Case No. 15-3751 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

RESPONDENTS' COMBINED OPPOSITION TO MOTIONS TO SUPPLEMENT OR COMPLETE THE ADMINISTRATIVE RECORD

JOHN C. CRUDEN
Assistant Attorney General

DANIEL R. DERTKE
AMY J. DONA
MARTHA C. MANN
JESSICA O'DONNELL
Environment & Natural Res. Div.
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0851
jessica.o'donnell@usdoj.gov

Of Counsel:

AVI S. GARBOW, General Counsel
KARYN I. WENDELOWSKI
U.S. Environmental Protection Agency

ROB PARK, Acting General Counsel,
Department of the Army
DAVID COOPER, Chief Counsel,
U.S. Army Corps of Engineers

INTRODUCTION

The rules governing judicial review of agency actions are well-established. "The task of the reviewing court is to apply the appropriate . . . standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The record for review contains all documents directly or indirectly considered by the agency in reaching its decision, but documents that reflect the deliberative process need not be part of that record. That is because the Administrative Procedure Act's "arbitrary and capricious" standard of review requires the court to judge the agency's action on its stated rationale; the decisionmaker's mental processes and subjective intent are irrelevant to the court's review. Further, an agency's certification of the record is entitled to a presumption of regularity and good faith. Only in exceptionally narrow circumstances will courts look beyond the record compiled by the agency.

Motions to "complete" the record have been filed in this consolidated matter by twenty-eight State Petitioners ("State Movants") (Doc. No. 103-1),[1] the Business and Municipal Petitioners ("Business and Municipal Movants") (Doc. No. 104), and the petitioners led by Waterkeeper Alliance in No. 15-3837 ("Waterkeeper") (Doc. No. 106-1). The Movants' arguments—that the record in this case is deficient and must be "completed"—do not come close to rebutting the presumption of regularity

[1] The States of Michigan, Ohio, and Tennessee are not among the movants in the State Petitioners' Motion to Complete the Administrative Record. States' Mot. at 1.

afforded the record, nor do the Movants demonstrate any of the narrow exceptions warranting supplementation of the record. Some Movants accuse the Respondent Agencies of improperly hiding or omitting numerous documents from the record, but in fact they have misread the record index and ignored that many documents they cite are already in the record. The small collection of documents the Movants identify that are not in the administrative record either are deliberative documents or were not considered by the decisionmakers and therefor are not properly part of the record.

Here, the United States Environmental Protection Agency ("EPA") certified a robust record that thoroughly documents and explains the Agencies' decisionmaking process and rationale for the Clean Water Rule. The record contains over 20,400 documents and more than 350,000 pages, consisting of the Proposed Rule and Final Rule, numerous and lengthy technical and scientific reports, a large body of scientific literature, comments submitted by the public and the Agencies' response, and other materials. It is more than sufficient to enable this Court's review of the Rule.

The Movants cannot meet their substantial burden to show that the record is incomplete or that supplementation is appropriate, and the motions should be denied.

BACKGROUND

I. Factual and Procedural Background

These consolidated petitions seek review of the "Clean Water Rule" (the "Rule"), a regulation promulgated by EPA and the United States Army Corps of Engineers ("the Agencies"). 80 Fed. Reg. 37,054 (June 29, 2015). The Rule defines the

scope of "waters of the United States" subject to regulatory jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251-1387.

The Agencies published the Proposed Rule on April 21, 2014. "Definition of 'Waters of the United States' Under the Clean Water Act: Proposed Rule," 79 Fed. Reg. 22,188. Consistent with the requirements of the Administrative Procedure Act ("APA") for informal rulemaking, 5 U.S.C. § 553(b), the Proposed Rule set forth the nature of the rulemaking, the legal authority for the Proposed Rule, the terms and substance of the Proposed Rule, and a description of the subjects and issues involved. In the Proposed Rule, the Agencies also instructed interested parties to direct all comments and supporting materials to the rulemaking docket established at www.regulations.gov. 79 Fed. Reg. at 22,188. On the date the Proposed Rule was published, the Agencies posted to the rulemaking docket the Proposed Rule and supporting materials, including a draft of EPA's review and synthesis of the scientific evidence ("Science Report") and an economic analysis. Public submissions and supporting and related materials gathered or generated by the Agencies were thereafter placed in the docket on a rolling basis. *See* Decl. of John Goodin at ¶ 6 (Attachment 1).

The Agencies filed the certified administrative record index in this Court on August 24, 2015. Doc. No. 17-1. A corrected index was filed on November 20, 2015, following the Agencies' discovery that some technical documents had been inadvertently omitted. Doc. No. 69. At that time, the inadvertently omitted

documents did not have docket numbers corresponding to EPA's electronic docket. On May 13, 2016, after the Court consolidated these cases, the Agencies filed the same index that was filed on November 20, 2015; however, this index included docket numbers. Doc. No. 94.

As the State Movants concede, the certified administrative record for the Rule is "voluminous." States Mot. at 14. The record comprises over 350,000 pages of material. It is also comprehensive. Among the more than 20,400 documents in the record are approximately one million public comments[2] and the Agencies' 18-volume compendium of responses thereto; a technical support document (423 pages); the final Science Report (408 pages) and thousands of scientific references; the final Science Advisory Board ("SAB") peer review of the Science Report; the SAB's separate comments on the technical and scientific basis of the Rule; the economic analysis and supporting files thereto; an environmental justice report; an environmental assessment; a report on discretionary outreach to small entities; a summary of tribal consultation; a report on the discretionary consultation and outreach to state, local, and county governments; lists of stakeholder meetings held during and after the comment period; and a summary of outreach to states on the Proposed Rule. Consistent with EPA's guidance on compiling administrative records,

[2] The number of documents on the index is fewer than the number of individual comments because comments that are identical or nearly identical, such as mass mailers, are reflected as one document.

the certified record contains "all the factual, technical and scientific material or data considered" in issuing the Rule. EPA's Administrative Records Guidance (Sept. 2011) ("Guidance") at 4 (http://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf) (Attachment 2).

II. The Standard and Scope of Review of Final Agency Action

A. Review under the Administrative Procedure Act

The Clean Water Act does not articulate the standard or scope of review for final agency action. Therefore, the familiar APA standard of review applies and the Rule must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Sierra Club v. Slater*, 120 F.3d 623, 632 (6th Cir. 1997). The Court "appl[ies] the . . . APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also* 5 U.S.C. § 706. That record, rather than "some new record made initially in the reviewing court," is the "focal point" for judicial review. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). By confining judicial review to the administrative record, the APA precludes the reviewing court from conducting a *de novo* trial and substituting its opinion for that of the agency. *Kroger Co. v. Reg'l Airport Auth. of Louisville & Jefferson Cty.* 286 F.3d 382, 387 (6th Cir. 2002) (quoting *Camp*, 411 U.S. at 142).

The record for review consists of "all materials 'compiled' by the agency [] that were 'before the agency at the time the decision was made.'" *Sierra Club*, 120 F.3d at

638 (citation omitted). Courts have interpreted this as "all documents and materials that the agency 'directly or indirectly considered.'" *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs,* 448 F. Supp. 2d 1, 4 (D.D.C. 2006)(citation omitted). Federal agencies maintain the documents received and prepared in connection with a final agency action, and certify the administrative record when an action is judicially challenged. *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 56-57 (D.D.C. 2003), *aff'd on other grounds*, 428 F.3d 1059 (D.C. Cir. 2005). The certified record is entitled to a presumption of regularity; courts assume the agency properly designated the record absent clear evidence to the contrary. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also Bar MK Ranches v. Yuetter,* 994 F.2d 735, 740 (10th Cir. 1993).

When the challenged agency action is supported by a contemporaneous explanation, it "must . . . stand or fall on the propriety of that finding." *Camp*, 411 U.S. at 142-143. If the reviewing court is unable to evaluate the action on the basis of the record before it, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light*, 470 U.S. at 744. While judicial review under the APA is based on the "whole record," 5 U.S.C. § 706, it is well-established that internal agency deliberations are not part of the administrative record. *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004); *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 18 (D.D.C. 2009) (rejecting argument that agency's record was "skewed" because it did not include pre-decisional deliberative documents in the record); *see also* Guidance at 9-10 (Attachment 2).

B. Standard for Supplementation of the Administrative Record

Courts reviewing agency decisionmaking will go beyond the administrative record only in exceptional cases. *See Fla. Power & Light*, 470 U.S. at 743-44; *see also Charter Twp. of Van Buren v. Adamkus*, 188 F.3d 506, 1999 WL 701924, at *4 (6th Cir. Aug. 30, 1999) (court has discretion to expand or supplement the record in "exceptional circumstances"); *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

This Court has recognized that supplementation of the administrative record may be appropriate when: (1) "an agency has deliberately or negligently excluded certain documents from the record," or (2) "a court needs certain 'background' information to determine whether the agency has considered all relevant factors." *Latin Americans for Social & Econ. Dev. v. FHWA*, 756 F.3d 447, 465 (6th Cir. 2014) (citing *Sierra Club*, 120 F.3d at 638); *Coal. for Advancement of Reg'l Transp. v. FHWA*, 576 Fed. Appx. 477, 486-87 (6th Cir. 2014). "The burden is on the plaintiff to justify supplementation of the record and plaintiff must make a 'strong showing' of bad faith." *Latin Americans*, 756 F.3d at 465 (citation omitted).

Though inconsistent in their terminology, some courts have distinguished between "completing" the administrative record with documents that were allegedly excluded from the administrative record and "supplementing" the record with extra-record evidence. *See, e.g.*, *WildEarth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243,

1253 n.5 (D. Colo. 2010) (discussing inconsistency). The Agencies are unaware of any case in which this Court has recognized such a distinction. Regardless of how a party characterizes its motion, it cannot avoid its substantial burden to rebut the presumption of regularity afforded an agency's designation of the administrative record. "The [movant] cannot merely assert that the documents are relevant, were possessed by the entire agency at or before the time the agency action was taken, and were inadequately considered." *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 262 (D.D.C. 2013) (internal quotations omitted).

To overcome the presumption that the record was properly designated, the movant must first articulate "when the documents were presented to the agency, to whom, and under what context." *Pac. Shores*, 448 F. Supp. 2d at 7; *see also Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008) (movant must also provide "concrete" evidence that the documents it seeks to add to the record were actually before the decisionmakers). The movant must also identify "reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record." *Am. Petroleum Tankers*, 952 F. Supp. 2d at 262 (internal quotation marks and citation omitted). And where a party seeks to have a court consider extra-record documents (i.e., documents that are not properly part of the administrative record), the movant must show that one of the narrow exceptions to record review applies. *Charter Twp. of Van Buren*, 1999 WL 701924, at *4.

ARGUMENT

The Court should reject the Movants' arguments that the administrative record is incomplete and should be supplemented with deliberative documents and materials that were not considered, directly or indirectly, by the Agencies. As described *supra* at 4-5, the Agencies compiled an extremely robust record and the Movants' characterization of the record as "incomplete," "sparse," or improperly "constructed" (*e.g.*, States Mot. at 3) is at odds with reality.

The motions to "complete" the administrative record are, in fact, motions to supplement the record with extra-record evidence because the documents are already in the record or do not belong in an administrative record. The Movants have not shown—by any quantum of proof required to rebut the presumption of regularity afforded an agency's certification of the record—that any of the limited circumstances recognized by this Court justify consideration of extra-record materials. Nor have they shown any bad faith in compiling the record or in the promulgation of the Rule.

I. The court should not supplement the record to include deliberative documents.

A. Documents reflecting the Agencies' mental processes and internal deliberations are not part of the administrative record.

Deliberative materials generally are not part of the administrative record. *See* Guidance at 5-6 (Attachment 2). Documents are considered deliberative when they (1) make recommendations or express opinions on legal or policy matters, and (2) are prepared prior to a final decision in order to assist the agency decisionmaker in

arriving at his or her decision. *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992).[3] Such materials are not part of the record because judicial review under the APA is based on the rationale provided by the Agencies and the information considered by the Agencies in the course of making the decision—not on the Agencies' subjective intent or internal decisionmaking process. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999). "[T]he actual subjective motivation of agency decisionmakers is immaterial as a matter of law . . . ." *In re Subpoena Duces Tecum*, 156 F.3d 1279 (D.C. Cir. 1998). Thus, courts have long respected the importance of protecting information that reveals the deliberative process from judicial review, *see United States v. Morgan*, 313 U.S. 409, 422 (1941), and have overwhelmingly recognized that documents reflecting the deliberative process are, almost without exception, not part of the record on review.[4]

---

[3] *See also* Guidance at 6 ("Deliberative documents are those that are prepared in order to assist an agency decisionmaker in arriving at a decision and reflecting preliminary or candid internal views or advice of the kind that would be discouraged if the document were made part of the record for decision."); *cf. Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988) (defining "deliberative" for purposes of exemption from disclosure under the Freedom of Information Act ("FOIA") as "reflect[ing] the give-and-take of the consultative process").

[4] *See, e.g.*, *Voyageurs*, 381 F.3d at 766 ("[i]nquiry into the mental processes of administrative decisionmakers is to be avoided") (citation omitted); *Town of Norfolk*, 968 F.2d at 1458; *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325-29 (D.C. Cir. 1984), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986) (en banc) (pre-decisional transcripts and related documents not part of record); *Suffolk Cty. v. Sec'y of*

Further, protecting those materials from judicial scrutiny advances the fundamental policy of encouraging the free flow of ideas within agencies, with agency employees not inhibited by the prospect of judicial review of their notes and internal communications and deliberations. *See In re Subpoena Duces Tecum*, 156 F.3d at 1279; *San Luis Obispo Mothers for Peace*, 789 F.2d at 44–45; *cf. Schell*, 843 F.2d at 944 (ruling against disclosure of deliberative memorandum in FOIA case because disclosure "would likely 'stifle honest and frank communication within the agency'"). Thus, courts regularly decline to consider deliberative materials such as evaluations, internal memoranda and communications, summaries, drafts not provided for public comment, and analyses evidencing the agency's consideration of the decisions at issue. *See In re Subpoena Duces Tecum*, 156 F.3d at 1279; *San Luis Obispo,* 751 F.2d at 1325-29; *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008); *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 142-43 (D.D.C. 2002).

Several of the documents the Movants seek to add to the administrative record are deliberative.[5] The eight internal memoranda prepared by Corps staff contain

---

Interior, 562 F.2d 1368, 1384 (2d Cir. 1977) ("review of deliberative memoranda reflecting an agency's mental process . . . is usually frowned upon").

[5] These documents include:

(1) eight internal, pre-decisional memoranda drafted by Corps staff (Waterkeeper Mot. at 3-5 & Appx. A-H; States' Mot. at 7, 11 & Appx. at i, iii; Bus. & Mun. Mot. at 1-2);

(2) two interagency review drafts: EPA and Corps, DRAFT Final Economic Analysis of the EPA-Army Clean Water Rule (Apr. 27, 2015) ("Draft Final

opinions, mental impressions, and staff recommendations that were shared internally among Corps and Army personnel and with Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), in the course of interagency deliberations in connection with the Rule. Further, these internal memoranda flow from the subordinates to Ms. Darcy for consideration. They are pre-decisional and share the "give-and-take" of the consultative process and thus are clearly deliberative.

The Draft Final Economic Analysis and Executive Order 12866 Review Draft of the Final Rule are internal, pre-decisional documents submitted to the Office of Management and Budget ("OMB") for interagency review pursuant to Executive Order 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). These documents are drafts reflecting tentative views shared internally with other federal agencies in the context of deliberations over the final agency decision and thus these documents are also deliberative.

Similarly, any drafts of the Environmental Assessment ("EA") prepared in connection with the final Rule contain internal, preliminary views of agency staff, including opinions or recommendations on scientific, technical or policy matters that may not necessarily reflect the final decision. Any factual information is inextricably

---

Economic Analysis"); E.O. 12866 Review Draft Final Clean Water Rule (Apr. 3, 2015) ("E.O. 12866 Review Draft"); and

(3) a "Draft EA" (States Mot. at 10-11 & Appx. at iii).

Other purported "NEPA Documents" listed at pages iii-iv of State Movants' Appendix are addressed *infra* at 28-30.

intertwined with deliberative material and overlaps with other documents already included in the record. Because such views are tentative, pre-decisional, and reflect the deliberative process within the agency prior to a final decision, they are deliberative.

Supplementation of the record to include the deliberative materials identified by Movants would be contrary to the overwhelming weight of authority that deliberative materials are immaterial to judicial review under the APA, and would serve only to chill the frank and candid resolution of complex issues addressed by the Rule. *See* Guidance at 6 (Attachment 2). Moreover, adding these documents to the administrative record would not aid judicial review of the Rule, which is supported by a comprehensive record fully disclosing the Agencies' findings, rationale, and technical and scientific support. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (holding that review is of the *final* agency action, not the agency's drafts or preliminary determinations).

C. The Movants fail to meet their burden to show that the administrative record must be supplemented with the deliberative documents.

The Movants do not directly challenge the deliberative nature of the documents discussed above. Rather, they argue that the documents should be included in the administrative record because: (1) the documents were considered by the Agencies; (2) they have been made public; and (3) the documents are necessary for judicial review. States' Mot. at 15-17; Waterkeeper Mot. at 10-19; Bus. & Mun. Mot. at 1-2. Each of these arguments lack merit.

1. Deliberative documents are not part of the record due to their deliberative content, regardless of whether they were considered by the decisionmakers.

The Movants' argument that these deliberative documents are part of a "complete" administrative record because they were considered by the decision-makers is a non sequitur. By definition, deliberative materials may be considered by the decisionmaker. *See Schell*, 843 F.2d at 940 (explaining that a document is "predecisional when it is 'received by the decisionmaker on the subject of the decision prior to the time the decision is made,' and deliberative when it 'reflects the give-and-take of the consultative process'") (internal citations omitted). As discussed *supra* at 9-11, an agency's internal, pre-decisional deliberations fall outside of the administrative record for judicial review, notwithstanding their consideration by the decisionmaker, due precisely to their deliberative content.

2. Disclosure of deliberative documents is irrelevant.

The Movants' next argument—that certain of the deliberative documents must be included in the record because they have been made public—also fails. As an initial matter, the Agencies did not make public the internal memoranda prepared by Corps staff, which were provided only to Congressional Committees and only at the request

of the Committees.[6] Additionally, no draft EAs were made public during the rulemaking process.[7]

More importantly, the Movants erroneously conflate the deliberative process *privilege*—which may be asserted in non-APA litigation such as a FOIA matter and which can be waived—with the deliberative document doctrine in APA jurisprudence, which has been held to apply to deliberative materials whether or not those materials are in the public domain.[8] *See*, *e.g.*, *New Mexico v. EPA*, 114 F.3d 290, 295-96 (D.C. Cir. 1997) (memoranda recording meetings with the Department of Energy and OMB placed in public docket but excluded from administrative record); *Ad Hoc Metals*, 227 F. Supp. 2d at 141-43 (interagency review memoranda and internal agency

---

[6] In providing the documents, Assistant Secretary Darcy noted that the documents were exempt from disclosure under FOIA, 5 U.S.C. § 552, and reserved the right to claim them as materials that may be privileged and withheld from release under § 552(b)(5). *See, e.g.*, Attachment 3 (Letter from Assistant Secretary Darcy to House Committee).

[7] Contrary to State Movants' suggestion, States Mot. at 11, no Draft EAs were posted to and then removed from the rulemaking docket. As stated in the email cited by State Movants (States Mot. Appx. at iii), consistent with the Corps' general practice, the Corps would "make the final EA available to the public and interested parties when the final rule and economic analysis documents are released." Email from Jennifer Greer, to Kansas State Representative Hedke, Oct. 9, 2014, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-19419. (N.B.: the link provided in the State Movants' Appendix is incorrect).

[8] In accordance with Executive Order 12866, § 6(a)(3)(B), EPA submitted a draft Final Rule to OMB before promulgation and placed in the public docket the OMB review drafts and comments made by OMB staff and other federal agencies during the interagency review process. *See id.* § 6(a)(3)(E)(i), (ii). These materials are not part of the administrative record, notwithstanding their placement in the docket.

communications properly excluded from administrative record). These internal memoranda and drafts were not withheld from the record based on privilege, though the Agencies might assert privilege over the documents in another context; rather, they are not part of the administrative record because they are immaterial to the Court's review under the APA. *See Tafas,* 530 F. Supp. 2d at 801 (agreeing that regardless of privilege, "internal emails, correspondence, summaries, and drafts that [plaintiff] seeks are not properly part of the administrative record in the first place" because they are "irrelevant to arbitrary and capricious review"); Guidance at 5, n.4 (Attachment 2) (stating that deliberative documents are not included in the record "based on relevance, not privilege").

As the *San Luis Obispo* court stated:

> Inclusion in the record of documents recounting deliberations of agency members is especially worrisome because of its potential for dampening candid and collegial exchange between members of multi-head agencies. While *public* disclosure stifles debate to some extent, *judicial* disclosure would suppress candor still further since off-hand remarks could turn out to have a *legal* significance they would not have if barred from the record on review.

751 F.2d at 1326 (emphasis in original).

Moreover, there would be a deleterious effect on the decisionmaking process if courts were to probe the mental processes of decisionmakers. "Just as *disclosure* of predecisional documents would 'injure the consultative process within the government,' so too would *judicial review* of the agency's deliberations

in this case." *Kan. State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (emphasis added; citation omitted); *see also* Guidance at 5.

3. The certified administrative record filed with the Court is adequate for judicial review.

The Movants' attempt to argue that the deliberative documents should be added to the record because the Movants believe the documents are necessary for this Court's review of their challenges also fails. First, the State Movants' contention that they are entitled to use the documents to "attack" the Agencies' conclusions (States Mot. at 17) misapprehends the APA standard of review and ignores the underlying rationale for non-inclusion of deliberative materials in an administrative record. The "arbitrary and capricious" standard in the APA is narrow: if the record shows that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," it must be upheld. *Motor Vehicle Mfrs.*, 463 U.S. at 43. This Court's task is to determine whether the Clean Water Rule is supported by the reasons given by the Agencies and by the scientific and technical record compiled, not whether the "recommendations or analysis" in the deliberative documents is "superior" to that reflected in the record. States' Mot. at 17.[9]

[9] The States Movants' related argument that they are prejudiced because the Agencies can pick and choose which drafts to include in the administrative record is misplaced. States Mot. at 16-17 & n.6. The Agencies did not exclude documents from the administrative record simply because they are drafts. The Draft Connectivity Report and the Section 6 Echo Lake TMDL document cited by the Movants were included

With respect to Waterkeeper's argument that the documents are needed for their National Environmental Policy Act ("NEPA") challenges, there is ample information in the record for the Court to assess whether NEPA applies in the context of this Rule, *see infra* at 28 n.14, and, if so, whether the Agencies complied with the requirements of NEPA. The record includes the Environmental Assessment, and the requirements of NEPA are established by statute and regulation, not via the pre-decisional memoranda Waterkeeper seeks to have the Court consider. In addition, the Agencies' Response to Comments document identifies and responds to a number of comments discussing environmental documentation and NEPA issues, including the sufficiency of the Environmental Assessment. Clean Water Rule Response to Comments – Topic 13 Process Concerns and Administrative Requirements at 313-25, Certified Index, Doc. 94, EPA-HQ-OW-2011-0880-20872.

Although Waterkeeper contends in a conclusory manner that the deliberative memoranda "show that the Agencies failed to consider all the relevant factors," Waterkeeper Mot. at 15, it provides no citation to what it presumes might be "the relevant factors," nor does it link the memoranda to those factors. Waterkeeper also asserts that the memoranda "contain factual

---

because they reflect factual information that the Agencies considered in developing the Final Rule and they were provided to the public for comment. *See generally*, 79 Fed. Reg. 22,188, Appx. A.

summaries that undermine the validity of two of the key documents relied upon [by] the Agencies in promulgating the Clean Water Rule." *Id.* But Waterkeeper only cites to the differences of opinion and criticism of those documents. *See id.* Moreover, to the extent a court finds a lack of support in the record, the proper remedy is not to consider deliberative materials that express non-final opinions that may conflict to some degree with the final decision, as Waterkeeper advocates. Rather, the appropriate remedy in such circumstances is to remand to the agency. *Kroger*, 286 F.3d at 387.

Also unavailing is Waterkeeper's alternative argument that the Court should include "factual information and summaries of information" appended to an April 24, 2015 memorandum by Jennifer Moyer. Waterkeeper Mot. at 19 & Ex. C. Contrary to Waterkeeper's assertions, the information in Appendix A to the April 24 Moyer Memorandum is not purely factual. As explained in the memorandum itself, Appendix A contains the analysis and opinions of Corps employees of information in jurisdictional determinations and permits that was used to "facilitate discussions" with EPA, as part of "a robust interagency discussion." Waterkeeper Mot. Ex C, at 1-2. Because it is clear from the face of the documents that any factual information in Appendix A to the April 24 Moyer memo is "inextricably intertwined with policymaking processes," such information is properly considered deliberative, *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 5 (6th Cir. 1980), and thus the Agencies were correct in not

including this particular information in the administrative record. *See also Schell*, 843 F.2d at 940 (recognizing that even "purely factual material may so expose the deliberative process within an agency" that it must be deemed deliberative). Further, the record includes over 400 jurisdictional determinations that were considered during the rulemaking, which provide ample basis for the Court and the Movants to evaluate the basis for the Agencies' decisions in the Rule. *See* Certified Index, Doc. No 94, EPA-HQ-OW-2011-0880-20876.

To the extent that Waterkeeper suggests that the Agencies are acting in bad faith by not including pre-decisional deliberative documents in the record, it is incorrect and has not made the "strong showing" required to defeat the presumption of regularity. *Latin Americans*, 756 F.3d at 465. Absent "serious, nonconclusory allegation[s] of bad faith," *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987), courts may not presume that an administrative record is "rigged" and consider extra-record evidence that delves into the agency's thought processes. The memoranda do not reveal that the Corps "swept . . . serious criticism under the rug." Waterkeeper Mot. at 14. Rather, the memoranda were part of a robust deliberative process. *See* Statement of Assistant Secretary Darcy Before the Comm. on Envt. & Public Works (Sept. 30, 2015) (Attachment 4) at 3 (recognizing valuable inputs of Corps staff and officials, and noting the inevitable internal differences of opinion).

Finally, Waterkeeper's reliance on other bases to supplement the record recognized in *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (Waterkeeper

Mot. at 12, 13) is misplaced. The D.C. Circuit has made clear that "*Esch* has been given a limited interpretation since it was decided, and at most it may be invoked to challenge gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review." *See Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013) (citation omitted). Waterkeeper may dispute the findings and conclusions in the Environmental Assessment and Finding of No Significant Impact, Waterkeeper Mot. at 14, but it does not assert any gross procedural deficiencies.

In sum, the Movants have failed to show that the record is incomplete as a result of the omission of these deliberative documents or any other basis for this Court to consider them.

C. A privilege log is not appropriate or warranted.

The Movants argue that the Agencies must identify documents withheld from the record on a claim of privilege in a log. States Mot. at 14; Waterkeeper Mot. at 19. However, "[t]he law is clear: [since] predecisional deliberative documents are not part of the administrative record to begin with, . . . they do not need to be logged as withheld from the administrative record." *Great Am. Ins. Co. v. United States*, No. 12-C-9718, 2013 WL 4506929, at *8 (N.D. Ill. Aug. 23, 2013) (internal quotation marks and citations omitted). *See also Cook Inletkeeper v. EPA*, 400 Fed. Appx. 239, 240 (9th Cir. 2010) (denying motion to require preparation of privilege log). Indeed, since deliberative materials are not part of the record, those documents were not compiled

and withheld from the record, consistent with EPA's Guidance. Requiring production of a log therefore would require the Agencies to undertake a search for internal documents and index them. Doing so for this multi-year rulemaking process, with complex technical and policy issues, would be time and resource intensive and disruptive to this litigation, all while being irrelevant to the question of whether the rule is consistent with the APA based on the administrative record provided by the Agencies.

The Movants' contention that a privilege log is necessary to assess the "validity" or "legitimacy" of the record, *see* Waterkeeper Mot. at 19 and States' Mot. at 18, must be rejected. "[T]he argument that a [movant] and the Court should be permitted to participate in an agency's record compilation as a matter of course contravenes the standard presumption that the agency properly designated the Administrative Record." *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32-33 (D.D.C. 2013) (internal quotation marks and citation omitted). While this Court has not addressed whether a privilege log may be ordered in an APA record-review case, it has otherwise required a showing of improper motives as a basis to order discovery in an APA matter. *E.g., Charter Twp. of Van Buren*, 1999 WL 701924, at *4 (citation omitted). No such showing has been made here.

Indeed, none of the Movants contends that the certified record index filed in this litigation is contrary to EPA's Guidance, which is based on the APA and case law regarding administrative records, or that EPA regularly provides a privilege log when

filing its administrative records with reviewing courts. That the State Movants cite a few examples in which an agency filed a privilege log does not mean that a privilege log is *required* under the APA or relevant case law.

Accordingly, the Movants' demand that the Agencies provide a privilege log is without support and should be denied.

II. Documents not considered in reaching the final decision are appropriately not in the record.

In addition to the deliberative materials discussed in part I, *supra*, the State Movants and Business and Municipal Movants claim an assortment of documents have been omitted from the record. States' Mot. at 8-14 and Appx. at ii-vii.;[10] Bus. & Mun. Mot. Appx. But these Movants' claims suffer from an incorrect notion of what constitutes an administrative record. Under their theory, any document related in any way to a rule–such as information posted on for public communication purposes or prior regulatory proceedings–must be part of the record. But as discussed above, a record consists of non-deliberative documents directly or indirectly considered by the Agencies in making a decision, not merely documents that are in existence or publicly available. A record does not include "every potentially relevant document existing within the agency," *Pac. Shores*, 448 F. Supp. 2d at 7, or "every scrap of paper that could or might have been created." *TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002). Perhaps because the movants misconstrue what documents are part of

[10] Many of the items listed on pages ii-vi of the States' appendix appear multiple times.

the record, the movants have not even attempted to meet their burden to rebut the presumption of regularity that attaches to the record.

As an initial matter, many of the documents cited by the State Movants are already in the record, as the Movants are fully aware. *See* States' Mot., Ex. A at 8-10 (Agencies' Opposition to Motion to Complete Record in *North Dakota v. EPA*, Case No. 15-cv-52-RRE-ARS, Doc. No. 110 (D.N.D., Dec. 21, 2015)). Moreover, in order to rebut the strong presumption of regularity that attaches to the record, a movant must clearly identify the circumstances in which the documents became part of the record, *Am. Petroleum Tankers*, 952 F. Supp. 2d at 262, and "'reasonable, non-speculative' grounds for their belief that the documents were directly or indirectly *considered*" by the decisionmaker. *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 17, (D.D.C.), *vacated in part on other grounds*, No. 10-01638, 2013 WL 11241368 (D.D.C. July 30, 2013) (emphasis in original); see also *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (a party seeking to overcome the presumption that a government official has acted properly must present "clear evidence to the contrary"). Here, the Movants have fallen far short of meeting their burden.

A. Documents are not part of the administrative record simply because they are publicly available.

First, the States and the Business and Municipal Movants contend that "many publicly available documents" were excluded from the administrative record index. States Mot. at 8; Bus. & Mun. Mot. at 2 (joining argument). The Movants cite to six

"examples" of this category of documents. States Mot., Appx. at ii. It is unclear why the State Movants identify these documents, however, since the Agencies previously stated that all of the documents listed at page ii of the appendix to the States' motion are in fact in the record. *See* States Mot., Ex. A at 8-9 (items 1-6).[11] In a footnote, the State Movants also generally refer to a web page for the Clean Water Rule and a web page for the Science Advisory Board's review of the Draft Science Report and suggest that the Agencies overlooked record materials posted on those web pages. States Mot. at 8 n.2. The State Movants fail to cite to any document at either website, much less any non-speculative grounds upon which they assert that any document from either website was considered by the Agencies in promulgating the Rule.

The Business and Municipal Movants further assert that the record should have included five additional "Public EPA Documents." Bus. & Mun. Mot. Appx. The first of those documents is a blog post by EPA Administrator Gina McCarthy and Assistant Secretary Jo-Ellen Darcy announcing the signing of the Clean Water Rule. *See* Attachment 5. The Movants provide no rationale or support for their assertion that the blog post should be included in the record, as there is no indication that the content of the statement (which contains information found elsewhere in the record)

[11] The Agencies wish to clarify that with respect to the last document listed at page ii of the State Movants' appendix—"Remarks of Gina McCarthy at Agricultural Business Council of Kansas City on Clean Water Proposal (July 10, 2014)—the document that is in the record at EPA-HQ-OW-2011-0880-18005 is a news report that extensively quotes Administrator McCarthy's remarks.

was ever considered as part of the rulemaking process. The same is true for three other social media postings by EPA employees in support of protecting clean water, and a general statement of widespread support for the need to clarify the scope of waters protected under the Clean Water Act.[12] *See* Attachments 6-9. There is no indication that these postings were considered as part of the rulemaking process.

B. The Movants fail to show that all documents filed with the agencies prior to the April 2014 Proposed Rule are part of the record.

The State Movants and Business and Municipal Movants contend that "all documents filed with the Agencies prior to April 2014" are missing from the record. States' Mot. at 9; Bus. & Mun. Mot. at 2 (joining argument). In fact, there are many documents in the record that pre-date the April 2014 Proposed Rule. More importantly, however, there is no legal basis for Movants' suggestion that the Court direct the Agencies to assemble a lengthy record for a Proposed Rule. *See* 5 U.S.C. § 553(b)(1)-(3) (requirements for proposal), § 553(c) (requirements for public comment and final rule). As the Supreme Court recently re-affirmed, courts generally are not free to require procedures beyond those set forth in the APA. *See Perez v. Mortgage*

[12] The Business and Municipal Movants erroneously characterize the last of the "Public EPA Documents" listed in their appendix as a "public advertisement of industry, recreational, and environmental organizations EPA claims support the [Clean Water] Rule." Bus. & Mun. Mot. Appx. The news release, which was issued the same day the Proposed Rule was issued, merely quotes organizations and entities that supported rulemaking to clarify the scope of waters protected under the Clean Water Act. *See* Attachment 9.

Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978)).

The Movants cite an Advance Notice of Proposed Rulemaking ("ANPR") on the Clean Water Act Regulatory Definition of "Waters of the United States" that was published *more than a decade before* the Proposed Rule. 68 Fed. Reg. 1991 (Jan. 15, 2003). States' Mot. at 9-10. The ANPR included no specific proposal and only generally requested public input on the issues associated with the definition of "waters of the United States" and implications of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). 68 Fed. Reg. at 1991. The Supreme Court subsequently addressed the scope of Clean Water Act jurisdiction again in *Rapanos v. United States*, 547 U.S. 715 (2006). Due to the significant lapse in time between the ANPR and the Proposed Rule and the changes in the legal landscape post-*Rapanos*, the Agencies did not revisit the comments that had been submitted in 2003 in response to the ANPR.

In response to the 2014 publication of the Proposed Rule, some commenters re-submitted their earlier comments to the 2003 ANPR; those re-submitted comments are in the record.[13] While courts commonly take judicial notice of a Federal

[13] For example, several comments to ANPR were part of the attachments to Water Advocacy Coalition's comments (http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-17921); other comments to ANPR were part of the attachments to comments from Natural Resources Defense Council and Southern Environmental Law Center

Register notice such as the ANPR, *see, e.g.*, *Rohnert Park Citizens to Enforce CEQA v. DOT*, No. C 07-4607 TEH, 2009 WL 595384, at *3 (N.D. Cal. Mar. 5, 2009), the Movants' contention that all comments submitted in response to the ANPR are "surely material 'compiled' and 'before' the Agencies during the rulemaking," States Mot. at 10, is merely speculation. A document is not part of an administrative record simply because it was once provided to an agency; it is included in the administrative record if the agency decision maker *considered* it in connection with a specific final agency action. The Movants have not provided specific facts to support their claim that the record should include all documents associated with the ANPR.

C. The Movants fail to identify any specific documents "related to" NEPA compliance that were omitted from the record.

The State Movants and Business and Municipal Movants assert that a "variety of documents related to [National Environmental Policy Act] compliance [ ] were originally posted on the Agencies' websites for this rulemaking but are not listed in the Index." States Mot. at 10; Bus. & Mun. Motion at 2 (joining argument). Even if NEPA requirements applied to the Rule, the Movants are wrong.[14]

(http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-17477).

[14] NEPA requires federal agencies to create an Environmental Impact Statement ("EIS") for "major Federal actions" significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). Where the significance of a given action's effects is not readily apparent, agencies may undertake an Environmental Assessment ("EA"). 40 C.F.R. §§ 1501.4, 1508.9. If an agency reaches a Finding of No Significant Impact based upon an EA, no EIS is required. *Id.* § 1508.13. Clean Water Act Section 511(c),

First, the Movants do not describe with the required specificity what documents they contend are missing from the record in connection with NEPA review. The Army voluntarily prepared an Environmental Assessment, which is in the record. There are no other documents "published as part of the NEPA process." States Mot. at 11. Second, the State Movants' statement that "the Agencies must include any discussions, correspondence, analyses, and draft decision documents regarding NEPA compliance" is not supported by the regulations they cite.

Third, with respect to the documents the State Movants cite in their Appendix, three of the documents identified at pages iii-iv of the appendix to the States' motion are already in the certified record, as the Movants are well aware. *See* States Mot. Ex. A at 9 (items 7-9). As described above, the deliberative memoranda and drafts identified at Appendix page iii of the States' Motion are not part of the administrative record. The remaining items listed at Appendix page iii-iv were not considered by the Agencies. The SAB materials listed at Appendix page iv are discussed in part II.D, below. There is no basis to include the remaining two documents on Movants' list in the Appendix. The 2009 letter from the Council on Environmental Quality, EPA, and the Departments of the Army, Agriculture, and Interior to Representative James

---

33 U.S.C. § 1371(c), exempts the Rule from NEPA's requirements. With two exceptions not relevant here, "no action of the [EPA] Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]." 33 U.S.C. § 1371(c)(1).

Oberstar contains those agencies' response to the Congressman's query regarding *legislation* to amend the Clean Water Act; it was not directly related to this rulemaking. Attachment 10. The States' citation to a letter from the Chamber of Commerce to the House Committee on Small Business, *see* Attachment 11, is even more perplexing, as it does not appear the letter was ever submitted to the Agencies.[15]

D. Materials relating to the Science Advisory Board's separate processes for evaluating the Science Report and Proposed Rule are not properly part of the record.

The State Movants' contention that the record should include all materials "attributed to" or "relating to" the work of an independently-functioning Science Advisory Board fails for two reasons. *See* States Mot. at 11-12; *see also* Bus. & Mun. Mot. at 1-2 (joining argument). First, three of the documents Movants seek to add to the record are already in the record as attachments to comments on the Proposed Rule. *See* States Mot. Ex. A at 9 (items 7-9). Second, the Movants improperly attempt to conflate the work of the SAB with the work of the Agencies. Unless materials related to the SAB's separate review of the Science Report were submitted to the Agencies and considered by the decisionmakers, they are not part of the record.

The SAB was established at Congress' direction to provide scientific advice to EPA. 42 U.S.C. § 4365. The SAB's work is conducted by subcommittees or panels

[15] The cited letter is similar to pages 37-40 of the Chamber of Commerce's comment on the Proposed Rule, which is in the record. Certified Index, Doc. No. 94, EPA-HQ-OW-2011-0880-19343.

that it convenes in accordance with its charter, and its recommendations are forwarded to EPA, as appropriate. The SAB's advisory activities are independent of and separate from any EPA rulemaking.

Here, EPA requested that the SAB conduct an independent peer review of EPA's Draft Science Report. 80 Fed. Reg. at 37,062. In addition, the SAB elected, under 42 U.S.C. § 4365(c)(2), to review the scientific and technical bases of the Proposed Rule and provide its advice and comments. 80 Fed. Reg. at 37,064. Both the SAB's review of the Draft EPA Science Report and the SAB's comments on the Proposed Rule are included in the record. Certified Index, Doc. No. 94, EPA-HQ-OW-2011-0880-8046, EPA-HQ-OW-2011-0880-7531. However, the Agencies did not receive or consider all materials submitted to or generated by the SAB as part of the SAB's independent review of the Draft Science Report and Proposed Rule. Those materials are part of the SAB's separate process, and not the Agencies' rulemaking process. Thus, they are not properly part of the administrative record for the rulemaking. *Cf. Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 457 (D.C. Cir. 1994) (rejecting claim that record was incomplete where the conclusions of consulting agency and committee were in the record but underlying documents prepared by the consulting agency and committee were not in the record).

Because the State Movants provide no facts to support a finding that the Agencies considered all documents submitted to or generated by the SAB, and

provide no legal support for a finding that all materials before the SAB must be part of the record, their request to supplement the record with such materials must fail.

E. Federal Emergency Management Agency Flood Zone Maps

The State Movants and the Business and Municipal Movants also seek to have all Federal Emergency Management Agency ("FEMA") flood zone maps included in the record. States' Mot. at 13; Bus. & Mun. Mot. at 2 n.2 & Appx. In support, the Movants cite to a sentence of the preamble to the final Clean Water Rule in which the Agencies state their intent to use FEMA flood zone maps to identify the location and extent of floodplains in future determinations of the boundaries of waters deemed to be "adjacent waters" under the Rule. States Mot. at 13 (citing 80 Fed. Reg. at 37,081).

Though the Agencies base the definition of "waters of the United States" in part on the 100-year floodplain, *see* 80 Fed. Reg. at 37,081/1 (regarding "adjacent" waters) and *id.* at 37,087/3 (regarding "case-specific" waters), the use of the "100-year floodplain" in the Rule to define the extent of "neighboring" waters does not establish that the Agencies considered each and every FEMA flood zone map. Rather, the Rule's reliance on the 100-year floodplain refers to the area with a one percent annual chance of flooding, consistent with the FEMA definition. Because the Agencies did not consider all FEMA flood zone maps during the rulemaking, they do not belong in the record.

III. The Movants' Generalized Allegations Regarding Omitted Documents and the Form of the Index Are Insufficient to Rebut the Presumption that the Record is Complete.

Perhaps hoping to bolster their argument that the record is incomplete, the State Movants and Business and Municipal Movants make additional generalized allegations of missing documents and criticisms about the certified index to the record. None of these allegations is sufficient to rebut the presumption of regularity afforded to the administrative record designated by the Agencies.

The State Movants' claim that "large swaths" of documents were omitted from the administrative record (States Mot. at 13) is based on their mistaken assumption that the certified index to the record is "organized by docket number, so the places where the Agencies skipped documents are readily apparent." *Id.* In fact, the certified index filed with the Court is organized by document type, not by docket number. Goodin Decl., Attachment 1 at ¶ 5. An index organized by docket number is attached. *Id.* at Attachment A. No "large swaths" of documents are missing. Of the 20,426 entries in the rulemaking docket, only 455 are *not* in the certified index. *Id.* at ¶ 7. As explained in the attached declaration, *id.*, of the 455 documents:

- 3 of the documents are deliberative documents related to OMB review;
- 4 of the documents are Federal Register notices that EPA will correct the index to include;
- 2 of the documents were erroneously placed in the docket;

- 7 of the documents were mistakenly deemed late; EPA will correct the index to include those documents; and

- the remaining 439 documents are comments submitted after the deadline for public submissions; 43 of the late comments were considered and EPA will correct the index to include those documents. The rest were not considered.

"[M]inor discrepancies" in a record are "woefully inadequate to justify going beyond the administrative record." *Tafas*, 530 F. Supp. 2d at 799 (citation omitted).

The Business and Municipal Movants' assertion that the Agencies must include in the administrative record "[a]ll e-mail correspondence and meeting minutes between or internal to EPA and the U.S. Army Corps" is totally devoid of support. Bus. & Mun. Mot. at 7. A party "must identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents and data that are 'likely' to exist." *California v. U.S. Dep't of Labor*, No. 2:13-cv-02069, 2014 WL 1665290, at *5 (E.D. Cal. Apr. 24, 2014) (citation omitted). The Business and Municipal Movants do not identify any specific emails or meeting notes that are missing or any other evidence to support their demand to collect such materials and include them in the record, regardless of whether they were considered by the decisionmaker or regardless of whether they are deliberative.

Also unpersuasive is the State Movants' suggestion that the Agencies must amend the record index so that the Court and the parties can evaluate whether the administrative record is complete, or that the Agencies must confirm which

documents they considered. *See* States Mot. at 14. It is the Movants' burden to establish that the record is lacking to overcome the presumption of regulatory afforded an agency's record. *Latin Americans*, 756 F.3d at 465.

EPA has certified that the index of documents filed with the court is "the complete administrative record in support of the Clean Water Rule." Certified Index, Doc. No. 94 at 4. In accordance with EPA's Guidance, the certified record contains "all the factual, technical and scientific material or data considered" in issuing the Rule "whether or not those materials or data support the decision." Guidance at 4 (Attachment 1). State Movants cite no requirement that the administrative record index separately list all attachments to documents. Rule 16 of the Federal Rule of Appellate Procedure provides that an agency may file with the court "a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record." EPA's certified index, which lists over 20,400 documents comprising the administrative record, fully satisfies Rule 16. In the absence of *any* showing that the agency negligently or deliberately omitted documents from the record, the Agencies' certified index is presumed sufficient.

CONCLUSION

The motions to supplement the record should be denied.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division

/s/ Jessica O'Donnell
DANIEL R. DERTKE
AMY J. DONA
MARTHA C. MANN
JESSICA O'DONNELL
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
T: (202) 305-0851
daniel.dertke@usdoj.gov
amy.dona@usdoj.gov
martha.mann@usdoj.gov
jessica.o'donnell@usdoj.gov
Counsel for Respondents

Dated: July 22, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be electronically filed on July 22, 2016. All registered counsel are to receive notice of the filing via the Court's electronic case filing system.

/s/ Jessica O'Donnell
United States Department of Justice
Counsel for Respondents