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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAVE STRAWBERRY CANYON, a non-profit corporation,	)	Case No. 11-01564-WHA
Plaintiff,	)	**FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO AUGMENT THE ADMINISTRATIVE RECORD AND FOR JUDICIAL NOTICE**
v.	)	
U.S. DEPARTMENT OF ENERGY, et al.	)	Hearing Date: October 20, 2011 Time: 8:00 a.m. Courtroom: 9, 19th Floor Judge William H. Alsup
Defendants.	)	

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I. INTRODUCTION

Plaintiff seeks to augment the administrative record in this case with materials which it asserts demonstrate that the Department of Energy (DOE) failed to consider relevant information in the Environmental Assessment (EA) it prepared pursuant to the National Environmental Policy Act (NEPA) in conjunction with the proposed Computational Research and Theory (CRT) building at the Lawrence Berkeley National Lab (LBNL). Pl's. Mot. to Augment [ECF No. 40]. This motion stems from Plaintiff's mistaken belief that when DOE evaluated the greenhouse gas (GHG) emissions attributable to the proposed CRT building, the agency failed to account for the hydroelectric and other non-GHG emitting power sources included in the mix of power provided by Pacific Gas and Electric (PG&E), thus tipping the scales against proposed alternative sites that use PG&E power.

Plaintiff therefore seeks to add to the record several pages from the PG&E website, and a Marin County Civil Grand Jury Report to show that the power provided by PG&E includes non-GHG emitting sources. Alternatively, Plaintiff suggests that if its documents are not admissible as supplements to the record, then the Marin County Grand Jury Report should be admitted under the doctrine of judicial notice. This motion should be denied.

As explained below, the GHG calculations prepared by the DOE do account for the hydroelectric and other non-GHG emitting power sources included in the mix of power provided by PG&E, and they properly compare the emissions attributable to the power provided by PG&E to the power provided to LBNL by the Western Area Power Administration (WAPA). Plaintiff's documents therefore are not evidence that the DOE failed to consider a relevant factor and should not be added to the administrative record. Plaintiff's alternative request, which seeks to use judicial notice to circumvent the rules pertaining to administrative record review, should also be denied.

II. BACKGROUND

On February 25, 2011, the DOE issued, pursuant to NEPA, an EA and Finding of No Significant Impact (FONSI) for the CRT facility. The proposed action includes: the construction of a new three-story building at LBNL by the University of California; the relocation of the

DOE's National Energy Research Scientific Computing Center (NERSC)—which includes two supercomputing systems as well as associated data storage systems and staff—from leased space in downtown Oakland, CA, to the CRT; and relocation of LBNL's Computational Research Division and the joint UC Berkeley/LBNL Computational Science and Engineering programs to the CRT. AR05:29.[1]

Pursuant to NEPA, the DOE issued a draft EA for public comment on September 14, 2010. AR64. The draft EA discussed a range of environmental effects, including the electrical consumption of the proposed CRT building, and the GHG emissions attributable to that energy use. AR65:1712. The DOE received numerous public comments—including from Plaintiff—but did not receive any comments related to electrical use at the facility. The only comment received related to GHG emissions was a letter from the Bay Area Air Quality Management District (BAAQMD). BAAQMD did not question the agency's GHG emission projections but rather urged the DOE to require on-site alternative energy sources, such as solar panels, and the use of energy efficient technologies in the building. AR31.

In the final EA, the DOE disclosed the electrical consumption of the proposed building, and noted that the CRT building at the LBNL site would receive electricity from WAPA. AR05:144. The EA noted that the GHG emissions were calculated using the assumption that 20 percent of the WAPA power was dedicated hydroelectric, and the remaining 80 percent "would be from a mix of electricity sources." Id. The EA also noted that the CRT "has been designed with a power usage efficiency that is better than any data center benchmarked to date." Id. at 145.

III. ARGUMENT

Plaintiff's motion should be denied. First, the materials proffered by Plaintiff were all available to Plaintiff during the public comment period, and Plaintiff has failed to demonstrate the "extraordinary circumstances" that would warrant judicial consideration of documents that it

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[1] When citing the administrative record, Defendants will use the abbreviation "AR" followed by the document number and the page number. So, for example, AR05:29 refers to Document 5 at bates numbered page 29

failed to provide to the agency when it had the opportunity to do so. Second, the documents do not fall within the record review exception for material demonstrating a relevant factor that the agency failed to consider, because, as the record itself, and the explanatory declaration of the expert who conducted the analysis for the DOE make clear, the DOE did consider the mix of power sources in the power provided by PG&E. Finally, Plaintiff's alternative request for judicial notice is inappropriate.

A. Judicial Review is Limited to the Administrative Record

Judicial review of the adequacy of the CRT EA and FONSI prepared by the DOE is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 706. Under the APA, a court is to review an agency's decision on the basis of the administrative record that existed before the agency at the time the decision was made. Both the Supreme Court and the Ninth Circuit have emphasized 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." Camp v. Pitts, 411 U.S. 138, 142 (1973). See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). As the Ninth Circuit has held, "[t]he 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." Friends of the Earth v. Hintz, 800 F.2d 822, 829 (9th Cir. 1986) (quoting Florida Power & Light Co., 470 U.S. at 743-44); see Southwest Ctr. for Biological Diversity, 100 F.3d at 1450-51.

The Ninth Circuit allows a reviewing court to consider extra-record materials in APA cases under four narrow exceptions: "(1) if necessary to determine 'whether the agency has considered all relevant factors and explained its decision,' (2) 'when the agency has relied on documents not in the record,' (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,'" or (4) "'when plaintiffs make a showing of agency bad faith.'" Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996) (quoting Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 997

(9th Cir. 1993) (per curiam) and Nat'l Audubon Soc'y v. U.S. Forest Serv., 46 F.3d 1437, 1447 n.9 (9th Cir. 1993)).

Particularly inappropriate in the context of judicial review is submission of extra-record material that the plaintiff had an opportunity to submit directly to the agency during agency proceedings. Judicial review is not to be conducted as a game of "gotcha." Participants in decision-making are obligated to "'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764 (2004) (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978)). Where the agency afforded the public the opportunity to participate in the decision making process, plaintiffs have an obligation, absent a showing of "exceptional circumstances," to present their criticisms of a proposed project at that point. See Havasupi Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991); see also Wilson v. Hodel, 758 F.2d 1369, 1372 (10th Cir. 1985) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but erred against objection made at the time appropriate under its practice."). The Ninth Circuit has made clear that courts should not accept through extra-record testimony material that the plaintiff had every opportunity to submit directly to the agency during agency proceedings. See Havasupi Tribe v. Robertson, 943 F.2d at 34; see also Southwest Ctr. for Biological Diversity, 100 F.3d at 1451.

B. Plaintiff's Documents Could Have and Should Have Been Proffered During the Public Comment Period

All of the documents that Plaintiff seeks to add to the administrative record appear to have been readily available to Plaintiff at the time of the public comment period on the draft CRT EA. The pages from the PG&E website all concern data from 2009, and the Marin County Civil Grand Jury Report was issued in 2009. See Exs. 7-9 to Lozeau Decl. [ECF. No. 34]. They would thus have been available to Plaintiff well before the DOE issued the draft EA for public

comment on September 14, 2010. AR64. Plaintiff has failed to show any "exceptional circumstances," that would justify its decision not to provide the documents to DOE during the administrative process. Havasupi Tribe v. Robertson, 943 F.2d at 34. Plaintiff's motion to augment should therefore be denied.

C. The Documents Proffered by Plaintiff do Not Demonstrate DOE failed to Consider All Relevant Factors

Plaintiff alleges that DOE underestimated the GHG emissions attributable to electricity use at CRT by assuming that 20 percent of the power provided by WAPA was hydropower and by assuming that none of the power provided by PG&E comes from hydropower. Pl's. Mot. to Augment at 4 [ECF No. 40]; Pl's. Summ. J. Br. at 20 [ECF No. 38]. In support of this allegation, Plaintiff proffers information from PG&E's website and from a Marin County Civil Grand Jury Report to demonstrate that power provided by PG&E includes hydroelectric and other non-GHG emitting sources which it alleges DOE failed to consider in reaching its decision. Pl's. Mot. to Augment at 3-4. This claim fails. As explained below, in calculating the GHG emissions attributable to power provided by PG&E, DOE utilized PG&E's official published mix of energy sources and the resulting emissions factor, which includes hydroelectric and other non-GHG emitting sources. Plaintiff's motion to augment should therefore be denied, because the proffered documents do not demonstrate that DOE failed to consider a relevant factor in its analysis.

As explained in the CRT EA, if the CRT building is constructed at LBNL, electrical power would be provided by the WAPA, whereas the power supply to off-site alternatives would be provided by PG&E. AR05:143-148; AR11:449; AR15:490. DOE therefore considered the GHG emissions attributable to power provided by WAPA in comparison to those attributable to power provided by PG&E. AR11:449; AR15:490. To determine the GHG emissions attributable to power derived from PG&E, the DOE used the emission factor provided by PG&E to the California Climate Action Registry (CCAR). Declaration of Eric Bell ("Bell Decl.") attached hereto as Exhibit 1. The CCAR emissions factor represents the emissions associated

with the power mix delivered by PG&E to end users, and incorporates all energy sources used by PG&E, including hydropower, nuclear, geothermal, and other zero emissions sources. Bell Decl. at ¶ 5. Moreover, the CCAR figures are publically reported and verified by a certified third party and are the scientifically accepted method for calculating GHG emissions. Id. at ¶ 6.

Power provided by WAPA to LBNL has two components: a component that comes from the dams of the Central Valley Project (CVP) that is 100 percent hydroelectric, and a component that WAPA purchases from a mix of sources, including hydroelectric and other non-GHG emitting sources, in the open energy market. AR23:704; See also Bell Decl. at ¶ 3.BThe final EA assumes that the CVP component represents 20 percent of the power provided to LBNL and the remaining 80 percent comes from power purchased by WAPA. Id. WAPA does not track the precise mix of sources represented in its purchased power, so DOE was required to estimate the GHG emissions attributable to the purchased component of WAPA power. AR11:449. To do so, DOE considered the emissions factors for the overall power grid in California, and from the States in the Northwest Region, and concluded that the mix of power purchased by WAPA would approximate the mix of power provided by PG&E. Bell Decl. at ¶ 12. Therefore, DOE used the PG&E emissions factor to estimate the emission of the component of power purchased by WAPA. AR11:450 ("In the absence of an emissions factor for PG&E was used as a suitable stand in for WAPA . . ."); Bell Decl. at ¶ 12. Thus the DOE calculated GHG emissions for WAPA power to CRT by using the PG&E emissions factor and then reducing it by 20 percent to account for the low-end estimate of CVP provided hydropower. AR11:450; Bell Decl. at ¶ 3.B.

Contrary to Plaintiff's assertions, the DOE included the full mix of power sources contained in PG&E's power when calculating GHG emissions. The proffered documents do not demonstrate a factor that DOE failed to consider, and thus Plaintiff's motion to augment the record to include the documents should be denied.

D. The Court Should Admit the Declaration of Eric Bell to Explain the Analysis Conducted by the DOE and its Relationship to the Documents Proffered by Plaintiff

As discussion above shows, the administrative record before the Court does demonstrate that DOE properly compared the GHG emissions attributable to the mix of power provided by PG&E and the mix of power provided by WAPA. However, because Plaintiff did not raise its GHG allegations in the public comment period, and waited until this matter was in litigation to proffer their documents addressing the mix of power provided by PG&E, the DOE had no opportunity in the record to fully address Plaintiff's concerns and to fully explain how its calculations incorporate the non-GHG emitting components of PG&E power. Therefore, to fully explain the record, the DOE proffers the declaration of Eric Bell, the Air Quality Analyst and Green House Gas Engineer who performed the GHG emissions analysis for the CRT EA. Bell Decl. at ¶¶ 1-2. Mr. Bell's testimony is limited to explaining the analysis included in the record, he does not offer any new justification of the agency's decision. To the extent the Court finds that the record is not clear, Mr. Bell's declaration is admissible to explain the agency's action. See, e.g., Northwest Envtl. Advocates v. NMFS, 460 F.3d 1125, 1151 (9th Cir. 2006) (allowing extra-record declaration because it contained "background, explanatory information" that helped inform the court whether the "agency undertook adequate fact-finding and analysis"); Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153, 1165 (9th Cir. 1998) (allowing declaration from agency decision maker to provide "'a satisfactory explanation of agency action [which] is essential for adequate judicial review.'") (quoting Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984)); Arizona Cattle Growers' Ass'n v. Cartwright, 29 F. Supp. 2d 1100, 1105 (D. Ariz. 1998) ("[The] [a]ffidavits submitted by Defendants may aid the court in analyzing the decision making process of the [agency]."). Mr. Bell's declaration should also be considered as a matter of equity to prevent Plaintiff from profiting from its decision not to raise its concern and the documents during the administrative process, when DOE could have responded to them on the record, and to instead to raise them for the first time in litigation.

E. Plaintiff's Alternative Request for Judicial Notice Should be Denied

Alternatively, Plaintiff asks the Court to take judicial notice of the fact "that PG&E's power-generation portfolio included non-GHG emitting sources," based on a Marin County Civil

Grand Jury Report. Pl's. Mot. to Augment at 6. This request should also be denied. Plaintiff should not be allowed to circumvent the rules governing supplementation of the administrative record through a request for judicial notice. Moreover, the report proffered by Plaintiff is not the proper subject of judicial notice.

As noted above, the scope of judicial review under the APA is narrow and subject to only limited exceptions. Trial based evidentiary procedures, such as judicial notice under Federal Rules of Evidence Rule 201, generally should be avoided in the context of administrative record review, as they contravene the principles of record review, forcing the Court into the improper role of fact-finder, rather than a reviewer of the agency's decision. Florida Power & Light Co., 470 U.S. at 744 ("The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking"). See also Madison Servs., Inc. v. United States, 92 Fed. Cl. 120, 130 n.6 (Fed. Cl. 2010) (noting that while "congressional staff report may qualify for judicial notice . . . this does not exempt plaintiff from having to meet the independent requirements for supplementation of the administrative record"). For the reasons explained above, the Marin County Civil Grand Jury report proffered by Plaintiff is not properly part of the administrative record. Plaintiff should not be permitted to side-step the record review rules through a request for judicial notice.

In addition to being an improper attempt to circumvent the appropriate process for supplementing the administrative record, the Marin County Civil Grand Jury Report does not meet the requirements of Federal Rule of Evidence 201. Under Rule 201, a court may take judicial notice of an adjudicative fact "not subject to reasonable dispute" in one of two circumstances: "it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Because judicial notice circumvents the normal evidentiary process, courts are cautioned in its application, "requiring that the matter be beyond reasonable controversy." Fed. R. Evid. 201, 1972 Proposed Rules, Advisory Comm. Notes, Subdiv. (b).

Plaintiff asserts that judicial notice of the Marin County Civil Grand Jury report is appropriate because the document is a "record or report of an administrative body." Pl's. Mot. to Augment at 7. This assertion misstates the law: courts do take judicial notice of public records, but they take notice of the *existence* of the report or record, not of the truth of the facts contained therein. Dent v. Holder, 627 F.3d 365, 372-73 (9th Cir. 2010) (taking judicial notice of official agency record, but not of facts contained therein); Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001) (holding district court properly took judicial notice of *the fact* that a waiver was signed in a prior proceeding, but erred in taking notice of the *validity of that waiver*, which remained a disputed fact); Bryant v. Carleson, 444 F.2d 353, 357-58 (9th Cir. 1971) (taking judicial notice of the fact that defendant had filed an affidavit on a certain date, but not taking judicial notice of the veracity of the affidavit's contents).

Plaintiff seeks judicial notice not of the existence of the Marin County Civil Grand Jury Report, but of the truth of its content. Such a request is plainly inappropriate under Rule 201 and should be denied.

IV. CONCLUSION

For the reasons set forth herein, Plaintiff's motion to augment the administrative record and alternatively for judicial notice should be denied.

Respectfully submitted this 15th day of July, 2011.

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