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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al. Federal Defendants.	)	Case No. 1:11-CV-0946-JEC-WDS

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD [ECF No. 26]

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INTRODUCTION

Plaintiff Los Alamos Study Group ("Study Group") initiated this litigation by filing a "Complaint for Declaratory Judgment and Injunctive Relief Under the National Environmental Policy Act of 1969." ECF No. 1. In its Complaint, the Study Group alleges Federal Defendants (principally, the U.S. Department of Energy/National Nuclear Security Administration ("DOE/NNSA")) violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(h), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, for actions related to the approval and design of the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at the Los Alamos National Laboratory in New Mexico. Specifically, the Study Group challenges the August 25, 2011 Final Supplemental Environmental Impact Statement ("Final SEIS") and the October 12, 2011 Amended Record of Decision ("Amended ROD") for the CMRR-NF. ECF No. 1 ¶ 2. On June 22, 2012, DOE/NNSA certified and lodged the Administrative Record for the agency decision – the Amended ROD for the Final SEIS – that is challenged in the Study Group's Complaint. ECF No. 25.

On July 13, 2012, without engaging undersigned counsel as required by D.N.M.LR-Civ. 7.1(a), the Study Group filed its Motion to Supplement the Administrative Record. ECF No. 26 (hereinafter, "Motion" or "Mot."). In its Motion, the Study Group asserts that the certified Administrative Record is inadequate because DOE/NNSA is allegedly implementing a new decision that first appeared in the President's FY 2013 budget proposal that was released on February 13, 2012. The Study Group alleges that this purported new decision from the budget proposal was not analyzed in the Final SEIS or selected in the Amended ROD. Mot. at 1. The Study Group then lists, in bullet point format, eighteen documents or categories of documents it

contends are necessary for judicial review of its claims, as well as three other documents the Study Group contends are "highly pertinent documents" missing from the certified Administrative Record. *See* Mot. at 3-6. Also contrary to the requirements of the Local Rules, the Study Group fails to provide a single citation for authority to support its position that this Court may develop a new Administrative Record for these proceedings. *See* D.N.M.LR-Civ. 7.3(a) ("A motion, response or reply must cite authority in support of the legal positions advanced.").

Even if the Court considers the Study Group's conclusory Motion, the Motion is without merit. As explained below, the Study Group falls far short of satisfying the Tenth Circuit's well-established requirement of "clear evidence" to show that a certified Administrative Record is deficient or that one of the extremely limited exceptions to extra-record evidence applies. Moreover, the underlying premise for the Study Group's Motion is false. The President's Fiscal Year 2013 Budget Request (the basis for the Study Group's allegation that DOE/NNSA made a new decision) is not subject to judicial review under the APA and, even if adopted by Congress without modification, would only defer construction of the CMRR-NF. DOE/NNSA has not changed or invalidated the Final SEIS or Amended ROD, nor has it disavowed the analysis contained in those documents. In short, the only agency decision subject to judicial review before the Court is the Amended ROD. DOE/NNSA has compiled, certified, and lodged the Administrative Record for that decision, and the Study Group has not and cannot meet its heavy burden of demonstrating that the Administrative Record is deficient. The Study Group's Motion should be denied.

STANDARD OF REVIEW

As this Court has already held, each of the claims raised by Plaintiff is subject to judicial review pursuant to the scope and standards set forth in the APA. *See* ECF No. 1 ¶ 1 (stating that Plaintiff's claims arise under the NEPA and the APA); ECF No. 22 at 1 (holding that "[b]ecause [NEPA] does not provide for a private cause of action, the judicial review provisions of the [APA] govern judicial review of Plaintiff's claims in this case") (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 n.23 (1989), and *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006)). Section 706 of the APA imposes a narrow and deferential standard of review of agency action or inaction, and the courts' role is solely to determine whether the challenged actions or inactions meet this standard based on a review of the administrative record that the agency provides to the court. 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party…"); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *cf. United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) ("[W]here Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held.").

This Court also has already held that the Study Group's claims in this case must be processed as appeals: "In *Olenhouse v. Commodity Credit Corp.*, the Tenth Circuit Court of Appeals set forth the procedures for judicial review of challenges to agency actions and inactions, establishing that such actions are processed as appeals and are decidedly not governed

by trial procedures or rules." ECF No. 22 at 2 (citing *Olenhouse*, 42 F.3d 1560 (10th Cir. 1994)). Limiting judicial review to the Administrative Record is a central aspect of cases brought under the APA, pursuant to which a district court functions as an appellate court when reviewing agency action. *See Olenhouse*, 42 F.3d at 1579-80 (expressly prohibiting reliance on trial-type devices as "inconsistent with the standards for judicial review of agency action under the APA" because they "invite[] . . . the reviewing court to rely on evidence outside the administrative record").

"The complete administrative record consists of all documents and materials directly or indirectly considered by the agency." *Bar MK Ranches v. Yeutter*, 994 F.2d 735, 739 (10th Cir. 1993) (citations omitted). The "designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent *clear evidence* to the contrary." *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007) (emphasis added) (quoting *Bar MK Ranches*, 994 F.2d at 740) (internal quotation marks omitted). Unless Plaintiff demonstrates some irregularity or shows that the record as presented is insufficient to allow "substantial and meaningful [judicial] review," courts defer to the agency's certification of the administrative record as the "whole" administrative record. *Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1138-39 (10th Cir. 1991); *see also 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, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.") (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). "A party

attempting to convince a reviewing court to expand the scope of its review properly bears a sizeable burden if it is to convince the court to forego the customary deference owed an agency's determination of what constitutes the record." *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1254 (D. Colo. 2010).[1]

ARGUMENT

I. The Study Group Falls Far Short of Its Burden to Show -- by Clear Evidence -- that the Administrative Record Is Deficient

The Study Group contends that the Administrative Record lacks twenty-one decisional documents or categories of documents. *See* Mot. at 3-6. Even if the Court were to accept this allegation on its face, the Study Group has fallen far short of its burden to demonstrate by clear evidence that the Administrative Record is deficient.

As noted above, the designation of the Administrative Record is entitled to a presumption of regularity. *Citizens for Alternatives to Radioactive Dumping*, 485 F.3d at 1097. "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." *Id.* (internal quotation and citation omitted). "[S]pecificity is the touchstone for determining whether a party has established clear evidence of irregularity." *Wilderness Soc'y v. U.S. Forest Serv.*, No. 1:11-CV-00246-AP, 2012 WL 1079169 at *2 (D. Colo. Mar. 30, 2012) (unpublished).

[1] In "extremely limited" circumstances, the Tenth Circuit recognizes narrow exceptions to the rule limiting judicial review to the administrative record. *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985). None of these narrow circumstances are present here, and the Study Group does not raise or address any. *See also Cnty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 79 (D.D.C. 2008) ("In order to invoke one of these exceptions, a party seeking a court to review extra-record evidence must first establish that the agency acted in bad faith or otherwise behaved improperly, or that the record is so bare that it prevents effective judicial review.") (quotation omitted).

A. The Study Group Fails to Show the Eighteen Categories of Documents Should Be Part of the Administrative Record

The Study Group's motion fails to present any argument or supporting case law – let alone the required clear evidence – to overcome the presumption of regularity and to demonstrate that the Administrative Record is deficient. The Study Group merely states that the "voluminous record submitted supporting the SEIS and AROD is grossly incomplete and largely irrelevant" and then lists eighteen bullet points of documents or categories of documents that it contends are "pertinent to defendants' new selected alternative." Mot. at 3; *see* Mot. at 3-6. This bare assertion of inadequacy, coupled with a list of requested documents or categories of documents (the majority of which relate to projects other than the CMRR-NF or post-date the Amended ROD), falls far short of the Study Group's burden to show that the Administrative Record is inadequate for the Court to review the action challenged in the Complaint or to establish an exception for extra-record evidence. Indeed, the Study Group's Motion reads more like a discovery request under Federal Rules of Civil Procedure 26 and 34, which this Court has already determined do not apply to this litigation. ECF No. 22 at 2 (citing *Olenhouse*, 42 F.3d 1560). The Study Group has failed to assert, let alone show, that any of these eighteen documents or categories of documents were "directly or indirectly considered by the agency" in reaching the Amended ROD, the only agency action before this Court. *See Bar MK Ranches v. Yeutter*, 994 F.2d at 739.

In addition to failing to meet its burden to show that the Administrative Record is deficient, the Study Group seeks to include a number of documents or categories of documents that post-date the October 12, 2011 Amended ROD. *See e.g.*, Mot. at 3 (listing FY 2013 budget documents); *id.* at 4 (memoranda from February 13, 2012 and March 27, 2012). Inclusion of

documents that post-date the Amended ROD and extrapolating the contents of these documents to challenge the merits of DOE/NNSA's analysis of the CMRR-NF usurps the Agency's decision-making authority and is contrary to both the deferential judicial provisions of the APA, 5 U.S.C. § 706, and the Tenth Circuit's admonishments in *Olenhouse*. *See also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (holding that "post-decision information . . . may not be advanced as a new rationalization either for sustaining or attacking an agency's decision"); *Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998) (rejecting environmental group's attempt in a NEPA case "to supplement the record with evidence of post-sale implementation activity, information that was not available to the [agency] when it prepared the Environmental Assessments"). By asking the Court to include post-decisional documents, the Study Group attempts to create a different record than the one before DOE/NNSA at the time of its decision and puts the Court in the role of administrative decision-maker, determining the relevance and significance of the materials without deferring to the expertise of the Agency to address the materials in the first instance.

The Study Group has thus made no showing that the eighteen documents or categories of documents are properly part of the Administrative Record. The Study Group's Motion is without merit as to these documents.

B. The Study Group Fails to Show the Three Documents Containing UCNI and Classified Data Were Before the Decision Maker

The Study Group also seeks to add to the Administrative Record two documents that contain Unclassified Controlled Nuclear Information ("UCNI") and one Classified document

marked as containing Secret Restricted Data. *See* Mot. at 6.[2] The Study Group alleges these three "highly pertinent" documents are missing from the Administrative Record based "upon information and belief." *Id*.

"[T]o overcome the presumption of regularity and meet the burden of proving that the record designated by the agency is incomplete, [Petitioners] must clearly set forth in [their] motion: (1) when the documents were presented to the agency; (2) to whom; (3) and under what context." *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275 (D. Colo. 2010). Such a showing by itself, however, is not sufficient because a plaintiff "must also establish that these documents were directly or indirectly considered by the relevant agency decision makers." *Id.* (citing *Bar MK Ranches*, 994 F.2d at 739).

The Study Group's bare assertion "upon information and belief" is speculative and fails to establish the clear evidence required to show when the documents were presented to the agency, to whom, and under what context. *See WildEarth Guardians*, 713 F. Supp. 2d at 1254; *Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1276 ("Petitioners do not meet their burden of providing clear evidence that the agency has failed to properly designate the Administrative Record by asserting, speculatively, that documents were relevant or before the agency at the time it made its decision.") (internal quotation and citation omitted). The Study Group also fails to establish that the requested documents were directly or indirectly considered by the relevant agency decision makers. *Bar MK Ranches*, 994 F.2d at 739. The Study Group therefore does

[2] Although the Study Group does not allege so, the December 31, 2008 Nuclear Facility Study contains UCNI. *See* Mot. at 6.

not meet its burden to show that these three documents should have been included in the certified Administrative Record.

The Study Group has fallen far short of its burden to show by clear evidence that the Administrative Record is deficient. It impermissibly seeks to include in the Administrative Record documents that post-date the challenged decision, and it fails to demonstrate that the documents containing UCNI and classified data were before the decision maker. The Study Group's Motion should be denied.

II. The President's FY 2013 Budget Proposal to Congress Is Not a New Decision

On February 13, 2012, the President sent his FY 2013 budget proposal to Congress. The proposal requests $35 million for the CMRR-NF and "proposes deferring CMRR construction for at least five years." ECF No. 26-1. In its Motion, the Study Group contends that the budget proposal is a "decision to indefinitely defer CMRR-NF in favor of another alternative." Mot. at 2. This contention is incorrect and provides an additional basis by which the Court should deny the Motion.[3]

"In exercising the broad discretion granted by the Constitution, Congress can approve funding levels contained in the President's budget request, increase or decrease those levels, eliminate proposals, or add programs not requested by the administration." I U.S. Gov't Accountability Office, GAO-04-261SP, *Principles of Federal Appropriations Law*, 1-26 (3d ed. 2004); *see Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citing earlier edition of source approvingly). Congress may still decide to provide funds for the construction of the Modified

[3] If the Study Group were correct, that would do nothing more than render their challenges to the Final SEIS and Amended ROD moot, with the result being that this case should be dismissed.

CMRR-NF, and the President's budget proposal may or may not result in the deferral of construction of the Modified CMRR-NF.

Additionally, the budget proposal on which the Study Group bases its motion to supplement does not change any of the facts relevant to the action challenged in the complaint. NNSA has not revoked or rescinded the Amended ROD. 76 Fed. Reg. 64,344 (Oct. 18, 2011). In the Amended ROD, NNSA selected the Modified CMRR-NF Alternative. *Id.* NNSA has not revisited that selection. The budget proposal did not change that selection, but only "proposes deferring CMRR construction for at least five years." ECF No. 26-1. Thus, even if Congress were to adopt the President's budget proposal, it would only postpone construction. NNSA also has not changed or invalidated the Final SEIS or Amended ROD, nor has it disavowed the environmental analysis in the Final SEIS.

Moreover, the President's budget request is not an action that is judicially reviewable under the APA. The Supreme Court has held "that appropriation requests constitute neither 'proposals for legislation' nor 'proposals for . . . major Federal actions,' and that therefore the procedural requirements of [NEPA] have no application to such requests." *Andrus v. Sierra Club*, 442 U.S. 347, 364-65 (1979); *see also Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006) (an agency's budget proposal "is not 'agency action' within the meaning of § 702 [of the APA], much less 'final agency action' within the meaning of § 704."). The Supreme Court explained that NEPA applies to major federal actions and that review of budget proposals regarding how actions should be funded would be redundant. *See Sierra Club*, 442 U.S. at 362-63. Even if the final budget does change an agency's actions, NEPA applies to the resulting, new major federal actions, not at the budget proposal stage. *See*

id.; *cf. Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103-04 (9th Cir. 2007) (finding that appropriations are unreviewable and that plaintiffs must challenge agency's final agency action); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006). To the extent the Study Group appears to be challenging the budget proposal or NNSA's hypothetical future conduct, the Study Group must wait to identify a final agency action and establish that it is a "major Federal action" to which NEPA applies. *See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1297-98 (D.C. Cir. 2007); *Kleppe v. Sierra Club*, 427 U.S. 390, 400-07 & n.15 (1976).

In short, the Study Group's assertions about the President's budget request are incorrect and, even if they were correct, do not provide evidence that DOE/NNSA improperly designated the Administrative Record for this case. There is only one agency decision at issue in this litigation – the Amended ROD, and the Study Group has done nothing to show that the Court may expand its judicial review beyond the certified Administrative Record.

CONCLUSION

For the foregoing reasons, the Court should deny the Study Group's Motion. The Study Group's Motion fails to cite any authority to support its legal position that the Court can or should review materials beyond the certified Administrative Record in this case. The Study Group falls far short of its burden to show, by clear evidence, that the certified Administrative Record for the action challenged in their Complaint is inadequate for judicial review under the APA. Additionally, the President's budget request is not a "new decision" that is reviewable under the APA as alleged by the Study Group. The Study Group has provided no basis for its Motion.

Respectfully submitted on this 30th day of July, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmitted a Notice of Electronic Fling to the following CM/ECF registrants:

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