IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-01342-RPM

ROCKY MOUNTAIN WILD; SAN LUIS VALLEY ECOSYSTEM COUNCIL; SAN JUAN CITIZENS ALLIANCE; WILDERNESS WORKSHOP,

Plaintiffs,

v.

DAN DALLAS, in his official capacity as Forest Supervisor; MARIBETH GUSTAFSON, in her official capacity as Deputy Regional Forester; UNITED STATES FOREST SERVICE, a Federal Agency within the U.S. Department of Agriculture; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency within the Department of the Interior,

Defendants,

v.

LEAVELL-McCOMBS JOINT VENTURE,

Intervenor.

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCLOSURE NECESSARY TO COMPLETE AND SUPPLEMENT DEFENDANTS' ADMINISTRATIVE RECORD

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Federal Defendants oppose Plaintiffs' Motion to Compel Disclosure Necessary to Complete and Supplement Defendants' Administrative Record ("Pls.' Mot."). ECF No. 22. Because Federal Defendants properly lodged a complete administrative record with this Court that is fully adequate for review of Plaintiffs' claims, and Plaintiffs have failed to carry their burden of demonstrating otherwise, Plaintiffs' motion should be denied.

I. INTRODUCTION

Plaintiffs seek judicial review, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706, of decisions by the United States Forest Service and United States Fish and Wildlife Service (FWS), authorizing an exchange of federal lands for private land owned by the Defendant-Intervenor, Leavell McCombs Joint Venture (LMJV). *See* ECF No. 1 (Complaint). Consistent with their obligations under the APA, Federal Defendants compiled and filed with the Court exhaustive administrative records containing those documents directly or indirectly considered by the agency decision makers. ECF No. 19. Plaintiffs dispute the adequacy of the Forest Service's administrative record, seeking to compel the inclusion in the record of: (1) all records in the possession of third-party NEPA contractors regardless of whether they were shared with the Forest Service; (2) all billing statements and budget records exchanged between LMJV and the third-party contractors; and (3) a settlement agreement between the LMJV and a non-party. Pls.' Mot. at 3. These requests should be denied. First, Plaintiffs fail to carry their threshold burden of demonstrating that the Forest Service's administrative record is not adequate to permit meaningful judicial review. Second, Plaintiffs fail to demonstrate that the material they seek to add to the record was considered—either directly or indirectly—by the decision maker and is thus needed to "complete" the record, or that the material falls within any of the narrow exceptions that permit "supplementation" of the record.

II. BACKGROUND

A. The Village at Wolf Creek Access Project

LMVJ owns land within the Rio Grande National Forest, adjacent to the Wolf Creek Ski Area, on which it has long sought to develop resort facilities to be known as the Village at Wolf Creek. *See* W12652, W12662-12664, W10725.[1] In 2006, the Forest Service granted LMJV an easement across the surrounding Forest Service land so that LMJV could access its private land in order to construct and operate the Village at Wolf Creek. *See* W10725. Plaintiffs in this case brought suit challenging the 2006 decision. *Colorado Wild v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213 (D. Colo. 2007). This Court granted Plaintiffs' request for preliminary injunctive relief, *id.* at 1231, and the parties ultimately settled the case, with the Forest Service agreeing to prepare a new Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) for any access request by LMJV. W10726.

In 2010, LMJV proposed to the Forest Service a land exchange as an alternative to an easement. Under the land exchange proposal, approximately 177 acres of LMJV's existing parcel would be exchanged for approximately 205 acres of federal land. W02344, W02211. The exchange would obviate the need for an access easement by creating direct access between LMJV's land and Highway 160. W02212. The exchange would also provide the Forest Service with 52 additional acres of riparian wetlands and 11,565 linear feet of perennial streams, and would reduce visual and recreational conflicts with the ski area by moving the development further from the ski area and closer to the highway. W12679.

[1] Defendants cite to the bates-numbered pages of the administrative record. *See* ECF No. 19. For the convenience of the Court and the parties, the record pages cited in this brief are reproduced in an appendix of record citations filed herewith.

In light of the concerns raised in the prior litigation about the conduct of the NEPA analysis process, LMJV and the Forest Service developed and entered into a Memorandum of Understanding ("MOU") designed to ensure that the evaluation of the proposed land exchange would be objective and transparent. The MOU makes clear that the NEPA analysis would be prepared by a Prime Consultant to be chosen and directly supervised by the Forest Service and paid by LMJV. W02275; *see also* W02229 (employment contract between LMJV and Prime Consultant). The MOU makes clear that contacts between the consultant and LMJV are limited to matters of budget and scheduling unless the Forest Service authorizes and is involved with the contact. W02276 (MOU, § III (E)); *see also* W02282 (MOU, § IV(A)) ("The role of the Proponent is the same as it would be if the process were being entirely performed by Forest Service personnel, with no Proponent financing."). At all times the Forest Service retained "sole responsibility for making decisions with regard to the NEPA analysis." W02275 (MOU, § II).

In May 2015, after an extensive environmental review process under NEPA, and after completion of consultation with the FWS under the Endangered Species Act, the Forest Service issued a Record of Decision (ROD) authorizing the proposed land exchange. W12650. Plaintiffs brought this action challenging the decision on June 24, 2015. ECF No. 1.

B. The Administrative Record for the Village at Wolf Creek Access Project

On November 13, 2015, the Forest Service and the FWS lodged their respective administrative records for the Village at Wolf Creek Access Project. ECF No. 19.

Because the Forest Service collected record materials from varied sources, including hardcopy and electronic files, and email archives, its administrative record consists of the several components. First, more than 18,000 pages of documents, described as the "conventional" administrative record, are included on one DVD. ECF No. 19 ¶ 2. This portion of the record

includes the primary documents considered directly or indirectly by the Forest Service in making the land exchange decision, including the decision-making documents, factual material and reports, comments received from the public and other agencies, and the records of the Regional Objection Review Team, which reviewed pre-decisional objections to the proposed land exchange. *See* ECF No. 19-2 (index). A second DVD, labeled "Additional Record Materials," consists of 45,000 pages of emails and attached documents gathered through an electronic search of the e-mail files of 39 current and former employees who were involved in the Wolf Creek decision-making process. *See* ECF No. 19 ¶ 3; ECF No. 19-3. A third DVD, label "Forest Service Additional Record Material: Privilege Set" contains an index of the materials over which the Forest Service asserts privilege and, where appropriate, redacted versions of the documents. ECF No. 19 ¶ 4. The two Forest Service employees who oversaw the compilation of the Forest Service's administrative record certified that the administrative record is complete and contains those documents considered directly or indirectly by the decision maker in making the Village at Wolf Creek Access Project decision. ECF No. 19-2 ¶ 2; ECF No. 19-3 ¶ 6.

The FWS, prepared and submitted its own record for the Biological Opinion it prepared for the Project pursuant to the Endangered Species Act. The FWS's record spans 7,183 pages. ECF No. 19-1.

C. The Parties' Conferral on the Administrative Record

As required by the Amended Case Management Plan, ECF No. 21, the Plaintiffs and Defendants engaged in an exchange of letters, and had numerous telephone conferences designed to identify and resolve Plaintiffs' concerns with the record. ECF No. 21 at ¶ 6(B).[2] Through this

[2] The parties exchanged three letters: (1) a January 25, 2016 Letter from Defendants to Plaintiffs; (2) a February 10, 2016 Letter from Plaintiffs to Defendants; and (3) a February 24, 2016 Letter from Defendants to Plaintiffs. The second and third letters are exhibits to Plaintiffs'

exchange the parties identified 13 items of concern. *See* ECF No. 22-3 (February 24, 2016 conferral letter). The parties successfully resolved many of the issues identified by Plaintiffs. *See* ECF No. 22 at 3 (noting items 1, 4, 5, 8, 10 and 13 have been resolved).

The parties also agreed that resolution of four of Plaintiffs' concerns could be postponed pending Plaintiffs' review of disclosures under the Freedom of Information Act (FOIA) scheduled for April 1 and April 18, 2016.[3] While Defendants believe that the administrative record is complete and adequate for judicial review, the parties agreed that review of the upcoming FOIA disclosures might help assuage Plaintiffs' concerns about the number of record custodians searched by the Forest Service during compilation of the administrative record (item 2), communications between LMJV and the Forest Service's Washington D.C. Office (item 9), and the inclusion of FOIA materials in the administrative record (items 11 and 12). The parties therefore agreed that Plaintiffs should be permitted to file a motion limited to those specific four items after having an opportunity to review the FOIA disclosures.

Finally, the parties identified the following disputed categories as appropriate for judicial resolution now: (1) all internal records generated by the Prime Consultant, WER, and its subcontractors (item 3); (2) the billing statements between LMJV and WER (item 7); and (3) a private settlement between the LMJV and the Wolf Creek Ski Area (item 6). These three categories are the subject of Plaintiffs' motion.

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motion (*see* ECF No. 22-2 and ECF No. 22-3). For the sake of completeness, the first letter is attached as Exhibit 1, hereto.

[3] Plaintiff Rocky Mountain Wild has two pending FOIA cases related to the Wolf Creek Village Access Project, *Rocky Mountain Wild v. U.S. Forest Serv.*, 14-cv-02496-WYD-KMT (D. Colo.) and *Rocky Mountain Wild v. U.S. Forest Serv.*, 15-cv-127-WJM-CBS (D. Colo.).

III. STANDARD OF REVIEW

A. Judicial Review of the Sufficiency of the Administrative Record

In the Tenth Circuit, an action seeking judicial review of an agency decision pursuant to the APA is "treated in the district court as an appeal." *Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1181 (D. Colo. 2002) (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994)). This standard requires agency action to "be reviewed on the basis articulated by the agency and on the evidence and proceedings before the agency at the time it acted." *Am. Min. Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985). "[T]he focal point . . . 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); *Olenhouse*, 42 F.3d at 1579 ("The . . . reliance on arguments, documents, and other evidence outside the administrative record is . . . [an] illicit procedure . . . to determine the issues for review.").

Consistent with the principles of record review, the administrative record filed by the agency is entitled to a "presumption of regularity." *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243 (D. Colo. 2010). Unless a plaintiff can carry the heavy burden of demonstrating through clear evidence that the record is not adequate to permit "meaningful judicial review," courts should defer to the agency's certification of the administrative record as the "whole" administrative record. *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1138-39 (10th Cir. 1991); *see also WildEarth Guardians*, 713 F. Supp. 2d at 1254 (explaining that it is appropriate to impose a substantial burden on a party attempting to expand the court's scope of review in an APA proceeding)

An administrative record need not include "every potentially relevant document existing within [the] agency." *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs,* 448 F. Supp. 2d 1, 5 (D.D.C. 2006); *see id.* ("A broad application of the phrase 'before the agency' would undermine the value of judicial review . . . [and] render judicial review meaningless."). A record need only contain "sufficient data to allow the reviewing court to determine whether the [agency] had a rational basis for [its decision]." *Franklin Sav. Ass'n,* 934 F.2d at 1139. Because the agency bears the risk of an incomplete administrative record, it has every incentive to provide a complete record: if the agency record is for some reason inadequate to explain the agency's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light v. Lorion,* 470 U.S. 729, 744 (1985).

This Court recognizes two procedures through which materials may be added to a record that has been demonstrated to be inadequate. First, the record may be "completed" with materials that were directly or indirectly considered by the agency but were omitted from the administrative record. *Wildearth Guardians,* 713 F. Supp. 2d at 1253. Second, the record may be "supplemented" with materials not considered by the agency but which "are necessary for the court to conduct a substantial inquiry." *Id.* Both procedures must be applied sparingly because judicial expansion of the record invites the court to engage in impermissible review of the agency's decision on the basis of "a new record made initially in the reviewing court." *Id*.

B. Completion of the Administrative Record

To succeed on a motion to complete the administrative record, a plaintiff "must show by *clear evidence* that the record fails to include documents or materials considered by [the agency] in reaching the challenged decision." *Wildearth Guardians*, 713 F. Supp. 2d at 1253 (emphasis added). A plaintiff cannot carry this "sizeable burden" by "asserting, speculatively, that documents were relevant or before the agency at the time it made its decision." *Id.* at 1254 (quoting *Pac. Shores*, 448 F. Supp. 2d at 6-7). Instead, a plaintiff must clearly set forth in its motion: (1) when the documents were presented to the agency; (2) to whom; (3) and under what context." *Id.*

While not every document must "pass before the eyes of the final decisionmaker" to be part of the record, the "proper touchstone remains the decision makers' actual consideration." *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275 (D. Colo. 2010). Thus, to complete the record with materials not directly considered by the decision maker—like a study cited in the recommendation of a subordinate—the plaintiff must demonstrate that the document "was so heavily relied on in the recommendations that the decision maker constructively considered it." *Id.* The requirement to include in the administrative record materials "indirectly considered" cannot be used to sweep all possibly relevant files into the administrative record. *Wildearth Guardians*, 713 F. Supp. 2d at 1255. *See also Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1277 (holding that an argument that all documents underlying the agency's decision must be included in the record "stretches the chain of indirect causation to its breaking point.").

C. Supplementation

Supplementation of the administrative record with materials not considered by the agency is appropriate only in "extremely limited circumstances," *Lee v. U.S. Air Force*, 354 F.3d 1229,

1242 (10th Cir. 2004), because reaching beyond the record risks substituting the judgment of the reviewing court for that of the agency. *See Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (allowing evidence outside the record "inevitably leads the reviewing court to substitute its judgment for that of the agency"). While the Tenth Circuit's articulation of the circumstances under which supplementation of the record is appropriate has not always been consistent, *see Ctr. Native Ecosystems*, 711 F. Supp. 2d at 1278-79, supplementation is generally limited to circumstances where the movant can: (1) show the agency ignored relevant factors it should have considered; (2) show the agency relied on factors left out of the administrative record; (3) show supplementation is necessary to explain technical terms or complex subject matter; or (4) make a strong showing of bad faith or improper behavior. *See, e.g., Citizens for Alternatives to Radioactive Dumping*, 485 F.3d at 1095; *Lee v. U.S. Air Force*, 354 F.3d at 1242; *Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1267.

In moving to supplement the record with extra-record materials, the plaintiff bears the burden of proving that the proffered materials fall within one of the exceptions justifying supplementation. *Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1278-79.

Supplementation of the record is not warranted when the record compiled by the agency allows adequate judicial review of a given issue, and supplementation is sought simply to provide a fuller record. *See Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior*, 667 F. Supp. 2d 111, 115 (D.D.C. 2009) (where judicial review is possible upon the existing record, there is no basis to supplement the record); *Seattle Audubon Soc'y. v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994) (holding the fact that additional documents might provide a fuller record makes no difference if the record as it exists is adequate).

IV. ARGUMENT

The administrative record filed by the Forest Service properly contains those materials directly and indirectly considered by the Forest Service in making the Wolf Creek Village Access Project decision. The record is adequate for judicial review, and Plaintiffs fail to carry their burden of presenting the clear evidence needed to overcome the presumption of regularity to which the record is entitled. Plaintiffs' request for discovery, whether as a means of completing or supplementing the record, or in an attempt to investigate their speculative allegations of improper influence, is unwarranted. Even assuming the record is inadequate Plaintiffs do not show that the materials they seek—materials that were not considered by the Forest Service and which did not bear on the Agency's decision—should be added to the record through completion or supplementation.

A. The Administrative Record is Complete and Plaintiffs Fail to Overcome the Presumption of Regularity

The Forest Service's record for the Wolf Creek Access Project is entitled to a "presumption of regularity." *Colorado Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1238 (D. Col. 2010). Before the Court may entertain requests to modify the administrative record, Plaintiffs must provide "clear evidence" that the record was not properly designated. *Bar MK Ranches*, 994 F.2d at 740. Plaintiffs seek to carry that burden here by emphasizing the ongoing FOIA litigation relating to the Project and by noting that the Forest Service's record includes a DVD entitled "Additional Record materials." Pls.' Mot. at 4-5. Neither assertion carries Plaintiffs' burden.

Plaintiffs' ongoing FOIA litigation against the Forest Service shows neither that the record lodged by the Forest Service is inadequate for judicial review of the challenged decision nor that the administrative record has lost the presumption of regularity. Plaintiffs assert that

until the FOIA process is complete, they are "unable to review the 'whole record' to inform its [sic] APA supplementation or completion requests." Pls.' Mot. at 2. This argument reverses the burden of proof and "confuse[s] the administrative record—the record the agency relied upon in its final action—with FOIA's emphasis on every scrap of paper that could or might have been created." *TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002).

The "whole record" under the APA is not the entire universe of documents Plaintiffs seek or obtain through FOIA. *State of Del. Dep't of Nat. Res. and Envt'l Control v. U.S. Army Corp of Eng'rs*, 722 F. Supp. 2d 535 (D. Del. 2010) ("A FOIA production request is an entirely discrete legal concept that bears no relation to the administrative record compiled for a court's review under the APA."); *Oceana v. Guitterez*, Civ. No. 08-00318 (ESH/AK), 2009 WL 8725110 (D.D.C. May 28, 2009) (denying motion to supplement the administrative record with all materials disclosed through FOIA). Instead, the whole record under the APA is the record of materials considered directly or indirectly by the decision maker. It need only "contain sufficient data to allow the reviewing court to determine whether [the Agency] had a rational basis" for its decision, and need not include "all information contained in [the agency's] files." *Franklin Sav. Ass'n*, 934 F.2d at 1139-40. Unless a plaintiff can demonstrate that the record is not adequate to permit "meaningful judicial review," courts should defer to the agency's certification of the administrative record as the "whole record." *Id.* at 1138-39. Here, although Plaintiffs generically assert that the record is not "whole" so long as they continue to dispute the adequacy of the Forest Service's compliance with their FOIA requests, they make no attempt to carry their burden of showing that the administrative record as filed is so inadequate that is will preclude "meaningful judicial review." *Id.*

Plaintiffs also suggest that that Forest Service's administrative record is not entitled to the presumption of regularity because in addition to the "conventional record"—composed of the principal decision-making documents, factual material and reports, and comments received from the public—the record also contains a DVD of "Additional Record Materials" collected through an electronic search of employee emails. Pls.' Mot. at 4. Contrary to Plaintiffs' unsupported assertion, the "Additional Record Materials" *are part of* the administrative record certified by the Forest Service. *See* ECF No. 19-2 at ¶ 2 (declaration of Guy Blackwolf, explaining that "[t]ogether with the conventional record, the RORT record and the email archive record constitute the Forest Service Administrative Record"). The sole difference between these two components of the record is the methodology by which they were collected and produced. Plaintiffs fail to explain how the inclusion in the administrative record of project-related emails generated or received by agency personnel during the decision making process is inappropriate or divests the record of the presumption of regularity to which it is entitled.

In sum, Plaintiffs fall well short of producing the "clear evidence" needed to overcome the presumption of regularity which must be afforded the administrative record certified and lodged in this case. *Bar MK Ranches*, 994 F.2d at 740.

B. Discovery is Unwarranted and Inappropriate

Plaintiffs make passing reference to seeking discovery in this case. *See, e.g.,* Pls.' Mot. at 11, 16. Each of the categories of documents Plaintiffs seek to add to the record is addressed in detail below, but it is worth noting at the outset that discovery—whether as a tool for completing or supplementing an inadequate administrative record, or as a tool to investigate Plaintiffs' claims—is improper in APA cases and particularly unwarranted here.

There is "a strong presumption against discovery in administrative proceedings" because it creates a *de novo* record in the trial court. *Conservation Force v. Salazar*, No. 1:10-cv-1262 BJR, 2012 WL 11947683, *6 (D.D.C. Feb. 6, 2012). *See also NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 195 (3rd Cir. 2006) (noting the "strong presumption against discovery"); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 444 (7th Cir.1990) ("only in an emergency should a reviewing court ... conduct its own evidentiary hearing").

Before a court should consider allowing discovery, a plaintiff must show by clear evidence the record before the court is inadequate. *Bar MK Ranches*, 994 F. 2d at 740 (holding plaintiffs failed to overcome the presumption of regularity, and noting limited discovery to complete the record is appropriate only after a plaintiff presents "clear evidence" the record is not complete); *California v. U.S. Dep't of Labor*, 2014 WL 1665290, *14-15 (E.D. Cal. Apr. 24, 2014) (denying plaintiffs' request to conduct discovery into allegations of political pressure where plaintiffs failed to rebut the presumption that the record was adequate of judicial review); *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041-42 (N.D. Cal. 2007) (same); *TOMAC*, 193 F. Supp. 2d at 195 (same); *Sierra Club v. U.S. Dep't of Energy*, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) (same). Even where a plaintiff has overcome the presumption of regularity and demonstrated that supplementation or completion of the record is warranted, the preferred course is to remand the record to the agency to include the additional materials, not to permit discovery. *Fla. Power & Light*, 470 U.S. at 744. Generally courts resort to discovery as a tool for completion or supplementation of the record only where there is a "strong showing of bad faith or improper behavior" or where discovery provides "the only possibility for effective judicial review and when there have been no contemporaneous administrative findings." *Cmty for Creative Non–Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990) (citing *Citizens to Pres.*

Overton Park v. Volpe, 401 U.S. 402, 420 (1971)). *See also USA Grp. Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996) (denying discovery in an APA case, noting that where "the public record discloses no evidence of bad faith on the part of the agency, that should be the end of the inquiry."); *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 458 (D.C. Cir. 1994) (denying discovery in APA case because plaintiffs failed to make "strong showing of corrupt decisionmaking").

Here, Plaintiffs' request for discovery should be denied because, as set forth above, they have failed to overcome the presumption of regularity and demonstrate that the administrative record filed by the Forest Service is inadequate for judicial review.

Plaintiffs also intimate that they should be afforded discovery—even in the absence of a finding that the record is inadequate—in order to *investigate* their claims that LMJV improperly influenced the NEPA process. *See, e.g.*, Pls.' Mot. at 13 ("The limited Administrative Record supports further investigation into questions of LMJV budget and invoice approval constraining an influencing NEPA contractor analysis."). Such exploratory discovery is inappropriate. Allowing discovery in an APA case in an "attempt to uncover definitive evidence of wrongdoing" would turn "every challenge to administrative action . . . into a fishing expedition into the motives of the defendant agency." *Office of Foreign Assets Control v. Voices in Wilderness*, 382 F. Supp. 2d 54, 62-63 (D.D.C. 2005). Thus, before discovery into the decision making process of an agency is permitted, a plaintiff must make a "strong showing" of bad faith or improper behavior. *Citizens to Pres. Overton Park, Inc*, 401 U.S. at 420, overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 104, 107 (1977).

Here, although Plaintiffs broadly speculate that LMJV improperly influenced the NEPA process, they provide no credible evidence—much less make a strong showing—that any such

influence took place. As explained in the accompanying declarations of Forest Supervisor Dan Dallas, Forest Service Project Manager Tom Malecek, and WER President David Johnson, the LMJV did not manipulate or otherwise interfere with the NEPA process. Decl. of Dan Dallas (attached hereto as Exhibit 2) ¶ 14, Decl. of Tom Malecek (attached hereto as Exhibit 3) ¶ 11, and Decl. of David Johnson (attached hereto as Exhibit 4) ¶¶ 13, 18. As set forth in detail below, the cherry-picked and mischaracterized assortment of emails from the record presented by Plaintiffs falls well-short of making the strong showing of bad faith or improper behavior that could justify injunctive relief.

In addition to being legally and factually unjustified, speculative discovery to "investigate" Plaintiffs' claims would impose an extreme burden on the third party contractor and its subcontractors. The third party contractor, WER, is small company, with a full-time staff of four. Johnson Decl. ¶ 11. Obligating it to search through nearly five-years' worth of email and other records to comply with Plaintiffs broad broad discovery request would likely take hundreds of hours and disrupt WER's ongoing work for other clients. *Id.* ¶ 11.

This Court should decline Plaintiffs' invitation to authorize intrusive and burdensome discovery based on Plaintiffs' speculation that and desire to further "investigate" their claims.

C. Plaintiffs Fail to Demonstrate that the Record Must be Completed or Supplemented

Even assuming Plaintiffs have carried their burden of demonstrating that the administrative record is inadequate, they fail to show that the documents they seek to add qualify for inclusion under the rubric of either "completion" or "supplementation." *Wildearth Guardians,* 713 F. Supp. 2d at 1253

1. The Internal Contractor and Subcontractor Documents Need Not be Added to the Record

Plaintiffs first seek to add to the administrative record all records related to the Project in the possession of the third-party contractor, WER, and its subcontractors, without regard to whether those documents were before the decision maker. Pls.' Mot. at 9. This request fails. All of the documents generated by WER and its subcontractors that were considered—either directly or indirectly—by the decision maker *are already in the administrative record*. Plaintiffs fail to demonstrate that completion or supplementation with any additional internal documents that the contractor or subcontractors possess is warranted.

i. Completion

Plaintiffs suggest that the record must be completed with all internal contractor and subcontractor records because the MOU between the Forest Service and WER obligated WER to index and provide to the Forest Service *all* documents related to the Project. Pls.' Mot. at 10. [4] This argument misconstrues the MOU. Nothing in the MOU required the contractor or its subcontractors to index and provide wholesale to the Forest Service *all* documents in their possession. Instead, the MOU directs WER to index and provide to the Forest Service for inclusion in the record, only those materials "directly or indirectly considered" by the agency or that "demonstrate compliance with laws, regulations or policies." W02277 (MOU, § IV (B)(ix)). Under the MOU, the Forest Service retained discretion to advise WER what categories of materials were important to its decision-making process—those considered directly or indirectly by the agency—and which needed to be provided to the Agency for inclusion the administrative

[4] Contrary to Plaintiffs' suggestion, there is nothing unusual, let alone "controversial," in hiring a third party contractor to coordinate or conduct a NEPA analysis. *See* Pls.' Mot. at 8. Indeed, the Council on Environmental Quality's NEPA regulations explicitly authorize the use of private contractors to prepare NEPA analyses. 40 C.F.R. § 1506.5.

record. *See* W02280 (MOU, § V(F)) (The Forest Service will "evaluate information submitted by" the consultant team and "[m]ake the final determination regarding inclusion or exclusion of material from the Analysis."); W02280 (MOU, § V(G) (The Forest Service will "provide guidance on the adequacy of existing data and studies.")); W02281 (MOU, § V(L) (The Forest Service will "[p]rovide direction to the Prime Consultant for designing, organizing, indexing, preparing and maintaining documents regarding the Analysis.").

As explained in the declarations of Tom Malecek and David Johnson the Forest Service and WER conferred and determined the categories of materials that should be indexed and provided to the Forest Service for inclusion in the administrative record. *See* Johnson Decl. ¶ 10; Malecek Decl. at ¶ 6. In compliance with its obligations under the MOU, WER indexed those documents and provided the index and the documents to the Forest Service for inclusion in the record. Johnson Decl. ¶ 10; *see also* W11513 (index of contractor documents provided to Forest Service).

In short, all the records in possession of WER or its subcontractors that were considered directly or indirectly by the decision maker are already in the administrative record, and Plaintiffs fail to adduce clear evidence to the contrary.

Nor is there a basis for Plaintiffs' apparent claim that the record should be completed with materials in the possession of the contractor and its subcontractors *that were neither requested by, nor shared with,* the Forest Service. As noted above, the Forest Service reasonably delineated those materials generated by the WER and its subcontractors needed by the agency to make a full and informed decision. *See* Malecek Decl. ¶ 8 ("All information from WER or its subcontractors that the Forest Service believed was necessary to conduct an adequate NEPA analysis was provided to the Forest Service."). The fact that WER and its subcontractors possess

other materials related to the project does not demonstrate the record is inadequate for judicial review. An administrative record does not have to contain every scrap of paper related to the challenged action. *See Franklin Sav. Ass'n ,* 934 F.2d at 1139-40; *Pac. Shores*, 448 F. Supp. 2d at 7. *See also Stand Up for California! v. U.S. Dep't of the Interior*, 71 F. Supp. 3d 109, 117-18 (D.D.C. 2014) ("mere possession triggers no requirement to include such records in the administrative record").

Plaintiffs speculate in passing that the records in possession of the contractor but not considered by the Forest Service "may" contain "undisclosed criticism and data" supporting Plaintiffs' other claims. Pls.' Mot. at 11. This sort of unadorned speculation falls well short of providing the clear evidence needed to show the record is adequate and must be completed.

ii. Supplementation

Nor have Plaintiffs carried their burden of proving that materials in the possession of WER or its subcontractors and not provided to the Forest Service fall within one of the "extremely limited" conditions under which the record may be supplemented with material not considered by the decision maker. *Lee v. U.S. Air Force*, 354 F.3d at 1242.

Plaintiffs appear to claim the contractor's internal documents fall within the exception for showing "bad faith or improper behavior," arguing that the administrative record shows LMJV "exercised political pressure at all levels of the Forest Service," and thus "[i]t is reasonable to infer that political pressure may be revealed by the contractor emails." Pls.' Mot. at 11. This speculative inference falls woefully short of Plaintiffs' burden of making a "strong showing" of

bad faith or improper behavior. *Citizens for Alternative to Radioactive Dumping*, 485 F.3d at 1096.[5]

First, Plaintiffs err in asserting that the administrative record shows LMJV "exercised political pressure at all levels of the Forest Service." *See* Pls.' Mot. at 10-11. In fact, all of Plaintiffs' record quotations (save one) come from a series of emails describing a single incident in October 2014, when representatives of LMJV expressed frustration with the length of time the Agency's analysis was taking. *See id.* (citing C0025101, CP003015, CP0002930). Tellingly, Plaintiffs omit Forest Supervisor Dallas's response to LMJV, which emphatically observes that while "Mr. McCombs is welcome to call anybody he wishes," doing so will not be "helpful to furthering his perceived need for faster progress, or the ultimate outcome." C0025107; *see also* Dallas Decl. ¶ 13. Nothing the Supervisor Dallas's response suggests that he—as the decision maker—was influenced by LMJV in either the timing or substance of his decision.[6]

Second, none of the emails cited by Plaintiffs make it "reasonable to infer" that the internal contractor records may reveal undue influence by LMJV on WER or its subcontractors. Pls.' Mot. at 11. To the contrary, the Forest Service and WER both make clear that they were aware of concerns about undue influence during the prior project and made every effort to ensure such allegations could not be leveled at this Project. *See* Johnson Decl. ¶ 5 ("The consultant team knew a strict communications protocal had been negotiated to ensure that our analysis would not be compromised by substantive direction of influence from LMJV and the entire

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[5] Moreover, even if Plaintiffs' reasoning by inference showed evidence of bad faith, that showing would not justify Plaintiffs' overly broad demand for production of all the thousands of documents in possession of the contractor. *See* Johnson Decl. ¶ 11.

[6] The other document cited by Plaintiffs, C0021685, is background discussion of Mr. McCombs's original acquisition of land in the early 1980s and shows no evidence of influence in the Project.

consultant team was committed to abide by that protocol."); Dallas Decl. ¶ 6 ("I enforced a very strict protocol to ensure that there was a "firewall" between WER and LMJV with regard to the substance and findings of the analysis."). As a result, the Forest Service alone directed the scope and content of the NEPA analysis. *See* Johnson Decl. ¶ 13 ("The scope of WER's analysis was determined solely by the Forest Service based on the scope of the project and requirements of NEPA."); Dallas Decl. ¶ 13 ("The Forest Service was solely responsible for deciding on the content and results of the substantive analysis.").

In short, Plaintiffs fail to carry their burden of demonstrating that the administrative record must be supplemented with records in the possession of the contractor or subcontractors which have not already been provided to the Forest Service and included in the administrative record.

2. Plaintiffs Fail to Demonstrate that the Record Must be Completed or Supplemented with the Contractors' Billing Information

Plaintiffs also seek to add to the administrative record budgets and billing information exchanged between LMJV and WER and its subcontractors, based on "[t]he reasonable inference that budgets, billing, and other means were similarly used to bring political pressure to bear on WER and the sub-contractors." Pls.' Mot. at 12. This speculative inference does not carry Plaintiffs' burden of demonstrating that these records should be added to the record through either completion or supplementation.

i. Completion

Plaintiffs make no attempt to argue that billing information exchanged between LMJV and the contractors was considered—either directly or indirectly—by the Forest Service in reaching the challenged decision. And indeed, both the Forest Service and WER affirm that billing records were not provided to the Forest Service. *See* Johnson Decl. ¶ 7 ("WER never

provided any billing records or billing communications to the Forest Service."); Malecek Decl. ¶ 9 ("The Forest Service was not routinely involved in the billing process, and did not receive or review copies of bills."). Completion of the administrative record with the contractors' billing information is thus inappropriate.

ii. Supplementation

Plaintiffs appear to contend that the contractors' billing records should be added to the record through the record review exception for bad faith or improper behavior. *See* Pls.' Mot. at 11. Plaintiffs argue that existing materials in the record allow the "[t]he reasonable inference that budgets, billing, and other means were similarly used to bring political pressure to bear on WER and the sub-contractors" and "support[] further investigation into questions of LMJV budget and invoice approval constraining and influencing NEPA contractor analysis." Pls.' Mot. at 12-13. This argument fails. In the absence of concrete evidence, Plaintiffs resort to speculative inference, which cannot carry their burden of making a "strong showing" of bad faith or improper behavior. *Citizens for Alternative to Radioactive Dumping*, 485 F.3d at 1096.

Plaintiffs attempt to parlay a series of emails regarding a temporary work stoppage by WER in February 2012 into evidence that LMJV improperly sought to manipulate the NEPA process through budgets and billing. Pls.' Mot. at 12. In fact, as WER president David Johnson and Forest Service Project Manager Tom Malecek explain, the events in early 2012 show exactly the opposite. In early 2012, the Forest Service and WER determined that to prepare an appropriate NEPA analysis, the EIS should consider three development levels—Low, Moderate, and High—for each alternative. Johnson Decl. ¶ 14; Malecek Decl. ¶ 10. This decision increased the complexity and cost of the analysis. *Id.* In February 2012, the Forest Service, WER and LMJV met to discuss the increase in cost, and WER temporarily stopped work on the

project to avoid incurring additional costs. Johnson Decl. ¶ 14, Malecek Decl. ¶ 10. As a result of the meeting LMJV agreed to pay for the expanded scope of the NEPA analysis, WER resumed work, and the WER and LMJV had not further billing disputes. Johnson Decl. ¶ 15, Malecek Decl. ¶ 10. Thus, rather than showing manipulation or coercion of the process by LMJV, the February 2012 meeting demonstrates that WER and the Forest Service were able to adjust the scope of the analysis as needed to comply with NEPA despite the increased costs to LMJV.[7]

Indeed, contrary to Plaintiffs' unsubstantiated speculation, both WER and the Forest Service emphasize that LMJV did not improperly influence the decision making process though the budget or any other means. *See* Johnson Decl. ¶ 18 ("I do not believe that LMJV or Western Lands Groups improperly influenced the NEPA analysis through the budget process or in any other manner."); Malecek Decl. ¶ 11 ("I am not aware of any instance in which the cost of analysis influenced the scope or outcome of the NEPA process. Throughout the EIS process, the Forest Service retained sole authority over the scope of the NEPA analysis."); Dallas Decl. ¶ 13 ("[A]t no time was LMJV allowed any oversight of the substantive analysis of the proposed land exhange either directly or through the budget and billing practices of WER or its subcontractors.").

In sum, Plaintiffs fail to carry their burden of making the strong showing of bad faith or improper behavior that would justify supplementing the record with the contractors' billing materials.

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[7] Mr. Johnson also explains in his declaration that two additional emails cited by Plaintiffs between Forest Service biologist Randy Ghormley and Rick Thompson, a wildlife biologist subconsultant (C0009299 and C0006139) are not evidence of the LMJV's use of the budget to manipulate the NEPA process. *See* Johnson Decl. ¶¶ 16-17.

3. Plaintiffs Fail to Demonstrate that the Record Must be Completed or Supplemented with a Settlement Agreement between LMJV and the Wolf Creek Ski Area

Lastly, Plaintiffs seek to add a 2008 settlement agreement from lawsuit between LMJV and the Wolf Creek Ski Corporation to the administrative record. Pls.' Mot. at 13. The settlement agreement was not considered either directly or indirectly by the Forest Service, and therefore is not needed to complete the record. And, because the settlement agreement does not fall within any of the exceptions to the record review rule, it cannot be added to the record through supplementation.

i. Completion

In 2008, the Wolf Creek Ski Area and the LMJV resolved litigation through a confidential settlement that, in part, conveyed to LMJV land that LMJV is now exchanging with the United States and adjusts various easements between LMJV and the Ski Area. C0026984. As explained by Forest Supervisor Dallas, after learning of the settlement agreement, Supervisor Dallas conferred with LMJV and the Ski Area and determined that the he could obtain the real estate information necessary to analyze the land exchange proposal without reviewing the agreement itself. Dallas Decl. ¶ 15. LMJV provided the Forest Service with a concise write-up of all of the terms and conditions that apply to the lands involved in the exchange proposal, as well as a copy of Exhibit C to the settlement, which depicts the parcels at issue. *Id.* Both the write-up and Exhibit C are in the record. *See* C0034141 (Letter describing relevant settlement terms); Ex. 1 (noting agreement to include Exhibit C in the record). The settlement agreement itself was never provided to the Forest Service. Dallas Decl. ¶ 15, Malecek Decl. ¶ 12.

Plaintiffs emphasize that the record contains emails discussing the terms of the Settlement Agreement. Pls.' Mot. at 15. The cited discussions, however, are all consistent with the description of the terms of the settlement provided to the Forest Service by LMJV and

included in the record. They do not prove that the Forest Service received and relied on the entire settlement agreement. *See* Malecek ¶ 13. Plaintiffs therefore they do not satisfy the standards set forth in *Wildearth Guardians* to establish that documents were considered, by showing when the documents were presented to the agency, to whom, and in what context. 713 F. Supp. 2d at 1254.[8]

ii. Supplementation

Plaintiffs do not claim that the settlement agreement falls within any of the narrow exceptions warranting supplementation of the record.

V. CONCLUSION

Plaintiffs' motion should be denied. Plaintiffs have failed to overcome the presumption of regularity that must be afforded the administrative record filed by the Forest Service. Even if Plaintiffs had overcome that presumption, they fail to show that the documents they seek to add to the record meet the Court's standards for completion or supplementation. To the extent that Plaintiffs are seeking discovery, that request is plainly unwarranted and inappropriate in this APA matter.

Respectfully submitted, this 11th day of April, 2016.

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/s/ Barclay T. Samford
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[8] Plaintiffs devote much energy to arguing that LMJV has waived any confidentiality associated with the settlement. This argument is irrelevant to the question of whether the settlement should be included in the record, because the settlement itself—confidential or not—was not before the decision maker.

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Certificate of Service

I hereby certify that on April 11, 2016, I electronically filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to counsel for the parties.

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