UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, Plaintiff, v. KEN SALAZAR, Secretary of the Interior, *et al.*, Defendants.	Civil No. 11-cv-01564 (BAH)
TERRY OWEN, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Civil No. 12-cv-00194 (BAH)
EXOTIC WILDLIFE ASSOCIATION, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Civil No. 12-cv-00340 (BAH) (Consolidated Cases)

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Defendants, United States Department of the Interior; Kenneth Salazar, in his official capacity as Secretary of the United States Department of the Interior; and Daniel Ashe, Director of the United States Fish and Wildlife Service ("the Service) (collectively "Defendants"), hereby oppose Plaintiffs' motion to supplement the administrative record (ECF No. 76). Plaintiffs have fallen far short of showing that supplementation of the Administrative Record is warranted or that one of the narrow exceptions for the consideration of extra-record materials applies. Accordingly, the Court should deny their motion.

INTRODUCTION

On September 2, 2005, the Service issued two rules on the scimitar-horned oryx, addax, and dama gazelle ("the Three Antelope species"). The Service issued a rule listing the Three Antelope species as "endangered species" under the Endangered Species Act ("Listing Rule") and also issued a rule exempting the U.S. captive-bred herds of the Three Antelope species from certain otherwise-prohibited activities ("Management Rule"). As a result of a challenge to the Management Rule by animal rights groups, Judge Kennedy of this Court remanded the rule to the Service for further action consistent with his opinion, which held that the Management Rule violated Endangered Species Act ("ESA") section 10(c) because it failed to provide the requisite notice and review of each application for a permit required by that section. To comply with the Court's Order, the Service proposed removing the Management Rule from the Code of Federal Regulations in July 2011, and finalized that rule on January 5, 2012 ("Removal Rule"). Plaintiffs allege four causes of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, one of which also allegedly arises under the National Environmental Policy Act, in connection with the Removal Rule.

Judicial review of Plaintiffs' causes of action is governed by the record review principles embodied in the APA. Under the APA, a court's review of a challenged agency action or decision is based on the agency's administrative record. *See* 5 U.S.C. § 706. Pursuant to the Scheduling Order in this case (Minute Order dated 3/29/12), Defendants filed the certified administrative record of materials considered in making the Service's January 5, 2012 decision to issue the Removal Rule. ECF Nos. 64, 65.

Plaintiffs moved to supplement the administrative record on May 1, 2012, asking the Court to order the Service to add the entire administrative records for the Listing Rule and the Management Rule to the record for the Removal Rule, because, they contend, "the exemption rule (and so its revocation) cannot be separated from the listing rule adopted that same day." Plaintiffs' Memorandum in Support of Motion to Supplement the Administrative Record (ECF No. 76-1) ("Pls' Memo") at 2. Plaintiffs are simply incorrect that the Removal Rule "cannot be separated" from the Listing Rule and the Management Rule because the basis for issuing the Removal Rule was entirely different than the bases for issuing the Listing and Management Rules. The Service issued the Removal Rule in order to comply with Judge Kennedy's remand order. In contrast, the Service issued the Listing and Management Rules to provide protections to the Three Antelope species and to enhance the propagation or survival of the U.S. captive-bred herds of the Three Antelope species. Due to these differences, the records for the Listing and Management Rules were not relevant to the Service's decision whether to issue the Removal Rule, and the Service did not consider any of the documents from these records in making its decision. Since a record consists only of those documents an agency considered in making a

decision, the documents from the Listing and Management Rule records are not part of the record for the Removal Rule.

Nor have Plaintiffs attempted to demonstrate, much less actually demonstrated, that the documents from the Listing and Management Rule records fall within any of the limited exceptions for consideration of extra-record materials. Rather, their argument that the Court cannot review the Removal Rule without referring to the documents from the records for these other rules is an issue for the Court to assess when deciding the merits of Plaintiffs' claims, not a basis for supplementing the record.

Finally, even if the Court were to agree with Plaintiffs that the rules "cannot be separated," Plaintiffs have not demonstrated that the entire records for the Listing and Management Rules need to be added to the record for the Removal Rule. In their motion to supplement, Plaintiffs did not identify any particular document from the Listing and Management Rule records that they contend the Service considered in issuing the Removal Rule. Indeed, when Plaintiffs filed their motion for summary judgment a few days later on May 4, 2012, they cited to a *single document* from the Listing Rule record in their summary judgment memorandum. Since the Court is required to review only "those parts of [the record] cited by a party" in determining whether an agency decision is arbitrary and capricious, the Court -- at most -- could order the Service to add this one document to the record for the Removal Rule. 5 U.S.C. § 706.

STANDARD OF REVIEW

Judicial review under the APA is "highly deferential" and "presumes agency action to be valid." *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (citations omitted). The reviewing

court's role is limited to "exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." *Id.* at 36. When a court is reviewing final agency action under the APA, its review is based on "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The D.C. Circuit has explained that the administrative record includes those materials that were "before the agency at the time the decision was made." *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). The administrative record "should not include materials that were not considered by agency decisionmakers." *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (citations omitted).

Indeed, the Supreme Court has admonished that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *accord Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (noting that the court must evaluate the decision of the agency based on "the full administrative record that was before the Secretary at the time he made his decision"). When an agency has compiled the administrative record and certified that it is complete, that certification is entitled to a "strong presumption of regularity." *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009). To that end, supplementation of the administrative record "is the exception[,] not the rule." *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1105 n.18 (D.C. Cir. 1979). As this court has colorfully put it, "[a] court that orders an administrative agency to supplement the record of its decision is a rare bird." *Cape Hatteras*, 667 F. Supp. 2d at 112. With regard to documents that are outside of the administrative record, the D.C. Circuit has identified four instances in which it may be appropriate to accept a plaintiff's extra-record evidence, namely where "the agency

failed to examine all relevant factors or to adequately explain its grounds for decision, or that the agency acted in bad faith or engaged in improper behavior in reaching its decision." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997).

ARGUMENT

As noted previously, the Service has compiled the administrative record in this matter and, for purposes of this motion, certified that it is complete. *See* ECF Nos. 64 & 65. The Service's certification is entitled to a "strong presumption of regularity." *Cape Hatteras*, 667 F. Supp. 2d at 114; *see also Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008) (noting same). Indeed, an agency is presumed to have "properly designated the administrative record absent clear evidence to the contrary." *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 770 F. Supp. 2d 283, 288 (D.D.C. 2011) (citations omitted); *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties") (citations omitted); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993).

Notwithstanding the well-established principle that judicial review should be limited to what was actually considered by the agency at the time of its decision and the Service's representation that it did not consider the documents comprising the records for the Listing and Management Rules in connection with this case (*see* Second Van Norman Decl. ¶ 4), Plaintiffs nonetheless seek to compel the wholesale addition of these documents without even engaging this fact. As explained below, Plaintiffs have fallen far short of the high bar for showing either

that the agency considered the documents in question, and thus that they are properly part of the administrative record, or that they should be accepted as extra-record materials.

I. The Records for the Listing and Management Rules Are Not Part of the Administrative Record Because the Service Did Not Consider Them In Issuing the Removal Rule.

When a plaintiff seeks to supplement the administrative record, "[t]he question . . . for the court is straightforward: who determines what constitutes the 'full' administrative record that was 'before' the agency? Common sense and precedent dictate that at the outset, the answer must be the agency." *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 56-57 (D.D.C. 2003) (citations omitted), *aff'd in part and vacated on other grounds*, 428 F.3d 1059 (D.C. Cir. 2005). This is because:

> [i]t is the agency that did the 'considering,' and that therefore is in a position to indicate initially which of the materials were 'before' it . . . . If it were otherwise, non-agency parties would be free to define the administrative record based on the materials they believe the agency must (or should) have considered, leaving to the court the unenviable task of sorting through a tangle of competing 'records' in an attempt to divine which materials were considered . . . . Hence the presumption that the agency properly designated the administrative record.

Id. at 57 (citations omitted); *accord Pac. Shores*, 448 F. Supp. 2d at 5 (quoting same); *Cape Hatteras*, 667 F. Supp. 2d at 114 (noting that "it is the responsibility of the deciding agency to compile the administrative record, and the agency is presumed to have properly done so") (citation omitted).

This court has explained a plaintiff's burden in seeking to overcome the presumption of regularity and succeed in having documents added to an agency's administrative record as follows:

> Plaintiff cannot merely assert that other relevant documents were before the [agency] but were not adequately considered. … Instead, plaintiff must identify

> reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record. … Finally, plaintiff must do more than imply that the documents at issue were in the [agency's] possession. … Rather, plaintiff must prove that the documents were before the actual decisionmakers involved in the determination. …

Sara Lee Corp., 252 F.R.D. at 34 (citations and quotations omitted); *Cape Hatteras*, 667 F. Supp. 2d at 114 ("[i]n order for a Court to order supplementation, the plaintiff must overcome th[e] strong presumption of regularity by putting forth concrete evidence that the documents it seeks to 'add' to the record were actually before the decisionmakers.") (emphasis added); *accord Midcoast Fishermen's Ass'n v. Gutierrez*, 592 F. Supp. 2d 40, 44 (D.D.C. 2008) (noting same); *Pac. Shores*, 448 F. Supp. 2d at 6 (noting same).

Plaintiffs have failed to meet this burden, as they have not produced any evidence, much less concrete evidence, that the entire Listing and Management Rule records were "before the actual decisionmakers" when the Service decided to issue the Removal Rule. In fact, the available evidence proves the opposite, namely that the Service, as the Service's Chief of the Branch of Permits, Timothy J. Van Norman, explains, did not consider any documents from either the Listing or Management Rule record in deciding to issue the Removal Rule. *See* Second Van Norman Decl. ¶ 4. Plaintiffs' motion to compel supplementation of the administrative record should be denied for this reason alone. *See Pac. Shores*, 448 F. Supp. 2d at 4 (noting that the administrative record "should not include materials that were not considered by agency decisionmakers") (citations omitted).

Plaintiffs argue that the record should be supplemented because these three rules are related and "cannot be separated" from one another. Pls' Memo at 2. While the rules certainly are related in the sense that they all involve the Three Antelope species, as explained above, the

Service had very different bases for issuing the Listing and Management Rules, on the one hand, and the Removal Rule, on the other. It is not enough for Plaintiffs to say the rules are related and assume, because the records for the Listing and Management Rules were in the possession of the agency at the time the Service decided to issue the Removal Rule, that the documents from the Listing and Management Rules were "before the actual decisionmakers." *See Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1305-06 (D.C. Cir. 1991) (rejecting argument that data was "before the agency" for purposes of the administrative record simply because the data was in EPA's files); *Cape Hatteras*, 667 F. Supp. 2d at 114 (finding that, simply because some comments received by the Service during the process of designating critical habitat mentioned a biological opinion did not mean that the biological opinion was considered by the Service); *Fund for Animals*, 245 F. Supp. 2d at 57 n.7 (noting that "interpreting the word 'before' so broadly as to encompass any potentially relevant document existing within the agency or in the hands of a third party would render judicial review meaningless").

Here, the Service has compiled the administrative record in this matter and it is complete for purposes of this motion. Second Van Norman Decl. ¶ 4. Plaintiffs have fallen far short of overcoming the presumption in favor of the record's completeness by not providing concrete evidence that the documents they seek to add to the record were before the actual decisionmakers involved in the decision to issue the Removal Rule. Plaintiffs' motion to supplement the administrative record therefore should be denied.

II. The Records for the Listing and Management Rules Do Not Fall Within Any Exception for the Consideration of Extra-Record Materials.

As explained above, Plaintiffs' motion to supplement the administrative record should be denied because none of the documents from the Listing or Management Rule records were

considered by the agency decisionmakers in this case. Although Plaintiffs' motion does not articulate such an argument, to the extent that Plaintiffs' intent was to argue that the records for the Listing and Management Rules are extra-record materials that should be considered under an exception for such materials, that argument fails as well.

A court can consider extra-record materials in only four limited circumstances: "1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for decision; 3) when the agency acted in bad faith; or 4) when the agency engaged in improper behavior." *Earthworks v. U.S. Dep't of Interior*, --- F.R.D. ---, No. 09-cv-1972 HHK, 2012 WL 373320, at *5 (D.D.C. Feb. 7, 2012) (citing *IMS, P.C.*, 129 F.3d at 624). Plaintiffs' argument that, without the records for the Listing and Management Rules "this Court simply cannot judge whether FWS's challenged decision to revoke the exemption rule without also revising the listing rule is arbitrary and capricious," Pls' Memo at 5, does not fit within any of these four circumstances. Rather, Plaintiffs seem to be making a merits argument that the Service's failure to consider the documents comprising the records for the Listing and Management Rules was arbitrary and capricious.

This court has rejected analogous arguments before. In *Midcoast Fishermen's Ass'n*, 592 F. Supp. 2d 40, the plaintiffs sought to compel supplementation of the administrative record under the theory that, notwithstanding the agency's certification that it did not consider certain data prior to 2006, "the agency was required to review all of the available data starting in 1998 in order to support its decision, and therefore, the agency must have reviewed that information." *Id*. at 44 (citation omitted). Like the plaintiffs in *Midcoast Fishermen's Ass'n*, "[r]ather than present concrete evidence that demonstrates that the agency did in fact rely on [the documents

comprising the Listing and Management Rule records], the plaintiffs basically make a merits argument in a discovery motion: that the agency's failure to review [these documents] would be arbitrary and capricious." 592 F. Supp. 2d at 44.

The court in *Midcoast Fishermen's Ass'n* rejected the plaintiffs' contention, noting that, "I appreciate that the plaintiffs disagree with the defendant's characterization of the scope of the adjustment, but that is an issue to be considered when evaluating the merits of this case, not the veracity of the defendant's certification." *Id*. Similarly, in this case, Plaintiffs may disagree with the Service's decision to remove the Management Rule without also revising the Listing Rule, however the legality of the Service's decision to do so is an issue to be considered when evaluating the merits of Plaintiffs' claims, not the completeness of the administrative record. The administrative record in this case is complete and provides a more than adequate basis to allow the Court to undertake an effective review of the Service's decision challenged in this case.

III. Plaintiffs Have Cited Only One of the Listing Rule Documents in their Summary Judgment Memorandum to the Record, Demonstrating that Those Entire Records are Unnecessary.

Finally, even if the Court were to agree with Plaintiffs, Plaintiffs have not demonstrated that the entire records for the Listing and Management Rules need to be added to the record for the Removal Rule. In fact, they have demonstrated the opposite, *i.e.*, that the Court does not need the entire records for the Listing and Management Rules, by failing to identify any particular document from those records that they contend the Service considered in issuing the Removal Rule and by citing to only one document from the Listing Rule record (and none from the Management Rule record) in their summary judgment memorandum. Since the Court is required to review only "those parts of [the record] cited by a party" in determining whether an

agency decision is arbitrary and capricious, at most the Court could order the Service to add this one document to the record for the Removal Rule.[1] 5 U.S.C. § 706.

May 18, 2012

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

SETH M. BARSKY, Section Chief
S. JAY GOVINDAN, Asst. Section Chief

/s/ Meredith L. Flax
MEREDITH L. FLAX
Sr. Trial Attorney (D.C. Bar No. 468016)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-0404
Facsimile: (202) 305-0275
Meredith.Flax@usdoj.gov

Attorneys for Federal Defendants

[1] Plaintiffs contend that "[i]t will be no hardship" to ask the Service to provide the records for the Listing and Management Rules because it produced these records for the *Friends of Animals v. Salazar* case. Pls' Memo at 5. Plaintiffs' contention is not accurate. While the Service did produce these records for the *Friends of Animals v. Salazar* case, it produced the records in paper form only, not electronically. For the *Safari Club International v. Salazar* case (in this consolidated action), the Service scanned all the documents from the Listing Rule record, which included some, but not all, of the documents from the record for the Management Rule. Thus, there are still a significant number of documents from the Management Rule record that the Service would have to scan to produce electronically. Accordingly, while the Service does not agree that the records for the Listing and Management Rules are properly part of the record for the Removal Rule, to the extent the Court may order the Service to produce these records, the Service respectfully requests that the Court simply order that the record from the *Safari Club* case be deemed part of the record for this case and that it be given sufficient time to provide the remaining documents from the Management Rule record. Second Van Norman Decl. ¶ 5.

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL,

Plaintiff,

v.

KEN SALAZAR, et al.,

Defendants.

TERRY OWENS, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

EXOTIC WILDLIFE ASSOCIATION, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Case No. 1:11-CV-01564-BAH

(consolidated with cases 1:12-cv-00194-BAH and 1:12-cv-00340-BAH)

DECLARATION OF TIMOTHY J. VAN NORMAN

I, Timothy J. Van Norman, declare as follows:

1. I am the Chief, Branch of Permits, the Division of Management Authority (DMA), of the United States Fish and Wildlife Service (the "Service"). As Chief, Branch of

Permits, I am responsible to the Director of the Service for the issuance of permits and certificates to import, export, and re-export species that are protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and by various other wildlife conservation laws, including the Endangered Species Act.

2. In June 2009, Judge Kennedy of the District Court for the District of Columbia held that 50 C.F.R. § 17.21(h) violated Section 10(c) of the Endangered Species Act and remanded the regulation to the Service. See Friends of Animals v. Salazar, 626 F. Supp. 2d 102 (D.D.C. 2009).

3. On July 7, 2011, the Service issued a proposed rule to remove 50 C.F.R. § 17.21(h), 76 Fed. Reg. 39,804. On January 5, 2012, the Service issued a final rule to remove 50 C.F.R. § 17.21(h), 77 Fed. Reg. 431 ("Removal Rule").

4. The Administrative Record for the Removal Rule was filed with the District Court for the District of Columbia on April 13, 2012. The Administrative Record included all documents the Service considered in making its decision to issue the Removal Rule. For reference as a background document, the Service included the final rule adopting 50 C.F.R. § 17.21(h), published at 70 Fed. Reg. 52,310 (Sept. 2, 2005) (the "Management Rule") in the Administrative Record for the Removal Rule. Plaintiffs now request that all of the documents comprising the Administrative Record for the Management Rule and all of the documents comprising the Administrative Record for the final rule listing the three antelope species as endangered, published at 70 Fed. Reg. 52,319 (Sept. 2, 2005) (the "Listing Rule"), be added as a supplement to the Administrative Record for the Removal Rule. However, the Service did not review

the Administrative Record for the Management Rule or the Administrative Record for the Listing Rule in making its decision to issue the Removal Rule. Rather, the decision to issue the Removal Rule was made in response to the District Court's June 2009 order.

5. While the Service does not agree that the Administrative Records for the Listing and Management Rules are properly part of the Administrative Record for the Removal Rule, to the extent the court may order the Service to produce these Administrative Records, the Service respectfully requests that the Court simply order that the Administrative Record from the Safari Club case (in this consolidated action) be deemed part of the Administrative Record for this case and that it be given sufficient time to provide the remaining documents from the Management Rule Administrative Record. The Administrative Record from the Safari Club case (in this consolidated action) included some, but not all, of the documents from the Administrative Record for the Management Rule. Thus, there are still a significant number of documents from the Management Rule record that the Service would have to scan to produce electronically.

6. This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing and accompanying Attachments are true and correct to the best of my current knowledge.

Executed in Washington, DC, on this 17 day of May, 2012.

Timothy J. Van Norman
Case No. 1:11-CV-01564-BAH

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, Plaintiff, v. KEN SALAZAR, Secretary of the Interior, *et al.*, Defendants.	Civil No. 11-cv-01564 (BAH)
TERRY OWEN, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Civil No. 12-cv-00194 (BAH)
EXOTIC WILDLIFE ASSOCIATION, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Civil No. 12-cv-00340 (BAH) (Consolidated Cases)

[PROPOSED] ORDER DENYING PLAINTIFFS EXOTIC WILDLIFE ASSOCIATION, ET AL.'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Pending before this Court is Plaintiffs Exotic Wildlife Association, et al.'s Motion to Supplement the Administrative Record [ECF No. 76]. After having reviewed the briefs and the entire record in this case, IT IS ORDERED that Plaintiffs' Motion is DENIED.

Dated this _____ day of _____, 2012

_____
BERYL A. HOWELL
United States District Judge