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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

PARTNERS IN FORESTRY COOPERATIVE, *et al.*,	
Plaintiffs,	Case No. 2:12-CV-00184-RHB
v.	Hon. Robert Holmes Bell
UNITED STATES FOREST SERVICE, *et al.*	FEDERAL DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STRIKE
Defendants;	

INTRODUCTION

Seven and half months after its deadline to raise objections to the Administrative Record, and seven weeks after the close of summary judgment briefing, Plaintiffs filed extra-record documents they claim are relevant to the Court's review of the Delich Land Exchange Project ("Project"). *See* Plaintiffs' Submission of Appraisal Referred to in Plaintiffs' Summary Judgment Reply Brief and Declaration of Counsel in Support, ECF No. 72; Exhibit A ("Ex. A"), 1-21 (extra-record documents) (hereinafter, the declaration and attached documents will be collectively referred to as "Declaration" or "Decl.").

Federal Defendant hereby moves to strike Plaintiffs' untimely Declaration in its entirety. Plaintiffs claim that the documents submitted with the Declaration are selected excerpts of the appraisal for the land exchange and that these documents should be included in the Administrative Record. What Plaintiffs do not acknowledge is that the Forest Supervisor (the Responsible Official who approved the Project) considered the Regional Review Appraisers' evaluations of the full appraisals, and those evaluations are already in the Administrative Record. *See, e.g.*, AR000680-734, AR001489-92. The appraisals themselves are not part of the Administrative Record because they were not considered by the Forest Supervisor when he approved the Project. Additionally, the Declaration does not provide evidence contrary to the information on timber stand composition data already contained in the Administrative Record. Plaintiffs have not met their burden to show that these documents satisfy one of the narrow circumstances where supplementation of an administrative record may be allowed. Even if the Court were to consider Plaintiffs' documents, they are duplicative of information contained in documents that are already in the Administrative Record. Federal Defendant respectfully requests that the Court strike Plaintiffs' Declaration in its entirety.

ARGUMENT

I. Plaintiffs' Declaration Is Untimely.

This Court provided clear deadlines for the parties to provide and settle the contents of the Administrative Record in advance of merits briefing. In its May 23, 2013 Case Management Order, the Court ordered that "Defendants shall file the Administrative Record by August 30, 2013. Plaintiffs shall file any objection to the Administrative Record by September 27, 2013." ECF No. 30. Federal Defendant filed the Administrative Record on August 27, 2013. ECF No. 53.

Plaintiffs neither consulted with counsel for Federal Defendant about the contents of the Administrative Record nor filed an objection with the Court before the September 27, 2013 deadline. Nor did Plaintiffs seek an extension of this deadline or indicate that one month was insufficient to review the Administrative Record. The fact that Plaintiffs did not attempt to locate certain documents until they were preparing their summary judgment reply (*see* ECF No. 71 at 10 n.2) does not absolve them of their responsibility to raise timely objections to the Administrative Record in accordance with this Court's Case Management Order. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (noting that "[d]isregard of the [scheduling] order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier").

Plaintiffs themselves recognize that the Declaration is untimely. Decl. at 2 (citing ECF No. 30). Yet the only explanation they provide for the untimely Declaration is that "plaintiffs and their counsel were not aware that the appraisal had been omitted from the 5000-page administrative record." *Id.* Plaintiffs do not explain why they were not aware or why they did not exercise diligence in reviewing the Administrative Record during the objection period.

Plaintiffs' Declaration is untimely and disregards the clear deadline set in this Court's Case Management Order. This basis alone provides sufficient justification for the Court to grant Federal Defendant's motion to strike.

II. Plaintiffs' Declaration Violates W.D. Mich. LCivR 7.1.

The Court should also strike the Declaration because Plaintiffs did not properly move the Court to consider the Declaration. Plaintiffs did not file a motion in accordance with W.D. Mich. LCivR 7.1, and they do not state the relief they seek. *See* Decl. Instead, they merely state that they "submit excerpts" and reference their summary judgment reply. Decl. at 1. Furthermore, although the Declaration refers to conversations between counsel regarding the contents of the Administrative Record, *see* Decl. at 2, the last exchange took place on April 10, and Plaintiffs never informed the parties that they would move to supplement the Administrative Record. Plaintiffs therefore could not have attempted to obtain concurrence in accordance with W.D. Mich. LCivR 7.1(d).

III. Plaintiffs Have Not Met Their Burden To Show That the Administrative Record Should Be Supplemented.

In addition to being untimely and non-compliant with the local rules, the Court should strike the Declaration because Plaintiffs have not met their burden to show that the documents should be added to the Administrative Record certified by the Agency.

A. The Record Review Rule Applies To This Proceeding.

Plaintiffs' claims arise under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370(h). Because NEPA does not create an independent right of action, these claims are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *Communities, Inc. v. Busey*, 956 F.2d 619, 623 (6th Cir. 1992).

The APA directs that "the court shall review the whole record or those parts of it cited by a party," and makes no provision for extra-record review. 5 U.S.C. § 706(2)(f); *see also Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (stating that "review is to be based on the full administrative record" that was before the agency at the time of its decision).[1] The "focal point for judicial review [of an agency decision] 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). Here, Federal Defendant lodged the certified Administrative Record with the Court on August 27, 2013 (ECF No. 53), and that record must constitute the focal point for this Court's review.[2] *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court.") (internal citations omitted).

Under certain narrow circumstances not present here, the Sixth Circuit provides that a "reviewing court may consider materials supplementary to the administrative record in order to determine the adequacy of the government agency's decision." *United States v. Akzo Coatings of*

[1] Plaintiffs mischaracterize the holding in *Overton Park*. Declaration at 4 (citing 401 U.S. at 420). Plaintiffs state that "[b]ecause the lower court in *Overton Park* did not have the full record for review, the Supreme Court remanded." *Id.* The Supreme Court remanded the case because the lower courts improperly considered litigation affidavits that were post-hoc rationalizations, *not* because the administrative record lacked certain documents as Plaintiffs contend. *Overton Park*, 401 U.S. at 419. *Overton Park* supports Federal Defendant's position that extra-record documents such as Plaintiffs' Declaration are not part of the Administrative Record certified by the agency.

[2] The agency's designation of the Administrative Record is entitled to a presumption of regularity: "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (citing *Wilson v. Hodel*, 758 F.2d 1369, 1374 (10th Cir. 1985)); *see United States v. Martin*, 438 F.3d 621, 634 (6th Cir. 2006) (noting that agency action is entitled to a presumption of regularity that may be overcome only by "clear evidence").

Am., Inc., 949 F.2d 1409, 1427 (6th Cir. 1991). A reviewing court "may consider additional evidence as either background information to aid the court's understanding, or to determine if the agency examined all relevant factors or adequately explained its decision," *id.* at 1428, or "when an agency deliberately or negligently excludes certain documents" from the administrative record. *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997). "Courts have suggested that in order to justify supplementation, a plaintiff must make a 'strong showing of bad faith.'" *Id.* (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)).

B. The Forest Service's Evaluation Of the Appraisals and Stand Composition Is Already Contained In the Administrative Record.

Plaintiffs' main argument appears to be that the certified Administrative Record is not complete because it does not contain Plaintiffs' documents. *See* Decl. at 4-6. Plaintiffs claim that the documents provided with their Declaration show that the Forest Service considered the appraisals. Decl. at 3 (stating that "the land exchange statute and regulations required the agency (the "Secretary") to review and consider the appraisal"); *id.* at 6 (stating that "key project documents, and the appraisal review document, make clear that the agency fulfilled its duty to review the appraisal as part of its decision making process."). Plaintiffs' claims do not support any supplementation of the Administrative Record.

The fact that the Forest Service reviewed the appraisals is not in doubt. Regional Review Appraisers, who are employees of the Forest Service, reviewed the full appraisals and prepared evaluations for consideration by the Forest Supervisor, the Responsible Official for approving the Project. Those evaluations are contained in the Administrative Record. *See, e.g.*, AR000680-713, AR00718-34, AR001489-92. The appraisals themselves are not part of the Administrative Record because they were not considered by the Forest Supervisor when he approved the Project.

Citing to a string of cases (none from this circuit), Plaintiffs claim the Administrative Record must contain every single document that was before the Agency at the time of the decision. *See* Decl. at 4-6. There is no such requirement. Contrary to Plaintiffs' claim, the scope of review under the APA is whether the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). Plaintiffs claim that the Agency violated NEPA because it: did not adequately disclose environmental impacts (Count I, ¶¶ 39-45); did not prepare an environmental impact statement (Count II, ¶¶ 46-50); did not analyze an adequate range of alternatives (Count III, ¶¶ 51-56); and did not prepare a supplemental environmental impact statement (Count IV, ¶¶ 57-62). *See* Amended Complaint, ECF No. 18, ¶¶ 39-62. The Administrative Record includes the documents relevant to those claims. Plaintiffs never pleaded a claim that the Forest Service improperly assessed the value of the land to be exchanged. *See id.* Nor do they raise any argument in their summary judgment briefs that the appraisal undervalued the land to be exchanged. *See* Plaintiffs' Brief, ECF No. 59; Plaintiffs' Reply, ECF No. 71. Thus, because the Declaration only includes documents related to the value of the appraisals, it does not pertain to any relevant factors at issue in this action.

Plaintiffs refer to only three of the documents with which they now seek to supplement the Administrative Record in their summary judgment Reply. The three documents characterize the timber stand composition on the property by species, basal area, and board feet per acre. ECF No. 71, 9-10; Decl. at 3 (citing pages 18-20 of Exhibit as the documents cited in Reply; Ex. A 18-20 (charts and graphs of stand composition and data). The Administrative Record already includes stand level data from the Forest Service's vegetation database (FSVeg) that is generated

and updated by field inventory work and modeling. *See* AR01063-65 (map showing Parcels overlaid with vegetative compartments and stand numbers); AR01066-69 (vegetation composition information by compartment and stand for Parcels); AR01438-45 (vegetation specialist report describes existing vegetative condition and silviculturist's review of the stands); AR01573-76 (Revised Environmental Assessment discussing vegetation affected environment). Thus, Plaintiffs' proposed supplemental documents are duplicative, at best.

Plaintiffs' Declaration, including the attached documents, adds nothing to the Court's review of Plaintiffs' NEPA claims. *Sierra Club*, 120 F.3d at 639 (affirming lower court's denial of motion to supplement because "the plaintiffs have failed to point to a single factor that would suggest the administrative record was inadequate for an assessment of their claims."). The Court should grant the motion to strike.

C. None Of the Sixth Circuit's Limited Exceptions To the Record Review Rule Apply To Plaintiffs' Declaration.

In addition to failing to explain why the Declaration is necessary for the Court's review of the Agency's decision, Plaintiffs made no attempt to demonstrate that one of the narrow exceptions to the APA record review rule applies to their Declaration. Plaintiffs therefore fail to meet their burden to show that the Court should supplement the Administrative Record.

Should the Court consider the narrow exceptions on its own accord, it is clear that none apply here. First, the Declaration does not provide background information to aid the Court's understanding. *Akzo Coatings*, 949 F.2d at 1427. This matter is not so technical that further background information would be warranted and Plaintiffs do not suggest otherwise. Second, the Declaration would not assist the Court in determining whether the Agency examined all relevant factors or explained its decision. *Id.* As discussed above, the Forest Supervisor reviewed the evaluations of the appraisals and the Administrative Record already contains

information on stand composition. Additionally, the first eleven pages of the Declaration Exhibit are included in the Administrative Record (*compare* AR00720-30 *with* Submission, Ex. A 1-11), and the map on page 21 of the Exhibit is nearly identical to the floodplain map in the Administrative Record. *Compare* AR00382 *with* Submission, Ex. A 21). Finally, there is no allegation or evidence that the Agency deliberately or negligently excluded the documents, nor is there any evidence or allegation of bad faith. *Sierra Club*, 120 F.3d at 638 ("[I]n order to justify supplementation, a plaintiff must make a strong showing of bad faith.") (internal quotation and citation omitted).

None of the narrow exceptions to the record review rule recognized by the Sixth Circuit apply to Plaintiffs' Declaration. The Court should grant the motion to strike.

CONCLUSION

For the foregoing reasons, Federal Defendant's motion to strike Plaintiffs' untimely Declaration should be granted.

Respectfully submitted on this 20th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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