IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL COMPANY, INC., Plaintiff,	)	
v.	)	No. 1:10-CV-00541-ABJ
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	

MOTION TO STRIKE EXTRA-RECORD MATERIAL AND PORTIONS OF BRIEFS THAT RELY UPON EXTRA-RECORD MATERIAL

The United States, on behalf of the Environmental Protection Agency ("EPA") moves to strike the extra record materials filed as exhibits to the briefs of amici curiae, and to strike portions of the briefs that rely upon such extra-record material. The extra record materials include the following:

Brief of Amicus Curiae the National Stone, Sand and Gravel Association:

> Exhibit A - "Aggregate and the Environment American Geological Institute Awareness Service In Conjunction with USGA" and portions of brief at pp 3-4.
>
> Exhibit B - Strategic Aggregates Study: Sources Constraints and Economic Value of Limestone and Sand in Florida" and portions of brief at pp 8-9.

Brief of Amici Curiae Chamber of Commerce, et al.:

> Attachment (not numbered) - paper entitled "Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal published by the Brattle Group dated May 30, 2011" and all of Argument II, pp.7-14.
>
> Attachment (not numbered) - document entitled "Testimony of Nancy K. Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency, Before the Subcommittee on Water Resources and Environment, Transportation and

Infrastructure Committee, United States House of Representatives, dated May 11, 2011" and footnote 6 at p. 4.

The grounds for this Motion are set forth in the accompanying memorandum of points and authorities.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL COMPANY, INC.	)	
Plaintiff,	)	
v.	)	No. 1:10-CV-00541-ABJ
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE EXTRA-RECORD MATERIAL AND PORTIONS OF BRIEFS THAT RELY UPON EXTRA-RECORD MATERIAL

The United States, on behalf of the Environmental Protection Agency ("EPA") moves to strike the extra-record materials filed as exhibits to the briefs of amici curiae because those exhibits are not part of the administrative record and should not be considered by the Court. In addition, the United States moves to strike portions of the briefs that rely upon such extra-record material.

Mingo Logan Company brought this action pursuant to the Administrative Procedure Act ("APA"). It is well-established that judicial review of APA claims is limited to the administrative record. Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971); Edison Elec. Inst. v. OSHA, 849 F.2d 611, 617-18 (D.D.Cir. 1988). The administrative record includes all materials that were "before the agency at the time the decision was made." Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 284 (D.C. Cir. 1981). Consideration of administrative action on the basis of extra-record material is "incompatible with the orderly functioning of the process of judicial review,"

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962), because it substitutes a new record for the one upon which the agency acted and imposes upon the courts the role assigned by Congress to the agency. Therefore, the APA limits judicial review to the administrative record "except when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514 (D.C.Cir. 2010) (quoting Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1085, 1095 (D.C.Cir. 1996). In the absence of such a showing, it is appropriate to strike extra-record material submitted to the court. IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997) (granting motion to strike extra-record affidavits submitted with brief).

Courts in this District have consistently limited their review of administrative actions to the administrative record presented to the Court by the agency. See, e.g., Coburn v. McHugh, 744 F. Supp. 2d 177, 182 (D.D.C. 2010); Calloway v. Harvey, 590 F. Supp.2d 29, 37 (D.D.C. 2008) (refusing to consider extra-record affidavits). Most recently, Judge Walton granted a United States' motion to strike extra-record materials that had been submitted as exhibits to a brief. National Mining Association, et al., v. Jackson, et al., Civ. Action No. 10-1220, DN 34 (Sept. 14, 2011) (copy of the decision is attached for the Court's convenience).

The exhibits proffered by the amici as exhibits to their briefs were not before EPA at the time of the agency action challenged here and are thus not part of the administrative record and should not be considered by the Court. Indeed, the exhibits submitted by the Chamber of Commerce, et al. post-date the final determination challenged in this action and address events that occurred after the date of the challenged agency action. It follows that the information could not be part of the administrative record in this case and is thus beyond the proper scope of

judicial review under the APA. See Oceana, Inc. v. Locke, 674 F. Supp. 2d 39, 44-45 (D.D.C. 2009) (granting motion to strike testimony that post-dated the challenged agency decision); County of San Miguel v. Kempthorne, 587 F. Supp. 2d 64, 78-79 (D.D.C. 2008) (denying motion to take judicial notice of report that post-dated the challenged agency action).

The exhibits submitted by National Sand, Stone and Gravel Association were also not before EPA at the time it made the final determination that is challenged in this case and, therefore, are not part of the administrative record. The proposed determination was published in the Federal Register to provide notice to the public and solicit comment on the proposal. The National Sand, Stone and Gravel Association could have submitted the materials to EPA for consideration during the comment period and they would then have been included in the administrative record. Having failed to submit the documents during the administrative process, they cannot now rely upon such extra-record materials in the course of judicial review.

The amici have not moved to supplement the administrative record, nor have they even attempted to establish that any of the very limited exceptions to record review are applicable here. See City of Dania Beach v. FAA, 628 F.3d 581, 590 (D.C. Cir. 2010) (motion to supplement the record denied in absence of demonstration that the agency "deliberately or negligently excluded documents that may have been adverse to its decision," or that information was needed "to determine whether the agency considered all the relevant factors," or that the "agency failed to explain administrative action so as to frustrate judicial review" (quoting American Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C.Cir. 2008)); Oceana, Inc., 674 F. Supp. 2d at 44-45 (failure to make the "strong showing" of bad faith or improper behavior required to justify supplementing the record). Moreover, none of the exceptions would apply in this case, because there is no evidence that EPA or the Corps "acted in bad faith or otherwise

behaved improperly[,]" or that "'the record is so bare that it prevents effective judicial review.'" County of San Miguel, 587 F. Supp. 2d at 79 (citation omitted).

For these reasons, the United States respectfully requests that the Court strike the extra record exhibits and the portions of amici briefs that rely upon those materials as identified in the Motion to Strike.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL MINING ASSOCIATION, et al.,	
Plaintiffs,	
v.	
LISA JACKSON, Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	Civil Action No. 10-1220 (RBW) Civil Action No. 11-0295 (RBW) Civil Action No. 11-0446 (RBW) Civil Action No. 11-0447 (RBW)
Defendants,	
and,	
SIERRA CLUB, et al.,	
Defendant-Intervenors.	

ORDER

These consolidated cases are currently before the Court on the federal defendants' Motion to Strike Extra-Record Material and Portions of Brief that Rely Upon Extra-Record Material ("Defs.' Mot to Strike"). Specifically, the federal defendants move to strike two exhibits from the State of West Virginia's Individual Memorandum in Support of Plaintiffs' Motion for Summary Judgment: (1) the Affidavit of Thomas L. Clarke ("Clarke Affidavit"), and (2) a June 19, 2009 letter from the Environmental Protection Agency ("EPA") to the West Virginia Department of Environmental Protection ("June 19, 2009 Letter"). Plaintiff West Virginia opposes the federal defendants' motion to strike. As explained below, because West Virginia has failed to show that the administrative record is incomplete or that it is so bare as to prevent judicial review, the Court will grant the federal defendants' motion and strike from the record

exhibits A and B of West Virginia's Individual Memorandum in Support of Plaintiffs' Motion for Summary Judgment.[1]

On July 20, 2010, plaintiff National Mining Association ("NMA") filed a complaint seeking declaratory and injunctive relief against multiple federal defendants. Complaint for Declaratory and Injunctive Relief ("Compl.") ¶ 1. The complaint, brought pursuant to Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006), challenges two EPA memoranda: the June 11, 2009 Enhanced Coordination Process memoranda, including the Multi-Criteria Resource ("MCIR") Assessment, and the April 1, 2010 Interim Detailed Guidance Memorandum.[2] Compl. ¶2.

On January 14, 2011, the Court denied the NMA's motion for a preliminary injunction and denied the federal defendants' motion to dismiss the NMA's complaint. After that ruling, four cases pending in United States District Courts in West Virginia and Kentucky that also challenged the EPA memoranda were transferred to this Court and consolidated with the case already pending in this Court—Civil Action 10-1220. The parties proposed, and the Court accepted, a bifurcated briefing schedule with respect to the disputed EPA actions (i.e., the Enhanced Coordination Process ("EC Process") and the Interim Detailed Guidance). Plaintiff West Virginia's memorandum containing the two exhibits at issue was submitted in support of the plaintiffs' consolidated motion for partial summary judgment regarding the MCIR Assessment and the EC Process. In their Motion for Partial Summary Judgment, filed on May 2,

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[1] In addition to the documents already identified, in deciding this motion the Court considered the State of West Virginia's Response in Opposition to Defendants' Motion to Strike ("W. Va. Opp'n"); the United States' Reply in Support of Motion to Strike Extra-Record Material and Portions of Brief that Rely Upon Extra-Record Material ("Defs.' Reply"); and the Notice of Filing of Joint Administrative Record Appendix ("Notice of Joint App'x").

[2] The statutory background and underlying facts of this case were explained in detail in the Court's earlier Memorandum Opinion in this case, National Mining Association, et al. v. EPA, Civil Action No. 10-cv-1220, January 14, 2011 Memorandum Opinion (RBW) (D.D.C. 2011) at 1-5, and will thus be only briefly recounted here as necessary to resolve the defendants' motion to strike.

2011, the plaintiffs claim that the EC Process, including the EPA's utilization of the MCIR assessment to determine which permits were subject to the EC Process, violates the statutory authority accorded the EPA under the Clean Water Act, and that the EC Process memoranda established legislative rules promulgated in violation of the Administrative Procedure Act's notice and comment requirements.

When reviewing agency actions under the APA, the Court's review is limited to the administrative record, either "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Because administrative records are presumed complete, motions to supplement the record are granted only in limited circumstances.[3] Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514 (D.C. Cir. 2010). Accordingly, it is only in rare circumstances that a court will consider extra-record evidence in reviewing agency actions. Franks v. Salazar, 751 F. Supp. 2d 62, 67 (D.D.C. 2010) (citing Fl. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985)).

"There is a standard presumption that the [administrative] agency properly designated the [a]dministrative [r]ecord." Calloway v. Harvey, 590 F. Supp. 2d 29, 37 (D.D.C. 2008) (citing Amfac Resorts, L.L.C v. Dep't of Interior, 143 F. Supp. 2d 7, 12 (D.D.C. 2001)) (internal quotations omitted). "The administrative record includes all materials compiled by the agency that were before the agency at the time the decision was made." James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (citations and internal quotations omitted). The agency must compile for the Court all the information that was either directly or indirectly considered in reaching its decision, Amfac Resorts, 143 F. Supp. 2d at 12, and the Court should consider only

[3] In its opposition to the federal defendants' motion to strike, plaintiff West Virginia "moves to supplement the record under the bare-record exception to the general rule confining judicial review to the administrative record." W. Va. Opp'n at 2. While plaintiff West Virginia's opposition contains no proposed order and arguably does not constitute a motion under the Local Rules of this Court, see D.D.C. LCvR 7(c), the Court will assume for the sake of the present analysis that plaintiff West Virginia's opposition suffices as a request to supplement the administrative record. Furthermore, as many of the federal defendants' arguments in their motion to strike pertain to why the administrative record should not be supplemented, the Court would be compelled to address the issue of supplementation even in the absence of a formal motion to supplement.

what was actually before the agency at the time of the decision, IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997)).

To supplement the administrative record, the moving parties must rebut the presumption of the record's completeness with clear evidence of incompleteness or inaccuracy. County of San Miguel v. Kempthorne, 587 F. Supp. 2d 64, 72 (D.D.C. 2008) (citing The Fund for Animals v. Williams, 397 F. Supp. 2d 191, 197 (D.D.C 2005)). Thus, parties cannot supplement the record "unless they can demonstrate unusual circumstances justifying departure" from the general rule that review is limited to the administrative record. Am. Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008) (quoting Tex. Rural Legal Aid., Inc. v. Legal Servs. Corp., 940 F.2d 695, 698 (D.C. Cir. 1991)). This Circuit has recognized three such unusual circumstances: "(1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, (2) the . . . court needed to supplement the record with background information in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review." Id. (quoting James Madison Ltd., 82 F.3d at 1095) (internal quotations and citations omitted) (alteration in original). It is not enough to simply offer evidence of disagreement with the administrative findings. Am. Wildlands, 530 F.3d at 1002. Finally, for the Court to "supplement the record, the moving party must rebut the presumption of administrative regularity and show that the documents to be included were before the agency decision maker." Calloway, 590 F. Supp. 2d at 37; see also Marcum v. Salazar, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (requiring that the plaintiffs put forth evidence that their supplements to the administrative record were actually before the agency at the time of the decision); County of San Miguel, 587 F. Supp. 2d at 72 (noting that "a party seeking to supplement the record must establish that the additional

information was known to the agency when it made its decision, the information directly relates to the decision, and it contains information adverse to the agency's decision") (citing San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 760 F.2d 1320, 1327 (D.C. Cir. 1985)).

Moreover, only on rare occasions will the Court's review of an agency decision extend to materials not part of the administrative record. See Marcum, 751 F. Supp. 2d at 78-79 (citing Fl.Power & Light Co., 470 U.S. at 743-44). Extra-record evidence consists of evidence outside of or in addition to the administrative record that was not necessarily considered by the agency. See Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 5 (D.D.C. 2006). Reviewing extra-record material is more appropriate when it is the procedural soundness of an administrative action being challenged, rather than its substantive soundness. See Marcum, 751 F. Supp. 2d at 79; see also Esch v. Yeutter, 876 F.2d 976, 992 (D.C. Cir. 1989). "Because an agency may not have had the benefit of extra-record material when it made its decision, a court should only consider such material in exceptional circumstances." Amfac Resorts, 123 F. Supp 2d at 12 (emphasis added); see also INS v. Alvarez, 129 F.3d 618, 623 (noting that the Court should have before it neither more or less information than did the agency when it made its decision). Exceptional circumstances include:

> (1) when an agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct . . . ; (6) in cases where agencies are sued for failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Esch, 876 F.2d at 991.

These exceptions are to only be applied in limited circumstances, see Calloway, 590 F. Supp. at 38, and "in order to invoke one of these exceptions a party seeking a court to review extra-record evidence must first establish that the agency acted in bad faith or otherwise behaved improperly, or that the record is so bare that it prevents effective judicial review," County of San Miguel, 587 F. Supp. 2d at 79 (internal quotations omitted) (citing Fund for the Animals, 245 F. Supp. 2d at 57-58); see also Theodore Roosevelt Conservation P'ship, 616 F.3d at 514-15. The applicability of the exceptions, however, is at its zenith when extra-record evidence is needed to facilitate examination of the procedural soundness of an agency decision. Esch, 876 F.2d at 991. Ultimately, extra-record evidence will only be considered if it is needed to assist a court's review. Calloway, 590 F. Supp. 2d at 38 (citing Esch, 867 F.2d at 991).

In opposition to supplementation, the federal defendants first argue that the Clarke Affidavit is a litigation affidavit that was not before the EPA or the U.S. Army Corps of Engineers ("Corps") when it established the EC Process. Defs.' Mot. to Strike ¶ 2. They further assert that the June 19, 2009 letter post-dates the June 11, 2009 EC Process memorandum and was similarly not before the agencies at the time they instituted the challenged actions. Id. ¶ 3. Plaintiff West Virginia responds that the defendants "ask this Court to accept a far-fetched premise, namely, that five documents adequately explain the agencies' decision to radically change the review process and standard for Section 404 permits," W. Va. Opp'n at 1, and that the defendants' motion "should be denied because the Court cannot determine the extent, finality, or legality of the EC Process without the two documents at issue," id. at 2. At no point does plaintiff West Virginia "claim that [the] EPA and the Corps . . . acted in bad faith or excluded documents that they actually relied upon." Defs.' Reply at 2.

On the record before the Court, plaintiff West Virginia has failed to rebut the presumption that the EPA's administrative record is incomplete or so bare as to frustrate judicial review. While it is true that the joint appendix submitted by the parties identifies only 52 pages of documents pertaining to the EC Process and 327 pages concerning the MCIR Assessment, see Notice of Joint App'x, Exhibit 1 (Joint Administrative Record Appendix) at 1-2, the size of the administrative record is unimportant, as the key questions facing the Court are how the June 11, 2009 Memorandum of Understanding establishing the EC Process does or does not alter the existing permitting process, and whether the EPA and the Corps had the authority to issue the memorandum. In other words, the amount of material in the record is insignificant so long as that material enables the Court to review the agencies' actions and determine the issues in dispute. Here, that information is before the Court in the form of the challenged EC Process memoranda, which the Court can evaluate in the context of the relevant statues and federal regulations that are the basis for the Section 404 permits, the application process for those permits, and the issuance of those permits.

Likewise, none of the eight "exceptional circumstances" that can merit consideration of extra-record evidence, Amfac Resorts, 123 F. Supp 2d at 12, are present here. There is no allegation that the agencies' actions are not adequately explained in the record before the Court, nor that the agencies failed to consider relevant factors. Moreover, neither the Clarke affidavit nor the June 19, 2009 Letter "address[es] matters that are so complex that without them the Court is unable to understand the challenges being advanced by the plaintiff[s]." Calloway, 590 F. Supp. 2d at 39. In short, the Court is confident that it can render a decision based upon the administrative record already before it and those portions of the record cited by the parties in their cross-motions for summary judgment.

Finally, although the parties advance their respective positions regarding the procedural versus the substantive aspects of the EC Process, see W. Va. Opp'n at 4; Defs.' Reply at 3-4, this case does not present a situation in which the Esch exceptions, even if one were applicable, would trigger the need for extra-record evidence in order to ascertain the procedural soundness of an agency decision. See Esch, 867 F.2d at 991. In Esch, the plaintiffs challenged the agency's processing of their administrative appeals—some proceedings having never occurred at all, and those that were held having been conducted in a manner that was not "conducive to obtaining relevant facts" and without the creation of written records. Id. at 992. The District of Columbia Circuit concluded that "[o]nly by examining the underlying facts, which [the agency] never gathered in a coherent record, could the court determine whether [the plaintiffs] got their procedural just due." Id. at 993. Here, where the parties are making procedural arguments relating to the interplay between the EC Process, the Clean Water Act, and the 404(b) Guidelines, the nature of the procedural questions presented to the Court are entirely different than those underlying the Circuit's holding in Esch. There is no need for the Court to consider extra-record evidence to evaluate the propriety of the permitting procedures being challenged by the plaintiffs.[4] Accordingly, it is hereby

ORDERED that the federal defendants' motion to strike is **GRANTED**. It is further

ORDERED that exhibits A and B to the State of West Virginia's Individual Memorandum in Support of Plaintiffs' Motion for Summary Judgment are stricken as extra-record in these consolidated cases.

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[4] Again without filing a formal motion, plaintiff West Virginia "respectfully asks the Court . . . to strike all references in [the federal d]efendants' brief based on facts outside the record." W. Va. Opp'n at 8. The federal defendants, however, point out that the plaintiffs' consolidated motion for summary judgment cites many of the same materials—an EPA website, for example—that are not part of the administrative record. See Defs.' Reply at 4-5. To be clear, as directed by the APA and the controlling law in this Circuit, the Court will consider only those materials that are part of the administrative record and identified as such by the parties in their joint appendix. The only materials the Court will actually strike from the record, however, are the Clarke Affidavit and the June 19, 2009 Letter, as those are the only extra-record exhibits formally filed by the parties.

SO ORDERED this 14th day of September, 2011.

REGGIE B. WALTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL COMPANY, INC.,	)	
Plaintiff,	)	
v.	)	No. 1:10-CV-00541-ABJ
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

[PROPOSED] ORDER

Having reviewed the United States' motion to strike the extra record materials filed as exhibits to the briefs of amici curiae and to strike portions of the briefs that rely upon such extra-record material, and having considered all responses thereto, and for good cause shown, it is

ORDERED that Exhibits A and B to the brief of Amicus Curiae the National Stone, Sand and Gravel Association be stricken from the record, along with portions of the brief at pages 3-4 and 8-9 relying upon such exhibits; and it is further

ORDERED that the unnumbered attachments submitted with the brief of Amici Curiae Chamber of Commerce, et al. be stricken from the record, along with Argument II at pages 7-14 and footnote 6 at page 4, relying upon the stricken attachments; and it is further

ORDERED that the amici refile their briefs without the stricken attachments and without the portions of the brief referencing the stricken materials, consistent with this Order.

SO ORDERED this _____ day of _____, 2011,

AMY BERMAN JACKSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL COMPANY, INC.,	)	
Plaintiff,	)	
v.	)	No. 1:10-CV-00541-ABJ
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I CERTIFY that on this 23rd day of September, 2011, I filed the foregoing Motion to Strike Extra-Record Material and Portions of Briefs That Rely Upon Extra-Record Material, and the Memorandum of Points and Authorities in support thereof, and a Proposed Order with the Court using the ECF system which will cause copies to be served upon counsel of record.

/s/ Cynthia J. Morris
Cynthia J. Morris