

## COMMENTS

### OVERLY RESTRICTIVE ADMINISTRATIVE RECORDS AND THE FRUSTRATION OF JUDICIAL REVIEW

BY

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*The seminal United States Supreme Court case of Citizens to Preserve Overton Park v. Volpe established the “record rule,” stating that courts reviewing the decisions of federal agencies under the Administrative Procedure Act must base their review solely on the record of the decision prepared by the agency unless one of a narrow class of exceptions applies. Because agency decisions stand or fall based on the content of the administrative record, environmental plaintiffs must assure themselves and the court that the record contains the full range of information that was available to the agency decision maker, and often the first real dispute in litigation with environmental agencies involves the exclusion of documents from the record that undermine the agency decision presented to the court.*

*Federal environmental agencies have recently attempted to limit the contents of the administrative record in order to shield from the probing eyes of courts the evidence of interagency dissent and controversy. They have done this primarily in three ways: first, they have issued guidance documents that instruct agency staff to strictly limit the contents of the record as it is compiled over the course of the agency decision making process; second, they have argued in litigation that the agency has unilateral authority to define the contours of the record; and third, they have asserted the deliberative process privilege—without legal justification or the use of a privilege log—over records that demonstrate conflicting opinions among agency staff.*

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*A growing number of courts have recognized that these efforts prevent reviewing courts from clearly understanding the process and nature of the agency decision at issue, thereby frustrating effective judicial review and undermining the objectives of the Administrative Procedure Act. With increasing frequency courts are ordering agencies to complete administrative records from which crucial documents have been incorrectly excluded and to justify their assertions of deliberative process privilege with the production of a privilege log identifying excluded documents. By doing so these courts strike an appropriate balance between the agency's need to provide for frank and open dialogue among staff and the public's interest in agency transparency and an opportunity for meaningful judicial review.*

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## I. INTRODUCTION

The record rule, as established by the United States Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*),<sup>1</sup> serves a valuable function. It ensures that courts do not engage in free-roaming de novo review of agency decisions, instead leaving to the expert agencies the difficult task of scientific and policy assessment for which they were created in the first place. But

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<sup>1</sup> 401 U.S. 402 (1971).

in an era of closed government,<sup>2</sup> the record rule is increasingly abused by agencies seeking to protect their decisions from the probing eyes of the court. Federal agencies, and specifically environmental agencies, abuse the record rule in two alarming ways.

First, they blur the distinction between a complete administrative record, which the Supreme Court requires for effective judicial review, and a supplemented administrative record, which is appropriate only in certain circumstances when the complete record is insufficient.<sup>3</sup> Courts also have difficulty discerning the difference between the two, and judicial review is hampered as a result.<sup>4</sup> Because a reviewing court must ensure it has the full and complete record prior to engaging in review of an agency action,<sup>5</sup> the burden that a plaintiff must meet before the court allows completion of the record should be significantly lower than the burden a plaintiff must meet before the court allows supplementation of the record with additional evidence.

Second, several federal agencies have begun to unilaterally withhold allegedly deliberative documents from the record without following the minimal procedures required to assert the deliberative process privilege.<sup>6</sup> This makes it exceedingly difficult for plaintiffs to challenge an agency's claim of privilege, and leaves a court to guess whether it truly has before it the full and complete record. Procedures established under the Freedom of Information Act<sup>7</sup> make clear that an agency seeking to prevent disclosure of allegedly deliberative documents must come forward with an assertion of privilege that is rationally justified, so that other parties have the opportunity to challenge the claim of privilege, and so the reviewing court may satisfy itself that the privilege is properly applied and in the public interest. A few courts have begun to recognize the necessity of these simple procedures,<sup>8</sup> and they should be widely incorporated in the context of the administrative record.

Part II of this Comment gives a brief overview of judicial review of agency actions under the Administrative Procedure Act (APA),<sup>9</sup> and describes the evolution of the so-called "record rule." Part III addresses the judicial and administrative framework for the compilation and review of administrative records. Part IV details the ways agencies have begun to abuse the record rule, focusing on the difference between completing and supplementing the record, and the misapplication of the deliberative process privilege. Some contemporary judicial reactions to these attempts are examined, and I demonstrate why certain courts have provided a model by which these abuses can be reversed.

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<sup>2</sup> See generally John D. Podesta, *Shadow Creep: Government Secrecy Since 9/11*, 2002 U. ILL. J.L. TECH. & POL'Y 361 (2002) (discussing the trend towards increasing government secrecy in the name of national security).

<sup>3</sup> See discussion *infra* Part IV.B.

<sup>4</sup> See discussion *infra* Part IV.B.

<sup>5</sup> Administrative Procedure Act, 5 U.S.C. § 706 (2006); *Overton Park*, 401 U.S. at 420.

<sup>6</sup> See discussion *infra* Part IV.C.

<sup>7</sup> 5 U.S.C. § 552 (2006).

<sup>8</sup> See discussion *infra* Part IV.C (discussing the Freedom of Information Act in relation to the deliberative process privilege).

<sup>9</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006).

## II. JUDICIAL REVIEW OF AGENCY DECISION MAKING

*A. Agency Actions Under the Administrative Procedure Act*

Federal agencies are subject to the required procedures of the APA.<sup>10</sup> The APA generally contemplates two different types of agency actions, adjudications<sup>11</sup> and rulemakings,<sup>12</sup> and two different levels of procedural formality, formal and informal.<sup>13</sup> The resulting four categories of agency actions are far from distinct, and it can often be a challenge distinguishing between them.<sup>14</sup> For purposes of this Comment, I will address solely informal rulemakings, as that is by far the most prevalent type of agency action in the field of environmental regulation.<sup>15</sup>

The scope of judicial review of informal agency actions is contained in the APA, and is usually called “arbitrary and capricious” review.<sup>16</sup> Just how far a reviewing court can go in examining an agency decision is a subject of much debate, and beyond the scope of this Comment. Suffice it to say that there exists a spectrum of scholarly opinion, ranging from full de novo review at one end to maximum deference to the agency at the other.<sup>17</sup> Typically, when an agency decision is found to be arbitrary or capricious, it is remanded to the agency for further consideration or explanation.<sup>18</sup>

<sup>10</sup> The term “agency” is defined by the APA to mean “each authority of the Government of the United States.” *Id.* § 551(1).

<sup>11</sup> An adjudication is defined by the APA to mean an “agency process for the formation of an order[.]” an order being a “final disposition . . . of an agency in a matter other than rule making but including licensing.” *Id.* § 551(6)–(7).

<sup>12</sup> A rulemaking is an “agency process for formulating, amending, or repealing a rule[.]” a rule being “an agency statement of general or particular applicability and future affect designed to implement, interpret, or prescribe law or policy . . . .” *Id.* § 551(4)–(5).

<sup>13</sup> Generally speaking, formal agency actions are those that must follow the procedures of sections 556 and 557 of the APA, whereas informal agency actions do not. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 652–57 (5th ed. 2002).

<sup>14</sup> *Id.* at 652–53. The surest way to determine whether an agency must use formal or informal procedures is to determine whether the organic statute at issue requires the agency to take action on the basis of a “record” after opportunity for a “hearing.” *Id.* at 652. As will be discussed further below, the “record” used in a formal agency action is actually quite different from the “record” involved in judicial review of an informal rulemaking. See discussion *infra* Part II.B.

<sup>15</sup> See CRAIG N. JOHNSTON ET AL., *LEGAL PROTECTION OF THE ENVIRONMENT* 79 (2nd ed. 2007) (discussing common rulemaking procedures in environmental law).

<sup>16</sup> The APA directs that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .” 5 U.S.C. § 706(2) (2006).

<sup>17</sup> See James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 TEMP. L. REV. 503, 540–43 (2000).

<sup>18</sup> *E.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 186–87 (2006) (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” (citations omitted)); see also CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 8.31[1] (2d ed. 1997).

*B. The “Record Rule” as Explained by the Supreme Court*

Generally speaking, judicial review of informal agency actions is confined to a review of the record that was before the agency at the time it made its decision.<sup>19</sup> This basic precept of administrative law, often called the “record rule,”<sup>20</sup> has only a marginal basis in the language of the APA itself, at least as applied to informal agency actions. Section 706 of the APA, which prescribes the scope of review of agency actions, explains that, in making its determinations, a reviewing court “shall review the whole record or those parts of it cited by a party . . . .”<sup>21</sup> But the statute gives no further guidance on what comprises the record, or how to determine if the record is complete.

It is important at this juncture to contrast the record compiled as part of a *formal* agency proceeding (be it adjudication or rulemaking) from the record on review of an *informal* agency rulemaking—the latter of which is the subject of this Comment. In formal proceedings, for which hearings are required,<sup>22</sup> the agency compiles an evidentiary record not unlike those created by trial courts. Thus, a court’s review of an agency decision is similar to an appellate court’s review of a trial court’s decision.<sup>23</sup> The court examines the evidence presented to the agency and the legal arguments made by the parties as included in the record below.<sup>24</sup> This review on the record in formal agency proceedings is wholly consistent with our system of adversary jurisprudence; without it, the entire fact-finding process could be made a nullity, frustrating effective judicial review.<sup>25</sup>

The APA offers a much less precise definition of the record required for an informal rulemaking.<sup>26</sup> This is possibly because at the time of the APA’s enactment in 1946, it was widely accepted that decisions falling outside of the “formal” realm addressed mere “generalized public interest[s]” of which the agency was the “sole protector,” and to which a private citizen would not likely have standing to address in a court.<sup>27</sup> Thus, there was rarely a need for judicial review of informal agency actions. (While the APA does grant a “right of review” to certain parties,<sup>28</sup> the

<sup>19</sup> KOCH, *supra* note 18, at § 8.27[1].

<sup>20</sup> See, e.g., RICHARD J. PIERCE, JR., II ADMINISTRATIVE LAW TREATISE § 11.6 (4th ed. 2002).

<sup>21</sup> 5 U.S.C. § 706 (2006).

<sup>22</sup> Formal agency actions are generally those requiring the agency to act on the record after the opportunity for a hearing. In such cases, the procedural requirements of sections 556 and 557 will apply. These provisions provide for a trial-like proceeding, with the presentation of evidence and the like. See BREYER ET AL., *supra* note 13, at 654–55.

<sup>23</sup> Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review* “On the Record,” 10 ADMIN. L.J. AM. U. 179, 195 (1996).

<sup>24</sup> *Id.* The APA provides that, in formal proceedings, the record consists of “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding . . . .” 5 U.S.C. § 556(e) (2006).

<sup>25</sup> BREYER ET AL., *supra* note 13, at 742.

<sup>26</sup> Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 338 (1984).

<sup>27</sup> Young, *supra* note 23, at 201–02.

<sup>28</sup> “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof.” 5 U.S.C. § 702 (2006). For a discussion of the legislative history of the “legal wrong” language in section 702,

existence of such a right does not ensure that judicial review will be available in all instances.)<sup>29</sup> However, over time, standing doctrine evolved so that private citizens were permitted to challenge informal agency rulemakings;<sup>30</sup> the Supreme Court's decision in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*<sup>31</sup> made clear that a person whose alleged injury arguably falls within the zone of interests protected by the statute at issue would have standing to sue the agency.<sup>32</sup>

What, then, is the source and function of the record rule as applied to informal agency actions? It comes not from the text of the APA, but rather from a line of Supreme Court cases, beginning with the seminal and enigmatic *Overton Park*.<sup>33</sup> In that case, the Court drew upon the APA's requirements for formal proceedings to require that judicial review of an informal adjudication be based solely upon an administrative record.<sup>34</sup> The Court stated that judicial review of the Secretary of Transportation's decision to fund the construction of a highway through a public park must be "based on the full administrative record that was before the Secretary at the time he made his decision."<sup>35</sup> The Court rejected the plaintiffs' contention that de novo review of the Secretary's actions was appropriate, instead choosing to adopt a more limited basis for review.<sup>36</sup> The Court went on to state its perplexing position on the standard of review: "[T]he generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review."<sup>37</sup> Implicitly,

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see Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1441 n.37 (1988).

<sup>29</sup> Sunstein states "there was no clear indication, in the text or history of the APA, whether and when the beneficiaries of regulation might have standing to vindicate legal requirements . . ." Sunstein, *supra* note 28, at 1441.

<sup>30</sup> YOUNG, *supra* note 23, at 201 n.81.

<sup>31</sup> 397 U.S. 150 (1970).

<sup>32</sup> *Id.* at 153. The Court's more lenient position on standing in cases seeking judicial review of administrative actions was influenced by several evolving theories of administrative law: first, that agency resistance to particular statutory schemes could frustrate congressional purpose just as surely as overzealous regulation; second, that agencies often become "captured" by the very entities they are intended to regulate, with political recourse less of a sure fix than had been supposed; third, that those seeking the protection of a regulatory scheme deserve access to a legal forum just as much as those regulated by it; and fourth, a growing understanding that certain interests other than traditional property interests, such as an interest in environmental protection, could form valid bases for legal action. Sunstein, *supra* note 28, at 1445; Young, *supra* note 23, at 201 n.81.

<sup>33</sup> 401 U.S. 402 (1971).

<sup>34</sup> *Id.* at 420.

<sup>35</sup> *Id.* As Professor Young noted, portions of the *Overton Park* opinion "brim with contradictions." Young, *supra* note 23, at 190. The Court recognized that the informal adjudication which formed the basis of the Secretary's decision "is not designed to produce a record that is to be the basis of agency action," *Overton Park*, 401 U.S. at 415, and yet "the Court required that judicial review of informal proceedings be confined to a scrutiny of [a] record [provided to the reviewing court]—precisely the requirement that the APA explicitly imposes on judicial review of agency formal proceedings." Young, *supra* note 23, at 190.

<sup>36</sup> See Stark & Wald, *supra* note 26, at 341 (noting in *Overton Park*, the lower court should only look at what the agency claimed the record showed to be its rationale).

<sup>37</sup> *Overton Park*, 401 U.S. at 415 (citations omitted). The Court goes on to explain, again in a contradictory manner, that "[a]lthough this inquiry into the facts is to be searching and careful, the

at least, the Court recognized that without an administrative record, there would be no basis upon which to measure the legality of the Secretary's decision, no subject upon which the court could turn its "probing, in-depth review." Indeed, as the Court explains its understanding of arbitrary and capricious review under section 706(2)(A)—"[t]o make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"<sup>38</sup>—it is hard to imagine such review without at least a complete administrative record, and perhaps additional evidence not contained in the record.<sup>39</sup>

The Court in *Overton Park* explicitly recognized—but did not apply—two possible exceptions to the record rule. The first exception applies only for adjudications: "*de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate."<sup>40</sup> This exception is found in section 706(2)(F) of the APA,<sup>41</sup> but the APA gives no further clarification as to when a "trial *de novo*" might be applicable. The second exception is not grounded in the text of the APA, and applies in an enforcement action: "there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action."<sup>42</sup> Furthermore, the Court recognized that in some instances it might be necessary to go even further beyond the record, as when the record does not "disclose the factors that were considered or the [agency's] construction of the evidence."<sup>43</sup> In such presumably rare instances, "[t]he court may require the administrative officials who participated in the decision to give testimony explaining their action. . . . And where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made."<sup>44</sup>

In *Camp v. Pitts*,<sup>45</sup> the Court again rejected the theory that arbitrary and capricious review involved any sort of *de novo* judicial review of the agency's decision.<sup>46</sup> Instead, the Court explained, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."<sup>47</sup> Therefore, if a reviewing court finds the administrative record incomplete or insufficient for effective judicial review, "the

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ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* at 416.

<sup>38</sup> *Id.* at 416.

<sup>39</sup> See Young, *supra* note 23, at 191 ("Based on a plausible definition of 'relevant factors,' how can a court determine what was not considered by an agency solely by looking to a record of what was?" (quoting *Overton Park*, 401 U.S. at 416)).

<sup>40</sup> *Overton Park*, 401 U.S. at 415.

<sup>41</sup> "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." Administrative Procedure Act, 5 U.S.C. § 706(2)(F) (2006).

<sup>42</sup> *Overton Park*, 401 U.S. at 415. For greater discussion of these two exceptions to the record rule, see Young, *supra* note 23, at 215–19.

<sup>43</sup> *Overton Park*, 401 U.S. at 420.

<sup>44</sup> *Id.* For a discussion of the modern, recognized exceptions to the record rule, see *infra* Part II.C.

<sup>45</sup> 411 U.S. 138 (1973).

<sup>46</sup> *Id.* at 141–42.

<sup>47</sup> *Id.* at 142.

remedy [is] not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.”<sup>48</sup>

Any doubts as to the role of the administrative record in review of informal agency actions were laid to rest by *Florida Power & Light Co. v. Lorion*.<sup>49</sup> There, the Supreme Court emphatically stated that judicial review of informal agency actions was to be based upon an administrative record, regardless of whether there had been a hearing before the agency.<sup>50</sup> As the Court explained, “a formal hearing before the agency is in no way necessary to the compilation of an agency record. . . . [A]gencies typically compile records in the course of informal agency action. The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred.”<sup>51</sup>

### C. Recognized Exceptions to the Record Rule

Despite the general rule that judicial review of informal agency actions is to be based solely on the basis of the administrative record that was before the decision maker at the time the decision was made, lower courts have created several exceptions that allow the introduction of extrarecord information.<sup>52</sup> While there is disagreement over the basis for several of these exceptions,<sup>53</sup> they have been accepted by a number of circuits and certainly have considerable effect today.<sup>54</sup>

#### 1. Bad Faith on the Part of the Agency

The first exception to the record rule may apply where there is a showing of bad faith on the part of the agency. It comes directly from the language of *Overton Park* itself, where the Supreme Court explained that a reviewing court “may require the administrative officials who participated in the decision to give testimony explaining their action,” but that “there must be a strong showing of bad faith or improper behavior before such inquiry may be made.”<sup>55</sup> This exception is logical

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<sup>48</sup> *Id.* at 143.

<sup>49</sup> 470 U.S. 729 (1985).

<sup>50</sup> *Id.* at 744.

<sup>51</sup> *Id.* The Court describes the record on review as “the record the agency presents to the reviewing court.” *Id.* It is clear from *Overton Park* and later Supreme Court decisions, however, that the record on review is the *entirety* of the record before the agency when the decision was made, whether or not all of it was presented to the reviewing court. See Young, *supra* note 23, at 208 n.115.

<sup>52</sup> Richard McMillan, Jr. & Todd Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 334 (1982); Stark & Wald, *supra* note 26, at 343.

<sup>53</sup> See Young, *supra* note 23, at 219–29.

<sup>54</sup> See Stark & Wald, *supra* note 26, at 343–54. Stark and Wald identify eight different exceptions to the record rule, claiming that these exceptions have swallowed the record rule almost entirely. *Id.* at 358. Their claim has been forcefully rebutted by Professor Young and others. See, e.g., Young, *supra* note 23, at 220. For purposes of this Comment I will only address the four most widely accepted and commonly applied exceptions to the record rule.

<sup>55</sup> *Overton Park*, 401 U.S. 402, 420 (1971); see also PIERCE, *supra* note 20, at 824.



because once there is a showing of bad faith by the agency, the reviewing court has lost its reason to trust the agency. There is no reason, then, to presume that the record is complete, and justice is served only by going beyond the record to ascertain the true range of information before the agency.

Although the “strong showing of bad faith or improper behavior” standard is often difficult to meet,<sup>56</sup> this exception has nonetheless been recognized by every circuit,<sup>57</sup> at least in circumstances where the plaintiffs have sought to use discovery to shed light on the mental processes of the agency decision maker.<sup>58</sup> As the Ninth Circuit Court of Appeals has explained, “where the so-called ‘record’ looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.”<sup>59</sup> Based upon such a showing of bad faith, the court may allow extrarecord evidence to be presented.

## 2. A “Bare” Record that Frustrates Effective Judicial Review

The second major exception to the record rule also has its basis in the language of *Overton Park*. There, the Supreme Court remanded the case to the district court for “plenary review” of the Transportation Secretary’s decision to fund the Memphis highway, based upon the administrative record.<sup>60</sup> However, the Court recognized that since the agency’s “bare record may not disclose the factors that were considered or the Secretary’s construction of the evidence[,]” it might be necessary for the district court to request further explanation on the part of the agency.<sup>61</sup> The Court did not explain exactly how the district court was to go about this additional inquiry, instead leaving it to the lower court to determine exactly what information was still needed, and how it would be best entered into the record.<sup>62</sup>

The “bare record” exception applies most frequently in two related circumstances. First, it applies when additional information may be necessary to

<sup>56</sup> *PIERCE*, *supra* note 20, at 824.

<sup>57</sup> See, e.g., *Town of Norfolk v. U.S. Army Corps of Eng’rs*, 968 F.2d 1438, 1458–59 (1st Cir. 1992); *Nat’l Nutritional Foods Ass’n v. Mathews*, 557 F.2d 325, 332 (2d Cir. 1977); *Greene/Guilford Envtl. Ass’n v. Wykle*, 94 F. App’x 876, 878 (3d Cir. 2004); *Franklin Sav. Ass’n v. Ryan*, 922 F.2d 209, 212 (4th Cir. 1991); *In re Fed. Deposit Ins. Corp.*, 58 F.3d 1055, 1062 (5th Cir. 1995); *Mount Clemens v. U.S. Envtl. Prot. Agency*, 917 F.2d 908, 918 (6th Cir. 1990); *Des Plaines v. Metro. Sanitary Dist.*, 552 F.2d 736, 739–40 (7th Cir. 1977); *Newton County Wildlife Ass’n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993); *CF&I Steel Corp. v. Econ. Dev. Admin.*, 624 F.2d 136, 141 (10th Cir. 1980); *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998).

<sup>58</sup> See, e.g., *United States v. Morgan*, 313 U.S. 409, 422 (1941) (holding that, while it is emphatically not the role of the courts to “probe the mental processes” of the agency decision-maker, courts have allowed such extrarecord examination precisely because of the clear language in *Overton Park*); *McMillan & Peterson*, *supra* note 52, at 370–71.

<sup>59</sup> *Portland Audubon Soc’y*, 984 F.2d at 1548.

<sup>60</sup> *Overton Park*, 401 U.S. at 420; see also *Stark & Wald*, *supra* note 26, at 344–46 (explaining the “bare record” exception to the record rule).

<sup>61</sup> *Overton Park*, 401 U.S. at 420.

<sup>62</sup> *Id.*

determine *whether the agency considered all of the relevant factors*. As one scholar has recognized, this determination raises a clear contradiction with the record rule, for how can a reviewing court determine if the agency failed to consider any “relevant factors” by examining a record that shows only those factors that *were* considered?<sup>63</sup> The Supreme Court has mandated that such an examination be made, for its very definition of an arbitrary or capricious agency action is one that was not “based on a consideration of the relevant factors . . . .”<sup>64</sup> The Ninth Circuit recognized this difficulty in *Asarco v. United States Environmental Protection Agency*,<sup>65</sup> where it explained that a district court engaged in review of an agency action may properly allow expert testimony in some limited circumstances:

It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a “substantial inquiry” if it is required to take the agency’s word that it considered all relevant matters.<sup>66</sup>

The second, yet related, subcategory of the “bare record” exception to the record rule applies where the administrative record is lacking sufficient or adequate information necessary to facilitate effective judicial review. As the Supreme Court explained in *Camp v. Pitts*, there may be instances where there is “such failure to explain administrative action as to frustrate judicial review.”<sup>67</sup> In such cases, the court may turn to extrarecord information. This second exception to the record rule, which would allow extrarecord information if necessary to fully explain the agency’s decision, has been recognized by many circuits.<sup>68</sup>

### *3. Agency Considered Materials that it Failed to Include in the Record*

The third exception to the record rule states that where the agency has considered or relied on documents, yet has failed to include such documents in its administrative record, the court should nonetheless consider those documents during judicial review.<sup>69</sup> This exception often arises in instances where the agency contends that it did not “rely upon” certain documents in making its ultimate decision. For instance, in *Ad Hoc Metals Coalition v. Whitman*,<sup>70</sup> the district court permitted the addition of certain documents to the record where those documents were clearly available to the agency when it made its decision, even though the

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<sup>63</sup> Young, *supra* note 23, at 191.

<sup>64</sup> *Overton Park*, 401 U.S. at 416.

<sup>65</sup> 616 F.2d 1153 (9th Cir. 1980).

<sup>66</sup> *Id.* at 1160; *see also* *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (limiting extrarecord evidence to four circumstances).

<sup>67</sup> *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973).

<sup>68</sup> *Sierra Club v. Marsh*, 976 F.2d 763, 772–73 (1st Cir. 1992); *Armstead v. U.S. Dep’t of Hous. & Urban Dev.*, 815 F.2d 278, 281 (3d Cir. 1987); *Arkla Exploration Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984); *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993); *Env’tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981).

<sup>69</sup> *Stark & Wald, supra* note 26, at 347.

<sup>70</sup> 227 F. Supp. 2d 134 (D.D.C. 2002).

agency claimed it did not rely on those documents.<sup>71</sup> The agency admitted that it had reviewed the documents in question and had even addressed the concerns raised by the documents internally; the court, however, rejected the agency's attempt to distinguish between the phrases "relied upon" and "considered," noting that the prevalent case law had applied the two phrases interchangeably.<sup>72</sup>

This exception is also consistent with *Overton Park*, because of the Supreme Court's admonition that judicial review is to be based upon the *full* record that was before the decision maker when the decision was made.<sup>73</sup> Courts have consistently rejected attempts by agencies to look only to that record compiled and submitted by the agency, to the exclusion of other documents that were clearly considered. As the D.C. Circuit Court of Appeals has explained, "[t]o review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'"<sup>74</sup> This important exception has been widely accepted in most circuits.<sup>75</sup>

#### 4. Additional Information Is Necessary to Explain Complex Issues

The fourth exception to the record rule permits a court to consider documents not in the administrative record if those documents are necessary for the court to understand complex or technical issues raised in the litigation.<sup>76</sup> For instance, in *Ass'n of Pacific Fisheries v. United States Environmental Protection Agency*,<sup>77</sup> the Ninth Circuit Court of Appeals considered several postdecisional studies offered by the petitioners in reviewing an informal agency rulemaking, considering them to be "a clarification or an explanation of the original information before the Agency . . . ."<sup>78</sup> This fourth exception to the record rule has been recognized in at least two circuits.<sup>79</sup>

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<sup>71</sup> *Id.* at 139–40.

<sup>72</sup> *Id.* at 139.

<sup>73</sup> *Overton Park*, 401 U.S. 402, 420 (1971).

<sup>74</sup> *Walter O. Boswell Mem'l Hosp. v. Heckler (Boswell)*, 749 F.2d 788, 792 (D.C. Cir. 1984); *see also* *Tenneco Oil Co. v. U.S. Dep't of Energy*, 475 F.Supp. 299, 317 (D. Del. 1979)

It strains the Court's imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives, and manuals . . . . DOE may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry.

*Id.*

<sup>75</sup> *See, e.g.,* *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997); *Thompson v. U. S. Dep't of Labor*, 885 F.2d 551, 555–56 (9th Cir. 1989); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004); *Esch v. Yeutter*, 876 F.2d 976, 991–92 (D.C. Cir. 1989).

<sup>76</sup> *Stark & Wald, supra* note 26, at 348.

<sup>77</sup> 615 F.2d 794 (9th Cir. 1980).

<sup>78</sup> *Id.* at 811. The court was careful to point out, however, that the postdecisional studies were not to be used as additional bases for challenging or supporting the agency's decision. *Id.* at 811–12. *See* *Young, supra* note 23, at 192–93 for further discussion of this decision.

<sup>79</sup> *See, e.g.,* *Davis Mountains Trans-Pecos Heritage Ass'n v. Fed. Aviation Admin., No. 03-10506, 03-10528, 02-60288, 2004 WL 2295986, at \*12* (5th Cir. Oct. 12, 2004); *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993).

## III. COMPILING AN ADMINISTRATIVE RECORD: THE LEGAL FRAMEWORK

*A. The Agency's Presumption of Regularity*

It is widely recognized that agencies, in preparing and submitting administrative records that form the basis for judicial review, enjoy a presumption of regularity.<sup>80</sup> Like similar presumptions of regularity in other contexts of administrative activity, the presumption serves important policy objectives. Not only does it respect traditional notions of separation of powers by limiting unnecessary or inappropriate judicial interference with agency decision making, it also comports with the degree of judicial deference granted to agencies in other contexts in which they operate within their spheres of expertise.<sup>81</sup> The presumption of regularity exists for another, more practical reason as well: No party can better identify the universe of relevant documents considered by an agency in a given decision than the agency itself.<sup>82</sup>

The presumption is rebuttable, however. While courts are willing to extend deference to agencies initially, once there has been a showing of irregularity in the agency's record as submitted, the reviewing court has no reason to take the agency's word that the record is complete, or that the agency will necessarily complete the record on its own accord.<sup>83</sup> There are a variety of reasons for which a

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<sup>80</sup> *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (“[T]he designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.”). The presumption of agency regularity pre-dated the APA and the modern administrative state. *See, e.g., United States v. Chemical Found. Inc.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

<sup>81</sup> Thus, for instance, courts will typically defer to agency interpretations of ambiguous statutes for which they have been delegated authority to administer. *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1983); *United States v. Mead Corp.*, 533 U.S. 218, 236–37 (2001). Courts will be more cautious in reversing agency decisions pertaining to scientific or highly technical matters that clearly implicate agency expertise. *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (“[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”). Indeed, the APA standard of review itself seems to embody a presumption of regularity, instructing courts to reverse agency decisions if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Administrative Procedure Act*, 5 U.S.C. § 706 (2006); *see also infra* Part II.B.

<sup>82</sup> *See, e.g., Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (“It is the agency that did the ‘considering,’ and that therefore is in a position to indicate initially which of the materials were ‘before’ it—namely, were ‘directly or indirectly considered.’” (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993))).

<sup>83</sup> *See, e.g., Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (“[W]here the so-called ‘record’ looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.” (citing *Buschmann v. Schweiker*, 676 F.2d 358, 358 (9th Cir. 1982))); *Natural Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291–92 (D.C. Cir. 1975) (declining to conclude that the record was complete after the agency supplemented the record with a document that was initially considered, instead finding the record was likely not complete and allowing limited discovery).

court might conclude that the presumption has been lost.<sup>84</sup> For instance, a showing by a party that the agency excluded documents that were certainly considered by the agency would suffice in most cases, especially if those documents are adverse to the agency's ultimate decision.<sup>85</sup> Additionally, an agency's piecemeal compilation of the record (i.e., submission of an initial record followed by a series of "supplemental" records) strongly suggests that the record is incomplete and that the presumption of regularity should be foregone.<sup>86</sup> Because it is essential that a reviewing court have the full and complete record before it, a minimal showing of irregularity is all that should be required before the presumption of regularity is rebutted.

### *B. What Constitutes the "Whole Record?"*

The scope of the administrative record is often a highly disputed issue in environmental litigation. Despite *Overton Park*'s directive that review be based upon the "whole record," which includes all the material "considered" by the agency decision maker,<sup>87</sup> the Supreme Court has never precisely defined what that phrase means. Lower courts have attempted to define some criteria, and a few trends can be discerned from the case law. Most importantly, courts recognize that, given the complexities of the modern regulatory structure, the idea of a sole decision maker acting on the basis of a factual record laid out before her on the desk is clearly a myth.<sup>88</sup> Some of the common formulations of the "whole record" are discussed below.

Most courts recognize that documents considered either directly or indirectly by the agency are part of the record.<sup>89</sup> Clearly documents considered directly by the agency belong in the record; they form the central core of documents that underlie the final decision. Documents considered indirectly, however, remain a more elusive category. The administrative record should not only demonstrate the basis for the final decision; most courts agree that it should also include relevant

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<sup>84</sup> See, e.g., *California ex rel. Lockyer v. U.S. Dep't of Agric. (California)*, No. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at \*2 (N.D. Cal. Mar. 16, 2006) ("Plaintiffs rebutted the presumption with a strong showing that [certain documents] were at a minimum indirectly considered by the Forest Service in its decision-making process . . .").

<sup>85</sup> See, e.g., *Int'l Longshoreman's Ass'n v. Nat'l Mediation Bd.*, No. 04-824, 2006 WL 197461, at \*3 (D.D.C. Jan. 25, 2006) (holding that "a party can establish that the administrative record is incomplete . . . if, inter alia, 'the agency may have deliberately or negligently excluded documents that may have been adverse to its decision.'" (quoting *Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 11 (D.D.C. 2001))).

<sup>86</sup> See, e.g., *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 21 n.10 (D.D.C. 2002) (noting in dicta that the agency's supplementation of the initially-submitted record with twelve emails "raises further doubts that it has provided the complete Administrative Record"), *vacated in part*, 89 F.App'x 273 (D.C. Cir. 2004).

<sup>87</sup> *Overton Park*, 401 U.S. 402, 419 (1971).

<sup>88</sup> Sunstein, *supra* note 28, at 1433.

<sup>89</sup> See, e.g., *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979).

documents which run counter to the agency's final decision if they were before the agency when the decision was made.<sup>90</sup>

Some courts have concluded that documents available to the agency decision maker are properly included in the record.<sup>91</sup> This category is even broader than the class of documents indirectly considered by the agency, because the decision maker need not have actually examined or considered the documents at all. The courts that would include this class of documents in the record seem to recognize that many decisions in modern agencies are made collectively, even though a single administrator or secretary might sign the ultimate decision memorandum.<sup>92</sup> By including those documents available to (but, by implication, not actually considered by) the decision maker, the court may actually be suggesting that the agency should nonetheless have considered those documents because they were relevant to his decision.

#### IV. ADMINISTRATIVE RECORDS IN MODERN AGENCY PRACTICE: USE AND ABUSE

In several startling ways, environmental agencies are taking advantage of the confusing legal standards for the compilation of an administrative record in order to restrict the scope of the record on review and prevent public access to information. First, agencies frequently muddle the difference between "completing" and "supplementing" the record submitted by the agency.<sup>93</sup> This impacts both the burden on the plaintiffs, who must demonstrate why any additional information is necessary, and the willingness of the reviewing court to allow that additional information to be admitted. Second, certain environmental agencies have taken an overly restrictive view on the scope of the record, seeking to unilaterally shield allegedly deliberative documents from judicial review in a manner that is inconsistent with the "deliberative process privilege" and prevailing case law.<sup>94</sup> I begin this section by setting the stage with an analysis of various agencies' internal guidance on compiling an administrative record; I then discuss each of the two abuses of the record rule in turn, offering solutions that strike an appropriate balance between agency autonomy and the public's interest in access to information and effective judicial review of agency decisions.

##### *A. Agency Guidance on Administrative Records*

Employees of federal agencies typically use informal guidance documents issued by the agency as a framework for compiling an administrative record. In this section, I will examine the guidelines used by three agencies: the United States Department of Justice (DOJ), Environment and Natural Resources Division; National Marine Fisheries Service of the National Oceanic and Atmospheric

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<sup>90</sup> See, e.g., *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Int'l Longshoreman's Ass'n*, 2006 WL 197461, at \*3.

<sup>91</sup> See, e.g., *Bar MK Ranches*, 994 F.2d at 729.

<sup>92</sup> See *Tenneco Oil Co.*, 475 F. Supp. at 317.

<sup>93</sup> See, e.g., *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, No. 05-1876-HA, 2008 WL 111054, at \*3 (D. Or. Jan. 7, 2008).

<sup>94</sup> See *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).

Administration (NOAA Fisheries); and the United States Fish and Wildlife Service (FWS). Each of these guidance documents are informal statements of policy, and are unlikely binding in and of themselves.<sup>95</sup>

### 1. DOJ Guidelines

As the legal office which must defend the decisions of FWS and NOAA Fisheries (at least as related to environment and natural resource protection) in court,<sup>96</sup> the position of the Department of Justice's Environment and Natural Resources Division (ENRD) on the proper contents of an administrative record would seem likely to have particular relevance to those agencies. It is therefore a logical place to begin our review of agency guidelines on administrative records. In 1999, ENRD issued a guidance document for the purpose of instructing federal agencies on the scope of administrative records as needed to prepare for judicial review of agency actions (ENRD Guidance).<sup>97</sup>

Recognizing that ENRD lawyers are often placed in the position of defending an agency that has failed to compile a complete administrative record, the ENRD Guidance initially counsels that it is "critical for the agency to take great care in compiling a complete administrative record. If the agency fails to compile the *whole* administrative record, it may significantly impact our ability to defend and the court's ability to review a challenged agency decision."<sup>98</sup> This warning is, of course, entirely consistent with the Supreme Court's statements in *Overton Park*.

Next, the ENRD Guidance properly recognizes that a complete administrative record is one that is focused upon the process of rulemaking, not just on the final decision settled upon by the agency.<sup>99</sup> This is critical, as a reviewing court must ultimately determine not just that the end decision can be rationally supported by some evidence put forth by the agency, but also that the agency's decision *as a whole* is not arbitrary or capricious.<sup>100</sup> To this end, the ENRD Guidance suggests that the following classes of documents should be placed in the administrative record:

- Include documents and materials whether they support *or do not support* the final agency decision.
- Include documents and materials which were before *or available to* the decision-making office at the time the decision was made.

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<sup>95</sup> See *PIERCE supra* note 20, at § 6.3 (discussing the differences between a general statement of policy and a legislative rule).

<sup>96</sup> See U.S. Dep't of Justice, Env't and Natural Res. Div., [http://www.usdoj.gov/enrd/About\\_ENRD.html#sections\\_tag](http://www.usdoj.gov/enrd/About_ENRD.html#sections_tag) (last visited Oct. 4, 2008) (describing the role and responsibilities of the Department of Justice's Environment and Natural Resources Division).

<sup>97</sup> ENV'T AND NATURAL RES. DIV., U.S. DEP'T OF JUSTICE, GUIDANCE TO FEDERAL AGENCIES ON COMPILING THE ADMINISTRATIVE RECORD 1 (1999), *available at* [http://environment.transportation.org/pdf/programs/usdoj\\_guidance\\_re\\_admin\\_record\\_prep.pdf](http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf) [hereinafter ENRD Guidance].

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.* at 1–2. "The administrative record consists of all documents and materials directly *or indirectly* considered by the agency decision maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency's decision. It includes documents and materials *relevant to the process of making the agency's decision.*" *Id.* (emphasis added).

<sup>100</sup> *Id.* at 1.

- Include documents and materials that were considered by or relied upon by the agency.
- Include documents and materials that were before the agency at the time of the challenged decision, *even if they were not specifically considered by the final agency decision-maker*.
- Include *privileged* and non-privileged documents and materials.<sup>101</sup>
- These types of documents, as ENRD recognizes, will give the reviewing court the ability to assess the agency's decision making process fully.
- The ENRD Guidance also discusses the kinds of information that should be included in the administrative record:
- Include all documents and materials prepared, reviewed, or received by agency personnel and used or available to the decision-maker, *even though the final decision-maker did not actually review or know about the documents and materials*.
- Include policies, guidelines, directives, and manuals.
- Include communications the agency received from other agencies and from the public.
- Include documents and materials that contain information that support *or oppose* the challenged agency decision.
- Include draft documents that were circulated for comment either outside the agency or outside the author's immediate office, if changes in these documents reflect significant input into the decision-making process.
- Include minutes from meetings and memorializations of telephone conversations.<sup>102</sup>

As the guidance makes clear, such information may be contained not only in written form, but also in "other means of communication or ways of storing or presenting information, including e-mail, . . . graphs, charts and handwritten notes."<sup>103</sup>

The ENRD Guidance indicates that only two types of documents should be routinely excluded from the administrative record, even if they may be pertinent to the final decision. First, the guidance states that "personal notes" are not properly part of the administrative record.<sup>104</sup> The ENRD explains that personal notes are notes taken by an individual at a meeting, or journal entries made by an individual.<sup>105</sup> Such personal notes are part of the administrative record, however, if they are included in an agency file.<sup>106</sup> Second, the ENRD Guidance explains that "working drafts of documents" are generally not part of the administrative

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<sup>101</sup> *Id.* at 2 (emphasis added).

<sup>102</sup> *Id.* at 3–4 (emphasis added).

<sup>103</sup> *Id.* at 3.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*



record.<sup>107</sup> The guidance goes on to explain that draft documents that were either circulated among other agencies, or circulated outside the author's office, are not working drafts subject to exclusion if the changes made to those drafts reflects "significant input into the decision-making process."<sup>108</sup> Perhaps recognizing the vagueness of this standard, ENRD suggests that such drafts be flagged for further advice from the DOJ attorney assigned to the case.<sup>109</sup>

Finally, the ENRD Guidance gives specific advice on dealing with privileged documents. It asserts that, generally, "the administrative record includes privileged documents and materials and documents and materials that contain protected information."<sup>110</sup> It further explains that such privileged materials will be redacted or removed only after the record is compiled.<sup>111</sup> As to those documents for which a privilege is asserted, the guidance explains that the index of the administrative record must identify all such documents, reflect their status as withheld documents, and state the basis upon which they are withheld.<sup>112</sup>

## 2. Fish and Wildlife Service Guidelines

FWS issued its own informal guidance statement on compiling an administrative record in 2000 (FWS Guidance).<sup>113</sup> The original FWS Guidance made explicit reference to the ENRD Guidance, incorporating it by reference;<sup>114</sup> there are, however, some interesting differences between the two. First, the FWS Guidance states that the record should include "[d]ocuments that relate to both the substance and procedure of making the decision."<sup>115</sup> This serves to emphasize that documents reflecting the internal process by which the agency reached its ultimate decision are part of the record; such documents may include, for instance, the form of debates among agency scientists, as well as the movement of information and recommendations up the chain of command. Second, the FWS Guidance expands somewhat on the ENRD Guidance's statement that documents that do not support the final decision are part of the record. The FWS Guidance states that the record must include "[a]ll pertinent documents regardless of whether they favor the decision that was finally made, favor alternatives other than the final decision, or express criticism of the final decision."<sup>116</sup> Third, the FWS Guidance explains that drafts "where hand-written notes or changes from one version to the next reflect the evolving process" belong in the record.<sup>117</sup> This is perhaps a more lenient standard

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<sup>107</sup> *Id.* at 4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The ENRD Guidance Document recognizes several possible bases for asserting a privilege, including "attorney-client, attorney work product, Privacy Act, deliberative or mental processes, executive, and confidential business information." *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Memorandum from Pete Raynor, Assistant Solicitor, Fish, Wildlife, and Env'tl. Prot. Branch, U.S. Dep't of the Interior to Director, U.S. Fish and Wildlife Serv. (Jan. 7, 2000), available at [http://www.nmfs.noaa.gov/pr/pdfs/recovery/appendix\\_f-j.pdf](http://www.nmfs.noaa.gov/pr/pdfs/recovery/appendix_f-j.pdf) [hereinafter FWS Guidance].

<sup>114</sup> *Id.* at 1.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2.

than that used by ENRD, which requires that a draft “reflect significant input into the decision-making process,”<sup>118</sup> because the evolution of the decision making process may be slight from one draft to the next. Overall, the FWS Guidance Document is consistent with, and perhaps more inclusive than, the ENRD Guidance Document.

### 3. NOAA Fisheries Guidelines

In 2005, NOAA Fisheries issued its own guidance document pertaining to the compilation of administrative record (NOAA Fisheries Guidance).<sup>119</sup> It is far longer and more detailed than either the ENRD or the FWS Guidance Documents, weighing in at almost sixteen pages. The NOAA Fisheries Guidance Document was also based upon the DOJ Guidance, as well as judicial decisions relating to the content of administrative records.<sup>120</sup>

The NOAA Fisheries Guidance is strikingly different from that of ENRD or FWS in several respects, and represents a troubling departure from what ENRD advises, and what APA jurisprudence requires. The NOAA Fisheries Guidance begins by describing two “threshold principles” which it says should be used in the evaluation of agency documents for possible inclusion in an administrative record.<sup>121</sup> This first principle is “relevance,” in that only those documents that are logically connected to the agency decision at issue should be part of the administrative record.<sup>122</sup> The second principle is “significance,” or those documents which “bear directly on the substantive issues examined by the agency while undertaking its decision-making process relating to the final action.”<sup>123</sup> While the relevance principle makes perfect sense, the significance principle is quite disturbing; it is clearly designed to serve as a means to whittle down the administrative record on grounds that are, at best, legally dubious. For instance, the NOAA Fisheries Guidance explains that “[i]f a document contains information and deliberations *relied on* by the decision-maker (or incorporated by reference in documents relied on by the decision-maker), then the document is significant.”<sup>124</sup> This is clearly inconsistent with the ENRD Guidance, which states that documents belong in the administrative record “*even though the final decision-maker did not actually review or know about the documents and materials,*”<sup>125</sup> and “*even if they were not specifically considered by the final agency decision-maker.*”<sup>126</sup>

As part of its discussion about the significance principle, the NOAA Fisheries Guidance takes a much more restrictive stance on e-mail correspondence than does the ENRD Guidance. NOAA explains that informal emails, such as “one employee making a comment to other employees about some aspect of a pending decision[,]”

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<sup>118</sup> ENRD Guidance, *supra* note 97, at 4.

<sup>119</sup> NAT’L MARINE FISHERIES SERV., U.S. DEP’T OF COMMERCE, GUIDELINES FOR AGENCY ADMINISTRATIVE RECORDS (2005) (on file with author) [hereinafter NOAA Fisheries Guidance].

<sup>120</sup> *Id.* at 2.

<sup>121</sup> *Id.* at 3.

<sup>122</sup> *Id.* at 4.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (emphasis added).

<sup>125</sup> ENRD Guidance, *supra* note 97, at 3 (emphasis added).

<sup>126</sup> *Id.* at 2 (emphasis added).

should be excluded from the administrative record because they are “rarely, if ever, transmitted to the decision-maker . . . .”<sup>127</sup> By contrast, the ENRD Guidance explicitly recognizes that documents to be included in the administrative record are not limited to paper documents, but “should include other means of communication . . . including e-mail . . . .”<sup>128</sup> Again, the NOAA Fisheries Guidance seems designed to limit the release of, or access to, documents which clearly pertain to the decision making process, especially in an electronic age where e-mail use is a common mode of communication at the workplace.<sup>129</sup>

Next, the NOAA Fisheries Guidance takes a more restrictive position on “working drafts” than does the ENRD Guidance. While the ENRD Guidance states that draft documents which were circulated outside the author’s office and which reflect “significant input into the decision-making process” should be included in the administrative record,<sup>130</sup> the NOAA Fisheries Guidance would exclude all drafts circulated within the agency (presumably inside or outside the author’s office).<sup>131</sup> NOAA Fisheries further explains that any unique information contained in a working draft should be summarized in the final decision memorandum and placed in the administrative record “in lieu of the working drafts themselves.”<sup>132</sup> Thus, the ENRD Guidance would include those working drafts that expose the evolution of the decision, whereas the NOAA Fisheries Guidance seeks to restrict inclusion of drafts containing unique information, or showing changes from one draft to the next.<sup>133</sup>

Finally, the NOAA Fisheries Guidance would automatically exclude documents that reflect the agency’s “mental processes – the healthy internal discussions reflecting staff viewpoints . . . .”<sup>134</sup> The guidance contends that such information is irrelevant to a court’s analysis in determining the legality of the agency’s decision.<sup>135</sup> While its true that federal agencies in some circumstances benefit from a “deliberative process privilege,”<sup>136</sup> shielding certain internal documents from release to the public, the ENRD Guidance explains that the administrative record should actually include such privileged documents, which may be removed or redacted after the record is compiled and indexed.<sup>137</sup>

Thus, a comparison between the informal guidance documents used by the three agencies indicates that the FWS Guidance closely mirrors the guidelines issued by ENRD, and in fact may even be more inclusive overall. The NOAA Fisheries Guidance, however, is flatly inconsistent with the ENRD guidelines in a

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<sup>127</sup> NOAA Fisheries Guidance, *supra* note 119, at 4.

<sup>128</sup> ENRD Guidance, *supra* note 97, at 3.

<sup>129</sup> A Bureau of Labor Statistics report published in 2005 indicates that 56% of all public sector employees nationwide use the internet at work. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, COMPUTER AND INTERNET USE AT WORK IN 2003 3 (2005), *available at* <http://www.bls.gov/news.release/pdf/ciuaw.pdf>.

<sup>130</sup> ENRD Guidance, *supra* note 97, at 4.

<sup>131</sup> NOAA Fisheries Guidance, *supra* note 119, at 6.

<sup>132</sup> *Id.* at 7.

<sup>133</sup> *See id.* at 6–7; ENRD Guidance, *supra* note 97, at 4.

<sup>134</sup> NOAA Fisheries Guidance, *supra* note 119, at 7.

<sup>135</sup> *See id.*

<sup>136</sup> *See discussion infra* Part IV.C.

<sup>137</sup> *See supra* notes 110–12 and accompanying text.

number of important respects, most notably those provisions dealing with documents available to but not relied upon by the decision maker: e-mails, working drafts, and deliberative documents.<sup>138</sup>

*B. "Supplementing" vs. "Completing" the Administrative Record*

Given the dynamic between the record rule and the exceptions to it, there is an important distinction to be made between "supplementation" and "completion" of the administrative record, though it is one that is seldom recognized by courts or by agencies. Supplementation of the administrative record implies either: 1) the addition of newly created evidence, such as through the collection of direct testimony from agency decision makers, or 2) the addition of documents or other information that was clearly not before the agency when the decision was made, such as postdecisional studies or public comments.<sup>139</sup> Completion of the record, by contrast, implies the addition of only those relevant documents that were actually available to the agency decision maker at the time the decision was made—and are therefore properly part of the record—but which were excluded from the version of the record presented to the court for review.<sup>140</sup> This distinction is critical for several reasons.

First, there are different burdens involved. While the agency enjoys a presumption of regularity when submitting a record to the court,<sup>141</sup> once that presumption is rebutted the burden shifts to the agency to demonstrate to the reviewing court that the record on review is complete.<sup>142</sup> By contrast, the burden is on the party challenging the agency action to demonstrate that the record is in need of supplementation, through the collection of new evidence or otherwise.<sup>143</sup> This stems from a the principle previously discussed: that review of agency actions should be based on "the whole record,"<sup>144</sup> meaning the full record that was before the agency decision maker at the time the decision was made,<sup>145</sup> nothing more and

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<sup>138</sup> Apparently recognizing that its policy is inconsistent with prevailing legal standards on compiling an administrative record, the NOAA Fisheries Guidance was "rescinded in [February 2007] pending an update of the procedure." NAT'L MARINE FISHERIES SERV., POLICY DIRECTIVE 30-123 (2005), available at <http://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/policies/30-123.pdf>.

<sup>139</sup> See, e.g., *Pub. Power Council v. Johnson*, 674 F.2d 791, 793–94 (9th Cir. 1982) (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973)) (discussing supplementation through affidavits or testimony when needed to effectuate judicial review); *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 779 (N.D. Ind. 1996) (seeking to supplement the record by taking testimony from agency staff).

<sup>140</sup> See, e.g., *California*, No. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at \*2 (N.D. Cal. Mar. 16, 2006) ("To be *complete*, the administrative record must contain materials that are directly or indirectly related to the agency's decision, not just those materials that the agency relied on." (emphasis added)); *Amfac Resorts v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("First and most basically, a *complete* administrative record should include all materials that 'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision." (quoting *Bethlehem Steel Corp. v. U.S. Env't Prot. Agency*, 638 F.2d 994, 1000 (7th Cir. 1980)) (emphasis added)).

<sup>141</sup> See *supra* Part III.A.

<sup>142</sup> See, e.g., *Boswell*, 749 F.2d 788, 792 (D.C. Cir. 1984).

<sup>143</sup> *Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).

<sup>144</sup> Administrative Procedure Act, 5 U.S.C. § 706 (2006).

<sup>145</sup> *Overton Park*, 401 U.S. 402, 419, 421 (1971).

nothing less.<sup>146</sup> A party challenging an agency's administrative record must still overcome the presumption of regularity in the administrative record,<sup>147</sup> but once it becomes evident that the court does not have before it the "whole record" then the court is likely to order that the record be completed by the agency.

A second, but related, reason is that courts require a showing that one of the exceptions to the record rule applies before allowing supplementation of the record with additional evidence or information.<sup>148</sup> For instance, a party seeking to obtain discovery from an agency will likely have to make a substantial showing that the agency has acted in bad faith.<sup>149</sup> Thus, parties seeking to delve beyond the complete record through supplementation must not only overcome the presumption of regularity, but must also demonstrate that one of the recognized exceptions to the record rule applies. No such showing is typically required when plaintiffs merely seek to complete the record with documents erroneously omitted by the agency.<sup>150</sup> Courts themselves, to engage in appropriate review, should make all necessary efforts to ensure that they have a full and complete record.<sup>151</sup> Anything less runs the risk of unfairly prejudicing the plaintiff challenging the agency action, who typically faces an uphill battle in gaining access to information withheld by the agency.<sup>152</sup>

Thus, the second exception to the record rule, which allows the consideration of documents upon which the agency relied yet were excluded from the administrative record presented to the court,<sup>153</sup> actually refers not to *supplementation* of the record, but to *completion* of the record. As one commentator has noted, it is contradictory to call this an "exception" to the record rule, because when a court "allows augmentation of the record submitted by an agency to include material actually considered, but not initially presented, to the reviewing court by the agency, it is attempting to ensure review of the record in the *Overton Park* sense."<sup>154</sup> Thus the distinction between completion and

<sup>146</sup> *Boswell*, 749 F.2d at 792 ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.").

<sup>147</sup> See *supra* Part III.A.

<sup>148</sup> *Amfac Resorts*, 143 F. Supp. 2d at 12.

<sup>149</sup> See *supra* Part II.C.1; *Amfac Resorts*, 143 F. Supp. 2d at 12 ("[A] party must make a significant showing—variously described as a 'strong,' 'substantial,' or 'prima facie' showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record." (quoting *Overton Park*, 401 U.S. at 420)). But see *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 140 n.5 (D.D.C. 2002) ("Contrary to defendants' contention, a showing of bad faith or improper behavior is not required for a court to supplement the record. . . . [Such] showing applies only to instances where the method of supplementation involves testimony inquiring into the mental processes of administrative decisionmakers." (citing *Overton Park*, 401 U.S. at 420)).

<sup>150</sup> *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982).

<sup>151</sup> See *Boswell*, 749 F.2d at 792; *Int'l Longshoreman's Ass'n*, No. 04-824, 2006 WL 197461 at \*3 (D.D.C. Jan. 25, 2006) ("It is therefore improper for a district court to review only a 'partial and truncated [administrative] record.'" (quoting *Natural Res. Def. Council, Inc. v. Train*, 519 F.3d 287, 291 (D.C. Cir. 1975))).

<sup>152</sup> *Ollestad v. Kelley*, 573 F.2d 1109, 1110 (9th Cir. 1978); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997).

<sup>153</sup> See *supra* Part II.C.3 (discussing the third "exception" to the record rule).

<sup>154</sup> Young, *supra* note 23, at 221–22; *Pub. Power Council*, 674 F.2d at 794 (recognizing that this so-called "exception" is really just a "qualification to or explication of the rule that judicial review is based upon the full administrative record" (emphasis added)).

supplementation becomes critical. To take into account the need for the reviewing court to examine the full record, as well as the agency's interest in protecting its inner workings from public scrutiny, a balance should be struck precisely at a "complete" record.<sup>155</sup>

If there is anything less than a complete record, then the plaintiff should be able to seek completion from the agency with a minimal showing that relevant documents may be missing. Plaintiffs seeking to truly "supplement" the record with additional information, however, should still be required to make a substantial showing that such additional information is needed for effective judicial review. By framing efforts by plaintiffs to secure a "complete" administrative record as inappropriate attempts to "supplement" the record, environmental agencies may take advantage of the confusion between the two in order to place a higher burden than necessary on the plaintiffs and limit the selection of documents actually reviewed by a court.

A handful of courts have correctly recognized the difference between completion and supplementation. For instance, in *Miami Nation of Indians of Indiana v. Babbitt*,<sup>156</sup> the plaintiffs sought both the completion of the record (with those documents considered by the agency, but withheld from the record) and the supplementation of the record (through a limited evidentiary hearing and the inclusion of additional extrarecord documents needed for adequate judicial review).<sup>157</sup> The court recognized this difference. First, the court granted the plaintiffs' motion to complete the administrative record, recognizing that, as to those documents considered but excluded by the agency, "[the plaintiffs] do not seek supplementation of the administrative record, but rather they seek to complete the current record to include materials that should have been there from the start."<sup>158</sup> The court then noted that "the [plaintiffs also] seek to supplement the record because 'even the complete administrative record will not be sufficient to allow appropriate review'" of the agency decision.<sup>159</sup> Ultimately the court denied the plaintiffs' motion to supplement the record without prejudice, pending resolution of the court's order directing the agency to complete the record.<sup>160</sup>

The court in another recent case, *Pacific Shores Subdivision California Water District v. United States Army Corps of Engineers (Pacific Shores)*,<sup>161</sup> went even further, taking great effort to explain the difference between "adding to the volume of the administrative record with documents the agency considered" and "viewing evidence outside of or in addition to the administrative record that was not necessarily considered by the agency."<sup>162</sup> As to the former—what I call

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<sup>155</sup> See *Boswell*, 749 F.2d at 792 ("To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case," whereas "[t]o review more than the information before the [agency] at the time [of its] decision risks our requiring administrators be prescient or allowing them to take advantage of post hoc rationalizations.").

<sup>156</sup> 979 F. Supp. 771 (N.D. Ind. 1996).

<sup>157</sup> *Id.* at 775.

<sup>158</sup> *Id.* at 777.

<sup>159</sup> *Id.* at 779.

<sup>160</sup> *Id.* at 781.

<sup>161</sup> 448 F. Supp. 2d 1 (D.D.C. 2006).

<sup>162</sup> *Id.* at 5. That court uses different terminology than that used in this Comment, however. What I call "completing" the record the court calls "supplementing" the record, and what I call "supplementing"

“completing” the record—the court would require that the plaintiff rebut the presumption of regularity and make some showing that the documents were before the agency decision maker when the decision was made.<sup>163</sup> And as to the latter—what I call “supplementing” the record—the court would also require the additional showing that one of the exceptions to the record rule applied under the circumstances,<sup>164</sup> thus raising the hurdle placed before the plaintiffs significantly. While the court in *Pacific Shores* found that the plaintiffs had failed to rebut the presumption of regularity,<sup>165</sup> it did take the important step of recognizing and explaining the difference between the two actions. A variety of other recent district court decisions also discuss the difference between completion and supplementation, indicating that courts are beginning to recognize the difference and thus to apply the appropriate standard.<sup>166</sup>

### *C. Deliberative Documents in the Record*

In addition to a broad failure to recognize or comprehend the difference between “completion” and “supplementation” of the record (be it purposeful or accidental), environmental agencies have also taken great pains recently to attempt to unilaterally withhold allegedly deliberative documents from their records. Specifically, agencies are increasingly withholding such documents from the record entirely, without affirmatively asserting a privilege, even though such documents were almost certainly before the agency decision maker when the decision was made. As discussed below, this practice distorts the scope of the admittedly valid deliberative process privilege, and is inconsistent with agency guidance and prevailing case law. Recently, however, a few courts have taken a firm stance against such abuse and, in doing so, provide other courts and plaintiffs with a suitable model for seeking an appropriate balance between the disclosure of relevant information and the protection of sensitive material.

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the court calls “reviewing extra-record evidence.” *Id.* That may, in part, be due to the fact that the plaintiffs described their motion as a “Motion to Supplement the Administrative Record.” *Id.* at 2.

<sup>163</sup> *Id.* at 6.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See, e.g., *Ohio Valley Envtl. Coal. v. Whitman*, 2003 U.S. Dist. Lexis 148, No. 3:02-0059, at \*10 (S.D. W. Va. Jan. 6, 2003) (Mem. Op. and Order) (“The plaintiffs do not seek to supplement the administrative record in the sense of adding documents to the record that were neither before the agency nor considered in the decision-making process. . . . Instead, the plaintiffs contend that the EPA has not submitted to the court all of the materials that properly constitute the complete administrative record.”); *California*, No. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at \*2–\*4 (N.D. Cal. Mar. 16, 2006). For an example of a court that failed to recognize the important difference, see *Fund for Animals*, 245 F. Supp. 2d 49, 58 (D.D.C. 2003) (“[T]he plaintiffs here expressly disavow any intent to supplement the record, saying instead that they ‘seek[] only to ensure that *all* of the ‘evidence’ that *was* before the agency, and therefore [is] part of the record, is actually disclosed to the Court.’ But that statement ignores the fact that the record is presumed properly designated. If, once the agency has designated the record, the plaintiffs believe that the defendants have excluded documents in bad faith, they should petition the court to supplement the record, identifying the applicable exception.” (citations omitted)).

### 1. *The Deliberative Process Privilege*

The deliberative process privilege is an important tool that allows Executive Branch agencies to withhold from disclosure those documents that might unduly expose the deliberative interactions of agency officials, the goal being “to protect free discussion of prospective operations and policy.”<sup>167</sup> The privilege has evolved significantly in the context of Exemption 5 under the Freedom of Information Act (FOIA),<sup>168</sup> which provides federal agencies grounds to withhold from release those “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>169</sup> The privilege, however, pre-dates both the APA and FOIA<sup>170</sup> and has been claimed as an essential component of efficient administrative function.<sup>171</sup>

Courts over the years have very clearly defined how the deliberative process privilege functions. It is clear that the agency must conform to certain procedural requirements in its assertion of the privilege;<sup>172</sup> the privilege is not automatic.<sup>173</sup> Generally, three steps are required. First, an agency official must affirmatively assert and justify the privilege over a set of documents, typically accompanied by a privilege log that clearly identifies each document withheld.<sup>174</sup> The agency has the

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<sup>167</sup> *Kaiser Aluminum*, 157 F. Supp. 939, 947 (Ct. Cl. 1958). The policy reasons underlying the privilege have been further explained:

The privilege . . . serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

*Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>168</sup> 5 U.S.C. § 552 (2006). *See* U.S. Envtl. Prot. Agency v. Mink, 410 U.S. 73, 86 (1973) (“[T]he legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that ‘confidential intra-agency advisory opinions . . . are privileged from inspection.’” (quoting *Kaiser Aluminum*, 157 F. Supp. at 946)); *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–52 (1975). Many of the cases cited herein relating to the scope of the deliberative process privilege arise in the FOIA context, not the administrative record context. Most courts, however, analogize freely between the two, and the analysis is functionally the same. *See, e.g.*, *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, No. 04-8244 (RBW), 2006 U.S. Dist. LEXIS 4080, at \*13 (D.D.C. Jan. 25, 2006) (“[I]t is clear that privileges under the APA are considered to be ‘co-extensive with Exemption 5 of [FOIA].’ Thus, to properly defend against a challenge to the exclusion of information from an administrative record, a defendant should necessarily provide the same information it would submit when defending against a challenge for withholding such information in a [FOIA] action.” (quoting *Seabulk Transmarine I, Inc. v. Dole*, 645 F. Supp. 196, 201 n.3 (D.D.C. 1986))).

<sup>169</sup> 5 U.S.C. § 552(b)(5).

<sup>170</sup> *See, e.g.*, *Morgan v. United States*, 304 U.S. 1, 18 (1938) (reviewing a pre-APA administrative procedure akin to adjudication, and explaining that “it [is] not the function of the court to probe the mental processes of the Secretary in reaching his conclusions”).

<sup>171</sup> *See Sears, Roebuck & Co.*, 421 U.S. at 151.

<sup>172</sup> *See, e.g.*, *Mobil Oil Corp. v. Dep't of Energy*, 520 F. Supp. 414, 416 (N.D.N.Y. 1981).

<sup>173</sup> *See Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1116 (9th Cir. 1988); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997).

<sup>174</sup> In cases arising under FOIA, such an index is ordinarily called a *Vaughn* Index, named for *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In that case, the court required the agency to “specify



burden of establishing that the privilege applies in any given circumstance,<sup>175</sup> and it can meet this burden by offering “oral testimony or affidavits that are ‘detailed enough for the district court to make a de novo assessment of the government’s claim of exemption.’”<sup>176</sup> It is logical to place this initial burden on the government because plaintiffs are at a “distinct disadvantage” when it comes to defending claims of privilege,<sup>177</sup> especially when they have no initial access to the withheld documents.

Second, the assertion of privilege is treated like any claim or defense raised by a party in litigation, and it must be subjected to competing arguments from both sides.<sup>178</sup> Most importantly, the party seeking admission of the documents must be given opportunity to challenge the agency’s claim of privilege.<sup>179</sup>

Third, the reviewing court must determine, based on the arguments put forth by the agency as well as the party seeking disclosure, whether the privilege applies and, if it does apply, whether it should nonetheless be overcome.<sup>180</sup> Whether the privilege applies in the first instance is a de novo judicial determination, and courts will operate under the presumption that the privilege “should be applied as narrowly as consistent with efficient government operations.”<sup>181</sup> Courts have applied varying tests to determine if a document is in fact deliberative; several circuits, for instance, use a functional test. Instead of looking to whether the document is purely factual or whether it is policy-oriented, those courts will “focus on whether the document in question is a part of the deliberative process.”<sup>182</sup> One thing is clear: the standard is a legal one, to be asserted by the government and possibly challenged by the plaintiff, but ultimately decided upon by the reviewing court. Even if the documents at issue are found to be deliberative in nature, the privilege can be overcome if the need for the documents outweighs the need for nondisclosure.<sup>183</sup> In balancing those competing interests the reviewing court will likely consider: “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated

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in detail which portions of the document are disclosable and which are allegedly exempt . . . [by using] a system of itemizing and indexing that would correlate statements made in the Government’s refusal justification with the actual portions of the document.” *Id.* at 827.

<sup>175</sup> *Maricopa Audubon Soc’y*, 108 F.3d at 1092.

<sup>176</sup> *Id.* (quoting *Doyle v. FBI*, 722 F.2d 554, 555–56 (9th Cir. 1983)).

<sup>177</sup> *Ollestad v. Kelley*, 573 F.2d 1109, 1110 (9th Cir. 1978).

<sup>178</sup> See *Mobil Oil Corp.*, 520 F. Supp. 414, 417 (N.D.N.Y. 1981).

<sup>179</sup> See *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).

<sup>180</sup> *Fed. Trade Comm’n v. Warner Commc’n Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-cv-00453 OWW DLB, 2007 U.S. Dist. LEXIS 21949, at \*18–\*19 (E.D. Cal. Mar. 9, 2007) (describing the “two-step process” that the court must engage in “when evaluating an assertion of privilege based on deliberative process”), *motion granted*, 2007 U.S. Dist. LEXIS 25954 (E.D. Cal. Mar. 21 2007).

<sup>181</sup> *Ctr. for Biological Diversity v. Norton*, No. Civ. 01-409 TUC ACM, 2002 U.S. Dist. LEXIS 27617, at \*8–\*9 (D. Ariz. July 24, 2002).

<sup>182</sup> *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988); see also *Russell v. Dep’t of Air Force*, 682 F.2d 1045, 1046–48 (D.C. Cir. 1982); *Providence Journal Co. v. U.S. Dep’t of Army*, 981 F.2d 552, 560 (1st Cir. 1992).

<sup>183</sup> *Warner Commc’n Inc.*, 742 F.2d at 1161; *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658–59 (6th Cir. 1976).

policies and decisions.”<sup>184</sup> Additionally, the privilege can be waived in certain circumstances, such as when an agency expressly adopts portions of an otherwise-deliberative document in a final decision,<sup>185</sup> or when the agency fails to object to the introduction of allegedly deliberative documents by the other party.<sup>186</sup> And lastly, the privilege may not even be available in certain types of litigation aimed at reviewing the agency’s subjective intent, as opposed to the substance of the final decision.<sup>187</sup> These procedural steps ensure faithfulness to our adversarial system, and are essential for ensuring that courts strike the proper balance between open government and efficient administrative function.

## 2. Agency Misuse of the Deliberative Process Privilege

Increasingly, federal agencies are misusing the deliberative process privilege by failing to properly assert and justify the privilege. Whether this is a symptom of an Administration that has grown progressively more secretive, or whether it is a result of Justice Department attorneys struggling to defend questionable agency decisions, is a subject for later debate. Environmental plaintiffs involved in litigation against the government must frequently resort to “Motions to Compel Completion of the Administrative Record” when it becomes apparent that the defendant agency has withheld documents from the record. By failing to properly assert the privilege, agencies put plaintiffs at a distinct disadvantage because plaintiffs can rarely identify with accuracy the “universe” of documents that was before the agency decision maker yet absent from the record. Such misuse of the privilege also serves to frustrate judicial review by shielding relevant records from the reviewing court, and can needlessly protract already time-consuming litigation.

As previously discussed, the policy guidelines used by several agencies clearly indicate that deliberative documents are to be placed in the administrative record, with the agency retaining the right to assert a claim of privilege either contemporaneously with or subsequent to the submission of the record to the court.<sup>188</sup> In several recent environmental cases, however, federal agencies failed to affirmatively assert a claim of privilege, instead choosing to simply claim that deliberative documents do not belong in the record to begin with.

In *Washington Toxics Coalition v. United States Department of Interior*,<sup>189</sup> the plaintiffs claimed that the Department failed to include in the record internal agency deliberations, communications with other agencies, and past criticisms of

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<sup>184</sup> *Warner Commc’n Inc.*, 742 F.2d at 1161.

<sup>185</sup> *Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1974); *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 356–57 (2nd Cir. 2005); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (“[E]ven if the document is [privileged] at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”).

<sup>186</sup> See *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996) (“The government’s lack of specific objection could be construed as a waiver of its claim of privilege.”).

<sup>187</sup> *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998).

<sup>188</sup> See *supra* Part IV.A.

<sup>189</sup> 457 F.Supp.2d 1158 (D. Wash. 2006).

relevant prior decisions.<sup>190</sup> Although the federal defendants failed to assert any claim of privilege, they argued that the record as submitted was complete because it contained “a detailed statement of the [agencies’] decision, the basis for that decision, and the agencies’ findings.”<sup>191</sup> In granting the plaintiffs’ motion to compel completion of the administrative record, the court held that all documents that were relevant to the final agency decision should be produced and included in the record, including the internal deliberations and communications.<sup>192</sup>

In *National Wildlife Federation v. National Marine Fisheries Service*,<sup>193</sup> the plaintiffs asserted that statements by the National Marine Fisheries Service’s Regional Administrator that “internal drafts of memoranda . . . and communications among my staff and with other federal employees . . . [are not considered] to properly be part of the Administrative Record”<sup>194</sup> left plaintiffs and the court “to guess at what documents and materials have been withheld.”<sup>195</sup> The federal defendant had made no effort to claim a privilege, arguing instead that it had the right to designate the record and that plaintiffs had failed to demonstrate the need to introduce extrarecord evidence.<sup>196</sup> The court found that the statements made by the Regional Administrator were sufficient to rebut the presumption of regularity, and ordered those documents that fell within the types of documents excluded by the agency to be added to the record.<sup>197</sup>

In an older case, *Miami Nation of Indians of Indiana v. Babbitt*, the federal defendants did not assert a privilege over allegedly deliberative documents; rather, they simply excluded various documents such as preliminary drafts and internal communications.<sup>198</sup> Because the agencies had failed to assert or justify any claim of privilege, the court recognized that it was not “able to determine which, if any, of these [withheld] materials may be covered by the deliberative process privilege.”<sup>199</sup> The court then reiterated the procedural steps required to assert the privilege, including: 1) a formal claim of privilege by an agency official, 2) specific description of those documents alleged to be privileged, and 3) the articulation of “precise and certain reasons for preserving the confidentiality of the requested information.”<sup>200</sup> With these procedural requirements “in mind,” the court ordered the agency to complete the administrative record with those documents previously withheld.<sup>201</sup>

Courts are increasingly taking issue with federal agencies’ attempts to unilaterally withhold allegedly deliberative documents without asserting a claim of

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<sup>190</sup> The court granted plaintiffs’ motion to compel completion of the administrative record. *Wash. Toxics Coal. v. U.S. Dep’t of Interior*, No. C04-1998C, 2005 U.S. Dist. LEXIS 45566, at \*3–\*4 (D. Wash. June 14, 2005).

<sup>191</sup> *Id.* at \*4.

<sup>192</sup> *Id.* at \*7.

<sup>193</sup> No. CV-640-RE, 2005 U.S. Dist. LEXIS 16655 (D. Or. Mar. 3, 2005).

<sup>194</sup> *Id.* at \*6–\*7.

<sup>195</sup> *Id.* at \*7.

<sup>196</sup> *Id.* at \*8.

<sup>197</sup> *Id.* at \*10.

<sup>198</sup> *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 776 (N.D. Ind. 1996).

<sup>199</sup> *Id.* at 778.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

privilege. Even in those cases where certain documents were ultimately found to be privileged, courts have required agencies to abide by the procedural requirements already soundly established in the FOIA context addressing claims of privilege.<sup>202</sup> Importantly, courts are beginning to recognize that claims of privilege in the administrative record context should be accompanied by a privilege log (or other written explanation) so that the plaintiffs, and the reviewing court, have the opportunity to assess or challenge the agency's claims.<sup>203</sup>

Additionally, courts have recognized that the final determination as to the application of the privilege is in the hands of the court, and not the agency itself.<sup>204</sup> Some courts have begun to rely on *in camera* review of allegedly deliberative documents withheld from the record in order to determine if the privilege has been properly invoked.<sup>205</sup> In other instances, where the documents are already available to the court (such as allegedly deliberative documents submitted by the plaintiffs), courts are able to make the determination on a document-by-document basis, relying on affidavits or declarations from the parties.<sup>206</sup> And in still other instances, where courts recognize that an agency has simply failed to include documents of a certain type (such as draft documents or correspondence), they have rejected agency attempts to unilaterally exclude all such documents, instead requiring completion of the record.<sup>207</sup>

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<sup>202</sup> See, e.g., *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, No. 04-824(RBW), 2006 U.S. Dist. Lexis 4080, at \*11–\*14 (D.D.C. Jan. 25, 2006) (explaining that the agency made “no effort to support [its] assertion [of privilege] with anything, such as an affidavit or declaration,” and taking issue with the agency’s refusal “to provide [the] Court with all the documents and information that were before the agency at the time it made its decision, or . . . provide the Court with a legal basis for withholding the information from the administrative record”). The court gave leave to the agency to resubmit its motion to dismiss, as long as it was “accompanied by the necessary support for its arguments that certain documents that appear relevant are properly excluded.” *Id.* at \*14.

<sup>203</sup> See, e.g., *Trout Unlimited v. Lohn*, No. C05-1128C, 2006 U.S. Dist. Lexis 28679, at \*8–\*14 (W.D. Wash. May 4, 2006) (requiring federal defendants to “produce an unredacted version and a proposed redacted version of the [allegedly privileged] documents . . . [that] indicate “precise and certain” reasons for preserving the confidentiality of the . . . information.” (quoting *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 544 (W.D. Wash. 2000))); *Coastal Conservation Ass'n*, No. H-05-1214, 2006 U.S. Dist. Lexis 96704, at \*9 (S.D. Tex. Feb. 17, 2006) (granting plaintiffs’ motion to compel completion of the administrative record and requiring the federal defendants to “compile a privilege log covering the documents and materials that have been withheld on the basis of privilege . . . [which] shall be served upon Plaintiffs, who may then challenge any such privilege assertions”); *California*, No. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at \*4 (N.D. Cal. Mar. 16, 2006) (ordering completion of the record with internal and external communications, drafts, and other correspondence, but allowing defendants to withhold documents on the basis of privilege as long as they provide a privilege log).

<sup>204</sup> *Kaiser Aluminum*, 157 F. Supp. 939, 947 (Ct. Cl. 1958); *Jade Trading v. United States*, 65 Fed. Cl. 487, 496 n.22 (Fed. Cl. 2005). *But see* *Marriott Int'l Resorts v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (“[A] trial court enjoys little oversight of the Government’s invocation of a privilege involving military and state secrets.”).

<sup>205</sup> See, e.g., *Ariz. Rehabilitation Hosp. v. Shalala*, 185 F.R.D. 263, 269 (D. Ariz. 1998); *Trout Unlimited*, 2006 U.S. Dist. Lexis 28679, at \*14 (involving *in camera* review of several documents withheld from the administrative record on the basis of the administrative process privilege).

<sup>206</sup> See, e.g., *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198–99 (D.D.C. 2005) (stating that certain documents, publicly available and submitted by the plaintiffs as exhibits, were improperly excluded from the record).

<sup>207</sup> See, e.g., *California*, No. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at \*4 (N.D. Cal. Mar. 16, 2006) (concluding that the record was incomplete because it lacked correspondence, email

Even more surprising is that federal agencies have typically recognized that the deliberative process privilege must be asserted and justified, and have acted accordingly in litigation to seek the privilege by providing a list of documents up front.<sup>208</sup> Not only is such an approach consistent with the jurisprudence governing the deliberative process privilege, it comports with both DOJ and FWS guidance on the interplay between the privilege and the scope of the administrative record.

Environmental agencies should follow the lead of these recent district court decisions defining the overlap between the deliberative process privilege and the compilation of an administrative record. Courts have long recognized that any assertion of the privilege in the FOIA context must comply with basic procedural requirements; it should be the same for administrative records. Unilateral exclusion of allegedly deliberative documents prevents the reviewing court from examining the whole record, and leaves plaintiffs with the near-impossible task of identifying themselves any withheld documents that were before the agency decision maker. Because of the presumption of regularity and the ordinary deference accorded to agency actions, federal agencies already have the tools they need to avoid intrusive or inappropriate judicial review.

#### V. CONCLUSION

The record rule, as initially established by the Supreme Court in *Overton Park*, plays an important role in administrative law; it ensures that reviewing courts do not overreach by engaging in broad, unconstrained de novo review of agency decisions, thereby respecting agency expertise and autonomy. But courts also play an important oversight function over federal agencies, and they have an obligation to review the full and complete administrative record in order to make their review as effective as possible. Agency abuse of the record rule, as demonstrated in the blurring of the line between completion and supplementation as well as the sweeping exclusion of allegedly deliberative documents, frustrates judicial review and prejudices plaintiffs who seek to challenge agency actions.

Modern courts should first recognize the crucial difference between supplementation and completion of the administrative record. While it is appropriate to grant agencies a presumption of regularity in the submission of an administrative record, and also to require a substantial showing from those plaintiffs seeking to supplement a record with additional, extrarecord evidence, plaintiffs should face a much lower burden when they seek merely to complete an incomplete record. No showing of bad faith should be required; rather, a minimal

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messages, and draft analyses). The court in *California* ordered the completion of the record with all relevant internal and external communications, but gave the agency the opportunity to assert a privilege, making clear that the agency must make a “specific showing establishing the application of a privilege for each document that it contends that it may withhold based on privilege.” *Id.* at \*14.

<sup>208</sup> See, e.g., *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-cv-00453(OWW DLB), 2007 U.S. Dist. Lexis 21949, at \*4 (E.D. Cal. Mar. 9, 2007) (“NMFS removed or redacted in part certain documents from the [administrative record], asserting the deliberative process privilege and/or the attorney-client privilege.”); *Center for Biological Diversity v. Norton*, No. CIV 01-409 (TUC ACM), 2002 U.S. Dist. Lexis 27617, at \*2 (D. Ariz. July 23, 2002) (“The Secretary [of the Interior] withheld 11 documents pursuant to attorney/client privilege, and 37 documents pursuant to the deliberative process privilege as documented in its filing entitled ‘Administrative Record/Privilege Log.’”).

demonstration that the record as presented is lacking materials that were arguably before the agency when the decision was made should suffice. Such a standard would prevent a court from engaging in essentially de novo review, by keeping newly created evidence out of the record in most instances, and would also honor the Supreme Court's requirement that review be based upon the whole record.

Additionally, federal agencies and reviewing courts should recognize that deliberative documents are properly part of the administrative record, if they were otherwise before the decision maker when the decision was made. Recent attempts by agencies to unilaterally withhold allegedly deliberative documents ignore the important procedures governing the deliberative process privilege, prevent plaintiffs seeking to challenge the application of the privilege from forming a basis for their arguments, and is flatly inconsistent with DOJ and FWS policy. Additionally, it prevents reviewing courts from determining if the privilege is applicable in the first instance, or whether the public interest dictates that the documents be included in the record despite their privileged status.

For judicial review to be an effective and worthwhile exercise, courts must be able to put themselves in the position of the agency decision maker to determine if he or she acted arbitrarily or capriciously. Absence of a full and complete record makes that task impossible.