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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SIERRA CLUB, *et al.*,

Plaintiffs,

vs.

DENNIS MCLERRAN, *et al.*,

Defendants.

Case No. C11-1759RSL

ORDER ON PLAINTIFFS' MOTION
REGARDING SCOPE OF REVIEW

I. INTRODUCTION

This matter comes before the Court on Plaintiffs' "Motion Regarding Scope of Review." Dkt. # 41. Plaintiffs Sierra Club and Center for Environmental Law and Policy (hereinafter "Sierra Club" or "plaintiff") ask the Court to engage in *de novo* review of the administrative record and to allow for discovery to proceed against defendants Dennis McLerran and Lisa Jackson, Administrators for the Environmental Protection Agency (hereinafter "EPA" or "defendant"). In response, EPA claims that agency disclosure is governed by the Administrative Procedure Act ("APA"), and that discovery is properly limited to the administrative record. Response at 2, Dkt. # 45.

For the reasons set forth below, the Court GRANTS in part and DENIES in part

1 plaintiff's Motion Regarding Scope of Review.

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3 **II. BACKGROUND FACTS AND PROCEDURE**

4 The instant discovery dispute arises out of Sierra Club's claim against the EPA for failing
5 to perform its non-discretionary duties under the Clean Water Act ("CWA" or "the Act") to
6 review plans by the Washington Department of Ecology (hereinafter "Ecology") to limit levels
7 of the pollutant PCB¹ in the Spokane River. See 33 U.S.C. § 1313(d)(2). Under the Act, states
8 are to identify a total maximum daily load ("TMDL") for contaminants that can safely be
9 discharged into certain waterways. Id. at § 1313(d)(1)(A). Upon submission of a TMDL to the
10 EPA, the EPA must approve or disapprove it within thirty days; if EPA disapproves the state's
11 proposal, it must promulgate its own TMDL within another thirty days. Id. at § 1313(d)(2). In
12 the instant matter, Sierra Club claims that Ecology constructively submitted a TMDL to EPA
13 with its "straight-to-implementation plan," which triggered the EPA's nondiscretionary duty to
14 review that TMDL under 33 U.S.C. § 1313(d)(2). Complaint at 7, Dkt. # 1.

15 In their Rule 26(f) conference, the parties noted their disagreement as to whether
16 discovery was permissible in this matter. Joint Status Report at 3-4, Dkt. # 32. Because Sierra
17 Club brings this claim under the CWA's authorization of citizen suits, 33 U.S.C. § 1365(a)(2), it
18 asserts that the APA does not apply to limit discovery proceedings to the administrative record.
19 Having had a chance to review the record and finding it inadequate, Sierra Club seeks to proceed
20 with discovery to determine EPA's position on Ecology's characterization of the straight-to-
21 implementation plan in lieu of a TMDL. Motion at 9-10. EPA, joined by defendant-intervenors
22 Washington State Department of Ecology and Spokane County, argues judicial review is
23 properly limited to the record in a constructive submission citizen suit. Response at 2-3.

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27 ¹ Polychlorinated biphenyl.

1 **III. DISCUSSION**

2 **A. Scope of Review Under the CWA Citizen Suit Provision**

3 Sierra Club brings this claim against EPA pursuant to the citizen suit provisions of the
4 CWA. 33 U.S.C. § 1365(a)(2). Accordingly, plaintiff cannot also file suit under the APA, which
5 permits review of agency action only where there is “no other adequate remedy in court.” 5
6 U.S.C. § 704. Because the CWA citizen suit provides an alternate remedy, plaintiff contends that
7 the citizen suit provision of the CWA nullifies the applicability of all other APA provisions,
8 including limitations on the scope of the record for judicial review. The CWA citizen suit
9 provision offers no guidance as to the scope of judicial review of the administrative record. See
10 33 U.S.C. § 1365(a)(2).

11 Where Congress has authorized a private right of action against an agency, but has
12 provided no standard for the scope of review, the Supreme Court recommends that
13 “consideration is to be confined to the administrative record and that no *de novo* proceeding may
14 be held.” United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963). In contradiction to
15 this approach, Sierra Club cites to two Ninth Circuit cases stating that the APA does not apply to
16 citizen suit actions in determining whether the district court can consider evidence outside of the
17 administrative record. Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 497 (9th Cir.
18 2011); Washington Toxics Coalition v. Environmental Protection Agency, 413 F.3d 1024, 1034
19 (9th Cir. 2005). Although plaintiff argues that this means that the Court should engage in *de*
20 *novo* review of the record, the cases themselves are more limited in scope. In both Kraayenbrink
21 and Washington Toxics, the issue before the Ninth Circuit was whether the district court had
22 properly allowed the parties to supplement the record with expert opinions and studies.
23 Kraayenbrink, 632 F.3d at 497–98; Washington Toxics, 413 F.3d at 1029. While the Ninth
24 Circuit ratified the district courts’ use of discretion in those cases to supplement the record, it is a
25 far cry to state that those cases require a district court to engage in *de novo* review of the record,
26 or that the APA’s standards are inapt guidelines.

1 Indeed, the Ninth Circuit has recognized that district courts wield great discretion in
2 setting the scope of administrative review in citizen suit cases, and that those decisions are
3 reviewed on an abuse of discretion standard. See e.g., San Francisco BayKeeper v. Whitman,
4 297 F.3d 877, 886 (9th Cir. 2002). This Court has employed the APA evidentiary guidelines as a
5 valid exercise of its discretion in analyzing the scope of review in citizen suits. See Seattle
6 Audubon Society v. Norton, 2006 WL 1518895, at *2 (W.D. Wash. May 25, 2006) (citizen suit
7 for agency’s failure to act under the Endangered Species Act). Despite the cases cited by
8 plaintiff, this Court finds no reason to depart from the APA standards in the instant matter.

9 **B. Scope of Review Under the APA**

10 Plaintiff asserts that EPA administrators failed to review Ecology’s TMDL for the
11 Spokane River, which was constructively submitted as a “straight-to-implementation plan.” A
12 court reviews an agency’s failure to act under Section 706(1) of the APA, which provides that
13 “the court shall review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706(1).
14 The term “whole record” refers to the administrative record. See Fla. Power & Light Co. v.
15 Lorion, 470 U.S. 729, 743-44 (1985). Furthermore, “[t]he ‘whole’ administrative
16 record...consists of all documents and materials directly or indirectly considered by agency
17 decision-makers and includes evidence contrary to the agency’s position.” Thompson v. United
18 States Dep’t of Labor, 885 F.2d 551, 555 (9th Cir. 1980) (citations omitted).

19 Although the statutory language of Section 706(1) is clearly limited to the administrative
20 record, the limitation is subject to judicial exceptions. In Seattle Audubon Society, this Court
21 noted four narrow exceptions identified by the Ninth Circuit that operate to identify and plug
22 holes in the administrative record:

- 23 (1) if admission is necessary to determine whether the agency has
24 considered all relevant factors and has explained its decision, (2) if the
25 agency has relied on documents not in the record, (3) when supporting
26 the record is necessary to explain technical terms or complex subject

1 matter, or (4) when plaintiffs make a showing of agency bad faith.
2 Seattle Audubon Society, 2006 WL 1518895, at *3 (citing Lands Council v. Powell,
3 395 F.3d 1019, 1030 (9th Cir. 2005) (internal citations omitted)). The Ninth Circuit
4 stressed in Lands Council that the scope of these exceptions is “constrained, so that the
5 exception does not undermine the general rule.” Lands Council, 395 F.3d at 1030. In
6 that case, the court was charged with review of final agency action. Id.

7 In contrast to Lands Council, plaintiff here brings a claim of agency inaction. A
8 reviewing court is necessarily limited in its ability to review the record when an agency
9 has neither developed one nor taken final agency action. Accordingly, this Court and
10 the Ninth Circuit have noted that an exception to the general rule can also apply in
11 cases where the agency is sued for failure to take action. See Friends of the Clearwater
12 v. Dombeck, 222 F.3d 552 (9th Cir. 2000) (citing Independence Mining Co. v. Babbitt,
13 105 F.3d 502, 511-12 (9th Cir. 1997)); Seattle Audubon Society, 2006 WL 1518895, at
14 *3 (“[W]here plaintiff complains of a failure to act, there is a greater chance that some
15 extraneous piece of information might be necessary to shed light on the agency’s
16 inaction—there simply are more holes in the administrative record for the parties to
17 identify and plug.”). In short, allowing extra-record review in a failure-to-act claim is
18 within the discretion of this Court. Whether or not to allow the supplementation and to
19 what extent it should be allowed must be considered on a case-by-case basis.

20 In the instant matter, Sierra Club’s claim against EPA rests on whether the
21 “straight-to-implementation” plan was truly a TMDL that EPA had a non-discretionary
22 duty to evaluate. EPA responds that it took no action because Ecology never submitted
23 a TMDL in the instant matter. To support its claim, Sierra Club seeks information
24 regarding any potential coordination between the EPA and Ecology regarding the
25 alleged re-characterization of the TMDL. Sierra Club asserts that EPA’s thirty-four
26 document administrative record is missing both known and unknown documents

1 regarding EPA’s communications with Ecology that would shed light on their alleged
2 coordination. Motion at 10. In particular, Sierra Club has identified documents from its
3 Freedom of Information Act request to EPA and its Public Records Act request to
4 Ecology that are missing from the administrative record. Decl. Of Marc Zemel, Dkt.
5 #42. Plaintiff contends the omission is evidence of invalidity of the record, Reply at 5,
6 and seeks to depose agency officials to review content not recorded in written form,
7 Motion at 9. Without commenting on the validity of the parties’ contentions, the Court
8 finds that supplementation of the record may be appropriate in this case to shed light on
9 the agency’s purported failure to act.

10 **C. Scope of Supplementation**

11 It is one thing for a court to allow supplementation of the administrative record
12 in a case where there has been alleged agency inaction—it is another to allow the
13 plaintiff the full arsenal of discovery proceedings under the Federal Rules of Civil
14 Procedure. Courts must strike the proper balance between adequate judicial review and
15 respect for agency decisions and process.

16 In striking this balance, the Supreme Court has recognized that district courts
17 have discretion to determine “which method will prove the most expeditious so that
18 full review may be had as soon as possible.” Citizens to Preserve Overton Park, Inc. v.
19 Volpe, 401 U.S. 402, 420–21 (1971) (overturned on other grounds) (recommending
20 remand to the agency for explanation before having agency official testify). Since
21 Overton Park, district courts have employed a range of adversarial and nonadversarial
22 procedural devices to supplement the record, from allowing the parties to voluntarily
23 file supplemental explanations of an agency’s position, see e.g., San Francisco
24 BayKeeper, 297 F.3d at 886, to compelling an agency to respond to limited discovery
25 requests. See Smith v. FTC, 403 F.Supp. 1000, 1012–13 (D.C. Del. 1975) (allowing
26 limited discovery where there was risk of the agency placing “a highly refined and,
27

1 perhaps unwarranted, gloss upon prior decision-making.”). Where there has been
2 alleged agency inaction, the Ninth Circuit has seen fit to expand the record where both
3 parties submitted supplemental material. Independence Mining, 105 F.3d at 511–12.

4 The Court need not address the extent to which it would permit Sierra Club to
5 seek discovery against EPA. Given the relatively early stage of litigation, the Court
6 finds it sufficient to instruct plaintiff to pursue supplementation of the record with the
7 agency before seeking to expand the record in this Court. This is an especially
8 appropriate step where plaintiff has not yet requested that the agency supplement the
9 record, and where the plaintiff seeks to depose agency officials. Should the parties
10 meet and confer and still fail to reach agreement, any party seeking to expand the
11 record shall file a specific motion with a certification according to CR 37 that the
12 parties met and conferred prior to the motion being filed.

13 **IV. CONCLUSION**

14 For all of the foregoing reasons, IT IS HEREBY ORDERED that “Plaintiff’s
15 Motion Regarding Scope of Review” is GRANTED in part and DENIED in part, as
16 follows: (1) defendant’s request to defer ruling on this motion until the Court considers
17 EPA’s motion for summary judgment is DENIED; (2) plaintiff’s request for a holding
18 of de novo judicial review is DENIED; (3) plaintiff is not entitled to discovery at this
19 time; and (4) plaintiff’s request for a holding that judicial review is not limited to the
20 administrative record is GRANTED to the extent that the permissibility of
21 supplementation will be determined by either agreement of the parties or upon future
22 motions allowing supplementation.

1 DATED this 6th day of November, 2012.

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4 *Robert S. Lasnik*
5 Robert S. Lasnik
6 United States District Judge
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