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

REPLY MEMORANDUM IN SUPPORT OF UNITED STATES' 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 reply memorandum in support of its motion for summary judgment.

INTRODUCTION

Pending before the Court are defendant's motions to exclude discovery, for judgment on the pleadings (on jurisdictional grounds), and for summary judgment (on the administrative record), and plaintiff's motion for summary judgment (on its claim that EPA has no statutory jurisdiction over the subject well).[1] With this reply to plaintiff's memorandum in opposition to defendant's motion for summary judgment, all of these motions are now fully briefed. For the reasons set out in defendant's memoranda and this reply, defendant's motions for summary

[1]In its memorandum in opposition to defendant's motion for summary judgment, plaintiff also requested that the Court consider issuing, *sua sponte*, summary judgment for the plaintiff on the remainder of its claims. Pl. Opp. Mem., Doc. 40 , p.10. Since plaintiff has not demonstrated that it is entitled to judgment as a matter of law on any of its claims, the Court should not issue, *sua sponte* or otherwise, summary judgment for the plaintiff.

judgment and for judgment on the pleadings should be granted and plaintiff's case dismissed.

ARGUMENT

At the outset, with respect to each of these motions, it is important to recognize what brought these parties before this Court: an oil well owned and operated by Pryor Oil Co., Inc. (Pryor) blew out, releasing thousands of gallons of oil, which then ignited causing a fire, discharged oil into nearby navigable streams, and threatened property managed by the U.S. National Park Service in the Obed Wild and Scenic River Area. In response to this catastrophic event, the Environmental Protection Agency (EPA) responded pursuant to the authority of Section 311(c) of the Clean Water Act (CWA), 33 U.S.C. § 1321, *et seq.*, by issuing an administrative order which required Pryor to conduct certain activities to effect a removal of the discharge, or to mitigate or prevent the substantial threat of further discharge, of oil into or on the navigable waters or adjoining shorelines or otherwise affect natural resources of the United States.

In this action for premature judicial review of such administrative order, Pryor asserts that EPA has no jurisdiction over the subject oil well[2] and in essence seeks to have this Court otherwise substitute its judgment for that of the EPA. Pryor's assertion is mistaken, and its quest, based on an erroneous view of EPA's role and the Court's standard of review, is misplaced. EPA's actions were in fact authorized by law and, applying the applicable standard of review, were neither arbitrary, capricious nor an abuse of discretion.

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[2]See Complaint, Doc. 1, ¶¶ 1, 61, 63, D; Plaintiff's Motion for Summary Judgment, Doc. 29 ("requests this Court grant summary judgment on its claim that Defendant has no statutory jurisdiction over the [subject oil well])."

A. EPA'S Actions Were Authorized by Law

The Clean Water Act (as amended by the Oil Pollution Act) authorizes the President, through the EPA[3], 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 . . . by remov[ing] or arrang[ing] for the removal of a discharge, and mitigat[ing] or prevent[ing] a substantial threat of a discharge, at any time [and] direct[ing] or monitor[ing] all Federal, State, and private actions to remove a discharge. . ." 33 U.S.C. § 1321(c)(1)(A) and (B). The Administrative Record demonstrates that a major discharge of oil to navigable waters occurred on July 19, 2002, from Pryor's well, (see, e.g., AR 2 8 0003; AR 2 10 00002), and Pryor does not dispute the events which resulted in such discharge. EPA exercised its statutory authority by assuming control over the cleanup of the subject site,[4] by issuing a Removal Administrative Order both to remove the discharge and to prevent or mitigate a substantial threat of further discharge,[5] and by modifying the Removal Order as indicated by changing conditions and additional information received by EPA.[6] Under such circumstances, EPA was clearly authorized pursuant to 33 U.S.C. § 1321(c)(1) to respond to the initial discharge and subsequent substantial threat of further discharge of oil to navigable

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

[4]On July 21, 2002, EPA issued to Pryor a Notice of Federal Assumption of Response Activity (AR 10 1 0001)

[5]See AR 1011 0001-17.

[6]See AR 1011 0019-20, 0026-27, 0030-32, 0039-41, 0044-47, 0051-53, 0060-64, 0066-67, 0071-72, 0076-77, 0076-77.

waters and adjoining shorelines caused by the well blow out and subsequent oil spill and fire. In doing so, EPA met the statutory standard for such action. Despite Pryor's suggestion to the contrary, (Pl. Opp. Mem., Doc. 40, p. 6), neither "an immediate threat" nor a determination that timing was "critical" are prerequisites to EPA's exercise of its authority. [7]

Nor did EPA's actions otherwise violate applicable law. Pryor cites a recent Eleventh Circuit decision, Tennessee Valley Authority v. Whitman, 336 F.3d 1236, 2003 WL 21452521 (11th Cir. 2003), which ruled that an EPA administrative order issued under the Clean Air Act would violate the Due Process Clause were it to have the force of law, in support of its position that the Amendment # 6 to the subject Removal Order violates its constitutional right of due process. Pl. Opp. Mem., Doc. 40, p. 8. The United States discussed the TVA decision in its memorandum in support of its motion for judgment on the pleadings. See Doc. 32 , pp. 20-21. In short, the Eleventh Circuit's decision is both wrong and inapplicable here.

The order challenged in TVA was based upon a Clean Air Act provision that allows compliance orders to be issued "on the basis of any available information" that a violation has occurred. 42 U.S.C.§ 7413(a)(5). The Eleventh Circuit read that language as mandating an exceptionally lax standard of judicial review of EPA orders that effectively deprived a court of any meaningful ability to determine whether underlying violations had occurred or whether the order was otherwise invalid. See TVA, 336 F.3d at 1243, 1256, 1258. Contrary to the Eleventh Circuit's apparent conclusion, see, e.g., 336 F.3d 1242, the underlying merits of an EPA order

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[7]Also, Pryor's suggestion that this Court should give a "hard look" at EPA's purported interpretation that "Section 311(c) allows for long-term authority over the Well" as opposed to the "short-term goals expressed in the statute," (Pl. Opp. Mem., Doc. 40, p. 9), is similarly unfounded. The Clean Water Act does not use such terminology and imposes no such long-term v. short-term standard.

are always subject to judicial review in a subsequent action brought by EPA to enforce the order.[8] The authorization in the Clean Air Act (and other statutes such as the Clean Water Act) of penalties for violations of EPA orders is naturally read to refer only to valid orders. Such a narrowing construction would certainly be appropriate to avoid holding a portion of the Act unconstitutional. Moreover, the "any available information" clause does not alter the standard of review when EPA's orders are challenged; it simply means that EPA need not apply judicial rules of evidence in determining whether there has been a violation of the Act that warrants issuance of an order.

In any event, orders under 33 U.S.C. § 1321(c) are not based upon "any available information" but rather upon determinations under the National Contingency Plan that a discharge of oil or a hazardous substance to navigable waters or adjoining shorelines has occurred or that there is a substantial threat of such a discharge. Indeed, 33 U.S.C. § 1321(b)(7)(B)(i) expressly provides a "sufficient cause" defense to the imposition of a civil penalty for violation of a Section 311(c) removal order. Moreover, a person who complies with such an order may recover its costs pursuant to 33 U.S.C. § 2708 by demonstrating that it is not liable or that liability should be limited. Thus, it is clear that a defendant has multiple avenues to address orders issued under Section 311 of the Clean Water Act, and TVA has no relevance here.

Pryor further seeks to support its unfounded argument (that EPA has exceeded its

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[8]In its opposition memorandum, Pryor concludes its argument on the mistaken notion that EPA has "attempted to enforce requirements" of Amendment No. 6 of the Removal Order. Pl. Opp. Mem., Doc. 40, p. 10. EPA has not, at this point, made any attempt to enforce any provision of the Removal Order. The parties to this action are before the Court, not because EPA sought enforcement, but because Pryor challenged the Removal Order.

statutory authority) by attempting to limit any Chevron[9] deference to EPA's interpretation, inaptly citing Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675, 683, 148 L.Ed.2d 576 (2001) ("SWANCC"). Pryor cites SWANCC for the proposition that "where an agency's construction of a statute would cause a court to 'needlessly reach constitutional issues,' a court need not defer to that interpretation." Pl. Opp. Mem., Doc. 40, p.9. In doing so, Pryor overstates the principle articulated by the Supreme Court. In any event, such principle has no applicability here.

In SWANCC, the Supreme Court held that the Army Corps of Engineers had exceeded its statutory authority under the Clean Water Act by regulating isolated, non-navigable, intrastate waters based solely on the use of those waters as habitat by migratory birds. In doing so, the Court concluded that it need not defer to the Corps' interpretation of the statute:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

531 U.S. at 683. Here, however, Pryor does not allege that Congress lacks the constitutional power to regulate oil spills that threaten navigable waters or that the spill here occurred into non-jurisdictional waters. Thus, neither Congress' power nor EPA's authority to respond to Pryor's oil spill is at issue in this case.

The only "constitutional" issue involved in this case is Pryor's unsubstantiated assertion that its due process rights have been violated with respect to Amendment # 6 of EPA's Removal

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[9]Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)

Action Order. That can hardly be a basis for negating the well-established deference that EPA normally receives when it interprets the Clean Water Act. Indeed, if Pryor's view were adopted, any recipient of an administrative order could attempt to overcome the deference principle simply by asserting a due process claim. That is most definitely not a result mandated by SWANCC.

B. EPA's Actions Were Not Arbitrary, Capricious, Nor an Abuse of Discretion

To the extent that this Court exercises jurisdiction[10] to review any aspect of Pryor's claims, such review is limited to the subject administrative record under the narrow and highly deferential arbitrary and capricious standard of review. See discussion in the United States' memorandum in support of its cross-motion for summary judgment. Doc. 36, pp. 12-14. Accordingly, in deciding a motion for summary judgment in this APA-review case, the Court need not determine whether there are disputes of underlying facts - that is, whether or not it agrees with EPA's technical decision-making - but only whether the administrative record reflects a "rational basis" for EPA's actions. See Gibbs v. USDA, No. 3:02-CV-547, p. 15 (E.D. Tenn., Memorandum Opinion, Sept. 11, 2003, Judge Phillips)(copy attached) Moreover, "[t]his 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 p. 10.

Pryor disagrees with EPA's actions with some of the information on which EPA relied in

[10]For the reasons set forth in the United States' motion for judgment on the pleadings and supporting memoranda (Docs. 31, 32), it is the United States' position that the Court lacks subject matter jurisdiction at this time over plaintiff's premature complaint seeking pre-enforcement review of EPA's actions.

reaching its decision to take such actions.[11] Such disagreement does not, however, render the decisions arbitrary, capricious or abusive. This is particularly true where, as here, the subject area - the well - is underground and EPA must make its decisions based upon the manifestation aboveground (oil recovered or sheen detected in the creeks) of what is occurring below the ground. As a result, EPA weighed the information provided to it from Pryor, personnel of other agencies involved, and its own experts and consultants and made reasoned decisions based upon its analysis of such information. (See, e.g., AR 2 4 0011-16; AR 10 1 0006-09; AR 2 2 0183-86; AR 2 4 0040-48; AR 2 4 0062-63; AR 2 2 02224)

Pryor states that the United States has made untrue and unsupported representations to the Court regarding oil discharges from its well. Pl. Opp. Mem., Doc. 40, p.3. The United States believes it is important to clarify this misstatement by Pryor. To begin with, the United States did not represent, as Pryor asserts, that the well itself "continues today to discharge oil directly to Clear Creek." Pl. Opp. Mem., Doc. 40, p. 3. Rather, citing to Pryor's own reports and EPA's contractor's reports which demonstrate the continued presence of at least an untraced oil sheen in the creek, the United States simply explained that "oil continues to discharge" into the creek. U.S. Mem. in Support of Sum. Jdgmt., Doc. 36, p. 17.

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[11]Pryor contends that defendant's memorandum contains "inaccurate statements not material to this Opposition." Pl. Opp. Mem., Doc. 40, p.3, n. 2. The United States agrees with Pryor's own admission that the statements identified are not material. As a result, the United States does not believe it is appropriate to respond to them in detail since Pryor's only purpose in pointing them out appears to be to draw attention away from the substantive, legal arguments bearing on this case. The United States is prepared to provide responses if the Court would find it useful.

Furthermore, the administrative record provides ample evidence that Pryor's well discharged extraordinary amounts of oil to the surface in its first days and to the creek that is part of a wild and scenic river system containing several threatened and/or endangered species. (See, e.g., AR 2 8 0003-09; AR 2 10 00002; AR 2 4 0001-04) The precise source of the oil in the creek --- whether directly from the well on an ongoing basis or indirectly from the well via leaks arising from the initial blowout -- could be more definitively determined through the Mechanical Integrity Test (MIT)(AR 2 2 0183-85; AR 2 4 0042-48) The fact remains without the MIT (which Pryor has not performed), the source of the ongoing discharge cannot be identified within a reasonable degree of certainty. Thus, in the absence of the results of such a test, it has been reasonable for EPA to assume, under the circumstances, that the well could be a source of the discharge into the creek that continues to this day since there was no ongoing discharge to the creek before the well suffered a blowout.

With regard to Pryor's refusal to include a time frame for performing an MIT, Pryor's explanation is incomplete and not credible. On September 10, 2002, EPA amended the Removal Order to require that the MIT be conducted by October 15, 2002. (AR 10 11 0030-32) EPA issued this amendment (#3) because Pryor failed to include in its proposed MIT workplan a time frame for the test, even though EPA had clearly specified that one was necessary. (AR 2 4 0013-16) EPA believed that the October 15 deadline would allow Pryor sufficient time to complete the pipeline and reduce gas pressure by producing through the pipeline. (AR 2 4 0057; AR 10 11 0049) Nonetheless, Pryor failed to submit a revised MIT workplan on September 16. (AR 10 11 0033-34) On September 27, EPA issued Amendment #4 in order to allow Pryor to cure its failure to submit this workplan and to stay in compliance with completion of other tasks. (AR 10

11 0033-38).

When Pryor continued to object to the MIT, EPA issued Amendment #5 which required a Gas Deliverability Test in lieu of an immediate MIT. (AR 10 11 0044-45) EPA issued this amendment, as it explained to Pryor in its cover letter, "in order to ascertain the volume of gas/oil and to determine a prudent path forward for the timing of the MIT. . ." (AR 10 11 0042)[12] Amendment #5 also provided Pryor with yet another extension within which to submit a MIT workplan and further left to be determined by EPA a later date within which to conduct the MIT. (AR 10 11 0044-45)[13] Amendment #6 then, issued on November 12, 2002, was EPA's attempt to resolve the question of the integrity of the well based upon all the information available to it at that time. (AR 1011 0048-53)

The record demonstrates that EPA had a rational and documented basis for those requirements and that it attempted to work with Pryor Oil, allowing Pryor to cure its deficiencies and granting extensions for performance, until EPA felt that further extension was not consistent with resolving the question of the oil source. Pryor continues to argue that EPA's requirements were arbitrary and capricious and to seek relief from EPA's administrative orders, even as they have been amended to address the evolving situation. In doing so, Pryor has failed to recognize

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[12]EPA has not been consistently informed of the gas production figures, though Pryor was ordered to do so. (AR 10 11 0064).

[13]On October 30, 2002, EPA wrote to Pryor, reminding it that Pryor had failed to submit the MIT workplan by the deadline, as extended by EPA, of October 14, 2002, and that the workplan should include a date by when the pipeline would be completed and tested. EPA explained: "[t]his information is important in evaluating not only the adequacy of the MIT, but also the progress that is being made in pipeline construction. Since Pryor Oil is proposing to connect to the pipeline before performing the MIT, this information is particularly important in evaluating the timeliness of Pryor Oil's proposal for performance of the MIT and, hence, protection of the environment." (AR 11 09 0002).

the presumption of regularity which attaches to EPA's actions and is, in essence, simply requesting this Court to substitute its judgment for that of EPA, the agency charged with the responsibility for responding to the subject catastrophic events.

C. The United States Seeks Summary Judgment on Plaintiff's Complaint

Pryor complains that defendant's motion for summary judgment is overbroad because it purportedly "goes beyond its complaint based only on the limited question of the propriety of amendment #6." Pl. Opp. Mem., Doc. 40, p. 1. Pryor is mistaken in suggesting that the United States' motion seeks relief beyond a summary judgment on plaintiff's complaint. Pryor's complaint is not, however, as narrow as it now suggests. See, e.g., Complaint, ¶ 1 ("Defendant's actions regarding the [subject Well] . . . exceed Defendant's statutory jurisdiction and authority, and are arbitrary, capricious and otherwise not in accordance with law"), and ¶¶ 61 & 62 (incorporating ¶ 1 into each of its claims for relief). Furthermore, Pryor has clearly interpreted its own complaint as much broader than just involving Amendment #6, as it requested in its own motion for summary judgment that the "Court grant summary judgment on its claim that Defendant has no statutory jurisdiction over the [subject Well] . . . because . . . [s]ince July 27, 2002, the Well has not discharged any uncontrolled oil or posed a threat of a substantial discharge of uncontrolled oil." Pl. Mot. Sum. Jdgmt, Doc. 29. Under the circumstances, Pryor has placed into issue whether EPA has had statutory jurisdiction over the well - at the very least from July 27, 2002, through the present, that is through the last amendment, Amendment # 11, issued on May 7, 2003. Moreover, Amendment # 6 is just one component of the Removal Administrative Order. EPA's authority to issue Amendment # 6 is based at least in part on its authority to issue the Removal Administrative Order.

The United States' motion for summary judgment is, therefore, not overbroad, but does encompass all of plaintiff's claims, including the issue of EPA's authority to respond to the subject oil spill.

CONCLUSION

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

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 20th day of October, 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)

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.

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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 S .. 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.
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> 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 3[illegible] 7727 (Bankr.D.Idaho 1999); *In re.* [illegible]*nnissen*, 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

a f February 21, 2001. The Agency covered 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 ha 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 Offic 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