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 REPLY
TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
MOTION TO EXCLUDE 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 reply to plaintiff's memorandum in opposition to the United States' motion to exclude Rule 26 disclosures and discovery.

INTRODUCTION

The United States filed its motion to exclude Rule 26 disclosures and discovery from the scheduling order on the grounds that this case is an action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (APA) of an administrative order issued to the plaintiff Pryor Oil Company, Inc. ("Pryor) by the Environmental Protection Agency ("EPA") and that such review, if available at all, is properly limited to the administrative record already in existence. In its memorandum opposing the United States' motion, Pryor first totally mis-characterizes the circumstances surrounding the issuance of EPA's administrative order and its subsequent amendments in a vituperative, hyperbolic and inaccurate recitation purportedly

describing the background of this case in an obvious effort to "poison the well." Pryor conveniently omits from its recitation of the facts that EPA's actions occurred in response to a blowout of Pryor's oil well releasing thousands of gallons of oil, which then ignited, causing a fire, polluting nearby streams, and threatening property managed by the U.S. National Park Service in the Obed Wild and Scenic River Area. (See Factual and Procedural Background below.) Pryor would have the court believe that EPA has been engaged solely in some nefarious plot to deprive Pryor of its oil well. Nothing could be further from the truth. As the administrative record demonstrates, EPA was justifiably taking what it deemed to be appropriate actions to ensure proper cleanup of the polluted area and to protect from further harm the tributaries of the Obed Wild and Scenic River and property of the United States managed by the National Park Service.

After its inaccurate presentation of the "Background" of this case, Pryor then concedes that "the Court's primary focus should be the materials that were before the agency when it made its final decision" and recognizes that there are only limited exceptions to the general rule that APA review is limited to the administrative record by the agency.[1] However, to the extent that Pryor suggests that certain exceptions warrant this Court's consideration of information outside of the record, the United States will address each such exception below after first accurately explaining (with citations to the administrative record[2]) the series of events which precipitated EPA's actions.

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[1]In its opposition memorandum, Pryor does not address the propriety of either Rule 26 disclosures or discovery, so presumably also concedes that the United States has correctly asserted that neither are appropriate.

[2]Pages of the administrative record will be referred to as (AR #).

FACTUAL AND PROCEDURAL BACKGROUND

On July 19, 2002, Pryor was performing drilling operations at the Howard-White #1 oil exploratory well[3] located in the Obed Wild and Scenic River Area, situated near both Clear and White Creeks[4] and the statutory boundary of National Park Service land. (AR 2 8 0005-07) During these operations, Pryor was unable to contain subsurface pressure in the well causing a blowout and uncontrolled release of oil and natural gas. (Doc. 1, Complaint, ¶ 6; AR 2 8 0005) For over ten hours thereafter, thousands of gallons of oil flowed to the surface from the well[5] and then caught fire. (AR 2 8 0005) The oil was diverted first to storage tanks, then to constructed surface impoundments, which were unable to contain the oil, resulting in oil spilling out of the containment impoundment. (AR 2 4 0001) During the construction of the impoundments, the discharged oil ignited and caught fire. (AR 2 8 0005) On the morning of July 20, 2002, Pryor ceased recovery operations when the well ignited, and contacted oil response contractor Boots and Coots International Well Control to extinguish the oil fire and cap the well. (AR 2 8 0005) The halted containment and recovery efforts allowed the oil to overflow the containment ponds and run down the hillside, burning a path east toward White Creek and south toward Clear Creek.

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[3]Pryor permitted the Howard-White #1 well on July 8, 2002, with a proposed total depth of 5,000 feet, and began drilling the well shortly thereafter. (AR 1104 0156)

[4]Clear Creek is home to four endangered and/or threatened species: the Spotfin Chub, the Purple Bean (a Unionid mussel), Virginia Spiraea and Cumberland Rosemary. (AR 2 8 0007)

[5] Pryor Oil estimated between 200 and 500 barrels per hour (bph). (AR 2 8 0005, 09) Using the lower flow rate of 200 bph, the well flowed over 2,000 barrels of oil to the surface before the oil caught fire. At 42 gallons per barrel, this is equivalent to more than 84,000 gallons of oil discharged during the first 10 hours before the oil ignited. This conservative estimate does not totally reflect the discharge, as Pryor reports to have collected 2,100 barrels of oil (88,200 gallons) into tanker trucks. (AR 2 8 0005) The well continued to flow oil to the surface until the well was plugged on July 26, 2002. (AR 2 8 0011)

(AR 2 8 0007) The flame height at the wellhead was estimated at 120 feet with a corresponding width of 65 feet. (AR 2 4 0003)

EPA was not notified of the blowout and fire until approximately eighteen hours after the blowout incident, in the evening of July 20, 2002, when it received notification from the National Response Center (NRC) in Washington, D.C.[6] (AR 2 1 003-05) The EPA On Scene Coordinator (OSC) arrived at the well site that same day and immediately began assessing the situation. (AR 2 10 00002) At the time of the arrival of the EPA OSC, the oil had flowed down the hillside from the well in two directions, burning paths through partially forested areas toward and along the banks of White Creek and Clear Creek, both of which creeks flow into the Obed River. (AR 2 8 0006-07) Paraffin, an oil-burning by-product the consistency of axle grease, covered portions of the creeks. (AR 2 8 0007) Oil saturated the surface soils. (AR 2 8 0009) Oil seeped from the face of the rock outcrop, and from the creek bank and creek bottom of Clear Creek into the creek. (AR 2 8 0009)

The EPA OSC was advised by Pryor's response contractor, Boots and Coots, that Pryor had been unable to provide sufficient financial assurance for Boots and Coots to perform the necessary response actions and that they (the contractor) would leave the site the following day. (AR 2 1 0074-75; 2 10 0020) At that time, the oil fire was still burning at an estimated height of 120 feet, Boots and Coots was monitoring the blow out, preparing staging areas for fire fighting equipment, building containment and storage pits for effluent and water, and otherwise taking

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[6] Pryor did not notify the NRC of the oil discharge, as is required by 33 U.S.C. §1321(b)(5). (AR 2 1 0002-04; 2 8 0007) The NRC was notified of the emergency by the Tennessee Emergency Management Agency who had, in turn, been notified by the Morgan County Emergency Management Agency. (AR 2 1 0002, 04; 2 8 0007)

steps to stabilize and secure the area. (AR 2 4 0003) Under those circumstances, when Pryor was unable to produce sufficient assurance, EPA OSC issued to Pryor a Notice of Federal Assumption of Response Activity, pursuant to which EPA would then conduct all further removal activities pursuant to Section 311(c) of the Clean Water Act, 33 U.S.C. § 1321(c)(1), in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan and applicable federal regulations. (AR 1 01 0003) This notice further advised Pryor that it would be billed for the resulting costs incurred by the Federal Government in accordance with Section 311(f) of the Clean Water Act. (AR 1 01 0003)

On July 22, 2002, the EPA OSC, after conferring with Pryor, contractor Boots and Coots, and National Park Service and U.S. Fish and Wildlife Service personnel, decided that the oil should be allowed to burn to reduce the environmental impacts and the potential for explosion during the well-capping activities. (AR 2 8 0009-11) That same day, a helicopter overflight was conducted by EPA and the Superfund Technical Assessment and Response Team (START) to observe the damage caused by the well blowout and fire. (AR 2 8 0010) During the overflight, spot fires were observed along a small portion of Clear Creek. (AR 2 8 0010) On July 23, 2002, Boots and Coots completed construction of a water reservoir and began pumping water from White Creek to have adequate fire-fighting water. (AR 2 10 00003-04) During this time, Ferguson Harbor, Inc., a Boots and Coots subcontractor assisting with the oil response, continued to contain oil released into Clear Creek by use of booms and a 2,000-gallon vacuum truck and sorbent booms and pads. (AR 2 10 00004)

On July 25 and 26, Boots and Coots extinguished the fire by utilizing their fire-fighting equipment and water pump trucks brought in by the Morgan County Volunteer Fire Department

and then capped the well. (AR 2 10 0006; 2 8 0012) The following day, Boots and Coots departed from the site. (AR 2 8 0012) In addition to continuing oil containment activities, the last week of July and the first few days of August were devoted to removing oil-contaminated soil from the well area, construction of erosion barriers to contain silt and dirt from eroding and entering the creek, and the removal of paraffin from White Creek. (AR 2 10 00009)

On August 5, 2002, EPA issued a Removal Administrative Order pursuant to Section 311(c) of the Clean Water Act, 42 U.S.C. § 1321(c). (AR 1011 0001-17) The order required that Pryor conduct certain stabilization, mitigation and removal actions including submission of workplans for: well integrity, road stabilization, spring/stream restoration, road from sawmill to well, pasture reseeding/restoration, water storage pit reseeding/restoration, and skimming operations. (AR 1011 0001-17) Those actions included the performance of a Mechanical Integrity Test (MIT)[7] on the well to ensure its integrity. (AR 1011 0011-12) The order also required Pryor to submit written progress reports containing all significant developments during the preceding period (e.g., during the drilling of the well), as well as weekly reports describing work performed, problems encountered, analytical data received, schedule or work to be performed, problems encountered or anticipated, and proposed cures to such problems. (AR 1011 0008)

The initial order was followed by eleven amendments over a period of eight months in response to the evolving situation as work progressed pursuant to the order. The amendments

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[7]The purpose of a MIT is to ascertain whether the casing is performing its intended function of sealing the well and any fluids contained in the wellbore from the subsurface and to provide one source of information of whether the well is a continuing or potential source of discharge to the navigable waters. (AR 2 1 0076; 2 2 0183-85)

ordered the following activities:

#1 Deleted the requirement of the order for the escrow of funds from the production of the well. (August 12, 2002) (AR 1011 0019-20)

#2 Added a requirement for a work plan for collecting oil at the boom locations and maintaining the booms in Clear Creek and White Creek (in addition to the containment area of Clear Creek). (August 22, 2002) (AR 1011 0026-27)

#3 Required Pryor to conduct the MIT by October 15, 2002, to immediately notify and provide to the OSC any information that the MIT will create or contribute to unsafe or unstable conditions at the well, and to restore portions of Highpoint Road, in consultation with the Morgan County Highway Department. (September 10, 2002) (AR 1011 0030-32)

#4 Extended the deadline for submission of the workplan for the MIT, revised the deadline for submission of the first weekly progress report, and extended the date for completion of certain of the ordered work. (September 27, 2002) (AR 1011 0039-41)

#5 Ordered Pryor to initiate a Gas Deliverability Test on October 15, 2002, and to delay the performance of the MIT until after the conclusion of the Gas Deliverability Test at a date to be later determined based upon wellhead pressure reduction figures and to revise the workplan for the MIT to specify the date when the pipeline (pipe gathering system) will be completed and tested. (October 11, 2002) (AR 1011 0044-47)

#6 Ordered Pryor to conduct certain activities involving preparation for and

performance of the MIT within the number of days indicated after receipt of the amendment:

- complete construction and testing of pipeline within 18 days;
- draw down gas by producing or flaring for 68 days;
- complete performance of the MIT with a contingency plan in place within 75 days;[8] and
- submit reports within 82 days.

(November 13, 2002) (AR 1011 0051-53)

Following Amendment #6, which required that Pryor complete certain tasks by December 2, 2002, EPA representatives advised Pryor that if it failed to timely complete such tasks, "EPA may, at its sole discretion, respond to the continued discharge or threat of discharge from [the well], including, without limitation, assessing well integrity or plugging and abandoning the Howard White #1 well." (AR 1011 0048) Thereafter, on November 27, 2002, Pryor filed the instant complaint, seeking, *inter alia*, temporary and permanent injunctive relief. (Doc. 1)

On December 3, 2002, the United States[9] signed an agreement with Pryor Oil, which resolved the pendency of the request for temporary injunctive relief by granting an additional

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[8]As in Amendment #3, this amendment also included the following notice to Pryor regarding the proposed MIT: "If, before commencing the MIT, Pryor Oil has information that the performance of the MIT will create or contribute to unsafe or unstable conditions at the well, it should immediately notify EPA OSC and provide that information to her."

[9]Acting through the United States Attorney

period of time for the completion of the gas pipeline gathering line[10] and other previously ordered tasks. (Doc. 6) In accordance with such agreement, and as a result of additional information received, on December 13, 2002, EPA issued Amendment #7 to the order which extended further the time for completion of certain of the required tasks, including construction and testing of the gas pipeline gathering line, and ordered as follows:

- complete construction and testing of pipeline connecting the well to a low-pressure gathering line by December 18, 2002;
- draw down pressure or flare gas to level acceptable for MIT by on or before February 1, 2003;
- complete performance of MIT[11] by February 8, 2003;
- submit reports to EPA by February 15, 2003; and
- submit any information on the well or pipeline within seven days of receipt of information regarding the well or pipeline, including any tests on either production parameters and volumes, arrangements for delivery of gas or oil and any geophysical surveys or tests. (December 13, 2002) (AR 1011 0060-64)

During late December, 2002, and January, 2003, EPA received additional information from Pryor and other sources which supported a decision by EPA to alter or further delay certain

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[10]As indicated above, this pipeline had to be completed to reduce pressure at the well head before the MIT to test the integrity of the well could be conducted.

[11]As in amendments #3 and 6 described above, this amendment also included notice to Pryor requiring notification to the EPA OSC of any information that the performance of the MIT would create or contribute to unsafe or unstable conditions at the well.

of the ordered actions, including the required MIT, while EPA analyzed such information and obtained a report from its retained expert. (See, e.g., AR 2 1 0084; 2 1 0087-90; 2 2 0227-240; 10 1 0036-38;1104 0083-84, 0135-0143, 0149-159) Thereafter, after considering new information, including concerning current conditions at the well, EPA amended its order four additional times as follows:

#8 Extended the deadlines for work related to the MIT to April 9, 16 and 23, 2003. (February 26, 2003) (AR 1011 0066-67)

#9 Extended the deadlines for work related to the MIT to April 23, 30 and May 7, 2003. (April 8, 2003) (AR 1011 0071-72)

#10 Extended the deadlines for work related to the MIT to May 7, 14, and 21, 2003. (April 22, 2003) (AR 1011 0076-77)

#11 Eliminated the requirement for a MIT at this time and ordered Pryor to notify EPA at least 30 days prior to drilling the subject well to a depth greater than its current depth. (May 7, 2003) (AR 1011 0076-77)

The removal administrative order issued pursuant to Section 311(c) of the Clean Water Act has not been amended further.

On May 12, 2003, after the last amendment to the order, Pryor sent notification to EPA, in accordance with Amendment #11, that Pryor intended to deepen the subject well on or after June 11, 2003. On June 12, 2003, EPA responded to such notification stating that EPA "does not at this time require that a Mechanical Integrity Test be performed on the well," and forwarding a memorandum dated May 28, 2003, by EPA-retained expert, David E. Smink, P.E., regarding his recommendations regarding future drilling operations. (Exhibit A, Plaintiff's Memorandum in

Opposition to Defendant's Motion to Exclude ("Opposition Mem.")) Pryor sent to EPA's OSC on June 20, 2003, a letter ostensibly responding to the memorandum from Mr. Smink enclosed in EPA's June 12, 2003, letter. (Exhibit B, Opposition Mem.) Since that time, EPA has continued to monitor the conditions at the site.

The United States filed on July 23, 2003, the subject motion to exclude disclosures and discovery from the scheduling order and supporting memorandum. Following the scheduling conference held on that same date, the United States filed a certified copy of the EPA administrative record. Pryor served by mail on August 4, 2003, its memorandum in opposition to the subject motion.

ARGUMENT

A. Scope of Review

As the United States explained in its initial memorandum in support of its motion to exclude Rule 26 disclosures and discovery from the Court's scheduling order, the Administrative Procedure Act ("APA") provides that judicial review of final agency action is based on the administrative record before the agency at the time it makes its decision. 5 U.S.C. § 706. *See* Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419-20, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). The Supreme Court has explained that "[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." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 84 L.Ed. 2d 643 (1985).

An agency's administrative record subject to such review "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), or otherwise described as "all materials 'compiled' by the agency . . . that were **before the agency at the time the decision was made**," (emphasis added), James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). See also Pollgreen v. Morris, 770 F.2d 1536, 1545 (11th Cir. 1985); American Petroleum Inst. v. EPA, 540 F.2d 1023, 1029 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977); Nickol v. United States, 501 F.2d 1389, 1390 (10th Cir. 1974) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L. Ed. 456 (1951)). Moreover, the designation of the administrative record by an agency is entitled to a presumption of regularity. Bar MK Ranches, 994 F.2d at 740. Thus a reviewing court should assume the agency properly designated the administrative record absent clear evidence to the contrary. Id.; see also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 751 F.2d 1287, 1324 n. 229, 1326 (D.C. Cir. 1984)("San Luis I"), aff'd in relevant part en banc, 789 F.2d 26 (D.C. Cir.)("San Luis II"), cert. denied, 479 U.S. 923, 107 S.Ct. 330, 93 L.Ed.2d 302 (1986).

Following these tenets, courts have recognized as well-established both "[t]he principle that judges review administrative action on the basis of the agency's stated rationale and findings" and "[the courts'] correlative reluctance to supplement the record." *See, e.g,* San Luis Obispo Mothers For Peace v. NRC, 751 F.2d at 1326. Accordingly, the practice of supplementing the record for judicial review in any fashion "decidedly is the exception, not the rule." San Luis I, 751 F.2d at 1324 (quoting Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1105 n.18 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980)). As this Circuit has clearly

recognized, exceptions to the general rule of limiting judicial review to the record are to be narrowly construed by the courts. City of Mount Clemens v. EPA, 917 F.2d 908, 918 (6th Cir. 1990).

Here, not only does Pryor seek to supplement the record with documents attached to a memorandum, but also apparently contends that it should be permitted to supplement the record with testimony of witnesses as well as experts, photographic and documentary evidence, and even a site visit. By doing so, Pryor is clearly asking this Court to simply substitute its judgment for that of the agency. That is not the province of a court reviewing agency action any more than it is the province of an appeals court to substitute its judgment for that of a district court by conducting an evidentiary hearing or otherwise consider new evidence outside of a record on appeal. See Cronin v. United States, 919 F.2d 439, 443 (7th Cir. 1990) ("When persons harmed by administrative action bring a suit for injunction in a federal district court, it is not because they . . . are entitled to, a trial. . . . In such a suit the district court is a reviewing court, like this court; it does not take evidence." (citations omitted)) "[O]nly in an emergency" should a reviewing court conduct its own evidentiary hearing. Cronin, 919 F.2d at 444. Because this case is subject to record review, it is properly resolved by dispositive motions rather than by trial. See First Nat'l Bank of Chicago v. Comptroller, 956 F.2d 1360, 1362 (7th Cir.), cert. denied, 506 U.S. 830, 113 S.Ct. 93, 121 L.Ed.2d 55 (1992).

A party who seeks to supplement the administrative record bears the heavy burden of showing that supplementation is justified. See, e.g, San Luis I, 751 F.2d at 1326. Only exceptional circumstances support consideration of supplementation by the reviewing court: (1) "when there is 'such a failure to explain administrative action as to frustrate effective judicial

review'"; (2) if the decisionmaker "relied on extra-record evidence favorable to its position . . . [or] the agency excluded from the record evidence adverse to its position"; or (3) when the agency acts in bad faith. San Luis I, 751 F.2d at 1326-27; see also Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers, 87 F.3d 1242, 1246 n. 1 (11th Cir. 1996).[12]

None of these exceptions apply here. Pryor has not even asserted any failure by EPA to explain its administrative action sufficient to frustrate judicial review. Nor has it demonstrated that EPA relied on extra record evidence or excluded "evidence" from the record adverse to its position.[13] Although Pryor makes the bold statement that EPA has acted improperly, or in bad faith, it has totally failed to establish any basis for such assertion.

B. Administrative Record Subject to Judicial Review

Pryor contends that the subject administrative record is incomplete and is therefore entitled to supplement the record with certain documents attached to its opposition memorandum, specifically Exhibits A, B, C and D, as well as with unspecified testimony of fact and expert witnesses, photographs, videotapes, and other documentary evidence.

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[12]This presumption against supplementation of the record presented by the agency is based upon "[t]he principle that judges review administrative action on the basis of the agency's stated rationale and findings." San Luis Obispo, 751 F.2d at 1325 (emphasis in original). Accordingly, in reviewing agency action, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 50, 1035 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

[13]As discussed below, Exhibits A and B to Pryor's opposition memorandum were not generated or received prior to EPA's last amendment to the subject administrative order, so clearly were not before the agency at the time of its decision and, therefore, properly excluded from the record. Exhibit C is actually in the administrative record, (AR 10 1 0026-27), and Exhibit D is not evidence that is either relevant or probative of the decisions made by EPA after its receipt.

Before addressing each of the exhibits in turn, it is important to recognize what is actually before the Court. Pryor filed this lawsuit challenging certain actions of the EPA as unauthorized, arbitrary, capricious and unconstitutional. At the time the lawsuit was filed on November 27, 2002, EPA had issued a Removal Administrative Order on August 5, 2002, and subsequently amended it on six separate occasions. To the extent that such order is reviewable at all at this juncture,[14] only the documents and materials directly or indirectly considered by EPA at the time it made the decision to issue such order can be considered. See Bar MK Ranches, 994 F.2d at 739; James Madison Ltd. v. Ludwig, 82 F.3d at 1095. As the subject administrative order has since been amended an additional five times since the lawsuit was filed, in an effort to be inclusive and provide this Court with a complete record, the administrative record compiled, a certified copy of which has been filed with the Court, has included all the documents and materials considered by EPA up through the last amendment to the administrative order issued on May 11, 2003. Documents generated after EPA's decision reflected in the order, even as amended, may not properly be part of the administrative record subject to judicial review. See Bar MK Ranches, 994 F.2d at 739; James Madison Ltd. v. Ludwig, 82 F.3d at 1095; see also Gables by the Sea, Inc. v. Lee, 365 F. Supp 826, 830 (S.D. Fla., 1973), aff'd, 498 F.2d 1340 (5th Cir. 1974).

Turning to the documents Pryor claims were improperly withheld from the record, first Pryor points to two letters attached as Exhibits A and B to its memorandum. These two letters

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[14]It is the position of the United States that even if EPA's order under the Clean Water Act constituted sufficiently-final agency action ripe for review, this Court does not have subject matter jurisdiction over an action for pre-enforcement review of such an administrative order. The United States will address the issue of subject matter jurisdiction in a separate motion.

both post-date the last amendment to the subject Removal Administrative Order. The June 12 letter (Exhibit A) reflects EPA's subsequent informal decision[15] in response to Pryor's notification of May 12, 2003, described above. Because this letter post-dates the last formal amendment to the order, it was not part of the materials compiled by the agency and before it at the time the subject decision was made.

Similarly, the June 20, 2003, letter (Exhibit B) post-dated even such subsequent informal decision, and could not, therefore, have been, and was not, considered by EPA in reaching its decision on either the administrative order which is the subject of this action, or the subsequent informal decision. The June 20 letter, then, is, in effect, simply a self-serving response by Pryor in an effort to bolster its record.

Because neither letter was considered by EPA in reaching its decision as set forth in the order, as amended, they were properly not included in the certified copy of the administrative record filed with the Court.[16]

Next Pryor claims that EPA has omitted "key evidence" of Pryor's attempts " to settle EPA's imaginary issues through EPA's administrative process," attaching as an example of such omission a self-serving letter dated November 26, 2002, in Exhibit C. Pryor, however,

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[15]By this letter EPA does not require any action or otherwise impose any obligation on Pryor. Rather the letter simply gives notice to Pryor that "EPA does not at this time require that a Mechanical Integrity Test be performed on the well [and will] continue to evaluate site conditions during its oversight activities." Pryor does not apparently object to EPA's determination that it does not now require the MIT to be performed.

[16]Notwithstanding the fact that such post-decision documentation is not a necessary part of the subject administrative record, in an effort to demonstrate that EPA is not attempting to hide anything from this Court, defendant will agree to permit Exhibits A and B to supplement the administrative record.

apparently neglected to look at the administrative record before making such assertion as that document may be found in the record at AR 10 1 0026-27. Pryor complained of no other "omitted" documents or materials. Nor did it demonstrate how documentation regarding its attempts to "settle" any issues are properly subject to this Court's judicial review to determine if EPA's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence" - that is, the proper standard of review under Administrative Procedure Act. See 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).

Pryor then purports to demonstrate a "strong showing of improper behavior" by claiming that "EPA has conveniently omitted it from the Administrative Record" - attaching as Exhibit D in a footnote a letter dated August 2, 2002, from the Morgan County Superintendent of Highways to EPA's Regional Administrator expressing concern about the federalizing of the subject site, the number of contractors and vehicles involved, and the effects of the response on local residents. As this letter did not involve the issues to be addressed by EPA in its subsequent decisions resulting in the removal administrative order or the amendments to the order, it was not considered directly or indirectly by EPA in reaching such decisions and, therefore, was properly omitted from the administrative record. See Bar MK Ranches, 994 F.2d at 739.

Pryor concludes with a sweeping diatribe asserting that the history of EPA's federalization and management of the subject site "provides textbook evidence showing how to make arbitrary and capricious decisions," much of which evidence Pryor claims is not included

in the administrative record. Pryor submits no substantiation for such hyperbole, save an unspecified need to supplement the record with witnesses, demonstrations, videotapes and site visits,[17] none of which Pryor suggests were previously provide to EPA and simply not considered.

Pryor has clearly not met the heavy burden of showing that supplementation of the administrative record is justified. See, e.g, San Luis *I*, 751 F.2d at 1326. Nor has Pryor demonstrated that either discovery or Rule 26 disclosures are appropriately included in the scheduling order. Furthermore, in the event that this Court should determine that the record is inadequate in any regard or that EPA's actions are not sustainable on the administrative record provided, the proper judicial remedy is to vacate this action and to remand the matter back to EPA for further consideration. Camp v. Pitts, 411 U.S. at 143; Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 347 (D.C.Cir. 1989); AT&T Information Systems v. Gen. Services Admin., 810 F.2d 1233, 1236 (D.C.Cir. 1987); San Luis Obispo Mothers for Peace, 751 F.2d at 1326.

CONCLUSION

Accordingly, the United States requests that the Court exclude from the scheduling order entered in this case the requirement that the parties make disclosures under Rule 26, Federal Rules of Civil Procedure, and any reference to discovery, as such procedures are not applicable in this action.

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[17]If EPA's decisions are even reviewable at this juncture, the role of this Court is not to act as a trier of fact or a technical expert, but rather to review the record before EPA at the time it made its decision and to determine whether the EPA's decision satisfies the arbitrary or capricious standard -- a standard that presumes the validity of agency actions if certain minimum standards of rationality are met. See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following via first class mail, postage pre-paid, this 12th ~~day~~ of August, 2003:

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