UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

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

MEMORANDUM IN SUPPORT OF UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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 cross-motion for summary judgment and in opposition to Plaintiff's motion for summary judgment.

INTRODUCTION

This case involves a premature request for judicial review of an administrative order, as amended, 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 required Pryor to take actions in response to the initial discharge and subsequent substantial threat of a discharge of oil to navigable waters and adjoining shorelines caused by a massive well blowout and oil spill and fire at the well site and

affected property, and to prevent further potential environmental harm.

As demonstrated in the United States' pending motion for judgment on the pleadings, this Court lacks subject matter jurisdiction over Pryor's complaint. If, however, the Court concludes that subject matter jurisdiction exists in this matter, Pryor's claims still fail because EPA acted well within the scope of its authority, and its actions were not arbitrary, capricious, or otherwise contrary to law. For these reasons, if the Court does not grant the United States' pending motion for judgment on the pleadings, it should grant summary judgment for the United States and deny Pryor's motion for summary judgment.

STATUTORY FRAMEWORK

The Clean Water Act (CWA) is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In addition to numerous other provisions designed to achieve that purpose, the Clean Water Act, in CWA Section 311 (Section 311)[1], 33 U.S.C. § 1321, provides that "it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or their] adjoining shorelines . . . ." 33 U.S.C. § 1321(b)(1). To that end, 33 U.S.C. § 1321(b)(3) prohibits "[t]he discharge of oil or hazardous substances . . . into or upon the navigable waters of the United States [or their] adjoining shorelines . . . in such quantities as may be harmful as determined by the President . . . ."

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[1]With the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701 - 2761, Congress enacted amendments to the CWA, including many pertaining to those provisions at issue in this lawsuit. These amendments were enacted, in part, in reaction to the Exxon Valdez oil spill of Mach 1989. CWA § 311 and 33 U.S.C. § 1321 may be used interchangeably throughout this memorandum.

The Environmental Protection Agency (EPA) is an administrative agency of the United States of America authorized to administer much of the CWA, including the sections at issue in this lawsuit.[2] When the EPA finds that a person is in violation of the prohibition against discharges of oil or hazardous substances in 33 U.S.C. § 1321(b)(1), the agency is authorized to respond to the violation in a number of alternative and complementary ways.[3] Here, EPA acted pursuant to its statutory authority in 33 U.S.C. § 1321(c)(1)(B)(i) and (ii) to "remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time; [and/or] direct or monitor all Federal, State, and private actions to remove a discharge." This authority may be exercised to "ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance." 33 U.S.C. § 1321(c)(1)(A).

FACTUAL BACKGROUND

As demonstrated by the Administrative Record, Doc. 24, this case involves a major discharge of oil that posed a threat to public health and the environment. As a result of such discharge, EPA exercised its statutory authority and, *inter alia*, issued an administrative order to Pryor for the purpose of addressing and mitigating the consequences of the discharge.

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[2]In particular, the President's authority under 33 U.S.C. § 1321(c) has been delegated to the EPA Administrator for discharges in the inland zone. See Section 3 of Executive Order 12777, 56 Fed. Reg. 54757 (October 22, 1991). Under this executive order, the same authority is exercised by the Coast Guard for discharges in the coastal zone. "Inland zone" and "coastal zone" are defined in the National Contingency Plan ("NCP"), 40 C.F.R. Part 300.

[3]See Statutory Background discussion in United States' Memorandum in Support of Motion for Judgment on the Pleadings. (U.S. MJP Mem.), Doc. 32, at 3-5.

On July 19, 2002, Pryor was performing drilling operations at the Howard-White #1 oil exploratory well[4] located in the Obed Wild and Scenic River Area, situated near both Clear and White Creeks[5] and the statutory boundary of National Park Service land. (AR 2 8 0005-07).[6] 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[7] 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 impoundments. (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 (Boots and Coots) to extinguish the oil fire and cap the well. (AR 2 8 0005) The halted containment and

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[4]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)

[5]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)

[6]References to pages of the administrative record are referred to as (AR #).

[7]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 was plugged on July 26, 2002. (AR 2 8 0011)

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. (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.[8] (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

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[8]Pryor did not notify the NRC of the oil discharge to navigable waters and adjoining shoreline, 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)

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, and 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 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 10 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 0011-12) 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 removal of 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, 33 U.S.C. § 1321(c)). (AR 1011 0001-17) The order required that Pryor conduct certain stabilization, mitigation, and other 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)[9] on the well to ensure its integrity.[10] (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

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[9]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)

[10]In addition, although EPA was under no obligation to do so, while it undertook to further assess the situation, it minimized any loss to Pryor, by allowing Pryor to produce from the well rather than by flaring the gas or by promptly plugging the well.

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.[11]

On November 13, 2002, EPA issued Amendment #6 to the removal administrative order which 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;[12] and

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[11]The first five amendments 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)

[12]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

submit reports within 82 days. (AR 1011 0051-53) Following issuance of Amendment #6, EPA representatives advised Pryor that, if it failed timely to 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)

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 entered into an agreement[13] with Pryor, which resolved the pendency of the request for temporary injunctive relief by granting an additional period of time for the completion of the gas pipeline gathering line[14] 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;

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should immediately notify EPA OSC and provide that information to her." (AR 1011 0052)

[13]This agreement was signed by the United States through the United States Attorney.

[14]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.

- complete performance of the MIT[15] 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 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 that concerning current conditions at the well, EPA amended its order four additional times, ## 8 through 10 of which simply extended deadlines for certain work to be performed.[16] On May 7, 2003, EPA issued Amendment #11 which eliminated the requirement for the 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

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[15]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.

[16] These amendments provided 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)

removal administrative order issued pursuant to 33 U.S.C. § 1321(c) 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.), Doc. 26) 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., Doc. 26) Since that time, EPA has continued to monitor the conditions at the site, and Pryor's own reports and EPA's contractor's reports demonstrate that oil continues to discharge into Clear Creek. (See, e.g., AR 11 04 0003-22; 11 04 0048-81; 11 04 0107; 11 04 0139-47, 0162-63, 0167; 0171; 0184, 0187-97)

PLAINTIFF'S CLAIMS

Plaintiff's complaint states two claims for relief. The first claim for relief asserts that EPA might seize Pryor's pipeline, which allegedly would violate the Takings and Due Process clauses of the Constitution. The second claim for relief alleges that Amendment #6 (relating to the mechanical integrity test) exceeds EPA's authority and is arbitrary, capricious, and taken without procedure required by law.

On August 21, 2003, the United States moved for judgment on the pleadings, on the

grounds that the Court lacks subject matter jurisdiction over Pryor's claims: the Clean Water Act precludes pre-enforcement judicial review of EPA's administrative order, only the Court of Federal Claims has jurisdiction over Pryor's claims of an unconstitutional taking, and Pryor failed to exhaust administrative remedies as to any claim for alleged wrongful conduct by EPA.[17] Also on August 21, 2003, Pryor moved for summary judgment seeking only a determination as to "whether EPA has had jurisdiction over the Well now or at anytime since at least November 27, 2002." Pryor's Memorandum in Support of Motion for Summary Judgment (Pl. MSJ Mem.), Doc. 30, at 14. The present memorandum is submitted in support of the United States' motion for summary judgment and in opposition to Pryor's motion.

STANDARD OF REVIEW

To the extent that this Court exercises jurisdiction to review any aspect of Pryor's claims, such review is limited to the administrative record made before the EPA, a certified copy of which has been filed in this action. (Doc.24). Moreover, the narrow and highly deferential arbitrary and capricious standard of review discussed below applies.

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." 5 U.S.C. §706(2)(A); 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

[17]Ordinarily, the United States would wait for a dispositive motion on jurisdictional grounds to be decided by the Court before filing a motion for summary judgment on the merits. However, the scheduling order in this case requires the United States to file all dispositive motions (which would include the present motion) by October 4, 2003.

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).

Under the arbitrary and capricious standard, the scope of review is very narrow. Railroad Ventures, 299 F.3d at 547; see also Simms v. Nat'l Traffic Safety Admin., 45 F.3d 999, 1003 (6th Cir.1995); Sierra Club v. Davies, 955 F.2d 1188, 1192 (8th Cir. 1992). The Seventh Circuit has stated: "The arbitrary and capricious standard is highly deferential: even if [a reviewing court] disagree[s] with an agency's action, [the court] must uphold the action if the agency considered all the relevant factors and [the court] can discern a rational basis for the agency's choice." Israel v. United States Department of Agriculture, 282 F.3d 521, 526 (7th Cir. 2002), cert. denied, 537 U.S. 822, 123 S.Ct. 102, 154 L.Ed.2d 31 (2002), affirming Israel v. U. S. Dept. of Agr., 135 F. Supp.2d 945 (W.D. Wis. 2001); see also Camp v. Pitts, 411 U.S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973); Overton Park, 401 U.S. at 415-16. Similarly this Circuit has ruled that in determining whether a decision by an agency is arbitrary or capricious, the reviewing court is to consider whether there was a "rational connection between the facts found and the choice made" and should uphold an agency decision "when it is possible to offer a reasoned, evidence-based explanation for a particular outcome." Railroad Ventures, 299 F.3d at 548 (citations omitted).

An agency's interpretation of the statutes and regulations it administers is entitled to "considerable weight and due deference . . . unless its statutory construction is plainly unreasonable." *Id.* at 548; see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (holding that reviewing court must only ask whether agency action "is based on a permissible construction of the statute"). Moreover, an agency's decision is "entitled to a presumption of regularity." Overton Park, 401

U.S. at 415; see also Sierra Club v. United States Army Corps of Engineers, 772 F.2d 1043, 1051 (2d Cir. 1985). Accordingly, the reviewing court is prohibited from substituting its own judgment for that of the agency. Overton Park, 401 U.S. at 415; United Shipping Co., Inc., 34 F.3d at 1390; Davies, 955 F.2d at 1192-93 (citing Overton Park).

In applying these standards 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 Gibbs v. USDA, No. 3:02-CV-547, p. 5 (E.D. Tenn., Memorandum Opinion, Sept. 11, 2003, Judge Phillips)(copy attached); Estate of Elinor James v. USDA, No.3:01-CV-628 (E.D. Tenn., Order, November 8, 2002, Mag.Jdge Shirley)(copy attached).[18] Furthermore, 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)).[19]

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[18]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. Gibbs, at p. 5, citing Wright v. FSA, No. 4:00-CV-94, 2001 WL 822417,*2 (W.D. Mich. June 22, 2001) and Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444, 50 S.Ct. 220, 226, 74 L.Ed 524 (1930). In order even to 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. v. Volpe , 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971); San Luis Obispo Mothers For Peace v. U.S. Nuc. Reg., 789 F.2d 26, 45 (D.C. Cir. 1986) (emphasis added). Pryor has made no such showing.

[19]Thus, if a court finds 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.

Federal Rule of Civil Procedure 56(c) permits a court to enter summary judgment whenever "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A material fact is a fact that is "relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." Manzanita Park, Inc. v. Insurance Co. of N. Am., 857 F.2d 549, 552 (9th Cir. 1988). Because the APA limits the Court's review to the administrative record and the record contains all the undisputed facts, the Court need not "find" underlying facts and can resolve this case based upon the parties' cross-motions for summary judgment.

ARGUMENT

I. EPA'S ACTIONS WERE AUTHORIZED BY LAW

In relevant part, Section 311(c) of the Clean Water Act authorizes the President[20] to "ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil . . .(i) into or on the navigable waters; (ii) on the adjoining shorelines to the navigable waters." 33 U.S.C. § 1321(c)(1)(A). Furthermore, the statute provides that, in carrying out this authority, "the President may (1) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time; (2) direct or monitor all Federal, State, and private actions to remove a discharge." 33 U.S.C. § 1321(c)(1)(B). The statute provides that "[r]emove" or 'removal' refers to containment and

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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).

[20]This authority was delegated to EPA in Executive Order 12777, 56 Fed. Reg. 54757 (Oct. 22, 2991).

removal of the oil from the water and shorelines or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." 33 U.S.C. § 1321(a)(8).

These statutory provisions provided all the authority EPA needed to respond to the initial discharge and subsequent substantial threat of discharge of oil to navigable waters and adjoining shorelines caused by the well blow out and subsequent oil spill and fire on Pryor's property. Pryor appears to concede as much and now asserts that "the only question before the Court is whether EPA has had jurisdiction over the Well now or at anytime since at least November 27, 2002." (Pl MSJ Mem., Doc. 30, at 14)

In its complaint, Pryor asserts that in order to issue a CWA Section 311(c) order, EPA must establish that a discharge or substantial threat of discharge is of sufficient size or character to be a substantial threat to the public health or welfare of the United States. (Complaint ¶¶ 65-67 at 12-13). In support of this allegation, Pryor relies on Section 311(c)(2) of the CWA; however, EPA did not issue the Removal Order to Pryor specifically pursuant to Section 311(c)(2). EPA's Removal Order was issued pursuant to section 311(c) generally. (AR 10 11 0001). Under Section 311(c)(1), a Removal Order does not require any finding of substantial threat to the public health or welfare of the United States or any determination as to that threat's size or character of the threat. 33 U.S.C. §1321(c)(1). Thus, for the Removal Order actually issued by EPA, nothing in the statute requires the specific findings identified by Pryor.

In its motion for summary judgment, Pryor asserts that the administrative record "does not contain a shred of evidence that the Well has leaked" since it was capped on July 27, 2002,

and that, therefore, EPA has no authority to take any action with respect to the Well. Pl. SJ Mem., Doc. 30, at 18. Plaintiff is wrong on both counts.

To begin with, Pryor's own reports (and EPA's contractor's reports) demonstrate that oil continues to discharge into Clear Creek. (See, e.g., AR 11 04 0048-81; 11 04 0139-47, 0162-63, 0167; 0171; 0184, 0187-97; 11 04 0003-22)[21] There is nothing in the Administrative Record to suggest that this discharge of oil, evidenced in continued, regular reports of the existence of an oil sheen observed in the water in Clear Creek, reasonably could be traced to a source other than the Pryor well. EPA is not aware of, nor has Pryor produced to EPA, any information indicating that the oil sheen appearing in Clear Creek began at any time prior to the first discharge of oil from the Pryor well on July 19, 2002, or has been caused by a different oil spill or another, unrelated accident. In fact, Pryor concedes that the oil in Clear Creek flowed through bedrock fractures from the soil surrounding the well. (Pl. MSJ Mem., Doc. 30, at 4).[22] In light of this discharge, and of EPA's statutorily-authorized responsibility to protect human health and the environment, it is, and has been, reasonable for EPA to continue to be present at the site, to take

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[21]Pryor states that it provided EPA with "conclusive" evidence that the well "could not be" the source of the oil in Clear Creek. Pl. SJ Mem., Doc. 30, at 11. Pryor's observations neither "prove" nor offer "conclusive" evidence about the source of the oil. There existed countervailing evidence that, even though there was no evidence of a surface leakage around the wellhead, the continued seepage into the creek supported testing the well, both for casing integrity and the possibility of subsurface formation fracture. (AR 2 2 0183-86) EPA considered all the input, including that from EPA's own contractors, the State and the NPS, in determining that the evidence was far from "conclusive" that the well was not, a source of the discharge.

[22]Though Pryor insists that EPA caused the oil to get into the soil, the Administrative Record documents that Pryor's halted recovery operations, before EPA was informed of the spill, allowed the oil to overflow its containment and to run toward Clear Creek and White Creek. (AR 2 8 0005, 07).

appropriate action to monitor the site to characterize and address the potential problems that still are present there, and to be in a position to respond effectively to possible future discharges until such time that the well and surrounding area are considered stable and secure and no longer a threat to human health and the environment.

In any event, nothing in the statute suggests that EPA is required to demonstrate a continuous discharge in order to carry out its responsibilities under Section 311(c)(1). Rather, that authority is triggered by a discharge or substantial threat of a discharge to navigable waters or adjoining shorelines, which clearly occurred here.[23]

To allow the agency sufficient discretion to respond appropriately under the wide variety of exigent circumstances likely to occur, EPA's statutory authority contains no limit, temporal or otherwise, which constrains this broad grant of authority in the manner suggested by Pryor. See 33 U.S.C. §1321(c)(1). As the statute does not set forth when EPA's statutory authority ends, it is certainly reasonable here for EPA to continue to exercise oversight of the site in light of the magnitude of the prior discharge and the fact that it is not clear that future discharges will not occur in the absence of protective measures.

In such situations, EPA is analagous to a fire department that has responded to a fire - it assumes responsibility for the site, directs appropriate actions to completely extinguish the fire, conducts appropriate investigations into the cause of the conflagration and does not relinquish control of the site until it, not only has ensured that all embers that might potentially flare up

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[23]Both Pryor's and EPA's contractor's reports establish the ongoing, if intermittent, nature of the discharge. (AR 11 04 0048-81; AR 11 04 0139-47, 0162-63, 0167; 0171; 0184, 0187-97; AR 11 04 0003-22)

again are completely cooled, but also that it has completed its investigation as to the cause of the fire.

As discussed above, the Administrative Record demonstrates that a major discharge of oil to navigable waters occurred on July 19, 2002, from Pryor's well. Any argument that EPAs statutory authority to address the discharge and substantial threat of discharge abruptly ended on November 27, 2002, has no support in either the statute or in the case law.

II. EPA ACTED REASONABLY IN ITS RESPONSES TO THE DISCHARGE.

In contrast to Pryor's exaggerated and inaccurate characterizations of EPA's actions, the Administrative Record clearly demonstrates, that in responding to Pryor's discharge of oil and the catastrophic fire that ensued, EPA's actions were reasonable.

In addressing the catastrophic discharge resulting from the failure of Pryor's well, EPA acted reasonably when it (1) assumed control over the cleanup of the site;[24] (2) issued a Removal Order both to remove the discharge and to prevent or mitigate a substantial threat of further discharge; and, (3) modified the Removal Order as indicated by changing conditions and additional information received by the Agency.

Particularly given the damage caused by Pryor's oil spill into navigable waters and

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[24]Although Pryor has expressed displeasure that EPA "federalized" the cleanup-and complained that the EPA OSC did this without discussing with Pryor its ability to fund the well-capping activities, (Pl MSJ, Doc. 30, at 10), Pryor's claims are apparently not based upon an assertion that EPA lacked the statutory authority to take charge of the cleanup. (See, e.g., Pl MSJ Mem., Doc. 30, at 14.) In any event, it was perfectly reasonable for EPA to do so, given the nature of the circumstances and the breadth of the CWA section 311(c) grant of authority, as discussed above. This is especially true since, before EPA assumed control over the removal action, Boots and Coots informed EPA that Pryor had not been able to provide sufficient financial guarantees of payment upon completion of the necessary work. (AR 2 1 0075)

adjoining shorelines, these actions were not arbitrary or capricious, nor were they an abuse of EPA's authority or discretion. They were clearly undertaken in a manner that was in accordance with the operative federal statutory provision and are clearly supported by substantial evidence. As documented fully in the Administrative Record, EPA has demonstrated that there is a "rational basis" for its actions, including its decision to issue the Removal Order. Furthermore, EPA has demonstrated that there was a "rational connection" between the facts surrounding the discharge and its response to that discharge (and subsequent threat of further discharge), including its initial decision to require an MIT and the other requirements of the Removal Order.

In light of the emergency nature of the situation that kept evolving quickly, EPA needed to make quick decisions in reacting to events as they unfolded after EPA was belatedly notified of the failure of Pryor's well. In circumstances where time clearly was of the essence – a blown-out well was discharging oil into navigable waters while a fire burned – EPA's actions to protect human health and the environment were eminently reasonable. As described in the Factual Background section above, EPA OSC took over the cleanup by issuing Pryor a Notice of Federal Assumption of Response Activity when significant doubts were raised about Pryor's ability to produce adequate assurances that it could carry out all necessary cleanup actions. It would have been irresponsible for EPA to do otherwise and potentially allow a dangerous situation to unfold in an uncontrolled manner.

After issuing the Removal Order on August 5, 2002, EPA issued a number of amendments to the order in response to the dynamic nature of the situation. In each instance, EPA acted in a reasonable and rational manner to respond appropriately to the developing conditions at the well site and other property affected by the events following the blowout and resulting discharge of oil.

For example, at the beginning of September, 2002, Pryor's well was discharging oil into Clear Creek at a rate of approximately 50 gallons per day. (AR 11 1 0035-39). Pryor had still not submitted an adequate workplan for conducting an MIT, as required by the August 5, 2002, Removal Order. Specifically, the draft workplans submitted by Pryor to EPA for its review omitted any actual time frame for conducting the MIT. (AR 2 4 0015-16; 11 04 0029-30) This omission of a time frame was significant, since the Removal Order anticipated that the MIT would be performed by September 24, 2002. (AR 10 11 0012). In light of Pryor's deliberate failure to include a specific time frame in its draft workplans, EPA issued Amendment #3 on September 10, 2002, which provided Pryor with a deadline (i.e., October 15, 2002) for the performance of the MIT. (AR 10 11 0030-32).

The crux of Pryor's complaint in this case involves EPA's decision to require the MIT. Pryor asserts that EPA acted outside its authority when it issued Amendment #6. See Complaint, Doc. 1, ¶¶ 1, 62, 67.

As discussed in the Factual Background section above, Amendment #6, dated November 12, 2002, required Pryor to conduct certain activities involving preparation for and performance of the MIT within specified time frames: complete construction and testing of pipeline; draw down gas by producing or flaring; complete performance of the MIT with a contingency plan in place; and submit reports. (AR 1011 0051-53) Despite Pryor's emphasis on this amendment, the last before it filed suit, Amendment #6 contained virtually no new requirements - all its provisions were essentially requirements of the original order issued on August 5, 2002. Rather, Amendment #6 simply provided revised and extended deadlines for the remaining tasks - specifically those which were required as a prerequisite to the MIT to test the integrity of the well casing (e.g., completion of construction of the low pressure pipeline to gather gas from the well

and reduce pressure in the well). Moreover, the time frames contained in Amendment #6 not only represented a significant extension over earlier deadlines,[25] but were also based on information as to feasibility that had been provided by Pryor's representative to a Coast Guard employee on site.[26] (See AR 10 11 0049; 11 01 0197)

The purpose of the 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 a reliable source of information of whether the well is a continuing or potential source of discharge to the navigable waters. (AR 2 1 0014, 18, 20; 2 1 0076; 2 2 0183-85) The well had experienced a violent strain upon its components during the blowout. (AR 2 1 0184) One of those components - the casing, if working as designed, would prevent the well from leaking once the well had been capped.[27] (AR 2 2 0184). The MIT was designed to test this component and would provide direct information about the well casing integrity (in contrast to available, but indirect, sources of information). (See 2 2 0183-85) Based upon the results of the MIT, EPA would be sufficiently informed to appropriately determine and prevent risks to human health and

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[25]The original order in Par. VII 1.A. required Pryor to assess well integrity in accordance with Attachment A, which specified that the "MIT will be done only after the gas has [been] discharged to a pipeline - 45 to 50 days," but was unclear as to precisely when the MIT itself would be completed. Par. VII. 1.A.i. required a work plan for the assessment of well integrity within 5 days. (AR 1011 0007, 12) Amendment #3 subsequently ordered the MIT to be completed by October 15, 2002. (AR 1011 0030) Amendment #6 then extended that deadline significantly - to 75 days after the effective date of Amendment #6 (November 12, 2002), effectively then to January 26, 2003 - along with establishing time frames for other related tasks. (AR 1011 0051-53)

[26]EPA and the U.S. Coast Guard have entered into an Interagency Agreement pursuant to which the Coast Guard, upon request by EPA, will provide contractor oversight or technical support for emergency and non-emergency removals. It was in this capactity that the Coast Guard Gulf Coast Strike Team provided oversight for the oil removal at the Howard-White #1.

[27]The well was capped on July 26, 2002, by Boots and Coots. (AR 2 8 0012)

the environment, resulting from the condition of the well. If the casing has integrity, the report would provide direct evidence that the casing has not been the source of the ongoing discharge of oil evidenced by the oil sheen reported regularly in Pryor's periodic reports. If, however, the MIT results were to indicate problems with the integrity of the well, it would provide direct evidence of that fact, and EPA would then be in a position to require such further steps as may be necessary to contain the oil in the well and ensure adequate protection for the nearby navigable waters and adjoining shorelines. Such information would be particularly significant in determining whether the well casing could successfully withstand further drilling or other significant disturbance. (AR 2 1 0057-63; 2 1 0087-90, 91; Exh. A, Pl Opp Mem to Mot to Exclude)

Under the circumstances (i.e., the well already having failed once in a catastrophic manner and discharge still occuring), it was clearly within EPA's scope of authority, eminently reasonable, and neither arbitrary nor capricious for EPA to decide that direct evidence of the integrity of the casing was both desirable and necessary and that the test to obtain that evidence could be performed in a manner that would minimize risk of harm to the environment.

Immediately following issuance of Amendment #6, EPA advised Pryor that, if Pryor failed to complete the requisite tasks within the indicated time frames, "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 well]. (AR 1011 0048). Given the multiple extensions of the deadlines previously provided to Pryor and its continued failure to submit a satisfactory MIT workplan (initially required 5 days after the original order), EPA's threat to respond more aggressively to continued delays was also well within the scope of its authority and neither arbitrary nor capricious.

Thereafter, the Removal Order was further amended. On December 13, Amendment # 7 was issued extending the deadlines for all of the MIT-related tasks, with the first, construction of the low-pressure gas pipeline, to be completed no later than December 18, 2002. (AR 1011 0062-64) After the pipeline was finally completed and gas production began,[28] EPA took under consideration additional information provided by Pryor concerning alternatives to immediately conducting a MIT and retained the services of an outside petroleum engineer in connection with such consideration. (AR 2 1 0084; 2 1 0087-90; 2 2 0227-240; 10 1 0036-38; 1104 0083-84, 0135-0143, 0149-159) During this period of consideration and to accommodate Pryor's production of gas via the pipeline,[29] EPA further extended the subject deadlines related to the MIT in Amendment ## 8, 9, and 10. (AR 1011 0066-69; 1011 0071-72; 1011 0076-77)

After a thorough analysis of all the information provided by Pryor, including the results of a gas deliverability test, a physical inspection by EPA personnel and its retained expert, and other information, EPA issued Amendment #11, which recognized Pryor's completion of construction and testing of the gas pipeline and ongoing production of natural gas and then deleted the requirements for Pryor to complete a workplan for assessment of well integrity and to perform the subject MIT. (AR 1011 0080-82) In lieu of the latter requirements, in Amendment #11 EPA ordered that Pryor notify EPA and the Tennessee Department of Environment and Conservation 30 days prior to drilling the well deeper than its current depth. (AR 1011 0081) Presumably, Pryor is not claiming that EPA acted outside of its scope of authority, or arbitrarily or

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[28]Pryor completed construction and testing of the pipeline on December 13, 2002, and began producing gas to Citizens Gas that same day. (AR 2 1 0087-91)

[29]In addition, although EPA was under no obligation to do so, while it undertook to further assess the situation, it minimized any loss to Pryor, by allowing Pryor to produce from the well rather than by flaring the gas or promptly plugging the well.

capriciously, in deleting the requirements for the subject MIT about which it complained for so long. As discussed above, it was clearly within EPA's scope of authority, eminently reasonable and neither arbitrary nor capricious for EPA to decide that direct evidence of the integrity of the casing was both desirable and necessary in initially requiring the MIT until it was provided with adequate information upon which to delay such a requirement, even indefinitely. It was similarly reasonable, and neither arbitrary nor capricious, following such deletion of the requirement of a MIT under the current situation, for EPA to require notification should the well be drilled deeper or otherwise further disturbed in the future and to advise Pryor, upon receipt of such notification, of the recommendations of its expert and that EPA "does not at this time require that a Mechanical Integrity Test be performed on the well," without more. (See AR 1011 0081; Doc. 26, Exhibit A,).

The record establishes and Pryor concedes that a discharge of oil to navigable waters occurred on July 19, 2002, from Pryor's well. (AR 2 1 0002-03) The record further demonstrates that such discharge has continued to the present. (AR 11 04 0048-81; 11 04 0139-47, 0162-63, 0167; 0171; 0184, 0187-97; 11 04 0003-22) Pursuant to CWA section 311(c)(1), 33 U.S.C. §1321(c), EPA has authority to respond and may direct or monitor all Federal, State, and private actions to remove or arrange for the removal of a discharge and to mitigate or prevent a substantial threat of a discharge at any time. Based upon the administrative record before the Court, in responding to the well blowout and resulting discharge of oil from Pryor's well, EPA acted well within the scope of its authority under 33 U.S.C. § 1321(c), and its actions were neither arbitrary, capricious, nor otherwise contrary to law.

CONCLUSION

Based upon the reasoning and authority discussed above and the administrative record filed in this action, the Court should grant the United States' motion for summary judgment and dismiss Pryor's complaint and deny Pryor's motion for summary judgment.

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 by mailing the same via first class mail, postage prepaid, this 12th day of September, 2003:

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

STEPHEN B. GIBBS, and
PAULA E. GIBBS,
Plaintiffs,

V.

THE UNITED STATED DEPARTMENT OF AGRICULTURE, and ANN M. VENEMAN, Secretary of Agriculture, in her Official Capacity,
Defendants.

NO. 3:02-CV-547
(Phillips)

JUDGMENT ORDER

For the reasons set forth in the memorandum opinion filed this day with the clerk, the motion for summary judgment filed by defendants [Doc. 13] is **GRANTED**, and this action is **DISMISSED.**

IT IS SO ORDERED.

ENTER:

Thomas W. Phillips

Thomas W. Phillips
UNITED STATES DISTRICT JUDGE

Date 9/11/03
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

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V.

THE UNITED STATED DEPARTMENT OF AGRICULTURE, and ANN M. VENEMAN, Secretary of Agriculture, in her Official Capacity,
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MEMORANDUM OPINION

Plaintiffs, who are family farmers, entered into an agreement with the United States Department of Agriculture (USDA) whereby the USDA agreed to write-down a portion of their debt in exchange for part of the appreciation in the value of their farm during the term of the agreement. Plaintiffs initiated this action, arguing that their obligation to pay ended with the term of the agreement and challenging the USDA's determination of the maximum amount collectible under the agreement. Defendants have moved for an order dismissing the action or, in the alternative, for summary judgment seeking dismissal of all plaintiffs' claims. For the following reasons, defendants' motion for summary judgment will be granted.

Background

The Agricultural Credit Act of 1987, 101 Stat. 1679 (1988), allowed farmers who were delinquent in payments on various agricultural loans to restructure their debts.

The Act provided for write-down of secured debt to reflect the market value of the land securing the loan. In exchange for the write-down, the USDA required the plaintiffs to sign a Shared Appreciation Agreement (SAA). The SAA provided in part:

> As a condition to, and in consideration of, [USDA] writing down the above amounts and restructuring the loan, Borrower agrees to pay [USDA] an amount according to one of the following payment schedules:
>
> 1. Seventy-five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the above security instrument(s) between the date of this Agreement and either the expiration date of this Agreement or the date the Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years or less from the date of this Agreement.
>
> 2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of this Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four (4) years but before the expiration date of this agreement.
>
> The amount of recapture by [USDA] will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the time this Agreement is entered into. If the Borrower violates the term of this Agreement [USDA] will liquidate after the Borrower has been notified of the right to appeal.

Plaintiffs assert that the USDA county supervisor with whom they signed the SAA informed them that, if they had not paid the loan in full, sold their land, or quit farming before the expiration of the SAA, they would owe nothing. Plaintiffs filed this action seeking

a determination that they owe no money to the USDA under the SAA. Defendants have moved for an order dismissing the action or, in the alternative, for summary judgment on the grounds that plaintiffs have failed to state a claim or otherwise demonstrate that they are entitled to judgment as a matter of law.

Analysis

The Federal Rules of Civil Procedure permit a court to dismiss a complaint before trial for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Rule 12(b)(6) provides as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted.
>
> A motion making any of these defenses shall be made before pleading if a further pleading is permitted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment will be granted by the court only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show that no genuine issue of material fact exists. The court

must view the facts and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Morris to Crete Carrier Corp.*, 105 F.3d 279, 280-81 (6th Cir. 1987); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943 (6th Cir. 1990); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). Once the moving party presents evidence sufficient to support a motion under Rule 56, Federal Rules of Civil Procedure, the non-moving party is not entitled to a trial simply on the basis of allegations. The non-moving party is required to come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *White,* 909 F.2d at 943-44. The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex,* 477 U.S. at 323; *Collyer v. Darling,* 98 F.3d 220 (6th Cir. 1996).

While styling the motion as one for either dismissal or summary judgment, in its memorandum in support of the motion, the USDA argues only from the summary judgment point of view. In response, plaintiffs oppose the motion as if it were a summary judgment motion. Rule 12(b), Federal Rules of Civil Procedure, requires the court to treat a motion to dismiss under Rule 12(b) as a motion for summary judgment if matters outside of the pleadings are presented to and not excluded by the court. The court will therefore consider the motion as only one for summary judgment.

In their response, plaintiffs request an opportunity to conduct discovery in order to present additional evidence in support of their claims which was not presented during the administrative review. A court reviewing agency decision-making is limited to the administrative record already in existence. *Florida Power & Light Co. v. Lorion,* 470 U.S. 729 (1985); *Camp v. Pitts,* 411 U.S. 138 (1973); *Edwards v. United States Department of Justice,* 43 F.3d 312 (7th Cir. 1994); *Cronin v. United States Dept of Agriculture,* 919 F.2d 439 (7th Cir. 1990). Nor may a court otherwise consider evidence that the agency did not have an opportunity to review, whether such evidence attacks or supports the agency's action. *Wright v. FSA,* 2001 WL 822417 *(citing Tagg Bros. & Moorhead v. United States,* 280 U.S. 420 (1930).

In order to supplement the administrative record, the moving party must demonstrate a "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 agency's procedures used and factors considered require further explanation for effective review. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971); *San Luis Obispo Mothers for Peace v. United States Nuclear Reg.,* 789 F.2d 26, 45 (D.C.Cir. 1986). Plaintiffs have not shown that the fact-finding process was inadequate at the administrative level, thereby failing to demonstrate the exceptional circumstances necessary to warrant this court's power to make a *de novo* inquiry outside the administrative record. 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. *Federal Power Comm. v. Transcontinental Gas*

Pipe Line Corp., 423 U.S. 326, 331 (1976). Accordingly, the court will review plaintiff's claims on the administrative record submitted by the parties, and plaintiffs' request for discovery and to supplement the administrative record will be denied.

The Shared Appreciation Agreement

Plaintiffs request declaratory judgment regarding the meaning of the Shared Appreciation Agreement and whether any amount is due if the farmer does not sell property or cease farming during the ten-year term of the agreement. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. *Mobile Oil Exploration & Producing Southeast, Inc. v. United States,* 530 U.S. 604, 607 (2000). The rule of construction that ambiguities are to be construed against the drafter applies with equal, if not greater, force against the United States. *United States v. Seckinger,* 397 U.S. 203, 209-10 (1970). Under no circumstances, however, may the court construe a contract in a manner that would violate conditions that Congress has placed on funds appropriated for the program. *See Office of Personnel Mgmt v. Richmond,* 496 U.S. 414, 424-25 (1990) (citing the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7). Accordingly, the court construes the SAA in light of the statutes and regulations authorizing the USDA to enter into such agreements.

Title 7 U.S.C. § 2001 directs the Secretary of Agriculture to "modify delinquent farmer program loans . . . to avoid losses to the Secretary on such loans." The Secretary

is to give "priority consideration" to "writing-down the loan principal and interest (subject to subsections (d) and (e)), and debt set-aside (subject to subsection (e)), whenever these procedures would facilitate keeping the borrower on the farm . . . ." *Id.* § 2001(a)(1). In addition to avoiding losses to the government, loan adjustments under § 2001 are intended "to ensure that borrowers are able to continue farming or ranching operations." *Id.* § 2001(a)(2). Eligibility for the program is conditioned on, among other things, a net recovery to the government at least as large as the recovery that would result from a "foreclosure on the property securing the loan." *Id.* § 2001(b)(4). Subsection (e) provides in part:

> (e) Shared appreciation arrangements.
>
> (1) In general. As a condition of restructuring a loan in accordance with this section, the borrower of the loan may be required to enter into a shared appreciation arrangement that requires the repayment of amounts written off or set aside.
>
> (2) Terms. Shared appreciation agreements shall have a term not to exceed 10 years, and shall provide for recapture based on the difference between the appraised values of the real security property at the time of restructuring and at the time of recapture.
>
> (3) Percentage of recapture. The amount of the appreciation to be recaptured by the Secretary shall be 75 percent of the appreciation in the value of such real security property if the recapture occurs within 4 years of the restructuring, and 50 percent if the recapture occurs during the remainder of the term of the agreement.
>
> (4) Time of recapture. Recapture shall take place at the end of the term of the agreement, or sooner – (A) on the conveyance of the real security property; (B) on the repayment of the loans; or (C) if the borrower ceases farming operations.

7 U.S.C. § 2001(e)(1)-(4).

Plaintiffs contend that no recapture is due under the SSA if the expiration date is reached and none of the three triggering events listed in § 2001(e)(4)(A)-(C) has occurred. The court accords deference to an agency's interpretation of ambiguous provisions in the statutes it is charged with administering. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984)). The court agrees with the USDA's interpretation of the statute, but also finds the statute unambiguous on whether repayment is required. Subsection (e)(4) states that "[r]ecapture shall take place at the end of the term of the agreement." Although Congress afforded the Secretary deference in determining whether to require the borrower to enter into a SSA, 7 U.S.C. § 2001(e)(1) (Agreement "may be required"), the terms governing recapture are mandatory. *Id.* § 2001(e)(2)-(4) (Agreement "shall provide for recapture"). To the extent that the SSA is ambiguous or that representations made by the USDA county agents suggest that no recapture is due at the end of the term, the mandatory provisions of the statute control. *See Stahl v. United States Dept of Agriculture*, 327 F.3d 697, 702 (8th Cir. 2003); *Israel v. United States Dept of Agriculture*, 282 F.3d 521, 527-28 (7th Cir. 2002) (stating that § 2001 "strongly supported" construction of Agreement requiring recapture at the expiration date of the agreement); *Parmenter v. FDIC*, 925 F.2d 1088, 1095 (8th Cir. 1991) ("Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority," *quoting FDIC v. Merrill*, 322 U.S. 380, 384 (1947)).

Plaintiffs also contend that the amount of any recapture due under the SAA is limited to a value labeled the "amount of account equity." Again, however, § 2001(e)(3) unambiguously specified the amount of recapture that is required. Seventy-five percent of the appreciated value of the property is due if recapture occurs within four years of the write-down, and fifty percent is due thereafter. 7 U.S.C. § 2001(e)(3). Nowhere in the SAA is there any indication that recapture is limited to the "amount of account equity." Rather, the SAA is consistent with the requirements of § 2001. The SAA "requires the repayment of amounts written off or set aside." *Id.* § 2001(e)(1). Read as a whole, § 2001(e) requires recapture of the amount written down, up to fifty percent (or seventy-five percent if triggered within four years) of the increased property value over the term of the SAA.

Although the SAA does not represent the pinnacle of the drafter's art, its terms are reasonably plain and in any case may not be construed to conflict with the conditions Congress has placed on participation in this program. Accordingly, I conclude that 7 U.S.C. § 2001 unambiguously requires recapture of fifty percent of the appreciated value of the property securing the loan upon the expiration date of the SAA, where the expiration date occurs more than four years after the date of the agreement. Other courts to consider this question have reached the same result. *See Stahl v. USDA*, 327 F.3d 697 (8th Cir. 2003); *Israel v. USDA*, 282 F.3d 521 (7th Cir. 2002); *Bukaske v. USDA*, 193 F.Supp2d 1162 (D.S.D. 2002); *Pandora Farms v. USDA*, No. 00-1752-A (E.D.Va. July 5, 2001); *Curtis v. USDA*, 2001 WL 822413 (W.D.Mi, 2001); *Wright v. USDA*, 2001 WL 822417 (W.D.Mi, 2001); *Viers v. Glickman*, 2000 WL 33363197 (S.D.Iowa 2000); *In re:*

Moncur, 1999 WL 33287727 (Bankr.D.Idaho 1999); *In re: Tunnissen*, 216 B.R. 834 (Bankr.D.S.D. 1996).

Review of NAD Decision

Plaintiffs' third claim challenges the NAD 's determination of the amount of recapture due from plaintiffs under the SAA. Pursuant to 7 U.S.C. § 6999, a final determination of the Director of the National Appeals Division (NAD) of the USDA is reviewable and enforceable by a court in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 701-706. This court's review of the findings of the Director regarding the values of plaintiffs' properties in 1991 and 2001 are subject to a very tough standard. The court must find that the Director's decision was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1213 (D.C.Cir. 1998) (quoting 5 U.S.C. § 706(2)(A)). The court must determine whether the Director's decision was based upon a consideration of the relevant factors and whether there has been a clear error of judgment as well as whether the USDA followed the necessary procedural requirements for reaching its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-17 (1971). This court is prohibited from substituting its judgment for that of the agency, and the agency's decisions are "entitled" to a presumption of "regularity." *Id.* at 415-16; *see also, Bowman Transp. Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 285 (1975). Moreover, the agency's action may not be attacked or supported in court by new evidence. 5 U.S.C. § 706; *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 444 (1930). The

question before this court then, is whether the decision of the USDA, acting through the NAD and its Director, was arbitrary and capricious, an abuse of discretion, or was otherwise not in conformance with the law.

In his decision, the Hearing Officer made, *inter alia*, the following findings of fact:

1. On July 22, 1991, the Gibbs received a debt write-down from the Agency in the amount of $160,195.50. As a condition for receiving the write-down, the Gibbs entered into an SAA, under the terms of which the Gibbs agreed to pay the Agency fifty percent of any positive appreciation in the market value of the real property that secured their loans between the date of the SAA and its expiration date. The SAA had a ten-year term.

2. The Gibbs' loans are secured by two tracts of real estate. One tract is in Smith County and the other is in Loudon County. When the Gibbs entered into the SAA, the two tracts had a combined market value of $96,100.

3. When the Agency prepared the Gibbs' SAA on July 22, 1991, it listed the market value of the secured property as being $109,560. This amount included real estate valued at $96,100 and equipment valued at $13,460.

4. Prior to entering into the SAA, the Gibbs and Third Party received Exhibit A of 7 CFR Part 1951, Subpart S, which explained the requirements of the SAA.

5. In 2001, the Agency contracted for two new appraisals to ascertain the current market value of the two tracts that secured the Gibbs' loans. The Agency required that the contract appraisers complete the appraisals in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP).

6. The contract appraiser who appraised the Smith County tract determined that it had a market value of $55,000

as of February 21, 2001. The Agency discovered an error in the contract appraisal and had the appraiser make the correction. The appraiser corrected the error and arrived at a revised market value of $50,000 On November 20, 2001.

7. The appraiser of the Smith County tract considered the fact that the tract is landlocked without deeded access to any public right of way. The contract appraiser made adjustments for the lack of access based on a comparable sale with similar lack of access.

8. The appraiser of the Loudon County tract determined that it had a market value of $217,000 as of January 4, 2001. The Agency found an error in the contract appraisal and had the appraiser make a correction. On January 17, 2002, the appraiser corrected the error and arrived at a revised market value of $215,000.

9. The combined current market value of the Gibbs' two tracts of real estate at the end of the SAA's ten-year term was $265,000 ($50,000 + $215,000). The market value of the property appreciated by $168,900 between the date the SAA was signed and the date it expired ($265,000 - $96,100).

10. On January 29, 2002, the Agency notified the Gibbs and Third Party that they must repay $84,450 in shared appreciation, which is 50 percent of the amount by which the real estate security appreciated in value during the ten-year term of the SAA.

Based upon the above findings, the Hearing Officer concluded that the USDA's decision to recapture shared appreciation at the end of the term of the SAA with the Gibbs was consistent with the applicable law and regulations. The Hearing Officer also concluded that the amount of the recapture, $84,450, was properly based on current appraisals that comply with 7 C.F.R. §§ 1951.914 and 761.7 and the original market value of $96,100. The Hearing Office further concluded that, notwithstanding verbal advice from

an agent of the USDA to the Gibbs that they would not be required to repay any shared appreciation unless they sold the real estate, stopped farming or paid off their debt prior to the expiration of the agreement, the applicable regulations allowed recapture or shared appreciation at the expiration of the agreement and that the Gibbs had been provided with written notice that advised "in plain language" that they would be asked to pay part of the debt that was written down at the end of the ten-year term unless repayment was triggered at an earlier date. Accordingly, the Hearing Officer determined that the USDA's decision to recapture $84,450 in shared appreciation was not erroneous.

The Hearing Officer's decision was entered on July 20, 2002, and the Gibbs were notified that they had thirty days to appeal the decision. On September 5, 2002, the Gibbs' attorney faxed to NAD a request for review of the decision. On September 6, 2002, the review request was denied, as having been untimely filed. The Hearing Officer's determination therefore remains in effect as the final agency action subject to judicial review.

Plaintiffs challenge the valuation process used by the USDA, however, they have failed to demonstrate that the manner in which the agency reached its decision was arbitrary and capricious. As the record reflects, the agency retained qualified outside appraisers, Lewis Pipkin and Laughlin Youree, to conduct the subject appraisals on the Loudon and Smith County properties. These appraisals were reviewed and analyzed by an agency Appraisal Specialist, who is also a certified real estate appraiser. Plaintiffs also retained Lewis Pipkin to conduct an appraisal on their Smith County property (the property

on which Mr. Youree had performed the appraisal for the agency). Plaintiffs provided to the agency this latter appraisal reflecting a market value of $40,300 based on an analysis of highest and best use for the property. This appraisal was submitted as part of the administrative record. Plaintiffs had the opportunity to request an independent appraisal, but did not do so. Plaintiffs submitted no other appraisal to the agency or to the NAD hearing officer for the administrative record. At the NAD evidentiary hearing, plaintiffs (who were represented by counsel) chose not to present testimony by any appraiser, even Mr. Pipkin who performed the appraisal on their Smith County property. The only testimony they presented on valuation was through Mr. Gibbs who testified as to his opinion of the value of his own property.

In contrast, the agency submitted the written appraisals of both outside appraisers and presented the testimony of Jeff Williams, an agency Appraisal Specialist, who is responsible for review and analysis of all appraisals received for content and to ensure that they meet the requisite regulatory standards. Williams discussed the agency's requirement that appraisals be for market value, both at the inception of the SAA and at the expiration of its term. The SAA in the record reflects on its face that "market value" was the determinative value under the agreement. It makes no reference to "agricultural value." Williams further testified that both the appraisals obtained by the agency on the subject properties at the expiration of the SAA acknowledge that agricultural use was, at least currently, the highest and best use for the properties.

Based on the evidence presented, the Hearing Officer determined that the agency's decision below, based on current appraisals that complied with 7 C.F.R. §§1951.914(c)(a) and 761.7(c)(1) was not erroneous, that the subject appraisals were not flawed, and that the agency's determination of value and its decision to recapture $84,450 in shared appreciation was not erroneous. The court agrees. The Hearing Officer's decision was clearly based on substantial evidence. His decision to rely on the independent outside appraisals was neither arbitrary nor capricious, but rather demonstrated that he considered all the relevant factors. Where, as here, a rational basis for the agency's determination can be discerned, the determination should be upheld. *See Israel v. United States Dept of Agriculture,* 282 F.3d 521, 526 (7th Cir. 2002). Accordingly, the decision of the NAD is affirmed, and defendants' motion for summary judgment will be granted.

Tort Claims

Plaintiffs have alleged fraudulent and negligent misrepresentation and negligent supervision by the USDA, claims which fall under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq.* However, plaintiffs have not alleged jurisdiction over the United States pursuant to 28 U.S.C. §§ 1346(b) and 2671, the only legislative authority by which the United States has consented to be sued for torts. Nor have plaintiff's alleged that they have met the administrative claim requirement of the FTCA.

When the United States consents to be sued through legislation such as the FTCA, such consent, and necessarily the court's jurisdiction, is limited to the conditions imposed by Congress under which suits will be permitted. *United States v. Sherwood*, 312 U.S. 584, 587 (1941); *Ashbrook v. Block*, 917 F.2d 918, 922 (6th Cir. 1990); *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981). The United States has imposed upon its consent to be sued under the FTCA an administrative claim requirement which precludes the institution of any tort claim unless a claim for such tort was first presented to the appropriate federal agency. 28 U.S.C. § 2675(a). This requirement of exhaustion of administrative remedies is also a jurisdictional prerequisite to the filing of an action under the FTCA. *McNeil v. United States*, 508 U.S. 106 (1993); *Joelson v. United States*, 86 F.3d 1413, 1422 (6th Cir. 1996); *Lundstrum v. Lyng*, 954 F.2d 1142, 1145 (6th Cir. 1990); *Ashbrook v. Block*, 917 F.2d at 922; *Rogers v. United States*, 675 F.2d 123, 124 (6th Cir. 1982); *Garrett v. United States*, 640 F.2d at 16.

Plaintiffs have alleged no submission of such a claim for damages. Nor does the NAD administrative record reflect such submission. Therefore, plaintiff may not proceed with any tort claim until the administrative claim requirement has been exhausted, either by having the claim finally denied by the agency, or six months having expired since the time the claim was filed. Accordingly, defendants will be granted summary judgment as to plaintiffs' claims for fraudulent and negligent misrepresentation and negligent supervision by the USDA.

In light of the above, defendants will be granted summary judgment on plaintiffs' remaining claims for injunctive relief.

Conclusion

For the reasons stated above, the court finds that defendants are entitled to summary judgment as a matter of law on all of plaintiffs' claims. Accordingly, defendants' motion for summary judgment [Doc. 13] will be granted and this action will be dismissed.

ENTER:

Thomas W. Phillips
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

ESTATE OF ELINOR M. JAMES and HER HEIRS,

Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF AGRICULTURE and ANN M. VENEMAN, Secretary of Agriculture, in her Official Capacity,

Defendants.

3:01-CV-628
(SHIRLEY)

MEMORANDUM AND ORDER

This case is before the undersigned pursuant to 28 U.S.C. § 636(c) and Rule 73(a), Federal Rules of Civil Procedure, for all further proceedings including entry of judgment. [Doc. 14].

The defendants, the United States Department of Agriculture ("USDA") and Ann M. Veneman, Secretary of Agriculture, in her official capacity, have moved to exclude from the scheduling order Rule 26 disclosures and discovery [Docs. 11 and 12] and have moved "for partial summary judgment seeking dismissal of all plaintiff's claims which exceed the scope of judicial review of administrative action on the record pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, *et seq.*, including any and all tort claims and plaintiff's request for trial by jury." [Doc. 17].

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The plaintiff, the Estate of Elinor M. James and her heirs, seeks judicial review of a final determination by the Director of the USDA's National Appeals Division ("NAD") regarding the amount owed by the plaintiff pursuant to a Shared Appreciation Agreements ("SAAs") that Elinor James entered into with the Farm Service Agency ("FSA"), an agency of the USDA. The plaintiff opposes the defendants' motions, arguing that genuine issues of material fact remain in dispute, that discovery regarding this matter is necessary, and that a trial de novo is necessary. [Docs. 15 and 16].

Both parties filed reply and response briefs [Docs. 19, 23, 24, and 26], and a hearing was held on September 26, 2002 regarding the pending motions. [Doc. 27].

Pursuant to 7 U.S.C. § 6999, a final determination of the Director is reviewable and enforceable by any United States District Court in accordance with the APA, 5 U.S.C. §§ 701-706. Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206, 1213 (D.C. Cir. 1998).

I. SCOPE OF REVIEW, RULE 26 DISCLOSURES, AND PARTIAL SUMMARY JUDGMENT

Defendants filed their motion for partial summary judgment on the limited issues raised by the following defenses set out in their answer filed on April 1, 2002:

> 3. Plaintiff is barred by the doctrine of sovereign immunity from pursuit of any claims in this action other than judicial review on the record pursuant to U.S.C. § 6999 and 5 U.S.C. § 701, et

seq., of the final NAD determination to reject the plaintiff's compromise offer of debt settlement.

4. To the extent plaintiff seeks to state a tort claim under the Federal Tort Claims Act, plaintiff has failed to exhaust the requisite administrative remedies pursuant to 28 U.S.C. § 2675, and any such claim would be barred by the applicable limitations period.

[Docs. 9 and 18].

During the hearing conducted on September 26, 2002, plaintiff's counsel admitted that plaintiff did not have, and did not state a cause of action as to, any claims arising under the Federal Tort Claims Act ("FTCA"). Therefore, in light of plaintiff's counsel's admission, the defendant's motion for partial summary judgment with regard to any tort claims[1] that might fall under the FTCA will be **GRANTED**. To the extent plaintiff seeks a jury trial based on an FTCA claim (see footnote 1), the same is prohibited. United States v. Neustadt, 366 U.S. 696, 701, 81 S. Ct. 1294, 1297 (1961). To the extent plaintiff's claim against the United States falls under 28 U.S.C. § 1346, a jury trial is prohibited per 28 U.S.C. § 2402. In any event, plaintiff has not set forth any authority or basis for a right to a jury trial. Accordingly, the defendants' motion for partial summary judgment as to the plaintiff's jury demand will be **GRANTED**, and the jury demand is hereby stricken.

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[1]In their brief the defendants state that "[a]lthough plaintiff has not specifically pled any cause of action pursuant to the Federal Tort Claims Act, plaintiff's counsel stated at the scheduling conference that the demand for a jury trial was based on plaintiff's claim of torts committed by defendant's agents as alleged in the complaint." [Doc. 18 n.3]. The defendants contend that the plaintiff demands a jury trial because of alleged tortious conduct of defendants' agents and that "[t]o the extent plaintiff asserts that the alleged violations of its constitutional rights are constitutional torts," the United States has not waived sovereign immunity under the FTCA for constitutional tort claims. Id.

While both parties agree that this action is an appeal of a final agency determination pursuant to the APA, 5 U.S.C. §§ 701-706, the parties disagree regarding the scope of the review to be undertaken by this Court. The defendants argue that summary judgment is appropriate because the "plaintiff has failed to make the requisite showing sufficient to establish jurisdiction beyond administrative review on the record of defendants' denial of plaintiff's order of compromise of indebtedness" [Doc. 18], and thus, discovery under Rule 26 of the Federal Rules of Civil Procedure is not appropriate. [Doc. 12].

The plaintiff argues that the Court should deny the defendants' motion for partial summary judgment because genuine issues of material fact remain in dispute and contends that the Court should either conduct a de novo review of the Agency's determinations, including permitting the admission and review of new relevant evidence outside the administrative record, or remand the matter to the administrative agency for a proper review of these issues. [Doc. 22]. The plaintiff seeks injunctive and equitable relief against the defendants by enjoining them from demanding or collecting any and all amounts claimed pursuant to the SAAs.

The plaintiff contends that "[t]he hearings were adjudicatory in nature and defendant's fact-finding was totally inadequate in that they refused to hear evidence crucial to plaintiff's case that demonstrated that defendant acted in an arbitrary and capricious manner." Id. Plaintiff claims that it

> filed this lawsuit in response to the NAD's refusal to consider various procedural, legal and Constitutional issues, including, among others, whether the FSA is estopped from enforcing the shared appreciation agreement as interpreted due to

> the misinformation and misrepresentations made by FSA personnel to the plaintiff; whether the very regulations and statutes applied were interpreted and applied correctly; whether the FSA acted contrary to legislative intent; whether prescribed procedural guidelines were followed properly; and whether the FSA used proper and appropriate figures in determining the calculations for the shared appreciation agreement.

Id. The plaintiff insists that the FSA failed to consider any of these issues, and the NAD stated in its determination that it lacked jurisdiction to make such "equitable determinations." [Doc. 22].

The defendants in their reply brief [Doc. 24] argue that the plaintiff has cited no authority for its claim that it is entitled to a jury trial; that the "fundamental issues" that the defendants allegedly failed to adjudicate are essentially legal issues which this Court can address in the course of its review on the administrative record; that the requisite exceptional circumstances necessary to warrant this Court's power to make a de novo inquiry outside the administrative record to reach its own conclusions has not been demonstrated, citing Kroger Company v. Regional Airport Authority of Louisville and Jefferson County, 286 F.3d 382, 387 (6th Cir. 2002); that the plaintiff has not distinguished or otherwise explained the decisions of other courts in similar actions addressing the same issues involving the terms of FSA SAAs, such as the agreement allegedly the subject of plaintiff's complaint, which have determined that the APA standard of review applies and that such review is on the record; and that none of the issues the plaintiff contends the Agency failed to address in its consideration and subsequent denial of plaintiff's settlement offer, would warrant a de novo hearing. Id.

Furthermore, with regard to the plaintiff's estoppel argument due to alleged misinformation and misrepresentations made by FSA personnel to plaintiff, the defendants maintain that the plaintiff cites no authority for the proposition that de novo review is authorized because of such an allegation; that plaintiff had ample opportunity to present evidence of such alleged misinformation or misrepresentation before the agency; and this Court may review such evidence in the course of its review on the record. Id.

II. ANALYSIS

On a motion for summary judgment the evidence of record must be viewed in a light most favorable to the plaintiff, see Kraus v. Sobel Corrugated Containers, Inc., 915 F.2d 227, 229 (6th Cir. 1990), and the plaintiff must be given the benefit of all favorable inferences, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986).

The APA, 5 U.S.C. § 706, follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–
>
> 1) compel agency action unlawfully withheld or unreasonably delayed; and
> 2) hold unlawful and set aside agency action, findings, and conclusions found to be–

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

I agree with the defendants that the plaintiff has not come forward with specific instances in which the fact-finding process was inadequate at the administrative level, thereby failing to demonstrate the exceptional circumstances necessary to warrant this Court's power to make a de novo inquiry outside the administrative record. Additionally, the defendants have provided several cases analogous to the instant case in which the reviewing Court addressed constitutional and estoppel claims upon a judicial review of the administrative record (and which

cases also addressed disputes concerning SAAs). See Curtis v. Farm Service Agency, No. 4:00-CV-93, 2001 WL 822413 (W.D. Mich. June 22, 2001); Wright v. Farm Service Agency, No. 4:00-CV-94, 2001 WL 822417 (W.D. Mich. June 22, 2001).

In light of the foregoing, I am of the opinion that this Court is to and will review the plaintiff's claims on the administrative record and that this Court will determine whether or not the Director's decision was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" based on the administrative record. Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206, 1213 (D.C. Cir. 1998) (quoting 5 U.S.C. § 706(2)(A)).

III. CONCLUSION

Because I am of the opinion that this Court is to review only the administrative record in this matter, the defendants' motion to exclude Rule 26 disclosures and discovery from the scheduling order [Doc. 11] is **GRANTED;** further, the defendants' motion for partial summary judgment with regard to any tort claims that might fall under the FTCA and with regard to a claim of a demand for jury trial [Doc. 17] is **GRANTED**. The defendants' motion for partial summary judgment as to "all of plaintiff's claims that exceed the scope of judicial review of the administrative action on the record pursuant to the APA, 5 U.S.C. § 706 [Doc. 17]" is **GRANTED**.

However, I am not holding that the administrative review will be limited to the sole issue of the "rejection of the compromise settlement offer." It does appear that the plaintiff raised certain other legal and equitable and/or "fundamental" issues during the administrative review process. As the defendants note, these "fundamental issues," which plaintiff claims were not fully adjudicated during the administrative proceedings "are essentially legal issues which this Court can address in the course of its review on the administrative record." [Doc. 24, Reply Memorandum in Support of Defendants' First Motion for Partial Summary Judgment at 4; Doc. 19, Defendants' Reply to Plaintiff's Response in Opposition to Motion to Exclude from Scheduling Order Rule 26 Disclosures and Discovery at 4-5].

Therefore, the plaintiff will file a brief setting forth the specific "fundamental" legal and/or equitable issues upon which the plaintiff relies and which plaintiff contends were raised in the administrative process. In addition, the plaintiff will provide a citation to the specific evidence in the administrative record which supports each specific issue addressed and any case law supporting each issue. The plaintiff will file this brief **on or before December 6, 2002.** The defendants will then file their response brief in a similar format **on or before January 3, 2003.**

IT IS SO ORDERED.

ENTER:

C. Clifford Shirley, Jr.
UNITED STATES MAGISTRATE JUDGE