

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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NORTHWOODS WILDERNESS
RECOVERY, INC.,
DOUGLAS R. CORNETT
and
HEARTWOOD FORESTWATCH,

Case No. 2:00-CV-154

Hon. Richard Alan Enslin

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,
ROBERT M. WALKER
and
ROBERT JACOBS,

OPINION

Defendants.

Defendants United States Forest Service, Robert M. Walker and Robert Jacobs have moved to dismiss Plaintiffs Northwoods Wilderness Recovery, Inc., Douglas R. Cornett and Heartwood Forestwatch's Amended Complaint. Plaintiffs have also moved to strike an exhibit contained in Defendants' Reply Brief as to the Motion to Dismiss. Both motions have now been fully briefed. Oral argument as to the motions is unnecessary in light of the briefing and the issues presented.

This action is a legal challenge under the Administrative Procedures Act, 5 U.S.C. § 706, to the United States Forest Service's finding of February 29, 2000 that there was no significant environmental impact as to various fishery, riparian habitat and recreational activities contemplated as part of the Indian River Project in the Hiawatha National Forest. Defendants' Motion to Dismiss argues that Plaintiffs have not sufficiently exhausted administrative remedies. Plaintiffs' Motion to

Strike argues that Exhibit 2, an administrative appeal containing handwritten alterations made by Defendants' counsel post-appeal, be stricken as improper.

FACTS

On April 13, 1999, District Ranger Robert M. Walker issued the Indian River Draft Environmental Assessment ("EA") for a 30-day notice and comment period as required by federal regulation, 36 C.F.R. § 215. The EA included an evaluation of two related projects: one for a proposed timber sale of 66 acres of jack pine and 220 acres of red pine ("timber sale"); and the other for the environmental effects of various fishery, riparian habitat and recreation activities proposed along the Indian River ("river project"). (Defendant's Exhibit 1, EA, at 4-7.) More specifically, the river project involved: the stabilizing of 18 eroding river bank areas; the replacing of rotting logs which were previously placed along the banks to control erosion; the placing of woody debris in the river to reduce the velocity of the stream and enhance the fishery habitat; the "enhancement" of wood turtle nesting sites; the reintroduction of native plant species along the banks to control erosion; and the designation and movement of camp sites to control use and prevent adverse environmental impacts. (*Id.*)

On March 12, 1999, during the pertinent comment period, Mark Donham (a member of the Plaintiff groups) made written comments to the Forest Service challenging both the sale of timber and the river project on both specific and general grounds. (Plaintiffs' Exhibit D.)

On February 29, 2000, Defendant Walker issued two decisions finding "no significant environmental impact" relating to the timber sale and river project. (*See* Defendants' Exhibit B, decision as to river project.) On April 17, 2000, Plaintiffs filed a 19-page administrative appeal pursuant to 36 C.F.R. § 215. (Defendants' Exhibit F.) The appeal stated that it concerned both decisions, although the bulk of the appeal language concerned the timber sale. (*Id.*) The appeal also

failed to mention the specific actions proposed by Defendants as part of the river project. (*Id.*) Notwithstanding, Paragraphs 9, 15 and 16 of the appeal discussed in part the general effect of the river project on the natural flow of the river. (*Id.*) Paragraph 28 of the appeal discussed the failure to the EA to make any findings relating to the effect of habitat alteration on the goshawk. (*Id.*) Paragraph 62 of the appeal discussed in part the general duty of the Defendants to mitigate the environmental effects of stream alteration. (*Id.*) Paragraph 69 of the appeal discussed in part that the Defendants had failed to prepare an Environmental Impact Statement (“EIS”) and that river area in question was a wild and scenic river which supported rare and sensitive species. (*Id.*) These various paragraphs relate to Plaintiffs’ legal claims in the Amended Complaint for violation of the Wild and Scenic Rivers Act (16 U.S.C. § 1281) by insufficiently studying the effects on the river (Count I), for violation of the National Environmental Policy Act (“NEPA,” 42 U.S.C. § 4332) in failing to prepare an EIS (Count II), for violation of the National Forest Management Act (16 U.S.C. § 1600) by failing to provide adequate data (Count III), and for violation of NEPA in failing to prepare a sufficient EA (Count IV). On May 19, 2000, the administrative decision was affirmed. (Defendant’s Exhibit H.)

On July 31, 2000, Plaintiffs filed the instant suit challenging both decisions by Defendant Walker. However, on November 13, 2000, Defendant Walker withdrew the decision as to the timber sale. Subsequently, Plaintiffs filed an Amended Complaint challenging only the river project decision.

LEGAL ANALYSIS

Legal Standards for Administrative Exhaustion

Since review of the agency decision in question is conducted under the APA, and since the APA and pertinent agency regulations require administrative exhaustion before suit, Plaintiffs must

show exhaustion of their administrative remedies. The application of this principle to a challenge to Forest Service action was recently illustrated by the Seventh Circuit Court of Appeals, which said as follows:

The requirement of administrative exhaustion is a traditional common law doctrine that has now been codified in section 10(c) of the APA, 5 U.S.C. § 704. Although section 10(c) only permits review of agency actions that are “final,” any definitive agency decision is considered “final,” and therefore reviewable, unless the agency's regulations require exhaustion as a prerequisite to judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 153, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993). In this case, the relevant Forest Service regulation provides that “any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part.” 36 C.F.R. § 217.18. Because the Forest Service regulations explicitly require exhaustion as a prerequisite to judicial review, and because the plaintiffs in this case did not pursue the available administrative appeals to the challenged RNA designations, the district court was correct in applying an administrative exhaustion requirement to the plaintiffs’ APA claim. *See Glisson v. United States Forest Service*, 55 F.3d 1325, 1328 (7th Cir.1995) (applying the administrative exhaustion requirement of the APA in circumstances where Forest Service regulations require such exhaustion).

Shawnee Trail Conservancy v. United States Dept. of Agriculture, 222 F.3d 383, 388-89 (7th Cir. 2000); *see also Darby v. Cisneros*, 509 U.S. 137, 153 (1993); *Cellnet Communications v. Federal Communications Commission*, 149 F.3d 429 (6th Cir. 1998).

Legal Standards for Pertinent Evidence on Administrative Review

In conducting APA review of agency decisions, the Supreme Court of the United States has emphasized the importance of the existing administrative record:

“[T]he 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, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).

Given this approach to APA review, the Sixth Circuit Court of Appeals has, with limited exceptions not applicable here, circumscribed the review process to consideration of the

administrative record. *See Sierra Club v. Slater*, 120 F.3d 623, 638-639 (6th Cir. 1997); *Walker v. Bethenergy Mines, Inc.*, – F.3d–, 2001 WL 92203 (6th Cir. 2001). Such case law mandates that evidence submitted outside of the proper administrative record be stricken. *Id.*

Motion to Strike

Consistent with the above case law, Plaintiffs have moved to strike Exhibit 2 of Defendants' Reply Brief, which is a copy of Plaintiffs' administrative appeal (although it is denominated "Notice of Appeal"). The Notice of Appeal was separately filed by Plaintiffs as part of the administrative record. However, Exhibit 2 contains additional handwritten notations by Defendants' counsel, which question whether the Notice of Appeal was directed toward aspects of the river project as opposed to the timber sale. Plaintiffs contend that the Exhibit should be stricken because these notations were added after the submission of the Notice of Appeal and do not reflect the intent of Plaintiffs. Defendants, while admitting these points, view the Exhibit as helpful in explaining their positions as to the inadequacy of the Notice of Appeal.

This Court agrees with the Plaintiffs' assessment. Since this Notice of Appeal was amended by persons other than Plaintiffs after the appeal, it is not reflective of the administrative proceedings and should be stricken. Nevertheless, the Court regards this decision as of little moment since the Court will consider Defendants' legal arguments in their briefing as to the adequacy of the administrative exhaustion notwithstanding the exclusion of the Exhibit.

Motion to Dismiss

Defendants cannot maintain, and do not maintain, that Plaintiffs failed to appeal the river project decision since this was acknowledged and discussed in the agency's decision making. Nevertheless, Defendants urge that the appeal of the river project decision was an appeal in name only in that it focuses almost exclusively on the logging operations and not on the river project

activities. Defendants also regard much of Plaintiffs' Notice of Appeal as so verbose, vague and ambiguous as to defeat the notice function of the document. Plaintiffs, however, characterize their Notice of Appeal differently and compare portions of their Complaint to the Notice of Appeal to illustrate that the issues were exhausted.

Neither party has cited any case precedent for the proposition of how clear an administrative appeal must be to satisfy the administrative exhaustion requirement. Defendants have cited an administrative regulation which requires that an appeal identify changes sought by the appellant and state how the Responsible Official failed to consider comments on the issue. *See* 36 C.F.R.. § 214.14. Defendants regard this administrative appeal as not meeting these standards. Plaintiffs regard the administrative appeal as meeting these standards in that the appeal requested specific relief pertaining to the river project (*i.e.*, declare it void under the pertinent statutes, conduct further study, *et cetera*) and the appeal related to comments made during the comment period about the river project by Mark Donham.

As the Supreme Court wisely said, "plain meaning, like beauty, is sometimes in the eye of the beholder." *Florida Power & Light Co. v. Lorion*, 470 U.S. at 737. Both parties here draw opposite conclusions from the same document. This Court, which has no vested interest in this controversy, believes that the appeal is to a large degree verbose, vague and ambiguous. However, the Court does not believe that the appeal was so lacking in notice as to defeat its function in the administrative process. Were the Court to hold otherwise, then it would have to announce some new, heretofore, unknown standard for the clarity of administrative appeals without the prior endorsement of Congress or of the present administrative agency. This would be a foolhardy judicial adventure from a statutory and administrative perspective. It would also run contrary to the Supreme Court's statements in *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) that a challenge to the

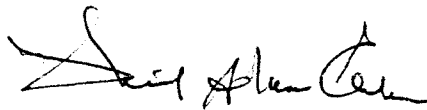
sufficiency of administrative exhaustion cannot succeed where the statutory purposes of administrative exhaustion are met. The task of chasing windmills shall be left to Don Quixote. The Motion to Dismiss will be denied.

CONCLUSION

An Order shall issue consistent with this Opinion granting Plaintiffs' Motion to Strike and denying Defendants' Motion to Dismiss.

DATED in Kalamazoo, MI:

4.5.01



RICHARD ALAN ENSLEN
Chief Judge