

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’ REPLY IN SUPPORT OF MOTION TO SUPPLEMENT
THE ADMINISTRATIVE RECORD WITH THE DECLARATION OF DR. DANIEL L.
ENGELJOHN, Ph.D.**

Federal Defendants submit this Reply in Support of their Motion to Supplement the Administrative Record with the Declaration of Dr. Daniel L. Engeljohn, Ph.D., ECF No. 66-1. Plaintiffs oppose the motion, arguing that Paragraphs 20-26 of the Engeljohn Declaration¹ are an “attempt to refute Plaintiffs’ arguments” and do not fall under an exception to allow supplementation. Pls.’ Opp’n to Fed. Defs.’ Mtn. to Supplement the Administrative Record (“Pls.’ Opp’n”) at 2, ECF No. 190. To the contrary, Paragraphs 20-26 fall within two exceptions consistently recognized by the Tenth Circuit, allowing 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

¹ Plaintiffs do not oppose Federal Defendants’ motion to supplement the record with Paragraphs 1-19 of the Engeljohn Declaration. *See* Pls.’ Opp’n at 1.

(10th Cir. 2001), or allowing the agency to explain technical information in “complex” cases. *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985).

As explained below, each of the challenged paragraphs of the Engeljohn Declaration offers further explanation of information already contained within the Administrative Record,² or helps explain complex technical matters highly relevant to the Food Safety Inspection Service’s (“FSIS” or “Agency”) challenged decisions.

Paragraphs 20 and 21 are appropriate for supplementation because they respond to extra-record material Plaintiffs introduced by declaration, Exhibits 2-9 to Decl. of Bruce Wagman, ECF No. 13, regarding alleged environmental harms from three now-closed horse slaughter facilities (the BelTex, Dallas Crown and Cavel facilities). Information about alleged environmental effects from those facilities is irrelevant here and FSIS opposes Plaintiffs’ reliance on these extra-record declarations.³ However, in the event that the Court allows Plaintiffs’ declarations, in paragraph 20 and 21 of Dr. Engeljohn’s Declaration, he explains the differences between the wastewater disposal methods used at the three now-closed facilities and the facilities at issue in this case. ECF No. 66-1 ¶ 20 (explaining that BelTex, Dallas Crown and Cavel “discharged their wastewater into their respective municipal waste water systems . . . whereas . . . Valley Meat and Responsible Transportation [will] discharge into septic tanks and lagoon systems”). To the extent the Court considers the information in Plaintiffs’ declarations, the

² To the extent Plaintiffs argue that Paragraphs 20-26 do not cite Administrative Record materials, Pls.’ Br. at 5, the Administrative Record had not yet been lodged at the time Dr. Engeljohn’s Declaration was signed and filed. *Compare* ECF No. 66-1 (dated July 19, 2013) with ECF No. 136, Notice of Lodging of Administrative Record (dated August 29, 2013).

³ Federal Defendants’ opposition to Plaintiffs’ reliance on these and other extra-record declarations is more fully explained in the Reply in Support of Defendant-Intervenors’ Motion to Strike Plaintiffs’ Extra-Record Declarations, ECF No. 175.

Court should also consider Dr. Engeljohn's explanation in Paragraphs 20 and 21 of his declaration.

Paragraph 22 is appropriate supplemental material because it explains the complex horse slaughter process, *Sierra Club-Black Hills Group v. U.S. Forest Serv.*, 259 F.3d 1281, 1289 (10th Cir. 2001), and provides additional information supplementing documents already in the administrative record regarding this process. *See, e.g.*, AR0002315-70 (FSIS humane handling guidance); AR0001857-58 (discussion of the National Residue Plan).

Paragraph 23 is appropriate for supplementation because it provides further explanation regarding waste water disposal methods for the facilities at issue in this case, expounding on information already in the record. *See* AR0002574-607, AR0002608-13, AR0002472-73 (Valley Meat waste water documents); AR0003356-61, AR0003362-65, AR0003367-88, AR0003343-54 (Responsible Transportation waste water documents); AR0004808, AR0004790 (Rains Natural Meats waste water documents). Paragraph 23 also allows the agency to explain complex technical matters regarding wastewater disposal. *Am. Mining Cong.*, 772 F.2d at 626; *Custer Cnty. Action Ass'n*, 256 F.3d at 1028 n.1. This information offers additional explanation for the Agency's determination that no extraordinary circumstances are present requiring preparation of a more detailed environmental analysis.

Paragraph 24 is appropriate for supplementation because it provides further explanation regarding a situation at Valley Meat in 2012, documented in the Administrative Record. AR0002766-69. *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."). This information helps explain

FSIS's determination that no extraordinary circumstances are present that would require preparation of a more detailed environmental analysis.

Paragraph 25 is appropriate supplemental material because it provides further information regarding the size of the facilities at issue in this case. In this paragraph, Dr. Engeljohn places in perspective the number of horses that might be slaughtered at the facilities at issue in this case compared with the total number of livestock slaughtered annually in the United States. ECF No. 66-1 at ¶ 25 (explaining that the facilities at issue in the case will comprise only 0.036 percent of all commercial slaughter in 2013 and 2014). This information helps explain the Agency's determination that no extraordinary circumstances are present due to the very small size of the three facilities at issue.

Paragraph 26 is appropriate for supplementation because it provides further information and explains complex technical information regarding drug residues that may be present in horses. Dr. Engeljohn's declaration supplements information already documented in the Administrative Record, AR0001861-69; AR0001851-58; AR0000194-244; AR0000438-39; AR0000478-91; AR0000635-54; AR0002010-29, and explains that the FDA drug approval process includes a NEPA analysis of the potential environmental effects of administering drugs to animals. *Cross Mountain Ranch Ltd. v. Vilsack*, No. 09-CV-01901-PAB, 2011 WL 843901, at *2 (D. Colo. March 7, 2011) (allowing supplementation with agency declaration that "simply recounts the analysis conducted and data considered during the decision-making process"). *See also* Fed. Defs.' Merits Br. at 8-11, ECF No. 185. Paragraph 26 also provides a more fulsome explanation for the process by which the Agency issued the National Residue Plan.

In summary, Dr. Engeljohn's declaration more fully explains how FSIS arrived at the conclusions in the categorical exclusion 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. These explanations also help explain the Agency's determination that the grants of inspection fall within the NEPA CE that FSIS invoked. 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 10th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 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.

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