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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al., *Plaintiffs,* v. SONNY PERDUE, et al. *Defendants.*	Case No. 3:20-cv-1537-RS **PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL COMPLETION OF THE ADMINISTRATIVE RECORD**

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INTRODUCTION

The Administrative Procedure Act (APA) requires courts to review agency action on the basis of "the whole record" that was before the agency in order to effectuate judicial review. 5 U.S.C. § 706; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (APA requires "thorough, probing, in-depth review"). The scope of "whole record" is broad: it includes documents directly and indirectly considered by the agency, including documents considered by subordinate employees, relevant comments submitted to the agency, transcripts of meetings, and other internal materials. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); Pls.' Mot. Complete 4-5, ECF No. 20. By contrast, an Administrative Record containing anything less is a "fictional account of the actual decisionmaking process" rendering judicial review "almost meaningless." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

The incomplete Administrative Record produced by Defendants United States Department of Agriculture (USDA) provides just such a "fictional account" of the Agency's denial of Plaintiffs' Petition (the Petition Denial). Defendants considered—as they must—the extensive deliberations from a wide range of sources concerning how hydroponic operations could fit under the production standards prescribed in the Organic Foods Production Act (OFPA), yet the Record includes only a handful of select set of transcripts and written materials, and is curiously missing other critical deliberative materials from expert committees, primary data, and other public submissions on this subject matter from the same time period. *See* Pls.' Mot. 8-11. It is undisputed that these materials were before the Agency and relate to its Petition Denial; as such, they are necessarily part of the "whole record" for this Court's review.

Defendants instead offer a narrow definition of the "whole record" that would reduce it to what an agency claims it had directly considered. Defendants' definition has been soundly rejected by courts, and contradicts bedrock principles of judicial review under the APA. As discussed below, Plaintiffs have more than met their burden to show irregularity in the Record produced. *See* Defs.' Opp'n Mot. Complete 1, ECF No. 24. USDA's culled and cherry-picked Administrative Record is untenable under the controlling authority. Alternatively, Plaintiffs have more than met

their burden for supplementing the record. The Court should grant Plaintiffs' Motion and include the attached documents filed with Plaintiffs' Motion to Complete as part of the Administrative Record. *See* Decl. Meredith Stevenson, ECF No. 21; *see also* Exs. A-D, ECF No. 21-1-21-4.

ARGUMENT

I. USDA Argues for a Dangerous Change that Would Obliterate Meaningful APA Review of Agency Action, in Contravention of Ninth Circuit Precedent and this Court's Prior Instruction.

As Plaintiffs previously noted, the standard for the scope of an administrative record in the Ninth Circuit is clear: the Record to be produced by the agency includes "all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555 (emphasis added); *see supra* p. 1. This Court has explained that "[i]nternal materials are part of the 'universe of materials' considered by the agency . . . and must be included in the administrative record unless omitted on the basis of [substantiated claims of privilege.]" *See Ctr. for Envtl. Health v. Perdue*, No. 18-CV-01763-RS, 2019 WL 3852493, at *2 (N.D. Cal. May 6, 2019); *see also Sierra Club v. Zinke, No. 17-CV-07187-WHO,* 2018 WL 3126401, at *3 (N.D. Cal. June 26, 2018) (noting that courts in the Ninth Circuit have "repeatedly required deliberative materials (such as internal memoranda, draft reports, emails, and meeting notes) to be added to the administrative record if they were considered in the agency's decision."). The Administrative Record includes "everything that was before the agency pertaining to the merits of its decision." *Portland Audubon Soc'y*, 984 F.2d at 1548 (citing *Thompson*, 885 F.2d at 555-56); Defs.' Opp'n 2. USDA does not dispute this, but contorts the standard as purportedly permitting the Agency (1) to withhold any and all documents because this case does not even require an Administrative Record; and (2) to allow the Agency to unilaterally withhold documents referenced in the Petition by claiming that the Agency did not review them. USDA's standard has been squarely rejected. This Court should not allow USDA to provide as the "whole record" only those documents that USDA relied upon, but must require the Administrative Record to include all the documents the Agency had before it and admittedly considered when making its Petition Denial.

A. An Administrative Record Is Required for the Court to Evaluate the Agency's Decisionmaking Process.

USDA improperly mischaracterizes the claims in this case as involving entirely "purely legal claims" of statutory interpretation. *See* Defs.' Opp'n 6. While it is true that many of Plaintiffs' claims concern USDA's statutory and regulatory interpretation of OFPA, which are legal questions, Plaintiffs also challenge USDA's underlying factual support in its Petition Denial, in particular as they relate to how hydroponic operations can meet OFPA's statutory and regulatory command. *See* Compl. ¶¶ 114-124, ECF No. 1.; *see also* Pls.' Br. 23-25. And even for the statutory and regulatory interpretation questions, the Administrative Record contains critical legislative and rulemaking history relevant to this Court's review, and interpretive opinions from experts tasked with aiding USDA's administration of OFPA that are informative for the Court.

USDA's argument is thus contradicted by this Circuit's clear instruction that an administrative record is required for courts "to comprehend the agency's handling of the evidence cited or relied upon . . . [and] to educate [themselves] so that [they] can properly perform [their] reviewing function: determining whether the agency's conclusions are rationally supported." *Nw. Coal. for Alts. to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotation marks omitted); *see also* Pls.' Mot. 2-3. Where plaintiffs challenge "not only the administrative decision, but also the process that led to that decision," "[t]he court is unable to assess the merits of these arguments without considering the administrative record." *Swedish Am. Hosp. v. Sebelius*, 691 F. Supp. 2d 80, 88-89 (D.D.C. 2010) (denying government's motion to dismiss and granting plaintiff's motion to compel production of administrative record); *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (" 'arbitrary and capricious' review under the APA focuses on the reasonableness of an agency's decision-making *processes*" (emphasis in original)).

USDA clearly understood this standard, for the Agency did prepare and submit to the Court an administrative record. Admin. R., ECF No. 19-2; *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004) (An agency must present a "rational connection between the facts found and the conclusions made" under APA review). The Petition cited the extensive history of the National Organic Standards Board's (NOSB) recommendations as well as

the findings of the Hydroponic Task Force as bases for why USDA should prohibit organic certification of hydroponic production. *See* Pet., AR13-19. USDA itself agreed that such factual materials are relevant to the Court's determination and prepared the Record, which, according to USDA's certification, contains "documents that were directly or indirectly considered" in the Denial. Defs.' Notice Lodging Admin. R. 3, ECF No. 19. This Court cannot effectuate review without the "whole record."

Further, the NOSB and Hydroponic Task Force deliberations Plaintiffs seek to introduce are essential in this evaluation, as Congress and USDA itself have recognized these bodies as important experts and advisors on USDA's implementation of OFPA. *See* Exs. A-B; Pls' Mot. Complete at 8-11. As Plaintiffs explained, Congress created the NOSB to ensure that USDA receives the expert input of the organic community in its administration of the National Organic Program. *See* Pls.' Summ. J. Br. 4, ECF No. 22 (and citations therein). USDA created the Hydroponic Task Force "to examine hydroponic and aquaponics practices and their alignment with the USDA organic regulations and [OFPA]." AR327. The deliberations and opinions of these experts are thus highly relevant in evaluating USDA's Petition Denial.

Rather than the recent guidance from the Ninth Circuit, or the long line of APA cases in which this Court based its determination on summary judgment on an Administrative Record in this Court, USDA depends on extra-circuit authority for its notion that an Administrative Record is not required, which it nonetheless mischaracterized. Defendants cite *District Hospital Partners, L.P. v. Sebelius*, which states the opposite of Defendants' position: when "the Agency's reasons for interpreting and applying a regulation [are] at issue," an AR is required. 794 F. Supp. 2d 162, 172 (D.D.C. 2011). *District Hospital Partners* only acknowledges some instances in which the D.C. Circuit did not require an AR, none of which apply here. Plaintiffs are not bringing a facial attack on a statute, as in *American Bankers Association v. National Credit Union Administration,* 271 F.3d 262, 266 (D.C.Cir.2001), and do not suggest that USDA's action was not a "formal administrative determination." *Allied Pilots Ass'n v. Pension Benefits Guar. Corp.,* 334 F.3d 93, 97–98

(D.C.Cir.2003).[1] Plaintiffs challenge USDA's decision-making process and final conclusions of both facts and law in its Petition Denial, a final agency determination; record review is thus necessary and proper. *See Dist. Hosp. Partners*, 794 F. Supp. 2d at 171 (quoting *Am. Bankers Ass'n*, 271 F.3d at 267) (urging production of a Record where the "'manner in which the Administration has applied [a] rule in specific cases'" is challenged). Similarly, in *Mohammadi-Motlagh*, the court based its determination on *INS v, Chadha*, 462 U.S. 919 (1983) in which the Court reviewed only a legal question: the constitutionality of the one-house veto, *not* an agency's decision making process. *See Mohammadi-Motlagh v. INS*, 727 F.2d 1450 (9th Cir. 1984).

Further, Defendants' claim that the documents Plaintiffs seek to include in the Record are immaterial is belied by what Defendants themselves thought were relevant and material to this Court's review. Defs.' Opp'n 5. Defendants included transcripts of NOSB meetings, AR26-28, 177-196, 207-269, 653-787, 810-916, 957-1072, 1118-1136, details of the surveys sent to organic certifiers, AR386-87, and letters and comments to USDA from 2016-2017. *See* AR952-956; *see also* Pls.' Mot. 10-12.

B. The Record Includes All Materials Before the Agency and Directly or Indirectly Considered, Not Just Those It Chose to Admit It Considered.

Defendants assert that the "whole record" somehow consists only of documents that were "actually considered" by the Deputy Administrator. Defs.' Opp'n 2. Defendants misstate the relevant standard. Courts within the Ninth Circuit have recognized that "a document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record." *People of State of Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, Nos. C05-3508 & C05-4038, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006). The Ninth Circuit has made clear, the "whole record" for purposes of the APA includes "everything that was before the agency pertaining to the merits of its decision." *Portland Audubon Soc'y*, 984 F.2d at 1548. This

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[1] Plaintiffs have also not requested judicial notice of legislative facts, as Defendants wrongly accuse. Defs.' Opp'n 5-6 (quoting *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010)). Plaintiffs rather request completion of the Administrative Record with documents directly and indirectly considered by the Agency; thus Fed. R. Evid. 201(a) does not apply.

encompasses not only documents that support an agency's asserted justification of a challenged agency action, but also "evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555; *see also Oceana, Inc. v. Pritzker*, No. 16-CV-06784-LHK-SVK, 2017 WL 2670733, at *2 (N.D. Cal. June 21, 2017) ("An agency may not exclude information it considered on the grounds that it did not rely on that information.").

Indeed, Defendants' improper focus on the documents that were "actually considered" by the Administrator confirms that the record it compiled is incomplete. Defs.' Opp'n 17. In *Lockyer*, the court concluded based on the agency's representation that it had only included records "relied" upon and "considered" by the agency meant that the agency had failed to include documents that had been *indirectly considered* by the agency. *Lockyer*, 2006 WL 708914, at *2. Accordingly, the court ordered the agency to "complete the record with the agency's internal and external communications regarding the decision-making process . . . , including drafts, internal reviews and critiques, inter-agency reviews, dissent from agency scientists, e-mail exchanges or other correspondence between and among the agencies and/or others involved in the process." *Id.* at *4. Likewise here, Defendants' erroneous restriction of the record to the materials "actually considered" misconstrues the appropriate legal standard, rendering the administrative record incomplete.

Defendants also assert that Plaintiffs were required to attach each of the requested documents to the Petition for Defendants to consider them. Defs.' Br. 8. By this logic, the Administrative Record would include the Petition only. Yet the very fact that Defendants certified and admittedly considered a much more extensive Administrative Record reveals this is not the standard. Defendants clearly state in the Petition Denial that the Agency based its decision on decades of deliberation and input, and Plaintiffs refer to the requested documents in the Petition. *See* AR1377; AR14; Pls.' Mot. 7. An Administrative Record of only Plaintiffs' Petition would fail to provide this Court with sufficient evidence to "determin[e] whether the agency's conclusions are rationally supported." *Nw. Coal. for Alts. to Pesticides*, 544 F.3d at 1052 n.7.

II. Plaintiffs Have Overcome the Presumption of Regularity.

This district and other courts in this Circuit have instructed that rebutting the presumption of regularity that attaches to an agency's initial record is accomplished by (1) showing that the agency applied the wrong standard in compiling the record; or (2) showing that documents likely exist that are not included. *Lockyer*, 2006 WL 708914, at *3; *see* Pls.' Mot. 7-12 (discussing case law and providing evidence of documents excluded from the Record).

Plaintiffs easily meet this burden. While USDA argues that Plaintiffs have not carried their burden to demonstrate that specific documents are missing from the record, the Agency admits that many more documents were before the Agency in this decision-making process, but which USDA has decided to omit from the Administrative Record. *See, e.g.*, Defs.' Opp'n 15-16 (admitting USDA "considered 'the substantial deliberation and input on [hydroponics] between 1995 and 2017 from a variety of sources, including the NOSB, public stakeholders, and the Hydroponic Task Force,' which did not involve reviewing *every* public comment"). The Agency also specifically admitted to excluding two documents identified by Plaintiffs, and subsequently included them in the revised Administrative Record. Defs.' Opp'n 1. Thus, the *existence* of these documents and even the Agency's *consideration* of the requested documents is not speculative—the only question the parties contest is whether USDA is justified in excluding those documents.[2]

As to the specific documents Plaintiffs have identified, USDA seeks to replace this Court's requirement to identify "reasonable, non-speculative grounds for the belief that the [omitted] documents were considered by the agency and not included in the record" with a standard requiring Plaintiff to demonstrate that the agency "actually considered . . . all of the documents in Exhibits A through D" just before making its decision. Defs.' Opp'n 12. This is not the standard, nor is it supported by the inapposite out-of-district cases USDA cites for support. Defs.' Opp'n 9-

[2] Plaintiffs do not seek to overcome the presumption of regularity based on the Agency's exclusion of pre-decisional, deliberative materials from the Administrative Record, as Defendants suggest. Defs.' Opp'n 15. Plaintiffs made clear that they were not seeking to compel completion of the Record with those withheld documents under claims of privilege. Pls' Mot. 5. Rather Plaintiffs overcome this presumption based on the Agency's incorrect standard in compiling the Record and the exclusion of Exhibits A-D, which were admittedly considered by the Agency. Defs.' Opp'n 15-16.

10. Defendants latch onto *Oceana, Inc v. Ross*, 290 F. Supp. 3d 73, 80 (D.D.C. 2018) for the premise that each document must be "actually considered." To the contrary, *Oceana* stated that the question is whether "the relevant decisionmakers actually thought about *or* [at minimum] had these documents before them in the process of making [the relevant] decision." 290 F. Supp. 3d at 80. Plaintiffs have established that these documents were before the Agency in denying the Petition "with sufficient specificity" and provided detailed explanations for why they were directly or indirectly considered by the Agency. *Gill v. Dep't of Justice*, No. 14-CV-03120-RS (KAW), 2015 WL 9258075, at *5 (N.D. Cal. Dec. 18, 2015); *see* Pls.' Mot. 7-12.

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." *Portland Audubon Soc'y*, 984 F.2d at 1548. USDA *admits* to its consideration of documents from 1995 to 2017, but offers no explanation why documents from the same period that are generated by processes involving the Agency on the subject of hydroponic operations, were excluded from the Agency's consideration. *See* Exs. A-D; Pls.' Mot. 8.

USDA also cannot support its assertion that a lower standard applies here because the Petition Denial "is a decision *not to act* at all." Defs.' Opp'n 14 (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 514-15 (2009)). To the contrary, "a 'failure to act' is not the same thing as a 'denial.'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (explaining that a denial is "the agency's act of saying no to a request," while failure to act requires "the omission of an action without formally rejecting a request."). Courts have held that "an agency's denial of a petition for rulemaking constitutes final, reviewable agency action." *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir.1992). In its response to Plaintiffs' summary judgment motion, Defendants do not dispute that the Petition Denial constitutes final agency action, subject to full arbitrary and capricious review.

A. Defendants Must Include Written Comments the Agency Reviewed Concerning Organic Certification of Hydroponic Production.

Defendants concede that the Agency "considered 'the substantial deliberation and input on [hydroponics] between 1995 and 2017 from a variety of sources, including the NOSB, public stakeholders, and the Hydroponic Task Force'" and that the Agency reviewed public comments—but apparently not "*every* public comment" because there were too many. Defs.' Opp'n 15-16. Defendants have failed to meet their burden to show that the omission of these public comments was harmless. Setting aside the fact that agencies typically compile and include *all* public comments received on a rulemaking as part of the administrative record, by Defendants' own admission, at least some, if not all, public comments were relevant to the Agency's consideration of the Petition. Yet, the Administrative Record contains only one written comment from industry supporting organic certification of hydroponic operations—the Plenty Ag letter—and not a single document from any other organization in opposition. AR952-956. The comments that Plaintiffs seek to include in the Record directly address the issue of whether organic certification of hydroponic operations should be prohibited. *See id.*, Ex. B. Without including Plaintiffs' requested comments, the Court would be left to consider "a fictional account of the actual decisionmaking process." *Portland Audubon Soc'y*, 984 F.2d at 1548.

B. Organic Certifier Responses Are Properly Part of the Administrative Record.

USDA also fails to meet its burden to show that exclusion of certifiers' direct responses to USDA's surveys on the state of organic certification of hydroponic operation is harmless and not necessary for judicial review. USDA justifies the exclusion of the survey responses based on its assertion that the Agency only directly reviewed spreadsheets compiled by staff based on these responses, which are contained in the Record. Defs.' Opp'n 17-18; AR387 (summarizing survey results). But Courts have made clear that the record—and here the survey responses—"need not literally pass before the eyes of the final agency decision maker"; rather the record must include documents that an agency "constructively considered." *Lockyer*, 2006 WL 708914, at *2; *Safari Club Int'l v. Jewell,* No. 16-00094, 2016 WL 7785452, at *2 (D. Ariz. July 7, 2016); *see also Oceana, Inc. v. Pritzker*, 2017 WL 2670733, at *4. Such "constructive" consideration may occur "where the

document was relied upon by subordinates, rather than the final decision-maker, or where a report relies so heavily on an underlying source that the cited authority might fairly be said to have been indirectly considered by the decision-maker." *Safari Club Int'l*, 2016 WL 7785452, at *2 (citation omitted); *see also Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275-76 (D. Colo. 2010) ("If the agency decision maker based his decision on the work and recommendations of subordinates, those materials should be included in the record." (citing authorities)). Here, the record makes clear that the individual survey responses were considered by USDA employees; indeed without that review there would be no summary slides that USDA did include in the Record. AR387. Moreover, the survey responses are the very "underlying source" to the summary data in the Record. Defendants rely on the summary data in their Opposition to demonstrate that hydroponic operations comply with OFPA's natural resource and biodiversity conservation requirements, yet fail to include the actual questions asked to certifiers in the Record. Defs.' Br. 26, ECF No. 23. USDA's failure to include survey questions and responses from organic certifiers, converted by lower level employees into slides viewed by decisionmakers, flouts the requirement that the record contain materials indirectly considered by the agency.

C. The Agency Must Include NOSB Transcripts in the Administrative Record.

The current Administrative Record includes numerous NOSB transcripts on the subject of hydroponic operations. AR26-28, 177-196, 207-269, 653-787, 810-916, 957-1072, 1118-1136. This makes sense given the long history of NOSB deliberations on whether and how hydroponic operations may be certified organic under OFPA. *See* Pls.' Br. 8-11. Yet USDA curiously omitted other relevant NOSB testimony on the subject.

Instead of demonstrating that the testimonies were not directly or indirectly considered, USDA mischaracterizes Plaintiffs' request for this fundamental material as seeking "every oral comment made to the NOSB regarding the compatibility of hydroponic operations with soil-based regulations." Defs.' Opp'n 15. The Agency acknowledged in the Petition Denial that such comments were, at the very least, indirectly considered. Defs.' Opp'n 15-16. The existing record compilation indicates that these transcript testimonies were or should have been considered by the Agency.

Instead, USDA defines "deliberation and input" far too narrowly to include only certain written comments submitted to NOSB in favor of organic certification and no oral comments in favor or against. Contrary to USDA's narrow definition, courts have repeatedly recognized that oral comments are properly included in the Administrative Record as evidence of verbal input that agency decisionmakers received in the course of reaching a decision. *Lockyer*, 2006 WL 708914, at *4 (ordering agency to complete the Record with "agency meeting notices regarding discussions" about revising regulation); *Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1267-69 (D. Colo. 2012) (completing the Record with meeting notes). Just two years ago, this Court observed that "[v]erbal input . . . can be every bit as influential, perhaps more influential, -in shaping informal agency decisions as written input." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211-WHA, 2018 WL 1210551, at *4 (N.D. Cal. Mar. 8, 2018). The Court should again require USDA to complete the Record with such input here. *See* Ex. A.

D. Comments, Slides, and Other Materials Pre-Dating the Agency's Final Decision Belong in the Administrative Record.

Defendants also excluded documents based on an arbitrary line it drew about the relevant timeframe for the Record. Defs.' Opp'n 9 (describing "decades-old documents"); *Id.* at 15 n. 4; *Id.* at 18 (requested slides were presented "years before CFS ever filed the petition for rulemaking"). As explained in the agency's own Petition Denial, the decision-making process that ultimately resulted in the Petition Denial began in 1995. This final agency action must necessarily be evaluated by the Court based on the Agency's own articulated basis, which includes "deliberation and input on this topic between 1995 and 2017." Pls.' Mot. 8.

Defendants argue that an administrative record should include only those materials before the Agency "in the process" of denying the Petition, Defs.' Opp'n 18, and therefore should not include documents such as slides, viewed just over three years before the Petition Denial. *Id.* Such a position is contradicted by the incomplete record already produced, which includes a few materials going back as far as 1995. *See* AR24-191 (documents dating from 1995 to 2002); *Lockyer*, at *3 (stating that "[i]t is inconsistent with the [agency's] own recognition that the administrative record does include documents pre-dating February 2004 as reflected in its inclusion of other

documents dating from 2001 in the record submitted to the Court"). Documents such as presentation slides presented directly to USDA, data presented to USDA in the form of survey responses, and comments made during the time period the agency considered are precisely the type of documents that the Court has required Defendants to include in the Record. *See* Exs. A-D.,

E. The Record Includes Internal Materials and Communications Within the USDA.

Defendants also refuse to complete the record with internal emails Plaintiffs obtained via a Freedom of Information Act request.[3] Yet, such emails are exactly the type of material that courts routinely evaluate and rely upon when deciding whether agency decisions are arbitrary and capricious. For example, in *Washington Toxics Coalition v. Department of Interior*, the court reviewed a "voluminous" administrative record of agency correspondence, e-mails, notes, and internal critiques, and concluded that the agency's decision was arbitrary because it disregarded comments and critiques. 457 F. Supp. 2d 1158, 1182-96 (W.D. Wash. 2006). As these cases demonstrate, the types of internal agency analyses, critiques, drafts, revisions, and communications that USDA has omitted here play a vital role in judicial review under the APA. The agency cannot construct a post-hoc sanitized narrative of the decision-making process for this Court to review in an attempt to shield its decisions from the thorough, probing, in-depth review the law requires.

III. In the Alternative, this Court Should Supplement the Administrative Record with the Requested Documents.

The Ninth Circuit allows courts to supplement the record with evidence from outside the administrative record in several circumstances, including: (1) "if necessary to determine whether the agency has considered all relevant factors and has explained its decision;" and (2) "when supplementing the record is necessary to explain technical terms or complex subject matter." *See, e.g., McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041-42 (N.D. Cal. 2007) (quoting *Sw. Ctr. for*

[3] Plaintiffs' decision not to cite certain requested documents from Exhibits C and D in the Motion for Summary Judgment also has no bearing on the issue at hand: the mandatory requirement of a *complete* Administrative Record. Plaintiffs simply included documents in its possession according to the definition of the administrative record under this Circuit's instruction, and filed them as required by the stipulated deadline for Plaintiffs' Motion to Complete. In any event, Plaintiffs' concurrently filed opposition and reply brief references documents from all four exhibits.

Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996) (citations omitted)). Exhibits A-D meet both grounds. First, these documents show that USDA failed to consider all relevant factors in denying the Petition because these materials provide the court with insight into OFPA's legislative history, application of its statutory and regulatory provisions, and how USDA's interpretation has resulted in inconsistent organic standards. Second, these documents will help the Court understand the purposes of organic crop production standards as prescribed under OFPA, and whether and how these standards can be applied to hydroponic production.

USDA's Opposition illustrates why the first ground for supplementation applies. USDA asserts that only some of thousands of comments were "actually considered" by the agency and included in the Record, Defs.' Opp'n 15-16; in other words, USDA does not dispute Plaintiffs' assertion that all comments included were in support of organic certification. USDA's argument proves Plaintiffs' point. The oral and written comments opposing organic certification of hydroponic production, none of which were included, highlight key factors USDA failed to consider: the practical implications of application of statutory and regulator provisions, and how USDA's Petition Denial has resulted in inconsistent organic standards for certifiers and farmers on the ground. *See* Pls.' Opp'n 13; Ex. A at 42 (organic farmer explaining the time and resources invested in soil-building and soil management as part of organic certification); *id.* at 50 (detailing practices for soil-based farming that are not required for hydroponic operations); *id.* at 67 (describing soil management practices that are audited by a certifier); *id.* at 4-5 (same).

While claiming that the requested documents "do not address issues not already there," Defs.' Mot. 19, USDA fails to point to anything in the record that actually addresses these highly relevant factors. USDA does not point to anything in the record, let alone comments, describing farmers' decades-long expenses and time-consuming investments to build soil as a prerequisite for obtaining organic certification under current regulations.

Similarly, USDA also argues that the Record already "contains ample technical analysis, not meaningfully different from what Plaintiffs now seek to submit." Defs.' Opp'n 20. The fact that the Record includes some technical analysis does not render other additional expert input unnecessary. Plaintiffs seek to include oral comments from farmers and organic certifiers who have

direct experience in evaluating and practicing OFPA's soil fertility requirements and ecologically-based standards, and their expertise and on-the-ground experience are necessary to assist the Court's review. *See Pub. Power Council v. Johnson*, 674 F.2d 791, 794-95 (9th Cir. 1982) (recognizing that supplementing administrative record could be necessary to understand "complex and vague contract clauses").

Nor are the documents in Exhibit C and D "duplicative," as USDA suggests. Defs.' Opp'n 20. USDA does not identify a single document that Plaintiffs seek to include as being already in the record; the question is whether they are necessary to aid in this Court's review. Here, the organic certifier responses in Exhibit C and emails in Exhibit D demonstrate the differing understandings among certifiers and farmers of what constitutes hydroponic production. *See* Ex. C at 9-10 (describing differing definitions of "hydroponic production"); Ex. D at 29-37.These exhibits thus demonstrate that USDA knew certifiers lacked clarity on applying certifying hydroponic operations. An understanding of these differing interpretations is necessary for this Court to adequately review USDA's Petition Denial, as one major basis USDA offered for the Petition Denial was the agency's "clarity and consistency of the NOP's approval of organic hydroponics." It is also necessary to aid this Court's review of Plaintiffs' claim that USDA's Petition Denial has resulted in inconsistent organic standards.

The documents in Exhibit D also provide important details explaining the Agency's own need for clarity on how to exempt hydroponic operations from the requirements of OFPA and regulations. Ex. D at 18-20. These slides reveal the USDA's uncertainty on how to define soil ecology and the Agency's questions on how hydroponic operations could meet soil fertility requirements. *Id.* Defendants have cited no other documents in the Record discussing the questions the Agency itself had when considering exempting hydroponic operations from OFPA.

Essentially, Exhibits C and D show that: (a) USDA was aware of its lack of clarity to certifiers and non-uniform certification yet emphasized its "clarity and consistency" on the matter in the Petition Denial; (b) the Agency itself noted need for clarification and some justification for excluding hydroponic operations from mandatory statutory and regulatory provisions but nonetheless asserted in the Petition Denial that these provisions do not apply; and (c) the Petition

Denial fails to consider the practical implications of allowing organic certification of hydroponic operations on farmers. These factors are highly relevant for this Court's review, and warrant supplementing the record.

CONCLUSION

For these reasons, the Court should order USDA to complete the Record or supplement the Record.

Respectfully submitted this 1st of December, 2020.

/s/ Meredith Stevenson
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CERTIFICATE OF SERVICE

I hereby certify that on this December 1, 2020 that a true and correct copy of the foregoing document was filed electronically with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Meredith Stevenson
Meredith Stevenson