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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al.,

Plaintiffs,

v.

TOM VILSACK, et al.,

Defendants.

Case No. 15-cv-01590-HSG (KAW)

**ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL COMPLETION OF THE ADMINISTRATIVE RECORD, OR IN THE ALTERNATIVE, FOR LEAVE TO CONDUCT LIMITED DISCOVERY**

Re: Dkt. No. 71

In this Administrative Procedure Act ("APA") case, Plaintiffs have filed a motion to complete the administrative record or, in the alternative, for leave to conduct limited discovery. (Plfs.' Mot., Dkt. No. 71.) The Court deems the matter suitable for disposition without hearing pursuant to Civil Local Rule 7-1(b). Having considered the papers filed by the parties and the relevant legal authority, the Court GRANTS IN PART and DENIES IN PART the motion to compel completion of the administrative record.

**I. BACKGROUND<sup>1</sup>**

The "Organic Foods Production Act" ("OFPA") was passed to establish national standards for the marketing of organic products, assure consumers that products met consistent standards, and facilitate interstate commerce in organic foods. (FAC ¶ 58.) The OFPA established three baseline standards that a product must satisfy to be sold or labeled as organic. (FAC ¶ 59.) One of these standards requires that organic agricultural products be "produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter." (Id. (quoting 7 U.S.C. § 6504(1).) The primary exception to this standard is found in the "National List." (FAC ¶

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<sup>1</sup> This background is drawn from the allegations in the operative complaint.

1 60.) If a substance undergoes National Organic Standards Board ("NOSB") review, and is then  
2 approved for addition to the National List, it can be used in organic production even though it is  
3 inherently not organic. (Id.) The OFPA places a five-year time limit on the exception granted to  
4 substances placed on the National List; this provision is subtitled, "Sunset provision." (FAC ¶ 70  
5 (citing 7 U.S.C. § 6517(e).) Thus, after five years, a substance is no longer exempted unless the  
6 NOSB reviews the substance and the Secretary of Agriculture renews the substance's placement  
7 on the National List. (FAC ¶ 71.)

8 On September 16, 2013, Defendants published the "National Organic Program--Sunset  
9 Process" ("Sunset Notice") in the Federal Register, "impos[ing] new, mandatory standards and  
10 Sunset Review procedures." (FAC ¶ 88.) Plaintiffs assert that the Sunset Notice did not provide  
11 for a public notice and comment period, thus violating the APA. (FAC ¶¶ 99, 106, 122.) Based  
12 on this alleged violation, Plaintiffs brought the instant suit against Secretary of Agriculture Tom  
13 Vilsack, Administrator Anne Alonzo, and Deputy Administrator Miles McEvoy, asserting  
14 violations of the APA and the OFPA. (FAC ¶¶ 122, 133.)

15 On December 5, 2016, Defendants lodged the Administrative Record ("AR"). (Dkt. No.  
16 67.) The AR included the following certification:

17 I, Thomas J. Vilsack, Secretary of the United States Department of  
18 Agriculture, do hereby certify that the annexed copy, or each of the  
19 specified number of annexed copies, is a true, correct and compared  
20 copy of a document in my official custody as hereinafter  
21 described[.]

(Dkt. No. 67-1.)

22 Starting in December 2016, Plaintiffs' counsel contacted Defendants' counsel regarding the  
23 completeness of the AR. (Zee Decl., Exh. A, Dkt. No. 74-2.) On January 18, 2017, Plaintiffs'  
24 counsel identified seven extra-record documents that they believed should be added to the AR.  
25 (Id. at 8.) On January 25, 2017, Defendants' counsel responded that the United States Department  
26 of Agriculture ("USDA") was considering the identified documents "as potential supplements to  
27 the administrative record," and asked for additional information on the NOSB meeting transcripts  
28 that Plaintiffs wanted included. (Id. at 5.) Plaintiffs' counsel responded that the meetings involved  
substantive discussions on the sunset review process, and that several documents included in the

1 record were in response to the NOSB meetings that Plaintiffs wanted to add. (Id. at 4.) On  
2 January 30, 2017, Defendants' counsel informed Plaintiffs' counsel that the USDA would be  
3 adding eleven documents to the AR, which included the seven documents identified by Plaintiffs'  
4 counsel and four documents identified by the agency, "on [the] condition that Plaintiffs agree not  
5 to litigate the supplementation issue." (Id. at 3-4.) Plaintiffs' counsel responded that they agreed  
6 "not to supplement the existing [AR] with any additional documents," with the exception of  
7 documents obtained by Plaintiffs if they prevailed on the instant motion. (Id. at 2.) On February  
8 1, 2017, Defendants filed a "Notice of Lodging of Addition to the Administrative Record," adding  
9 the eleven documents. (Dkt. No. 70.)

10 Pursuant to the parties' stipulation, on February 1, 2017, Plaintiffs filed the instant motion  
11 to compel completion of the administrative record, or in the alternative, for leave to conduct  
12 limited discovery. On February 24, 2017, Defendants filed their opposition. (Defs.' Opp'n, Dkt.  
13 No. 74.) On March 10, 2017, Plaintiffs filed their reply. (Plfs.' Reply, Dkt. No. 76.)

14 **II. LEGAL STANDARD**

15 When reviewing agency action under the APA, the court "will reverse the agency action  
16 only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."  
17 *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2004) (citing 5 U.S.C. § 706(2); footnote  
18 omitted). "An agency's action is arbitrary and capricious if the agency fails to consider an  
19 important aspect of a problem, if the agency offers an explanation for the decision that is contrary  
20 to the evidence, if the agency's decision is so implausible that it could not be ascribed to a  
21 difference in view or be the product of agency expertise, or if the agency's decision is contrary to  
22 the governing law." *Id.* (citations omitted). "Although [the court's] inquiry must be thorough, the  
23 standard of review is highly deferential; the agency's decision is 'entitled to a presumption of  
24 regularity,' and [the court] may not substitute [its] judgment for that of the agency." *San Luis &*  
25 *Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

26 In considering a challenge, "courts reviewing an agency decision are limited to the  
27 administrative record." *Lands Council*, 395 F.3d at 1029. Courts must, however, "review the  
28 whole [administrative] record or those parts . . . cited by a party . . ." 5 U.S.C. § 706. "The

1 whole administrative record, however, is not necessarily those documents that the agency has  
2 compiled and submitted as the administrative record. The whole administrative record, therefore,  
3 consists of all documents and materials directly or indirectly considered by agency decision-  
4 makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of*  
5 *Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal citations and quotations omitted).

6 "An agency's designation and certification of the administrative record is treated like other  
7 established administrative procedures, and thus entitled to a presumption of administrative  
8 regularity." *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) (citations  
9 omitted). For this reason, "in the absence of clear evidence to the contrary, courts presume that  
10 public officers have properly discharged their official duties." *Id.* (citations omitted).

11 In limited circumstances, however, the record may be supplemented, i.e., "(1) if admission  
12 is necessary to determine 'whether the agency has considered all relevant factors and has explained  
13 its decision,' (2) if 'the agency has relied on documents not in the record,' (3) 'when supplementing  
14 the record is necessary to explain technical terms or complex subject matter,' or (4) 'when  
15 plaintiffs make a showing of agency bad faith.'" *Lands Council*, 395 F.3d at 1029 (citation  
16 omitted).

17 "These limited exceptions operate to identify and plug holes in the administrative record,"  
18 and "are narrowly construed and applied" to ensure "that the exception does not undermine the  
19 general rule." *Id.* (citations omitted). "Were the federal courts routinely or liberally to admit new  
20 evidence when reviewing agency decisions, it would be obvious that the federal courts would be  
21 proceeding, in effect, *de novo* rather than with the proper deference to agency processes, expertise,  
22 and decision-making." *Id.*

23 To meet the clear evidence standard, a plaintiff must (1) "identify reasonable, non-  
24 speculative grounds for the belief that the documents were considered by the agency and not  
25 included in the record," and (2) "identify the materials allegedly omitted from the record with  
26 sufficient specificity, as opposed to merely proffering broad categories of documents and data that  
27 are 'likely' to exist as a result of other documents that are included in the administrative record[.]"  
28 *Winnemem Wintu Tribe v. U.S. Forest Service*, No. 2:09-CV-01072-KJM-KJN, 2014 WL

1 3689699, at \* 10 (E.D. Cal. July 24, 2014) (citation omitted). "It is insufficient for a plaintiff to  
2 'simply . . . assert [ ] that the documents are relevant, were before . . . [the agency] at the time it  
3 made its decision, and were inadequately considered.'" Id. (citation omitted; modifications in  
4 original).

### 5 III. DISCUSSION

#### 6 A. Presumption of Completeness

7 Here, the parties dispute whether the AR consist of all documents and materials directly or  
8 indirectly considered by the agency in making its decision. Plaintiffs raise three arguments for  
9 why the Court should find that the presumption of completeness is rebutted. First, Plaintiffs point  
10 to Defendants' decision to add the eleven documents, arguing that this "makes clear that the  
11 original record production was incomplete." (Plfs.' Mot. at 4.) Second, Plaintiffs contend that the  
12 certification accompanying the filing of the AR did not indicate that the AR was complete. (Id.)  
13 Finally, Plaintiffs argue that Defendants admit that they did not include any internal agency  
14 communications or drafts based on an assertion of the deliberative process privilege, thus  
15 demonstrating that the AR is not complete. (Id.)

16 In response, Defendants first argue that Plaintiffs cannot rely on the eleven documents  
17 because Defendants did not concede that the documents should have been included, and because  
18 the parties had agreed that Defendants would only make the additions if Plaintiffs agreed not to  
19 litigate the supplementation issue. (Defs.' Opp'n at 6.) Further, Defendants contend that since the  
20 documents have now been added, the AR is now sufficient. Second, Defendants have provided a  
21 new certification, which states that the AR contains "all non-privileged materials directly or  
22 indirectly considered by USDA in issuing the Sunset Notice on September 16, 2013." (Id. at 5;  
23 Tucker Decl. ¶ 3, Dkt. No. 74-4.) Finally, Defendants argue that privileged documents are not  
24 part of the administrative record, and therefore their exclusion cannot rebut the presumption of  
25 completeness. (Defs.' Opp'n at 7.)

26 The Court finds that the presumption of completeness is rebutted because even in the  
27 updated certification, Defendants admit that the AR contains only "all non-privileged materials  
28 directly or indirectly considered by USDA in issuing the Sunset Notice . . . ." (Tucker Decl. ¶ 3

1 (emphasis added).) The Court recognizes that there is a split of authority regarding whether  
2 internal communications and drafts are properly part of the record. The D.C. Circuit Court, for  
3 example, has concluded that such agency deliberations are not part of the record, reasoning that  
4 "the ordinary APA cause of action does not directly call into question the agency's subjective  
5 intent." *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1280 (D.C. Cir. 1998). Thus, "[a]gency  
6 deliberations not part of the record are deemed immaterial" "because the actual subjective  
7 motivation of agency decisions is immaterial as a matter of law." *Id.* at 1279-80. Likewise,  
8 several district courts in this Circuit have concluded that "internal agency deliberations are  
9 properly excluded from the administrative record . . . ." *California v. U.S. Dep't of Labor*, No.  
10 2:13-cv-2069-KJM-DAD, 2014 WL 1665290, at \*13 (E.D. Cal. Apr. 24, 2014); *United States v.*  
11 *Carpenter*, No. 3:99-cv-547-RLH-RAM, 2011 WL 4763675, at \*3 (D. Nev. Oct. 7, 2011)  
12 (denying request to include records to the administrative record where they related to internal  
13 deliberations or mental processes).

14 In contrast, courts in this district have uniformly concluded that internal agency  
15 communications and drafts are part of the administrative record. Recently, in *Institute for*  
16 *Fisheries Resources v. Burwell*, the district court explained:

17 It is obvious that in many cases internal comments, draft reports,  
18 inter- or intra-agency emails, revisions, memoranda, or meeting  
19 notes will inform an agency's final decision. Therefore, the  
20 government is wrong to assert that these types of materials, as a  
categorical matter, should be excluded from the universe of  
materials "directly or indirectly considered by agency decision-  
makers."

21 Case No. 16-cv-1574-VC, 2017 WL 89003, at \*1 (N.D. Cal. Jan. 10, 2017); see also *People of the*  
22 *State of California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-3508 EDL, C05-4038 EDL,  
23 2006 WL 708914, at \*3 (N.D. Cal. Mar. 16, 2006) ("Plaintiffs have also shown that the record is  
24 incomplete because it lacks internal and external agency documents relating to the decision-  
25 making process for the State Petitions Rule"); *United Farm Workers v. Administrator, U.S. EPA*,  
26 No. C 07-3950, 2008 WL 3929140, at \*2 (explaining that the Court's review of the whole record  
27 under the APA "includes internal correspondence, memoranda and drafts that were part of the  
28 EPA's decision making process") (N.D. Cal. Aug. 26, 2008).

1 Defendants point to the Ninth Circuit's decision in *Portland Audubon Society v.*  
2 *Endangered Species Committee*, 984 F.2d 1534 (1993), to argue that internal deliberative  
3 processes are not part of the administrative record. There, the Ninth Circuit distinguished a  
4 District of Columbia Circuit Court decision, explaining that the case before it "concern[ed] neither  
5 the internal deliberate processes of the agency nor the mental processes of individual agency  
6 members," unlike the District of Columbia Circuit Court decision. *Id.* at 1549. The Ninth Circuit  
7 did not, however, hold that such documents are not part of the administrative record, nor did it  
8 have the opportunity to do so because the records before it concerned improper *ex parte*  
9 communications, not internal documents. *Id.* Defendants also point to *Cook Inletkeeper v. U.S.*  
10 *EPA*, a non-precedential decision where the Ninth Circuit denied a motion to supplement and an  
11 accompanying motion to prepare a privilege log where the plaintiff sought to supplement the  
12 administrative record. 400 Fed. Appx. 239, 240 (9th Cir. 2010). The Ninth Circuit denied  
13 supplementation, however, because the EPA "denie[d] that it considered the documents at issue."  
14 *Id.* (emphasis added). Thus, *Cook Inletkeeper* did not concern internal correspondence,  
15 memoranda, or drafts, and is not supportive of Defendants' position that all deliberative processes  
16 are categorically not part of an administrative record.

17 Given the lack of binding authority that internal deliberate processes are not part of an  
18 administrative record, the Court agrees with other courts in this district which conclude that such  
19 records are part of the "universe of materials 'directly or indirectly considered by agency decision-  
20 makers.'" *Inst. for Fisheries Resources*, 2017 WL 89003, at \*1. Because Defendants do not  
21 dispute that they have excluded all such documents from the AR on the basis of deliberative  
22 process privilege, the Court finds that the presumption of completeness is rebutted, and on this  
23 basis GRANTS Plaintiffs' motion to compel completion of the administrative record. Defendants  
24 shall revisit the AR to ensure its completeness, including searching for all documents and  
25 materials directly or indirectly considered by the agency in amending sunset review. Defendants  
26 shall also provide a declaration explaining their search and its results.

27 **B. Privilege Log**

28 The parties do not dispute that Defendants withheld a number of documents on the basis of

1 the deliberative process privilege without providing a privilege log. The parties do, however,  
2 dispute whether Defendants should be required to provide a privilege log.

3 In *Gill v. Department of Justice*, this Court required the defendants to provide a privilege  
4 log. Case No. 14-cv-3120-RS (KAW), 2015 WL 9258075, at \*7 (N.D. Cal. Dec. 18, 2015). In so  
5 concluding, the Court explained:

6 "Even under the correct standard, some agency documents, such as  
7 purely internal deliberative materials, may be protected from  
8 inclusion in the administrative record, but Defendants must make a  
9 specific showing establishing the application of a privilege for each  
10 document that it contends that it may withhold based on privilege."  
11 *Lockyer*, 2006 WL 708914, at \*4. In keeping with this rule, courts  
12 in this district have required parties withholding documents on the  
13 basis of the deliberative process privilege to, at a minimum,  
14 substantiate those claims in a privilege log. See, e.g., *Ctr. of  
15 Biological Diversity v. U.S. Bureau of Land Management*, No. C-06-  
16 4884-SI, 2007 WL 3049869, at \* 6 (N.D. Cal. Oct. 18, 2007)  
17 (finding in camera review of purportedly privileged documents  
18 appropriate despite declaration formally asserting the deliberative  
19 process privilege and explaining the bases for those assertions);  
20 *Lockyer*, 2006 WL 708914, at \*4 (granting the plaintiffs' motion to  
21 compel and ordering the defendants to provide a privilege log if  
22 withholding any documents on the basis of privilege).

23 As in *Gill*, Defendants in the instant case have withheld documents from the AR on the  
24 basis of the deliberative process privilege. They have not provided a privilege log describing the  
25 documents, the basis for their withholding, or the grounds that justify asserting the deliberative  
26 process privilege. While Defendants argue that no such privilege log is necessary because  
27 deliberative material is not part of the AR, they have not pointed to binding Ninth Circuit authority  
28 that stands for the proposition that in an APA action, an agency may withhold documents on the  
basis of privilege without providing so much as a privilege log. (See *Defs.' Opp'n* at 11-12.)  
Absent any such authority, the Court will follow the same approach adopted by other judges in  
this district. See *Lockyer*, 2006 WL 708914, at \*4; *Inst. for Fisheries Resources*, 2017 WL 89003,  
at \*1 (ordering the government "to complete the administrative record and/or produce a log of  
documents withheld from the record on privilege grounds within 30 days"). Therefore, if, while in  
the process of completing the AR, Defendants wish to withhold certain documents on the basis of  
the deliberative process privilege, they shall provide a privilege log that describes the document,  
identifies the basis for its withholding, and substantiates any claimed deliberative process

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privilege.<sup>2</sup>

**IV. CONCLUSION**

For the reasons stated above, Plaintiffs' motion to complete the administrative record is GRANTED. Defendants are to revisit their compilation of the AR to ensure that it includes all documents and materials considered by the agency in amending sunset review. If Defendants withhold any documents that should be included in the AR on the basis of the deliberative process privilege, they shall produce a privilege log as set forth above. Because the Court grants Plaintiffs' motion to complete the administrative record and to produce a privilege log, Plaintiffs' request for alternative relief in the form of limited discovery is DENIED.

IT IS SO ORDERED.

Dated: May 3, 2017

  
KANDIS A. WESTMORE  
United States Magistrate Judge

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<sup>2</sup> Because the Court grants the motion to compel completion of the administrative record, it need not decide Plaintiffs' request for alternative relief that Plaintiffs be permitted to conduct limited discovery. (See Plfs.' Mot. at 10 ("Should the Court decline to compel Defendants to complete the Administrative Record and produce a privilege log justifying any withheld documents, Plaintiffs respectfully ask that the Court []go beyond the Administrative Record and allow Plaintiffs to conduct limited discovery in order to effectuate judicial review").)