

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE**

**OAK RIDGE ENVIRONMENTAL PEACE)
ALLIANCE, NUCLEAR WATCH OF NEW)
MEXICO, NATURAL RESOURCES DEFENSE)
COUNCIL, RALPH HUTCHISON, ED SULLIVAN,)
JACK CARL HOEFER, and LINDA EWALD,)**

Plaintiffs,

v.

**JAMES RICHARD PERRY,)
Secretary, United States Department of Energy,)
**and LISA E. GORDON-HAGERTY,)
*Administrator, NATIONAL NUCLEAR)
SECURITY ADMINISTRATION¹,*)****

Defendants

**No. 3:18-cv-00150
REEVES/POPLIN**

JOINT STATUS REPORT AND MOTION TO VACATE SCHEDULING ORDER

The parties file this Joint Status Report and Motion in order to advise the Court regarding the parties' recent discussions concerning the status of this case and to notify the Court of the parties' agreement that this case, brought under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, should be resolved through cross-motions for summary judgment based on an administrative record, and that a trial is not proper in this case. Thus, by agreement of the parties and for the interest of judicial efficiency, the parties respectfully request that the Court vacate its Scheduling Order establishing discovery deadlines and a trial date of November 5, 2019 (ECF No. 32) ("Scheduling Order"), and instead allow the parties to propose a mutually agreeable

¹ Pursuant to Fed. R. Civ. P. 25(d), Lisa E. Gordon-Hagerty, Administrator, National Nuclear Security Administration, is automatically substituted for her predecessor, former Administrator Frank G. Klotz.

schedule for the submission of cross-motions for summary judgment. The parties agree that this case should be fully briefed on summary judgment well before the current trial date of November 5, 2019.

Having conferred about the status of this case, the parties hereby notify the Court of the following facts relevant to the scheduling of dispositive motions.

- Plaintiffs' Complaint challenges the National Nuclear Security Administration's ("NNSA") 2016 Supplement Analysis ("2016 SA") prepared under NEPA in connection with the decision by NNSA and the Department of Energy not to prepare a new or supplemental Environmental Impact Statement ("EIS") after the NNSA decided on a new design for the Uranium Production Facility at the Y-12 National Security Complex. The 2016 SA contains an analysis of proposed changes to certain of the alternatives described in the 2011 Site-Wide Environmental Impact Statement prepared for the Y-12 Complex ("2011 SWEIS") and evaluates the changes in comparison to the 2011 SWEIS analysis. Plaintiffs' Complaint also challenges the NNSA's alleged rejection of a letter, characterized by Plaintiffs as a "petition," by Plaintiffs Oak Ridge Environmental Peace Alliance and Nuclear Watch of New Mexico requesting the agencies to prepare a new or supplemental EIS.
- The parties have reached an agreement about the contents of the Administrative Record for the actions challenged in Plaintiffs' Complaint, including some supplemental documents that Federal Defendants have agreed to add to the Administrative Record previously lodged with the U.S. District Court for the District of Columbia prior to the transfer of this case. Ordinarily, cases

challenging federal agency action must be resolved on the basis of the administrative record considered by the agency and without any de novo factfinding (*i.e.*, discovery or trial proceedings).²

- The NNSA is now in the process of preparing a new Supplement Analysis (“New SA”) in order to consider whether any new information or changed circumstances arising since the 2011 SWEIS and not addressed by the 2016 SA necessitate the production of a new or supplemental EIS. This New SA is likely to be relevant to the claims in this case and require further supplementation of the Administrative Record.
- The NNSA anticipates issuing a draft of its New SA by May 25, 2018.

² See *Little Traverse Lake Prop. Owners Ass'n v. Nat'l Park Serv.*, 883 F.3d 644, 657–59 (6th Cir. 2018) (“When courts review an agency decision, ‘[t]he APA requires courts to review the whole record or those parts of it cited by the party.’ (quoting *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997)). “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.*” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44, (1985) (citation omitted) (emphasis added). “[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.” *Kroger Co. v. Reg'l Airport Auth. of Louisville & Jefferson Cty.*, 286 F.3d 382, 387 (6th Cir. 2002) (citation and internal quotation marks omitted, alteration in original.”); *S. Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 977 (6th Cir. 2016); *Latin Americans for Social and Economic Development v. Administrator of Federal Highway Admin.*, 756 F.3d 447, 452 (6th Cir. 2014) (“When an agency action is challenged under the APA, the reviewing court’s factual examination is generally limited to the administrative record”); *Tennessee Clean Water Network v. Norton*, No. 3:05-CV-214, 2005 WL 2464675, at *6 (E.D. Tenn. Oct. 4, 2005) (“It is worth reiterating that this Court’s review, pursuant to NEPA and the Administrative Procedures Act (“APA”), is a review of the administrative record. 5 U.S.C. § 706(2)(A). Specifically, the Court is to review the ‘administrative record already in existence, not some new record made initially in the reviewing court.’ The administrative record consists of all the materials compiled by the agency that were before the agency at the time of the decision at issue.” (citations omitted)); see also Fed. R. Civ. P. 26(a)(1)(B) (exempting any “action for review on an administrative record” from initial disclosure requirements).

- The NNSA anticipates that it will provide a public comment period for the draft of the New SA of 30 days and running until June 25, 2018.
- Based on its current estimate, the NNSA anticipates issuing the final New SA, along with a Record of Decision as to whether to prepare a new or supplemental Environmental Impact Statement, by July 27, 2018. However, this schedule is subject to potential change.
- After the NNSA issues its final New SA and accompanying decision record, and depending on the contents of those documents, Plaintiffs' intent is to proceed as expeditiously as is reasonably possible. To that end, Plaintiffs may file an Amended Complaint (or a motion to file an Amended Complaint).
- After Plaintiffs file an amended complaint (or motion to amend) or elect not to do so, the NNSA plans to prepare and finalize a Supplemental Administrative Record ("SAR"), which SAR will include the supplemental documents that the parties have already agreed shall be included in the Administrative Record, as well as any additional documents considered during the preparation of the agency's New SA.
- The parties will confer about the contents of the SAR as to any new documents to be included in connection with the New SA and will attempt to resolve any conflicts without recourse to motions practice in this Court.
- Once any conflicts over the contents of the SAR have been resolved, the SAR has been lodged with the Court, and Plaintiffs have had a reasonable time to review its contents, the parties will file dispositive cross-motions for summary judgment, in the following order:
 - Plaintiffs' motion for summary judgment and memorandum in support;

- Defendants' cross-motion for summary judgment and opposition to Plaintiffs' motion, and memorandum in support;
- Plaintiffs' combined opposition to Defendants' cross-motion for summary judgment and reply in support of Plaintiffs' motion for summary judgment;
- Defendants' reply in support of Defendants' cross-motion for summary judgment.

Because the specific schedule for the foregoing events will depend on various factors, the parties respectfully propose filing a further Joint Status Report within 60 days, by no later than July 10, 2018, to notify the Court of developments in this case and to propose a further schedule. At this time, however, the parties respectfully request that, consistent with precedent concerning the appropriate manner for resolving challenges to federal agency action, the Court vacate the Scheduling Order, including all deadlines set for discovery, pretrial, and trial proceedings in that Order.

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Respectfully submitted,

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I hereby certify that on May 11, 2018, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

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**[PROPOSED] ORDER VACATING SCHEDULING ORDER AND SETTING
DEADLINE FOR JOINT STATUS REPORT**

Upon consideration of the parties' Joint Status Report and Motion to Vacate Scheduling Order and finding good cause, the Motion is hereby GRANTED.

It is hereby ORDERED that:

- (1) The Scheduling Order entered April 27, 2018 (ECF No. 32) and all deadlines thereunder are vacated; and
- (2) The parties shall submit a Joint Status Report by no later than July 10, 2018 to notify the Court of developments in this case and to propose a further schedule.

DATED this _____ day of _____, 2018.

PAMELA L. REEVES
UNITED STATES DISTRICT JUDGE