IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Beyond Nuclear, *et al.,*	)	Case No. 1:16-cv-01641
Plaintiffs,	)	Judge Chutkan
-vs-	)	
U.S. Department of Energy, *et al.,*	)	
Defendants.	)	
	)	

* * * * *

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD AND TO SUBMIT EXTRA-RECORD DOCUMENTS

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Local Civil Rule 7(h), Plaintiffs, by and through their undersigned counsel, hereby reply to "Defendants Combined Reply in Support of Their Motion to Strike and Opposition to Plaintiffs' Motion to Supplement the Record and to Submit Extra-Record Documents" (Jan. 10, 2017) (Doc. Nos. 29, 30) ("Combined Reply").

INTRODUCTION

Defendants continue to deny that the 1972 survey compiled by DOE's predecessor, the Atomic Energy Commission ("AEC"), is "indirectly" in the administrative record and should supplement that record. *See* "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants" (WASH-1238, December 1972) ("AEC Environmental Transportation Survey"). The AEC Survey directly factored into longstanding NRC radioactive waste transport regulations and the 1977 NRC Transportation Environmental Impact Statement

relied on by Defendants. They have done nothing to dislodge the government's reasoning more than 40 years ago for rejecting liquid irradiated fuel shipments out-of-hand as an environmentally unacceptable option. Defendants incorrectly suggest that only the agency itself may supplement the record for clarification purposes. DOE makes this argument both as to the AEC Survey and as well to exclude the expert declarations by Drs. Gordon Edwards and Marvin Resnikoff proffered by Plaintiffs. These declarations demonstrate the seriousness of the environmental concerns that Plaintiffs would raise before the DOE if they were granted an opportunity to comment on a new or supplemental EIS for the proposed shipment of target materials. Regardless of whether the Court orders supplementation of the record or considers Plaintiffs' extra-record declarations, the record of this case provides more than sufficient grounds for a decision under the National Environmental Policy Act ("NEPA") ordering DOE to prepare a new or supplemental EIS in support of its proposal to ship radioactive target material in liquid form.

ARGUMENT

A. The AEC Survey clearly implicates both *Dania Beach* factors invoked by Plaintiffs

Defendants err in insisting that nothing about the AEC Environmental Transportation Survey implicates the factors in *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) that would justify supplementation of the record (*viz.*, deliberate or negligent exclusion of documents adverse to agency decision, or whether background information is needed "to determine whether the agency considered all the relevant factors"). Combined Reply at 2-3. To the contrary, both prongs of the *Dania Beach* standard are met here.

First, Plaintiffs demonstrated in their Reply Memorandum in Support of Their Cross-Motion for Summary Judgment (ECF 25 at 16) ("Plaintiffs' Reply Memorandum") that the AEC

Environmental Transportation Survey is a central document that DOE could not reasonably have ignored, because it explicitly undergirds Table S-4 of 10 C.F.R. § 51.21 (entitled "Environmental Impact of Transportation of Fuel and Waste To and From One Light-Water-Cooled Nuclear Power Reactor"). Table S-4 cites the AEC Survey as authority for its generic findings that the environmental impacts of transporting spent fuel and other radioactive waste are small if the irradiated fuel is "in the form of sintered uranium dioxide pellets" (10 C.F.R. § 51.52(a)(2)) and that all other "radioactive waste shipped from the reactor is packaged and in a solid form." 10 C.F.R. § 51.52(a)(4).[1] Second, tThe AEC Environmental Transportation Survey provides important background information by explaining, in greater detail than subsequent studies, the rationales on which the AEC relied, as DOE's agency predecessor, in making the determination to ship irradiated material only in solid form as a means of mitigating dangerous accidents.

DOE attempts to make the AEC Survey appear irrelevant by renewing its argument that "target residue material" isn't "spent nuclear fuel." (Combined Reply at 3.) This is a word game which the agency surely loses, given that DOE's own environmental impact statements ("EISs") explicitly characterize target material as a form of spent fuel. *See* Plaintiffs' Reply Memorandum (ECF 25) at 5-7 (citing Final Environmental Impact Statement, Proposed Nuclear Weapons Nonproliferation Policy Concerning Foreign Research Reactor Spent Nuclear Fuel ("FRR FEIS") (AR0008045, AR0008576); Savannah River Site Spent Nuclear Fuel Management Final Environmental Impact statement ("SRS FEIS") (AR0011590)). DOE's argument also flies in the face of the 1977 NRC FEIS,[2] which the agency admits "also [*i.e.,* like the AEC Survey] focuses

[1] While DOE argues that Table S-4 is irrelevant because the NRC is a different agency from DOE (Combined Reply at 4 n.4), the DOE relies on the very same 1977 EIS that underlies Table S-4.

[2] 1977 Final Environmental Statement on the Transportation of Radioactive Waste by Air and other Modes (NUREG-0170) (AR0000001-AR0000198) ("NRC Transportation EIS").

on materials transported from light-water reactors" and has "'served as a benchmark EIS for subsequent environmental analyses." Defendants' Combined Reply at 4. The 1977 Transportation EIS is predicated on the AEC Environmental Transportation Survey;[3] hence the AEC Survey is both a document "adverse to the agency decision," and also, the source of significant background information tending to prove that DOE did not consider its longtime policy preference for shipment of only solid radioactive materials.

The Court should reject the DOE's bid to restrict the scope of its review to only the past 20 years, which is the period during which the agency maintains that the option of shipping liquid radioactive material has remained open. The full 40-year history plainly shows that the federal government – including both DOE and the NRC – followed an environmental policy of rejecting shipments of radioactive waste in liquid form on environmental grounds. Consideration of the compelling 40-year policy preference, instead of the incomplete 20-year history, not only completes the regulatory history, but reinforces and explains the intentional determination in the 1996 FRR FEIS to transport only nonliquid radioactive material. In short, an examination of the full 40-year long view eradicates any vestigial belief that liquid radioactive waste remained an unexamined option.

Defendants urge that "the *Dania Beach* exception for background information is intended to permit *the agency* to submit additional background information to show that it *did* consider relevant factors; it is not a blank check for plaintiffs to submit extra-record materials." Combined Reply at 5 (citing *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285-287 (D.C. Cir. 1981) (emphasis in original)). But *Envtl Def. Fund* was decided 29 years before *Dania Beach*

[3] The AEC Environmental Transportation Survey is cited as a basis for the 1977 NRC Transportation FEIS (AR0000001-AR0000198)).

and cannot be read to impose a *post hoc* limitation. Moreover, while the D.C. Circuit in *Envtl Def. Fund* struck four non-agency affidavits which "address][ed] the merits and propriety of the agency decision," the court still affirmed the very purpose for which Plaintiffs here offer the AEC Survey, *i.e.*, "as background information, or to determine the presence of the requisite fullness of the reasons given. . . ." *Id.* at 286. The AEC Survey is a longtime internal policy document of the DOE's predecessor agency, not an affidavit created for litigation. Its authenticity is not disputed.[4]

B. Consideration of the AEC Survey 'completes' the administrative record.

Defendants cite *Grunewald v. Jarvis,* 924 F.Supp.2d 355 (D.D.C. 2013) for the proposition that the AEC Survey was not before the actual decisionmakers involved in the determination to ship target materials in liquid form, because "the mere citation of the AEC Survey in an administrative record does not, *ipso facto,* mean that the Survey was 'before' DOE decisionmakers and part of the record." Combined Reply at 7. But *Grunewald* provides no shelter to DOE.

In *Grunewald,* the D.C. District Court denied supplementation of the record "for a document that was referred to in a document that was referred to in the Record." *Id.* at 358. The supplemental document in *Grunewald* was a national species management plan which had no direct connection to a local White-Tailed Deer Management Plan/Environmental Impact Statement. The national plan was at two removes from the administrative record. Here, in

[4] DOE's proposition that the *Dania Beach* exception for background information is limited to agency proffers to show its consideration of relevant factors is found nowhere in the decision itself. The D.C. Circuit in *Dania Beach* said only that "'[W]e do not allow *parties* to supplement the record' unless they can demonstrate unusual circumstances. . . ." *Id.* at 628 F.3d 590. (Emphasis added). *Dania Beach* does not confine supplementation to the agency, but instead allows another party to supplement if it "can demonstrate unusual circumstances."

contrast, the AEC Environmental Transportation Study is the direct predecessor to the 1977 EIS on which DOE relied for the 1996 FRR FEIS, and is referenced in the 1977 Transportation EIS. The 1977 Transportation EIS is, in turn, an important reference in the 2013 DOE Supplement Analysis that is central to the DOE decision to ship target material in liquid form.

The *Grunewald* judge recognized that the Administrative Procedure Act requires a court to review 'the whole record or those parts of it cited by a party.'" Id. at 356. (Citing 5 U.S.C. § 706). Courts in the D.C. District interpret the "whole record" to include "all documents and materials that the agency 'directly or indirectly considered'. . . [and nothing] more nor less." *Maritel, Inc. v. Collins*, 422 F.Supp.2d 188, 196 (D.D.C.2006) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir.1993)); *Amfac Resorts, LLC v. Dep't of Interior,* 143 F.Supp.2d 7, 12 (D.D.C. 2001); *Ammex, Inc. v. United States*, 62 F.Supp.2d 1148, 1156 (C.I.T. 1999) (relevant materials that were directly or indirectly considered by agency decisionmakers may be included).

Thus, the AEC Transportation Survey meets the court's test in *Grunewald* -- and the District's standard--that a document "directly or indirectly considered" is part of the "whole record." The AEC Survey is–at the very least-- a document "indirectly" considered by DOE because it is temporally and logically connected to the ultimate DOE decision. And since the Survey postulates an adverse position to DOE's decision, the Court may find that either DOE negligently or deliberately kept adverse information out of the record, and/or that the survey is necessary background information regarding DOE's deeply-rooted radioactive materials transport policy preference.

C. The Court should consider the Resnikoff and Corrected Edwards Declarations.

Defendants assert that the Resnikoff and Corrected Edwards affidavits must be disregarded because they prompt a "battle of the experts" which contradicts the principle requiring deference to the agency's expertise. Combined Reply at 8-9 (citing- *Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 436, 472 (D.D.C. 2015)). Unlike *Delta Air Lines,* however, Plaintiffs' expert declarations are not being used to challenge technical defects in a planned activity; they are proffered to suggest the degree to which DOE is misusing a non-NEPA preliminary determination document to dispense with NEPA compliance. Plaintiffs rely on the administrative record to show that the environmental impacts of shipping liquid target material are significant or uncertain, as compared with the original proposals' impacts. *Hodges v. Abraham*, 300 F.3d 432, 446-447 (4th Cir. 2002). This showing is visible in DOE's inability to demonstrate in its record that the likelihood of harm from the shipments is so "'remote and speculative' as to reduce the effective probability of its occurrence to zero" (quoting *State of New York v. Nuclear Regulatory Com'n*, 681 F.3d 471, 482 (D.C. Cir. 2012) (citation omitted), as Plaintiffs previously have discussed. The Edwards and Resnikoff declarations, however, depict the gravity of the technical environmental issues that would be raised if Plaintiffs were permitted to comment on a draft EIS. Plaintiffs demonstrate via the two declarations how far DOE has transgressed beyond the narrow strictures on use of Supplement Analyses.

When an agency uses "non-NEPA environmental evaluation procedures" such as Supplement Analyses to determine whether new information or changed circumstances require the preparation of a supplemental EA or EIS, an agency's authority to conduct such a review "is limited" to "conduct[ing] such a preliminary inquiry *to determine whether it is possible that the altered proposal's environmental impact will be significant*." *Hodges*, 300 F.3d 446-447

(emphasis added). Per *Hodges*, consideration of the possibility of environmental impacts is the only role for a Supplement Analysis. If the environmental impacts of a change in a proposal are significant in comparison with the original proposal, "then the DOE must complete additional documentation." *Hodges*, 300 F.3d 446-447.

D. Plaintiff's Motion to Supplement was timely.

Contrary to Defendants' argument (Combined Reply at 13), Plaintiffs brought their Motion to Supplement in a timely fashion. Under the abridged timetable for this litigation, Plaintiffs cannot reasonably be expected to have presciently predicted the shortfalls of the administrative record DOE produced at the very outset of this litigation. Plaintiffs moved to supplement the record as soon as their legal research revealed the DOE had failed to consider the highly relevant AEC Transportation Study, and as soon as they filed their expert declarations in support of their response to DOE and motion for summary judgment.

Plaintiffs are disinclined to rehash the enormous factual distinctions they discussed concerning the quite lengthy administrative litigation timetables in *CTS Corp. v. EPA*, 759 F.3d 52 (D.C. Cir. 2014) and *Banner Health v. Burwell*, 126 F. Supp. 3d 28 (D.D.C. 2015). See Plaintiffs' Reply Memorandum (ECF 25) at 19-21. Plaintiffs in this case have had to litigate over a much larger administrative record in less than 20% of the length of time it took to complete the *Banner* case and in less than 25% of the duration of *CTS Corp*. Defendants' arguments are inapropos and merely academic, since they have not demonstrated that the alleged "flurry of last-minute briefing" has caused them any legal harm or prejudice. Defendants' objection based on untimeliness must fail.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion to Supplement the Record and to Submit Extra-Record Documents.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I electronically filed the foregoing PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD AND TO SUBMIT EXTRA-RECORD DOCUMENTS with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

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