UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PRYOR OIL CO., INC.,	)	
	)	
Plaintiff,	)	
	)	No. 3:02-CV-679
v.	)	Judge Phillips/Mag. Judge Guyton
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO EXCLUDE FROM SCHEDULING ORDER RULE 26 DISCLOSURES AND DISCOVERY

Defendant, United States of America, by and through Harry S. Mattice, Jr., United States Attorney for the Eastern District of Tennessee, moves the Court to exclude from any scheduling order any requirement for Rule 26 disclosures and discovery on the grounds that, to the extent plaintiff is entitled to judicial review of the actions of the Environmental Protection Agency (EPA) which are the subject of plaintiff's complaint, such review, pursuant to the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* (APA), is limited to the administrative record. Defendant submits contemporaneously with this motion its memorandum in support of this motion and expects to file with the Court later this week a certified copy of the EPA administrative record.

Respectfully submitted,

HARRY S. MATTICE, JR.
United States Attorney

By: _____

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing motion has been served upon the following by telecopier on July 22, 2003, and by hand-delivery this 23rd day of July, 2003:

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	)	
Plaintiff,	)	
	)	No. 3:02-CV-679
v.	)	Judge Phillips/Mag. Judge Guyton
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE FROM SCHEDULING ORDER RULE 26 DISCLOSURES AND DISCOVERY

Defendant, United States of America, by and through Harry S. Mattice, Jr., United States Attorney for the Eastern District of Tennessee, submits this memorandum in support of its motion requesting that the Court exclude from any scheduling order any requirement for Rule 26 disclosures and discovery.

INTRODUCTION

This case involves a request for judicial review of an administrative order, as amended,[1] issued by the Environmental Protection Agency ("EPA") to plaintiff Pryor Oil Company, Inc. (Pryor) pursuant to EPA's authority under section 311(c) of the Federal Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1321, *et seq.* The administrative order issued required Pryor to conduct certain activities to effect a removal of

[1]All further references to the "administrative order" shall be deemed to refer to such order including all amendments to such order. At the time plaintiff's complaint was filed, the administrative order had been amended six times. As indicated in the certified administrative record filed contemporaneously with this memorandum, the subject administrative order has now been amended eleven times.

a discharge, or to mitigate or prevent the substantial threat of a discharge, of oil into or on navigable waters, on the adjoining shorelines to the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

Plaintiff filed this action on November 27, 2002, to challenge such order on the grounds that, in issuing its administrative order, EPA purportedly acted arbitrarily and capriciously, outside the scope of its authority, and in violation of plaintiff's constitutional rights. On April 16, 2003, after court-approved extensions of time, the United States timely filed its answer asserting the following defenses: lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, the actions of EPA were within its statutory and regulatory authority, neither EPA nor its employees and agents abused their discretion or otherwise acted arbitrarily or capriciously, and certain of plaintiff's claims are moot and others are not yet ripe. The United States expects to file with the Court later this week a certified copy of the EPA administrative record.

For the reasons discussed below, to the extent plaintiff is entitled to any judicial review at this time of the subject actions of EPA, such review is limited to the administrative record pursuant to the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* (APA). Counsel for defendant has conferred with counsel for plaintiff and advised of defendant's position that, under these circumstances, no further disclosures (beyond providing the administrative record) or discovery are appropriate or required.

ARGUMENT

Plaintiff's complaint seeking relief from the subject EPA administrative order constitutes

a request for judicial review of administrative action pursuant to the APA.[2] (See Complaint, ¶1.) In an action for judicial review under the APA, the reviewing court must first determine whether the agency acted within the scope of its authority, and thereafter, determine whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence." 5 U.S.C. §706(2)(A),(E); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16, 91 S. Ct. 814, 28 L. Ed 2d 136 (1971), overruled on other grounds in Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977); Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 548 (6th Cir. 2002).

In applying this standard under the APA, the court reviewing agency decision-making is limited to the administrative record already in existence. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44, 105 S. Ct. 1598, 1607, 84 L. Ed. 2d 643 (1985); Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973); see also Estate of Elinor James v. USDA, No.3:01-CV-628 (E.D. Tenn., Order, November 8, 2002, Mag. Shirley) (copy attached). Courts may not create "an evidentiary record different from that before the agency." Stauber v. Shalala, 895 F.Supp. 1178, 1189 (W.D.Wis. 1995) (citing Camp, 411 U.S. at 142; Edwards v. United States Dept. of Justice, 43 F.3d 312, 314 (7th Cir. 1994); Cronin v. United States Dept. of Agriculture, 919 F.2d 439, 443-44 (7th Cir. 1990)). Nor may the court otherwise consider evidence that the agency did not have an opportunity to review, whether such evidence attacks or supports the agency's action. See Wright v. Farm Service Agency, No. 4:00-CV-94, 2001 WL

[2]As indicated above, defendant has asserted a defense of lack of subject matter jurisdiction over plaintiff's premature request for review. Defendant does not now concede that the Court has such subject matter jurisdiction at this juncture, but asserts that, to the extent any judicial review of EPA's administrative order is appropriate, such review is limited to the record.

822417 at *2 (W.D. Mich. June 22, 2001)(copy attached) (citing Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444, 50 S.Ct. 220, 226, 74 L.Ed 524 (1930)).[3] Even if a court should find challenged agency action not sustainable on the administrative record, its function is not to build a new record upon which it may reach its own conclusions. Rather, the decision must be remanded to the agency for further consideration. Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331, 96 S. T. 579, 46 L. Ed. 2d 533 (1976).

Due to the nature of such judicial review in actions under the APA, discovery is not generally permissible except in very limited circumstances. Hall v. Norton, 266 F.3d 969, 977-78 (9th Cir. 2001) (discovery properly denied where plaintiff failed to make requisite showing for discovery outside administrative record); Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993) (discovery limited to where there is a clear showing that the agency has failed to properly designate the administrative record, and even in such cases, only limited discovery is appropriate to resolve that question); City of Mt. Clemens v. U.S. Environmental Protection Agency, 917 F.2d 908, 917 (6th Cir. 1990) (*de novo* review to secure discovery not permitted absent exceptional circumstances).

Plaintiff apparently disagrees with the conclusions the EPA drew from the information on which it relied in rendering the subject administrative order. However, such disagreement does not establish the exceptional circumstances to warrant a *de novo* hearing or other

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[3]In order to even supplement the administrative record, the moving party must demonstrate the requisite "**strong showing** of bad faith or improper behavior" on the part of the involved agency, that the agency relied on substantial records and materials not included in the record, or that the procedures used and factors considered by the agency require further explanation for effective review. Citizens to Preserve Overton Park, Inc., 401 U.S. at 420, 91 S.Ct. at 825; San Luis Obispo Mothers For Peace v. U.S. Nuc. Reg., 789 F.2d 26, 45 (D.C. Cir. 1986) (emphasis added). Plaintiff has made no such showing.

supplementation of the record. See Camp v. Pitts, 411 U.S. at 142; City of Mt. Clemens v. EPA, 917 F.2d at 913, 917.

To the extent that plaintiff is entitled to judicial review of the subject EPA administrative order, this Court can address any applicable factual and legal issues based upon the administrative record itself without any further fact-finding or other supplementation of the record.

CONCLUSION

Accordingly, defendants request that the Court not include in any scheduling order entered in this case any requirement that the parties make disclosures under Rule 26, Federal Rules of Civil Procedure, or otherwise participate in discovery as such procedures are not applicable in this action.

Respectfully submitted,

HARRY S. MATTICE, JR.
United States Attorney

By: _____

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