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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRIENDS OF THE EARTH, INC., *et al*., Plaintiffs, v. PETER WATSON, *et al*., Defendants.	Civ. No. C 02-4106 JSW Date: April 29th, 2005 Time: 9 A.M Courtroom 2, 17th Floor

PLAINTIFFS' MOTION TO STRIKE DECLARATIONS ATTACHED TO DEFENDANTS' REPLY MEMORANDUM AND PORTIONS OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM.

Plaintiffs hereby move to strike declarations attached to the Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, and portions of Defendants' Motion for Summary Judgment and Reply Memorandum. Specifically, Plaintiffs move to strike the: (1) Declaration of Thomas Schehl; (2) Declaration of James Mahoney; and (3) Declaration of Dr. David R. Legates. In addition, Plaintiffs move to fact-dependant

arguments in Defendants' Motion for Summary Judgment and Reply Memorandum, including Defendants' standing and finality arguments.

I. Defendants' New Affidavits are Not Material to this Court Inquiry and Should be Struck as Extra-Record Evidence Offering a *Post-Hoc* Rationale.

In response to Plaintiffs' Opposition, Defendants now rely on three new affidavits in a last-minute effort to contest Plaintiffs' standing. *See Declaration of Thomas Schehl* (Att. A to Def. Reply); *Declaration of James Mahoney* (Att. B to Def. Reply); *Declaration of Dr. David Legates* (Att. C to Def. Reply). These most recent affidavits are immaterial to the Court's inquiry at this stage of litigation and are interposed as a back-door method of providing a new agency rationale separate from, and in conflict with, the agencies' own determinations on the Record. They should be struck.

Both the Supreme Court and the Ninth Circuit have made clear that, for purposes of summary judgment, facts averred by the Plaintiff with respect to standing must be taken as true. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (in response to a summary judgment motion challenging a plaintiff's standing to bring suit the plaintiff need only "set forth by affidavit or other evidence 'specific facts' . . . which for purposes of the summary judgment motion will be taken to be true."); *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068-69 (9th Cir. 1997) ("At the summary judgment stage, factual allegations in support of standing are taken as true. *Lujan*, 504 U.S. at 561. Plaintiffs need only plead facts that, taken as true, would show that [government authorized activity] caused their injuries."). Plaintiffs in this case have set forth specific facts relevant to their standing, *see* Pls.' Exhs. 1-16, and for the purposes of Defendants' motion for summary judgment, these facts must be taken to be true. *Lujan*, 504

U.S. at 561. Defendants' most recent declarations contesting facts averred by Plaintiffs thus are not material to the Court's consideration of the Defendants' motion for Summary Judgment.

Furthermore, Defendants' new affidavits are nothing more than an attempt to provide a new rationale for the agencies' failure to comply with NEPA. Judicial review of an agency decision is limited to the administrative record in existence at the time of the decision and does not include any part of the record that is made initially in the reviewing court. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Extra-record evidence may only be considered under limited circumstances – none of which are claimed by the Defendants. *See Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Thus, the agency may not advance new rationalization for sustaining its action. *Id*.

> we emphasize[ ] a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

The Records here fully support Plaintiffs' claims: the agencies concluded that increased greenhouse gas emissions were a reasonably foreseeable impact of their actions; they concluded that anthropomorphic greenhouse gas emissions could contribute to global warming; and they concluded that global warming could result in a series of significant impacts, including those now alleged by the Plaintiffs. *See generally Ex-Im Bank's Role in Greenhouse Gas Emissions and Climate Change* and OPIC's *Climate Change: Assessing Our Actions*. The agencies' *only*

rationale for not conducting any NEPA analysis was that their contribution to global warming was insignificant. *Id*.

Dr. Legates' affidavit is extra-record evidence that offers a *post-hoc* rationale that is inconsistent with the agencies' conclusions in the Administrative Record, and it must be struck. *Chenery*, 332 U.S. at 196. Defendants have affirmatively argued to this Court that the current matter is a "record review" case, and likewise have affirmatively argued that expert testimony outside the record is inappropriate.[1] Yet now, when forced to confront their own Record conclusions that increased GHG emissions are a reasonably foreseeable impact of their actions, that such emissions contribute to global climate change, and that climate change may result in the type of impacts alleged by Plaintiffs, Defendants are scrambling to substitute their record with expert testimony that actually contradicts their own conclusions.[2] Defendants may not

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[1] Attorney Navaro stated at hearing on the Government's Motion for Change in Venue that:

> [b]oth the Expert/Import (sic) Bank and the Overseas Private Investment Corporation considered CO2 emissions from relevant projects, and, in fact, both have looked at climate change implications, and both have determined that their contribution, or the arguable contribution of projects in which they are involved, of CO2 has a negligible impact on climate and therefore would have no Domestic Impact. *So there is an administrative record that contains all that consideration and that would be the evidence and there would be no need in this situation for experts.*

Transcript of Proceedings at 27 (April 4, 2003) (emphasis added) (Att. A) [hereinafter "Transcript of Proceedings"].

[2] For example, while Dr. Legates now suggests that the role of anthropomorphic carbon emissions contribution to climate change is "uncertain," the agencies, in fact, expressed a different opinion. *See, e.g.*, OPIC's *Assessing our Actions* Report at 7 ("there is a strong and growing scientific consensus that these steady additions of GHGs have tipped a delicate balance and begun to impact our climate and may be the dominant force driving recent warming trends."); *id*. at 49 ("Climate change represents a serious global environmental challenge. Since the dawn of the industrial age, man has been emitting increasing quantities of heat-absorbing GHGs primarily through the combustion of fossil fuels. As a result, atmospheric concentrations of CO_2 – the most important GHG – are now at their highest levels in more than 160,000 years

withhold their determinations on the Record from this Court, and substitute those determinations with a new rationale.[3]

Defendants also rely on two affidavits from agency personnel purporting to offer an alternative method of accounting for greenhouse gas (GHG) emissions from projects financed, insured, or otherwise financially supported by Ex-Im and OPIC. *See Declaration of Thomas Schehl* (Att. A to Def. Reply); *Declaration of James Mahoney* (Att. B to Def. Reply). As with

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and global temperatures are rising. With emissions of CO_2 and other GHGs expected to increase – especially in developing regions – current forecasts suggest that atmospheric concentrations of CO_2 could double by 2060 with a resulting global average temperature increase of as much as 2º to 6.5º F over the next century. Such rapid temperature increase could have potentially grave economic and environmental impacts."); *see also*, Ex-Im Banks' *Our Role in Greenhouse Gas Emissions and Climate Change* Report at 3 ("available data would suggest that the increase in GHG, caused predominately by the anthroprogenic emissions of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O) and chlorofluorocarbon (CFC), has begun to trap additional heat within the atmosphere, due to the associated altering of the energy balance of the atmosphere."); *id*. at 4 ("the information presented … leads one to conclude that GHG concentrations have indeed risen and that there is a reasonable likelihood that the increased concentrations of these gases will result in increased average global temperatures during the coming decades.").

[3] The Government suggests that the Court need not consider the Record in its inquiry into Plaintiffs' standing. Def. Opp'n to Pls' Mot. to Strike at 2, 6-7. Case law, however, does not support this position. As explained further in Plaintiffs' Reply to Defendant's Opp'n to Plaintiffs' Motion to Strike, courts quite clearly begin an analysis of standing with the Record produced by the agency. *See Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) ("In short, *our review of the record* supports the district court's conclusion that [plaintiff] has standing to challenge the Forest Service's action.") (emphasis added); *Sierra Club v. EPA*, 352 U.S. App. D.C. 191 (D.C. Cir. 2002) (noting that a court's assessment of standing is "based upon the application of [the plaintiff's] legal theory to facts established by evidence in the record. Consistent with *Defenders of Wildlife*, therefore, the [plaintiff] must either identify in that record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence…"); s*ee also Sierra Club v. Patterson*, 185 F.3d 349, 365-366 (5th Cir. 1999) (finding that *where no agency record actually existed*, district court's decision to develop a factual record to consider standing issues was not an abuse of discretion), *rev'd & vacated on other grounds en banc*, 228 F.3d 589 (5th Cir. 1999). Here, Defendants affirmatively argue that each agency has a Record embodying each agency's consideration of climate change. *See* Transcript of Proceedings at 27-28, 30 (April 4, 2003) (Att.A). The standing inquiry, therefore, must begin with that Record – and the Court should strike Defendants' extra-record evidence because Defendants have not filed the Administrative Record or even attempted to demonstrate that it needs to be supplemented.

Dr. Legates' declaration, both Mr. Schehl's and Mr. Mahoney's declarations should be struck. The agencies' Records document their analysis of direct greenhouse gas emissions – an analysis that more than adequately supports Plaintiffs' reasonable concerns over each agencies' contribution to climate change, even without an accounting of indirect impacts as required by NEPA. *See Central Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002) (concluding that plaintiffs successfully alleged a credible threat of future injury based, in part, on the fact that the government's own studies confirmed plaintiff's allegations); 40 C.F.R. § 1508.8 (requiring consideration of indirect effects such as downstream GHG emissions); *see also Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1015 (S.D. Cal. 2003) (evaluation of proposed power line on U.S./Mexico border violated NEPA because, among other things, the Department of Energy failed to consider the indirect greenhouse gas emissions of a 500 MW gas-turbine power plant located in Mexico that would be connected to the power line). To the extent that the methodology and results offered by the Schehl and Mahoney declarations differ from each agency's determination in their respective Administrative Records, they must be struck. Defendants cannot use standing to ignore their Administrative Records and offer a post-hoc rationale.[4] *Chenery*, 332 U.S. at 196; *see also Southwest Ctr. for Biological Diversity*, 100 F.3d at 1450.

II. Defendants' Standing and Finality Arguments Should be Struck Because They Refuse to File the Record and Now Argue That the Record Provided to the Plaintiffs May Not Be Appropriate.

Defendants' standing and finality arguments (and any other fact-dependant defense) should be also be struck, or in the alternative, Defendants should be estopped from making such

[4] And to the extent that they dispute facts averred in Plaintiffs' Opposition, Plaintiffs' facts must be taken as true for the purposes of Defendants' Motion for Summary Judgment. *Alaska Wildlife Alliance*, 108 F.3d at 1068-69.

arguments because they refuse to provide the Court the administrative record, and now remarkably assert that the Record provided to Plaintiffs may not be appropriate.[5] Def. Opp'n to Pls' Mot. to Strike at 2 & 6, n. 2 &7. Simply put, the Defendant agencies cannot characterize their actions as not contributing to climate change or not final, but refuse to provide the administrative record – the basic evidence on which such arguments must be founded. As explained above and in Plaintiffs' Surreply, the Administrative Record is the starting point of such inquiries.

"Where justice and fair play require it, estoppel will be applied against the government." *Watkins v. United States Army*, 875 F.2d 699, 706-707 (9th Cir. 1989) (quotations and citations omitted). Estoppel is appropriate when: (1) the party to be estopped knows the facts; (2) the party intends that his or her conduct will be acted on; (3) the claimant must be ignorant of the true facts; (4) and the claimant must detrimentally rely on the other party's conduct. *Id*.; *Salgado-Diaz v. Gonzales*, 2005 U.S. App. LEXIS 4015 (9th Cir. 2005). Two additional elements must be met to estop government. First, "affirmative misconduct going beyond mere negligence" must be established. *Watkins*, 875 F.2d at 707. Second, the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage. *Id*.

First addressing estoppel against government, there is no dispute that Defendants are purposefully withholding the Administrative Record despite the fact that Local Rules require its filing. *Letter from Ann D. Navaro, Esq. to Ronald A. Shems* (December 30, 2004) (Att. B); Civil L.R. 16-5 ("In actions for District Court review on an administrative record, the defendant must serve and file an answer, *together with a certified copy of the transcript of the administrative*

[5] In particular, Plaintiffs move to strike page 8, line 4 though page 23, line 17 and page 23, line 18 though page 28, line 22 of Defendants' Motion for Summary Judgment. Plaintiffs also move to strike page 2, line 3 though page 10, line 17, and page 11, line 1 though page 20, line 18 of Defendants' Reply.

record, within 90 days of receipt of service of the summons and complaint") (emphasis added). And only after Defendants' realization that the Administrative Record amply supports Plaintiffs' claims (and nearly two years *after* its April 29, 2003, transmission to Plaintiffs), did Defendants assert that it may be inadequate. Def. Opp'n to Pls' Mot. to Strike at 2 & 6, n. 2 & 7. Until this point, Defendants strenuously asserted that the Defendant agencies had developed comprehensive administrative records. *See* Transcript of Proceedings at 27-28, 30.

Plaintiffs will suffer injustice if Defendants' *post-hoc* rationale is considered in lieu of the record. *See Chenery*, 332 U.S. at 196 (*post-hoc* rationale may not be used to support agency decision). Any finality determination necessarily starts with the record. *Northcoast Env. Ctr v. Glickman*, 1996 U.S. Dist. LEXIS 22845 (N.D. Ca. 1996) ("It is not necessary to go beyond the administrative record submitted by defendants to determine whether the POC Program constitutes final agency action.") *aff'd Northcoast Envtl. Ctr. v. Glickman,* 136 F.3d 660, 665 (9th Cir. 1998) (District Court properly struck extra-record evidence and determined finality only on administrative record); *Northwest Resource Inf. Ctr. v. P.U.D. No. 2*, 25 F.3d 872, 874-75 (9th Cir. 1994) ("Only where what petitioner challenged was not a final agency action *based upon an administrative record* have we found against jurisdiction in this court.") (emphasis added). The public interest is also served by following established norms for public-interest litigation.

The traditional elements of estoppel are also met. First, the Defendants know the facts. They hold the record and admit that they are responsible for its certification. Def. Opp'n to Pls' Mot. to Strike at 2, n.2. Second, Defendants intended their conduct to be acted on. They produced an administrative record and affirmatively stated that it would be adequate to guide this matter. Transcript of Proceedings at 28 ("but given what I expect the contents of the record will

be that Mr. Shems will have in just a couple of weeks, I don't expect that [extra-record evidence] would be necessary."). Indeed, it is entirely expected that NEPA litigants rely on an administrative record. Third, only Defendants know why the Record they produced may be inadequate. Plaintiffs have not objected to it.

Fourth, Plaintiffs rely extensively of the Administrative Record. Indeed, the Record memorializes Defendants' assessment (or lack thereof) of their contributions to climate change. Likewise, Defendants concede that any determination of final agency action is dependent on "the character of the underlying action." Def. Reply at 12. The Administrative Record embodies the underlying action. Reliance on the Record would be detrimental to Plaintiffs if Defendants withhold the Record and Defendants' *post-hoc* rationale is instead considered by the Court.

III. Conclusion.

This Motion to Strike should be granted for the above reasons.

March 14, 2005

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