UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case Nos. 15-3751/15-3799/15-3817/15-3820/15-3822/15-3823/15-3831/15-3837/15-3839/15-3850/15-3853/15-3858/15-3885/15-3887/15-3948/15-4159/15-4162/15-4188/15-4211/15-4234/15-4305/15-4404, *In re: Murray Energy Corporation v. EPA, et al*
Originating Case No. : EPA-HQ-OW-2011-0880

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Amy E. Gigliotti
Case Manager
Direct Dial No. 513-564-7012

cc: Ms. Loren L. AliKhan
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Ms. Jennifer L. Verleger
Mr. Ryan Walsh
Ms. Catherine Wannamaker
Mr. Justin T. Wong
Ms. Mary Jo Woods
Mr. Frederick Richard Yarger
Ms. Tamara Zakim

Enclosure

Case Nos. 15-3751, et al.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 04, 2016
DEBORAH S. HUNT, Clerk

In re: UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 Fed. Reg. 37,054 (June 29, 2015),

MURRAY ENERGY CORPORATION, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

MEMORANDUM OPINION AND ORDER ON ADMINISTRATIVE RECORD

BEFORE: KEITH, McKEAGUE and GRIFFIN, Circuit Judges.

PER CURIAM. Petitioners in these actions consolidated by the Judicial Panel on Multi-District Litigation for handling as a multi-circuit case, challenge the validity of a Final Rule adopted by respondents U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, "the Clean Water Rule." 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule clarifies the definition of "waters of the United States," as used in the Clean Water Act, 33

U.S.C. § 1251 *et seq.* The Rule became effective on August 28, 2015, but in October, we issued a nationwide stay pending further proceedings in this case. *In re EPA and Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). In February, we denied motions to dismiss and held that jurisdiction is properly laid in this court. *In re Dep't of Def. and EPA Final Rule*, 817 F.3d 261 (6th Cir. 2016). Now before the court are petitioners' motions to complete the administrative record.

The Agencies have filed a Corrected Certified Index of the Administrative Record. The index alone consists of 632 pages. Yet, petitioners contend the record omits materials that were undisputedly considered by the Agencies and should be made part of the "whole record" on which judicial review must be based. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) (citing the APA, 5 U.S.C. § 706); *Hill Pharmaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013) (noting that reviewing court should have before it neither more nor less information than was before the agency when it took action).

For their part, the Agencies recognize that the record should consist of all materials compiled by them that were either directly or indirectly considered, citing *Sierra Club v. Slater*, 120 F.3d 623, 632 (6th Cir. 1997), and *Pacific Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F.Supp.2d 1, 4 (D.D.C. 2006). Further, they add that their certification of the record is entitled to a presumption of regularity. *Overton Park*, 401 U.S. at 415; *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). The presumption can be overcome only by "clear evidence to the contrary." *Sherwood v. Tennessee Valley Authority*, 590 F. App'x 451, 459–60 (6th Cir. 2014) (quoting *Bar MK Ranches*, 994 F.2d at 740).

Although petitioners have identified several categories of documents they contend are improperly omitted from the record, they have carried their "clear evidence" burden only in

relation to one, or at least portions thereof: the April 24, 2015 U.S. Army Corps of Engineers Memorandum from Jennifer Moyer, Regulatory Program Chief, to Major General John W. Peabody, entitled "Technical Analysis of Draft Final Rule on Definition of 'Waters of the United States,'" together with its Appendix A, "Representative Examples." The Agencies do not deny that this memorandum was considered, but they contend that it and other Army Corps memoranda are predecisional deliberative documents, reflecting subjective motivations and decision-making thought processes. The Agencies contend that such deliberative materials are properly exempted from the record, citing *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325–29 (D.C. Cir. 1984), as well as the EPA's own internal "Administrative Records Guidance."

Deliberative process materials are generally exempted from inclusion in the record in order to protect the quality of agency decisions by ensuring open and candid communications. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). Further, we generally defer to an agency's interpretation of its own rules. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Many of the Army Corps memoranda identified by petitioners contain predominantly deliberative materials and were properly omitted from the record. However, our review of the Moyer Technical Analysis under the EPA's own Administrative Record Guidance reveals it to be predominantly factual and technical in nature. As to inter-agency correspondence that is both "deliberative (for example, expressing staff opinions) and non-deliberative (for example, providing technical information or decisions) . . . [o]nly the non-deliberative information is part of the record." R. 109, Agencies' Attachment 2, Admin. Records Guidance at 8. Applying this

standard to the Moyer Technical Analysis, we find that paragraphs 10 and 11 are in the nature of opinions and recommendations that are deliberative. In addition, the "revised draft final rule" attached to the Moyer memorandum shows suggested changes and comments. It, too, is essentially deliberative in nature. The remainder of the four-page Moyer memorandum and its Appendix A are factual and technical and are properly included in the record.[1]

As to the other documents petitioners contend should be included in the record, denominated as public EPA documents, National Environmental Policy Act ("NEPA") documents, and Science Advisory Board Panel ("SAB") documents, petitioners have failed to carry their burden of rebutting the applicable presumption of regularity by clear evidence.

Accordingly, petitioners' motions to complete the record are **GRANTED in part** and **DENIED in part.** The Agencies are hereby **ORDERED** to include the Moyer April 24, 2015 Technical Analysis (sans ¶¶ 10–11 and attached revised draft final rule) with its Appendix A (free of handwritten underlining and notations), in the administrative record. In all other respects, the motions are **DENIED.**

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[1] A second Moyer memorandum to Major General Peabody, dated May 15, 2015, and entitled "Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of 'Waters of the United States,'" also contains deliberative and non-deliberative material. However, because the non-deliberative contents cannot be neatly extricated from the deliberative, we find no impropriety in the Agencies' omission of this and other Army Corps memoranda from the record.