United States District Court

For The District of Wyoming

WILD EARTH GUARDIANS, Petitioner, vs. SALLY JEWELL, in her capacity as U.S. Secretary of the Interior, U.S. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, and the U.S. DEPARTMENT OF THE INTERIOR, Respondents, STATE OF WYOMING and ANTELOPE COAL LLC, Intervenor-Respondents.	Civil No. 16-CV-166-J

ORDER DENYING PETITIONER'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD [DOC. 73]

This matter is before the Court on Petitioner's Motion to Supplement the Administrative Record [Doc. 73]. The Court, having carefully considered the Motion, Responses, and Reply, finds as follows:

BACKGROUND

This case is originally before the Court on Petitioner's challenges to the approval of mining plans for the Black Thunder and Antelope Mines in Wyoming. One of the allegations contained in the underlying action is that the Office of Surface Mining Reclamation's ("OSM") failure to prepare a supplemental Environmental Impact Statement ("EIS") violated the National Environmental Policy Act ("NEPA"). Judicial review of

NEPA claims are governed by the Administrative Procedure Act ("APA"), which limits a courts review to the administrative record. The administrative record was lodged on October 7, 2016 [Doc. 71]. Petitioner requests the Court order the administrative record be supplemented with three additional documents. Petitioner argues these three documents are relevant to its claims the Federal Respondents failed to supplement the 2008 EIS based on new information not available before the 2008 EIS was complete, but available prior to the approval of the Plan in 2013.

Standard of Review

"The APA governs judicial review of agency action, requiring a reviewing court to 'hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Biodiversity Conservation All. v. U.S. Forest Serv.*, No. 11-CV-226-S, 2012 WL 3265865, at *1 (D. Wyo. Jan. 4, 2012) (quoting 5 U .S.C. § 706(2)(A)). A district court's review of an agency decision is limited to whether the challenged action or inaction meets the requisite standard based on the administrative record before the agency at the time the decision was made. 5 U.S.C. § 706: The Supreme Court has stated the review of an agency decision is limited to the "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, (1971). A court may not rely on evidence outside the administrative record absent extraordinary circumstances. *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985); U.S.D.C.L.R Rule 83.6(b)(3) for District of Wyoming. The 10th Circuit has recognized five possible exceptions wherein a party is allowed to introduce evidence outside the record:

> (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient

> because the agency ignored relevant factors it should have considered in making its decision; (3) the agency considered factors that were left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) evidence coming into existence after the agency acted demonstrates the actions were right or wrong.

Id. (citing *Custer County Action Assn v. Garvey,* 256 F.3d 1024, 1028 n. 1 (2001)). "Generally, however, documentation and evidence suitable for annexing to an agency's designated record takes two distinct, yet often confused, forms: (1) materials which were actually considered by the agency, yet omitted from the administrative record ('completing the record'); and (2) materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry ('supplementing the record')." *Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1265 (D. Colo. 2012).

RULING OF THE COURT

The issue before the Court is straightforward: should the two cost of carbon documents and a Council on Environmental Quality ("CEQ") Draft Climate Guidance be included in the Administrative Record. The Tenth Circuit has made clear 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) (citations omitted). Petitioner claims the Administrative Record is deficient since the agency decision ignored relevant factors it should have considered in making its decision since the three documents at issue constitute "significant new circumstances or information relevant to environmental concerns and bearing upon the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). The Supreme Court has stated the focus should be on if the new

information affects the environment "in a significant manner or to a significant extent not already considered." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989).

Petitioner fails to make the necessary showing under the narrow exception that "the record is deficient because the agency ignored relevant factors it should have considered in making its decision." *Am. Mining Cong.*, 772 F.2d at 626. The two social costs of carbon documents do not show a change in the environmental impacts of developing coal in general, or specifically from the Antelope II lease tracts. Rather, by Petitioner's own accord, the documents provide a new and different method for analyzing the impacts. Specifically, Petitioner claims "[t]hese documents support of Guardian's claim that Federal Respondents violated NEPA by failing to supplement the 2008 EIS based on new information about ***analyzing*** climate impacts that became available after the 2008 EIS was completed but well in advance of Federal Respondents decision to approve the Antelope Mining Plan in 2013." Pet.'rs Mem. In Supp. of Mot to Suppl. the Administrative R. 2, Oct 21, 2016, ECF No. 74. (emphasis added). The EIS at issue here has already survived judicial challenges to a number of alleged deficiencies, including claims the Federal Respondents did not take a hard look at the effect of the decision on global climate change. In *Wildearth Guardians v. Jewell* the court found the Federal Respondents "satisfied its obligations under NEPA to consider climate change." 738 F.3d 298, 311 (D.C. Cir. 2013). Therefore, the Court finds the social costs of carbon documents do not change the environmental impacts of developing the mine; it only provides another method for evaluating the impacts.

Additionally, the Federal Respondents considered all relevant factors and comments in adopting the challenged EIS and recommending approval of the mining plan. There is nothing to indicate the Federal Respondents knew of, or should have known of, the existence

of the social costs of carbon documents. Neither OSMRE nor the Department of the Interior were involved with the development of the documents, and neither Petitioner nor any other party presented any of the three documents for consideration during the notice and comment process. Petitioner argues the Federal Respondents "improperly excluded the public from participating in the agency's process leading to the approval of the Antelope Mining Plan-depriving Guardians of the opportunity to place the document[s] before the agency for its consideration." Pet.'rs Reply to Mot to Suppl. the Administrative R. 2, November 11, 2016, ECF No. 79. If Federal Respondents approval of the Antelope Mining Plan failed to meet NEPA's public notification requirements in violation of NEPA, CEQ regulations implementing NEPA, Interior Department regulations implementing NEPA, and OSM directives, that failure provides separate grounds on which to challenge the proposed action. *See Dine Citizens Against Ruining our Env't v. Klein*, 747 F. Supp. 2d 1234, 1260 (D. Colo. 2010) ("[W]hen properly implemented, NEPA procedures "ensure [ ] that the agency will inform the public that it has indeed considered environmental concerns in its decision making process.") (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 97 (1983)). This argument, however, does not provide an appropriate basis for supplementing the Administrative Record. Whether the Federal Respondents violated NEPA's public notification and public participation requirements is a separate issue. Failure to provide adequate notice and comment is not, however, one of the narrow enumerated exceptions allowing for supplementation of the record.

Lastly, the Federal Respondents and both Respondent-Intervenors acknowledge Petitioner may cite the draft CEQ guidance as legal authority without supplementing the Administrative Record. Considerations of regulations offered as a source of law rather than

a source of fact are not barred by the doctrine limiting review to the administrative record. *Jackson Hole Conservation All. v. Babbitt*, 96 F.Supp.2d 1288, 1296 (D. Wyo. 2000).

CONCLUSION

Review of an agency decision is limited to the "the full administrative record that was before the Secretary at the time he made his decision," and evidence outside the administrative record may not be relied upon absent extraordinary circumstances. *See Citizens to Preserve Overton Park*, 401 U.S. 402; *Am. Mining Cong.*, 772 F.2d 617; U.S.D.C.L.R. 83.6(b)(3) for District of Wyoming. The social costs of carbon documents and the draft CEQ guidance are not necessary to determine whether the Federal Respondents considered all relevant factors, and provided a sufficient explanation of its decision. There is also nothing to indicate the Federal Respondents should have reviewed the documents before reaching a decision, and Petitioner's claims they were denied the ability to present the evidence since the Federal Respondents violated NEPA's public notification and public participation requirements is a separate issue. The Administrative Record lodged with the Court consists of all the documents and materials considered by the Federal Respondents. There is nothing to indicate the Court cannot adequately review the decision without considering these materials, and Petitioner fails to demonstrate the documents fall within one of the narrow exceptions to the general rule prohibiting consideration of extra-record materials.

THERFORE IT IS ORDERED Petitioner's Motion to Supplement the Administrative Record [Doc. 73] is DENIED.

Dated this 1st day of December, 2016.

Kelly H. Rankin
U.S. Magistrate Judge