot be used to determine the correctness of the agency's decision." *Klamath Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, CIV.03-3006-CO, 2004 WL 1289704, at *3 (D. Or. Jan. 12, 2004) *report and recommendation adopted in part*, 03-3006-CO, 2004 WL 1289536 (D. Or. June 9, 2004) (granting plaintiffs' motion to strike extra-record declarations that "[could not] be considered background information" where "[m]uch of the testimony consist[ed] of post-decisional information" that the defendant agency sought to use to support the "correctness" of its decision, and the declarations were not "explanations of the record, the terminology in the record, or the complexities of the issues") (citation omitted).

Nor is this an instance where the Agency's declaration "simply recounts the analysis conducted and data considered *during the decision making process*." *Cross Mountain Ranch Ltd. P'ship v. Vilsack*, No. 09-CV-01902-PAB, 2011 WL 843905, at *2 (D. Colo. Mar. 7, 2011) (emphasis added) (finding agency declaration that merely "describe[d] an analysis actually conducted and which was directly considered by the relevant decision makers" at the time of the agency's decision was not a *post hoc* rationalization). Paragraphs 20-26 of the Engeljohn Declaration attempt to cast doubt on Plaintiffs' proof of harms caused by the prior horse slaughter plants, and speculate about the likelihood of such environmental harms occurring at VM or RT. As such, they should not be included in the Administrative Record.

Moreover, courts regularly reject record supplements where the existing record is already sufficient for judicial review. *See City of Colorado Springs v. Solis*, 589 F.3d 1121, 1134 (10th Cir. 2009). In *Solis*, where the defendant-agency issued a letter decision denying the city's objections to a labor agreement, the court stated that the agency's letter "admittedly was terse, but it was sufficient for review," and the court clarified that it would only seek additional explanation for the agency's decision "to the extent this court were to conclude that the [ ] letter and the administrative record lacked sufficient information to permit judicial review." *Id*. at 1134-35. *See also Piedmont Envtl. Council v. U.S. Dep't of Transp.*, 159 F. Supp. 2d 260, 273-74 (W.D. Va. 2001) *aff'd in part, remanded in part*, 58 F. App'x 20 (4th Cir. 2003) (granting plaintiffs' motion to strike affidavit of agency's senior environmental specialist that essentially guided the court through the administrative record "because the defendants' briefs in this case are more than adequate to assist the Court in navigating the administrative record").

There is no need for additional explanation or information here. The Administrative Record in this action, combined with permissible extra-record evidence submitted by Plaintiffs,

allow this Court to reach a decision with respect to the issues presented. The fact that Federal Defendants now hasten to offer explanations for their challenged actions does not reflect the Court's *need* for such explanations. *See Crockett*, 2012 WL 1834488, at *6 ("[T]hat extra-record materials offer an explanation for Defendants' actions does not mean that they are necessary to explain Defendants' actions").

III. CONCLUSION

For the foregoing reasons, Federal Defendants have failed to show that Paragraphs 20-26 of the Engeljohn Declaration constitute a valid supplement to the Administrative Record, and thus their Motion to Supplement should be denied with respect to those portions of the Engeljohn Declaration.

Respectfully submitted this 7th day of October 2013.

/s/ Bruce A. Wagman

BRUCE A. WAGMAN (Admitted *Pro Hac Vice*)
ROCKY N. UNRUH (NM Bar #3626)
SCHIFF HARDIN LLP
One Market, Spear Tower, 32nd Fl.
San Francisco, CA 94105
Telephone: (415) 901-8700
Facsimile: (415) 901-8701
bwagman@schiffhardin.com
runruh@schiffhardin.com

Attorneys for Plaintiffs

BRIAN EGOLF
EGOLF + FERLIC + DAY, LLC
128 Grant Avenue
Santa Fe, NM 87501
Telephone: (505) 986-9641
brian@egolflaw.com

Attorneys for Foundation to Protect New Mexico Wildlife

CERTIFICATE OF SERVICE

I certify that on October 7, 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/ Bruce A. Wagman
BRUCE A. WAGMAN (Admitted *Pro Hac Vice*)
SCHIFF HARDIN LLP