IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

THE LITTLE ROCK DOWNTOWN NEIGHBORHOOD ASSOCIATION, INC., *et al.*,	)	Case No. 4:19-cv-362-JM
Plaintiffs,	)	
v.	)	
FEDERAL HIGHWAY ADMINISTRATION, *et al.*,	)	
Defendants.	)	

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR ADMISSION OF WITNESS TESTIMONY

The United States Department of Transportation (DOT) and the Federal Highway Administration (FHWA), Vivien N. Hoang, Division Administrator (originally named as Angel L. Correa) (together, Federal Defendants), hereby file their brief opposing Plaintiffs' Request for Admission of Witness Testimony (Dkt. No. 71). Federal Defendants have filed administrative records for both the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) issued on February 26, 2019, and the Re-evaluation issued on June 1, 2020, for the I-30 Crossing Project. (Dkt. No. 44, 46, & 47). Except as to the issue of alleged "irreparable harm," which Plaintiffs must prove as part of their request for injunctive relief, all matters before the Court are contained within the administrative record, and Plaintiffs offer no reason why the Court should allow extra record testimony on matters related to the merits of Plaintiffs' claims.

Accordingly, Plaintiffs' motion to admit expert testimony going to the merits of case should be denied.

Background

Plaintiffs are proposing to present two witnesses whom Defendants have reason to believe, based upon prior communication with Plaintiffs' counsel, would appear as subject matter experts to address the merits of Plaintiffs' claims. One proposed witness, Casey Covington, is employed with Metroplan, the metropolitan planning organization for Little Rock. *See* http://www.metroplan.org/staff. Defendants presume Plaintiffs are proposing to have Mr. Covington testify as an expert with respect to either traffic forecasting or long range planning as either pertain to the I-30 Crossing Project. Plaintiffs also propose to present the testimony of Dr. John Kirk, a professor employed at the University of Arkansas, Little Rock. Defendants understand Dr. Kirk would be presented as an expert witness in the subject area of Environmental Justice.

Argument

Testimony is generally disfavored in a NEPA/APA matter.

Plaintiffs' motion for to admit testimony of witnesses pertaining to the merits of the case or the sufficiency of the administrative record should be denied. "It is black-letter law that judicial review under the APA is generally confined to the administrative record that was before the agency when it made the decision being challenged. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *see also Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir.2004) (*citing Overton Park*). Only under 'extraordinary circumstances' will a reviewing court allow a party to introduce evidence in litigation that was not part of the administrative record. *Voyageurs Nat'l Park Ass'n*, 381 F.3d at

766." *Sierra Club v. Kimbell*, 595 F. Supp. 2d 1021, 1033 (D. Minn. 2009), *aff'd*, 623 F.3d 549 (8th Cir. 2010). By confining judicial review to the administrative record, the APA precludes the reviewing court from conducting a de novo trial and substituting its opinion for that of the agency. *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

"However, certain exceptions have been carved from the general rule limiting APA review to the administrative record. These exceptions apply only under extraordinary circumstances, and are not to be casually invoked unless the party seeking to depart from the record can make a strong showing that the specific extra-record material falls within one of the limited exceptions. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436–38 (9th Cir.1988). When there is a contemporaneous administrative record and no need for additional explanation of the agency decision, 'there must be a strong showing of bad faith or improper behavior before the reviewing court may permit discovery and evidentiary supplementation of the administrative record.' *Newton*, 141 F.3d at 807–808 (*quoting Overton Park*, 401 U.S. at 420, 91 S.Ct. 814)." *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004) (internal quotations omitted). Plaintiffs brief proffers no indication of bad faith action on the part of the agency that would warrant supplementation of the record with expert witness testimony.[1]

Plaintiffs' brief indicates the two witnesses proffered testimony would address, at least in part, "likelihood of success on the merits." It seems that in effect at least to the extent they would address the likelihood of Plaintiffs prevailing on the merits, Plaintiffs hope to engage in a battle of the experts against the opinions and conclusions of agency experts expressed in the administrative record and the NEPA documents and re-evaluation Defendants prepared to study

[1] Moreover, the parties previously developed a joint planning schedule which specifically contemplated an opportunity for Plaintiffs to review the record and notify Defendants if they believed the record needed to be supplemented in any way. Docket 39, p. 2. That would be the proper avenue of supplementing the record and to date that has not yet occurred.

the I-30 Crossing Project. However, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). Thus, the Court will not weigh critiques or consider declarations or testimony from Plaintiffs' experts to decide the merits of the Plaintiffs' NEPA claims. Expert testimony is therefore irrelevant to the "likelihood of success on the merits."

Courts have also recognized that witness testimony offered on its face to explain a technical issue should not be permitted if in fact it amounts to an endeavor to engage the agency in a battle of the experts. *Friends of Richards-Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1190–91 (8th Cir. 2001). (The petitioners' remaining contentions are based in large part on the opinion of their own expert, which was not made a part of the administrative record. Through a motion to this court, petitioners sought to supplement the record with letters and expert opinions that were not before the agency, in order to show that the agency overlooked substantial environmental issues and relevant factors. We are not in a position to substitute our own judgment for that of the agency by considering expert testimony that was not made a part of the administrative record.) *See also Georgia River Network v. U.S. Army Corps of Engineers*, No. 4:10-CV-267, 2011 WL 2551044, at (S.D. Ga. June 27, 2011) ("The agency need not act as an expert witness, explaining 'technical terms or complex subjects' to the Court. *See PEACH*, 87 F.3d at 1246 n.l. The agency need only adequately explain its action. *See id*. Where 'technical terms or complex subjects need to be explained' the Court can allow supplementation. *See id*. Plaintiffs' proffered extra-record evidence is an expert's testimony attacking the expert report relied upon by the Corps. *See* Doc. 28 at 20–21. This is not the sort of evidence the Court might need to understand

this subject matter, this is an attempt to commence a battle of the experts after the record has been closed.")

It is unclear how individuals unassociated with the FHWA or ARDOT could help the Court understand the administrative records.

Plaintiffs' brief does not specify the specific purpose or content of either proposed witness's testimony but merely states "[t]he witness testimony being sought for admission will provide a detailed explanation of components of the Administrative Record, highlight defects and deficiencies, and illustrate support for the issuance of the preliminary injunction," and suggest the witnesses would "enhance the Court's understanding of the Administrative Records." (Docket, 71, p. 2, 4.) Plaintiffs do not specify how the administrative records are deficient and in need of supplementing. Neither do Plaintiffs explain what aspects of project documentation require clarifying explanation or why the two proffered witnesses are qualified to provide that clarifying explanation. Neither witness is employed with any component of either the Federal or State Defendants in this matter. Neither witness had any role in preparing the administrative records for this matter, so it is not at all clear how either could "enhance the Court's understanding." Consequently, it is unclear how the testimony of these two individuals regarding the merits of the case constitute an "extraordinary circumstance" that would justify the general rule of deciding a NEPA/APA matter on the basis of the administrative record alone.

A number of documents sent by or to Mr. Covington appear in both administrative records. Those documents speak for themselves and are the best evidence of their own content. In the short period of time Defendants have had to respond to Plaintiffs' request for the admission of witness testimony, Defendants have not yet been able to locate any documents indicating Dr. John Kirk submitted comments regarding the project or was otherwise involved

with project development with respect to Environmental Justice or any other aspect of the project.

Plaintiffs' Case Law is Inapposite and Unpersuasive

The case law Plaintiffs cite in support of their motion appears to be inapposite. In *Arkla Expl. Co. v. Texas Oil & Gas Corp*., the Court justified the admission of witness testimony stating on the grounds that the filed administrative records lacked key documents the court needed to make an informed decision and that only witness testimony could substitute for the missing document:

> A crippling weakness of the administrative record was the omission of the map used by the Tulsa USGS office in making the clearlisting decisions. By the time this case reached the district court, the map no longer existed. Without this map, it was impossible for Judge Waters to know which wells surrounding the lease area were considered and which were not considered in making the KGS determination and the clearlisting decisions here at issue. In his deposition, Johnson testified that the map could not be recreated because it may have had mistakes in it. Johnson deposition at 76–77.
> Judge Waters was confronted with an administrative record that raised many more questions than it answered about the basis of the Secretary's decision. He therefore found it necessary to admit a limited amount of additional information, including testimony from Johnson and his superiors, to determine the true scope of the administrative record and cure its factual deficiencies, particularly the lack of the map used in making the clearlisting decisions.

Arkla Expl. Co. v. Texas Oil & Gas Corp., 734 F.2d 347, 352 (8th Cir. 1984).

Here, Plaintiffs do not allege that the administrative records in the case at bar are missing any such critical documents. Even if a document were determined to be missing, Plaintiffs do not explain why if a document were missing, witness testimony would be warranted instead of simply supplementing the record with the missing document. In short, the facts of this case are nothing like those in *Arkla Expl. Co. v. Texas Oil & Gas Corp*.

Plaintiffs cite to *Sierra Club v. United States Army Corps of Eng'rs*, for the proposition that testimony should be permitted to determine if the administrative records are in some way

inadequate, but Plaintiffs do not state in what way the records are inadequate or what information the proffered plaintiffs have that would show the records are inadequate. No. 4:10CV04017-WRW, 2010 U.S. Dist. LEXIS 147535 (W.D. Ark. Oct. 27, 2010). Without that information, there is little evidence that this is an extraordinary circumstance warranting the introduction of evidence not a part of the administrative record. The Sierra Club case is also distinguishable because there are no Endangered Species Act concerns pertaining to this case.

Conclusion

Plaintiffs' request for expert testimony on matters that go to the merits of the case should be denied because they have not demonstrated there are extraordinary circumstances that warrant departing from the rule that judicial review under the APA is generally confined to the administrative record that was before the agency when it made the decision being challenged.

Respectfully submitted on August 20, 2020.

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