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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al. Defendants.	)	Case No. 1:11-CV-0946-JEC-WDS

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION AND REQUEST FOR A CONFERENCE OF THE PARTIES UNDER RULE 26(f) AND FOR THE ISSUANCE OF A SCHEDULING ORDER UNDER RULE 16 [ECF NO. 14]

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INTRODUCTION

On October 21, 2011, Plaintiff Los Alamos Study Group initiated this litigation by filing a "Complaint for Declaratory Judgment and Injunctive Relief Under the National Environmental Policy Act," ECF No. 1. In its Complaint, Plaintiff alleges Federal Defendants (principally, the U.S. Department of Energy/National Nuclear Security Administration ("DOE/NNSA")) violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, for actions related to the approval and design of the Chemistry and Metallurgy Research Building Replacement Nuclear Facility ("CMRR-NF") at the Los Alamos National Laboratory in northern New Mexico. Compl. at ¶¶ 1, 81-130.

On December 23, 2011, prior to engaging with the undersigned counsel about a proposed schedule for the lodging of the Administrative Record and briefing this case on the merits, Plaintiff filed the instant motion seeking "an order setting pre-trial procedures under D.N.M. LR-Civ 16, including a discovery conference and order under Fed. R. Civ. P. 26(f)." ECF No. 14 (hereinafter, "Plaintiff's motion" or "Pl.'s Mot.") at 1. The parties have since initiated discussions on a proposed schedule for lodging the Administrative Record, resolving its contents, and briefing the case on the merits, but Plaintiff's motion maintains that discovery is appropriate in this Administrative Record review case.

If Plaintiff's claims are subject to judicial review at all, such review is governed by the provisions of the APA and the procedure set forth in Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560 (10th Cir. 1994). Pursuant to the express admonition of the Tenth Circuit in Olenhouse, the Federal Rules of Civil Procedure cited by Plaintiff governing pretrial procedure do

not apply to this litigation. There can be no trial in this case and, hence, no basis for applying the pretrial procedures that Plaintiff seeks to impose. Plaintiff's request for a Rule 16 and Rule 26(f) conference also is contrary to the Federal Rules of Civil Procedure themselves, which exempt Administrative Record review cases from discovery. See Fed. R. Civ. P. 26(a)(1)(B)(i). Moreover, any allegation that the Administrative Record is somehow inadequate is without merit because the Court has not yet set a date for lodging the Administrative Record, which DOE/NNSA is in the process of compiling. Plaintiff's motion therefore is misplaced and should be denied.

ARGUMENT

I. THE APA AND OLENHOUSE LIMIT JUDICIAL REVIEW OF AGENCY ACTION AND INACTION TO THE ADMINISTRATIVE RECORD

Each of the claims raised in Plaintiff's Complaint is subject to judicial review, if at all, pursuant to the scope and standards for judicial review set forth in the APA. See Compl. at ¶ 1 ("This action arises under the National Environmental Policy Act...This action also arises under the Administrative Procedure Act..."); id. at ¶¶ 81-130 (alleging violations under NEPA and the APA); Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006) ("Because none of the statutory or regulatory provisions in question [including NEPA] provide for a private cause of action, the judicial review provisions of the APA govern this suit."); Utah v. Babbitt, 137 F.3d 1193, 1203 (10th Cir. 1998) ("Because [NEPA does not] provide for a private right of action, Plaintiffs rely on the judicial review provisions of the APA in bringing their claims."); Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996) ("Because NEPA does not provide a private right of action for violations of its provisions, the County claims

a right to judicial review under the APA.") (internal citation omitted).

Section 706 of the APA imposes a narrow and deferential standard of review of agency action or inaction, and the Court's role is solely to determine whether the challenged actions or inactions meet this standard based on a review of the Administrative Record that the federal agency provides to the Court. Camp v. Pitts, 411 U.S. 138, 142 (1973). See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977) (review of an action brought pursuant to the APA is "based on the full administrative record that was before the Secretary at the time he made his decision"); Vill. of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 972-73 (10th Cir. 1992) (*en banc*); Lodge Tower Condominium Ass'n v. Lodge Props., Inc., 880 F. Supp. 1370, 1374 (D. Colo. 1995). The APA expressly directs that, in reviewing final agency action or agency inaction, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The Supreme Court has held that "in cases where Congress has simply provided for review [under the APA], . . . [judicial] consideration is to be confined to the administrative record and . . . no *de novo* proceedings may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citations omitted).

"The complete administrative record consists of all documents and materials directly or indirectly considered by the agency." Bar MK Ranches v. Yeutter, 994 F.2d 735, 739 (10th Cir. 1993) (citations omitted). The Supreme Court has held that the agency determines what constitutes the Administrative Record and that courts are to base their review on that Record. "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the court." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-

44 (1985) (citations omitted). The agency's designation of an Administrative Record is entitled to a presumption of regularity. "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." Bar MK Ranches, 994 F.2d at 740 (citation omitted).

The Tenth Circuit recognized the unique procedures for judicial review of challenges to federal agency actions and inactions in the landmark case of Olenhouse, 42 F.3d at 1580. In Olenhouse, a class of farmers sought review under the APA of a decision by the Agriculture Stabilization and Conservation Service concerning wheat crop payments. Id. at 1572. The farmers asserted claims that, *inter alia*, the agency's action failed to comply with applicable laws and regulations, was unsupported by the record, and violated the farmers' rights under the Fifth Amendment of the United States Constitution. Id. The Tenth Circuit determined that this informal agency action was subject to judicial review pursuant to Section 706 of the APA. Id. at 1573. The Court found that informal agency action[1]/ must be "set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 1573-74 (quoting Overton Park, 401 U.S. at 413-14).

The Tenth Circuit in Olenhouse expressly stated that:

> A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district court must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.

Id. at 1580 (emphasis in original). The Tenth Circuit found that the process employed by the district court in reviewing the case, which included the use of pretrial motions practice, discovery, and a

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[1]/ For a distinction between formal and informal agency action, see Olenhouse, 42 F.3d at 1573 n.22.

motion for summary judgment, is, "at its core . . . inconsistent with the standards for judicial review of agency action under the APA [and] invites (even requires) the reviewing court to rely on evidence outside the administrative record." Id. at 1579-80. The Olenhouse Court held, in no uncertain terms, that when a district court is reviewing agency action or inaction, it acts as a court of appeal and "it is improper for a district court to use methods and procedures designed for trial." Id. at 1564, 1580; see also Lodge Tower Condominium Ass'n, 880 F. Supp. at 1374 (district court does not sit as a finder of fact because agency action is "reviewed, not tried," rather, "the issue is not whether the material facts are disputed, but whether the agency properly dealt with the facts").

The principles of judicial review outlined in Olenhouse apply to both a petition to compel agency action unlawfully held or unreasonably delayed under 5 U.S.C. § 706(1) and to a petition to hold unlawful or set aside agency action under 5 U.S.C. § 706(2). See Kane Cnty. Utah v. Salazar, 562 F.3d 1077, 1086 (10th Cir. 2009); Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1170 (10th Cir. 1997); Sierra Club v. U.S. Dep't of Energy, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) ("The judicial review provisions of the APA do not distinguish between a claim that an agency unlawfully failed to act and a claim based on an action taken. In both cases, the court's review of the defendant agencies' action is generally confined to the administrative record."). The principles of judicial review outlined in Olenhouse apply to all cases brought under the APA, including NEPA cases. S. Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 824 n. 4 (10th Cir. 2000); Wildearth Guardians v. U.S. Forest Serv., 668 F. Supp. 2d 1314, 1324 (D.N.M. 2009).

As in Olenhouse, Plaintiff's claims here seek judicial review of Federal Defendants' alleged actions or inactions. These claims are thus subject to judicial review, if at all, pursuant to judicial

review provisions of the APA, 5 U.S.C. § 706. Indeed, Plaintiff states that the APA provides a basis for the Court's jurisdiction of these actions. See Compl. at ¶ 1. Olenhouse requires actions such as this one brought pursuant to the APA to proceed as appeals, not using methods and procedures designed for trial. Indeed, the Tenth Circuit characterized the very pretrial procedures that Plaintiff now seeks as "illicit":

> The District Court's reliance on arguments, documents and other evidence outside the administrative record is due, at least in part, to the *illicit procedure* it employed to determine the issues for review [which included] process[ing] the . . . appeal as a separate and independent action, initiated by a complaint and subjected to discovery and a 'pretrial' motions practice."

Olenhouse 42 F.3d at 1579 (emphasis added). The Tenth Circuit further found that:

> [t]his process, at its core, is inconsistent with the standards for judicial review of agency action under the APA. The use of [dispositive motions practice based on discovery and other pretrial procedures] permits the issues on appeal to be defined by the appellee and invites (even requires) the reviewing court to rely on evidence outside the administrative record. Each of these impermissible devices works to the disadvantage of the appellant. We have expressly disapproved of the use of this procedure in administrative appeals in the past, and explicitly prohibit it now.

Id. at 1579-80 (footnotes omitted).

Plaintiff's invocation of Federal Rules of Civil Procedure 16 and 26(f), which govern pretrial procedures, is therefore misplaced, and Plaintiff cannot subject either Federal Defendants or this Court to these rules. See also, e.g., Colo. Wild v. Vilsack, 713 F. Supp. 2d 1235, 1237, 1242-43 (D. Colo. 2010) (stating that, pursuant to Olenhouse, the court would "apply the Federal Rules of Appellate Procedure and, generally, limit [its] review to the evidence relied upon by the [federal agency] in reaching the challenged decision," and holding that reviewing whether the plaintiffs waived issues by inadequately noticing them in the district court was properly based on the Federal

Rules of Appellate Procedure, not the Federal Rules of Civil Procedure).

II. ACTIONS FOR REVIEW ON AN ADMINISTRATIVE RECORD ARE EXEMPT FROM PRETRIAL PROCEDURES UNDER BOTH THE FEDERAL AND LOCAL RULES OF CIVIL PROCEDURE

In addition to being contrary to clear admonitions of the Tenth Circuit in Olenhouse, Plaintiff's motion for a pretrial scheduling conference and order also fails under the plain language of both the Federal and Local Rules of Civil Procedure.

The Federal Rules of Civil Procedure expressly exempt actions for review on an administrative record from initial disclosure and conference of the parties. Rule 26(f) requires a conference of the parties "[e]xcept in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)." Fed. R. Civ. P. 26(f)(1). Such proceedings include "an action for review on an administrative record." Fed. R. Civ. P. 26(a)(1)(B)(i). This action is brought under the APA, which provides for judicial review of the Administrative Record that the agency provides to the Court. Camp, 411 U.S. at 142; Bar MK Ranches, 994 F.2d at 739.

The Local Rules of Civil Procedure also exempt this action from initial disclosure and conference of the parties. D.N.M.LR-Civ. 26.3(a)(1) exempts "all disclosure in cases excluded from case management procedures by D.N.M.LR-Civ. 16.3," which excludes "proceedings requesting injunctive or other emergency relief" such as this one. D.N.M.LR-Civ. 16.3(r); see Compl., Prayer for Relief at A, D, and E (seeking injunctive relief). Magistrate Judge Torgerson considered the same request by Plaintiff for a Rule 26(f) conference and Rule 16 order in Plaintiff's earlier case. Los Alamos Study Group v. U.S. Dep't of Energy, No. 1:10-CV-760-JCH-ACT (D.N.M. Apr. 8, 2011), ECF No. 51. Although Magistrate Judge Torgerson denied Plaintiff's motion to compel for

prudential reasons, he also found that "[t]his action for declaratory judgment and injunctive relief is explicitly excluded from pretrial case management procedures." Id. at 2.

Plaintiff's motion fails to address why this action should be exempted from the clear requirements under the Federal and Local Rules of Civil Procedure that a Rule 26(f) conference simply does not apply to actions for review of an administrative record. These rules provide an additional basis for the Court to deny Plaintiff's motion.

III. PLAINTIFF'S REQUEST FOR CONSIDERATION OF EXTRA-RECORD EVIDENCE IS PREMATURE

Plaintiff makes a number of assertions in its motion regarding the adequacy of the Administrative Record. See e.g., Pl.'s Mot. at ¶ 4 ("There is scant record evidence concerning the bases for the Final SEIS, or for the absence of reasonable alternatives"); id. at ¶ 6 ("...the record, as it presently exists, provides no explanation for defendants' actions and omissions in this regard."); id. at ¶ 7 ("Based on defendants' Final SEIS, many questions concerning defendants' decision-making process are left unanswered, and any information about the process is conspicuously absent from the present record."). These assertions about the adequacy of the record are unfounded because DOE/NNSA has not yet compiled and certified the Administrative Record for the Final SEIS for the CMRR-NF Project, nor has the Administrative Record been lodged with this Court or provided to Plaintiff.

DOE/NNSA has already completed extensive environmental review of the proposed CMRR-NF in accordance with NEPA. The original review culminated in a November 2003 Environmental Impact Statement ("EIS") and a February 12, 2004 Record of Decision ("ROD") that approved

construction of CMRR-NF and the associated Radiological Laboratory Utility Office Building ("RLUOB"). Since the 2004 ROD, new developments and information have necessitated modifications in the design of the proposed CMRR-NF. In continuing compliance with NEPA, DOE/NNSA elected to prepare a Supplemental EIS ("SEIS") to further analyze potential environmental impacts as DOE/NNSA identifies design changes necessary to maintain and improve the safety of CMRR-NF, even though the proposed scope of operations, building location, and footprint have not substantially changed. DOE/NNSA issued the Final SEIS on August 30, 2011. An amended ROD was signed on October 12, 2011, and appeared in the Federal Register on October 18, 2011. The documents and decisions supporting the recently issued SEIS will be compiled, certified, and lodged as an Administrative Record in the near future, at a time designated by the Court. DOE/NNSA is already in the process of compiling the Administrative Record, but this is an expensive and time-intensive task as it involves a complex and lengthy administrative decision-making process that dates back well more than a decade. Because DOE/NNSA has yet to compile, certify, and lodge the Administrative Record, Plaintiff's characterization of what the Administrative Record contains, or does not contain, is baseless.

Plaintiff cites two Tenth Circuit cases in its motion for the proposition that "courts are not reluctant to receive evidence outside the administrative record to determine NEPA issues. Nor do courts hesitate to call for discovery, either to determine the proper extent of the record or to allow for extra-record evidence to be obtained." Pl.'s Mot. at ¶ 9 (citing Lee v. U.S. Air Force, 354 F.3d 1229 (10th Cir. 2004) and Am. Mining Cong. v. Thomas, 772 F.2d 617 (10th Cir. 1985)). Plaintiff misreads these cases because the Tenth Circuit allows for extra-record evidence only in "extremely

limited" circumstances that must meet one of five narrow exceptions.[2]/ Am. Mining Cong., 772 F.2d at 626. By the fact that these exceptions apply to "extra-record" evidence, they can only be established *after* an agency certifies the Administrative Record, which has not yet occurred in this case.

What is more, the two Tenth Circuit cases cited by Plaintiff did not involve discovery, as Plaintiff suggests, but rather a motion to strike or a motion to supplement an Administrative Record already in existence. Lee, 354 F.3d at 1236 ("The district court first held that these expert affidavits were not eligible for admission into evidence."); id. at n.2 ("The district court granted the Government's motion to strike extra-record declarations..."); Am. Mining Cong., 772 F.2d at 626 ("The EPA, supported by the environmental petitioners, has moved to strike references in the briefs filed by industry petitioners to documents and reports not in the record. Industry petitioners not only allege that those items are proper for our consideration but have moved to supplement the record to include the documents and reports that they cite."). In Lee, the Tenth Circuit affirmed the district court's exclusion of three affidavits because the affidavits presented only a difference of opinion and

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[2]/ The exceptions which allow a party to introduce extra-record evidence are limited to the following situations:

> (1) that the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) that the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) that the agency considered factors that were left out of the formal record; (4) that the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong.

Am. Mining Cong., 772 F.2d at 626 (internal citations omitted).

did not show that there were gaps or inadequacies in the Administrative Record. 354 F.3d at 1242, 1244. In American Mining Congress, the Tenth Circuit denied both the agency's motion to strike and denied the industry petitioner's motions to supplement the record. 772 F.2d at 627. Plaintiff's reliance on Lee and American Mining Congress for the proposition that discovery is permissible before an agency has certified and lodged an Administrative Record--if ever--therefore is misplaced.

Plaintiff also cites five out-of-circuit cases. See Pl.'s Mot. at ¶ 2. Four are distinguishable because the records in those cases had already been lodged and the courts reviewed the adequacy of the records in existence. See id. (citing Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 198 (4th Cir. 2009) ("Focusing now *on the administrative record before us*, and viewing the Corps' findings through the lens of arbitrary and capricious review, we cannot say that its findings regarding stream structure and function, mitigation, or cumulative impacts were an "abuse of discretion" or "not in accordance with law.") (emphasis added); Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7, 15 (2d Cir. 1997) ("The case law permits a reviewing court to *consider* evidence beyond that which is contained in the administrative record in certain circumstances. But, no good authority exists to permit a reviewing court to add evidence that will actually be *included* as part of an agency-compiled record. Hence, we do not approve the district court's action in supplementing the Forest Service's record.") (emphasis in original); Suffolk Cnty. v. Sec'y of Interior, 562 F.2d 1368, 1384 (2d Cir. 1977) (admitting a cost-benefit analysis (the Program Decision Option Document or "PDOD") that was relied upon by the decision maker but was not present in the EIS because "the PDOD here contained information germane to the decision and not duplicated *elsewhere in the record*.") (emphasis added); Fund for Animals v. Williams, 391 F. Supp. 2d 191, 197 (D.D.C. 2005)

(granting a motion to supplement an administrative record already in existence)). The remaining out-of-circuit case cited by Plaintiff stated in dicta that substantive agency decisions were *not* reviewable under the APA. Pl.'s Mot. at ¶ 2 (citing Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 425 (5th Cir. 1973)). The Fifth Circuit expressly disavowed Hiram in Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army. 492 F.2d 1123, 1139-40 (5th Cir. 1974) ("We therefore hold that the broad and general provisions of Section 101 [of NEPA] do delineate sufficiently definite standards to permit a meaningful, albeit limited, review; and that an agency's ecological decisions under NEPA are not beyond APA scrutiny."). None of these out-of-circuit cases stands for the proposition that NEPA/APA cases may proceed on a pretrial discovery track. And none, of course, can trump the strong admonishments of the Tenth Circuit in Olenhouse.

The parties have initiated conversations to prepare a schedule for the lodging of the Administrative Record, resolving any deficiencies, and briefing this case on the merits. Plaintiff's request to engage in pretrial procedures that the Tenth Circuit in Olenhouse called "illicit," see 42 F.3d at 1579, are premature because Plaintiff has yet to receive the Administrative Record. Because Plaintiff has not yet received the Administrative Record in this case, its allegations of an inadequate Administrative Record lack merit.

IV. SUGGESTED PROCEDURE FOR PROCEEDING IN THIS LITIGATION PURSUANT TO THE APA AND OLENHOUSE

Because judicial review in this case is governed by the standards set forth in the APA and the principles enunciated in Olenhouse, the Court should proceed on a presumption that the Administrative Record to be lodged by the United States will be adequate for its review of the merits

of Plaintiff's claims and that therefore discovery is neither necessary nor appropriate. Bar MK Ranches, 994 F.2d at 740. This procedure applies whether Plaintiff's claims are considered challenges to agency action or inaction. See, e.g., Sierra Club v. U.S. Dept. of Energy, 26 F. Supp.2d 1268, 1271 (D. Colo. 1998) ("The judicial review provisions of the APA do not distinguish between a claim that an agency unlawfully failed to act and a claim based on an action taken. In both cases, the court's review of the defendant agencies' action is generally confined to the administrative record.").

The United States is already working with Plaintiff on a proposed schedule for lodging the Administrative Record, resolving its contents, and briefing the case on the merits to attempt to resolve informally any disputes over the content of the Administrative Record. The United States proposes to distribute a draft index of Administrative Record documents on or before February 13, 2012, and solicit comments from Plaintiff. The United States believes that it should be able to complete this informal process on or before March 12, 2012, and lodge the certified Administrative Record with the Court on or before March 26, 2012.

After the United States lodges the Administrative Record for this case and provides copies of the documents to Plaintiff, Plaintiff may elect to file objections to the content of the Administrative Record or seek supplementation under narrow circumstances. As the Tenth Circuit held,

> [a] reviewing court may go outside of the administrative record only for limited purposes. For example: Where the administrative record fails to disclose the factors considered by the agency, a reviewing court may require additional findings or testimony from agency officials to determine if the action was justified; or where necessary for background information or for determining whether the agency

> considered all relevant factors including evidence contrary to the agency's position; or where necessary to explain technical terms or complex subject matter involved in the action.

Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision, 934 F.2d 1127, 1137-38 (10th Cir. 1991) (internal citations omitted); Am. Mining Cong., 772 F.2d at 626. Under rare circumstances,[3]/ limited discovery concerning the content of an administrative record *may* be appropriate upon a proper showing by a party. See, e.g., Bar MK Ranches, 994 F.2d at 739-40 (10th Cir. 1993) ("When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question."); but see Sierra Club v. U.S. Dept. of Energy, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) (applying Olenhouse and the APA to NEPA and other claims to deny discovery because "Plaintiff has not demonstrated that the administrative record is insufficient for the court to make a determination on plaintiff's claims, or that the information plaintiff seeks in discovery is necessary for adequate judicial review"). Until the Administrative Record is before the Court, however, any such attempts at discovery are premature.

The United States respectfully suggests that the Parties should be afforded four to six weeks from the date of lodging the Administrative Record to file any motions concerning the content of the Administrative Record. The Court should then set a schedule for briefing the merits of the

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[3]/ The Supreme Court has emphasized, however, that discovery is disfavored even when a court concludes that an administrative record is inadequate to support the agency action. See, e.g., Fla. Power & Light Co., 470 U.S. at 744 ("[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); Lewis v. Babbitt, 998 F.2d 880, 882 (10th Cir. 1993) (to facilitate judicial review, reviewing court may obtain affidavits from the agency that provide additional explanations of the reasons for its decision).

claims presented in this case based on the date the contents of the Administrative Record have been resolved.

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be denied. The Parties have initiated discussions regarding a timeline for the compilation and production of the Administrative Record for Plaintiff's claims, as well as a schedule for resolving the contents of the Administrative Record and briefing Plaintiff's claims on the merits. Until that time, Plaintiff's motion for inapplicable pretrial procedural requirements is both misplaced and premature.

Respectfully submitted on this 6th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2011, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmitted a Notice of Electronic Fling to the following CM/ECF registrants:

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