UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR ENVIRONMENTAL HEALTH, et al.,

Plaintiffs,

v.

SONNY PERDUE, et al.,

Defendants.

Case No. 18-cv-01763-RS

**ORDER GRANTING MOTION TO COMPEL COMPLETION OF THE ADMINISTRATIVE RECORD**

## I. INTRODUCTION

In March 2018, Plaintiffs[1] filed suit under the Administrative Procedure Act ("APA") challenging the United States Department of Agriculture's withdrawal of the Organic Livestock and Poultry Practices ("OLPP") Rule. Defendants[2] produced a Proposed Administrative Record containing approximately 150,000 pages of material. Plaintiffs move to compel completion of the Administrative Record with 47,000 public comments submitted in response to a related rulemaking, and production of a privilege log identifying all materials withheld on the basis of privilege. For the reasons set forth below, Plaintiffs' motion to compel is granted.

[1] Plaintiffs in this case are Center for Environmental Health, Center for Food Safety, Cultivate Oregon, International Center for Technology Assessment, National Organic Coalition, Animal Legal Defense Fund, and The Humane Society of the United States.

[2] Defendants in this action are Sonny Perdue, in his official capacity as Secretary of the USDA; Bruce Summers, in his official capacity as Acting Administrator of the USDA's Agricultural Marketing Service ("AMS"); Jennifer Tucker, in her official capacity as Deputy Administrator of the AMS National Organic Program (collectively, "Defendants" or "USDA").

## II. BACKGROUND

In May 2017, the USDA announced the possible withdrawal of the OLPP Rule originally scheduled to enter effect on March 20, 2017 and presented to the public the Proposed Options Rule. The Proposed Options Rule set forth four possible courses of action for the OLPP Rule, (1) implementation, (2) indefinite suspension, (3) delay, or (4) withdrawal. The public then had a chance to comment on the proposed rule. At the end of the comment period, 47,000 public comments had been submitted to the USDA. In November 2017, the USDA chose to delay implementation. Then, in December 2017, the USDA presented a proposed rule withholding the OLPP Rule without a replacement alternative ("Proposed Withdrawal Rule"). The USDA's stated reasons for the Proposed Withdrawal Rule were "(1) its analysis that the OLPP Rule's animal welfare protections exceeded the limited grant of statutory authority . . . and (2) its concerns that the OLPP Rule would unnecessarily hamper innovation and growth in the organic industry and impose undue burdens." (Opp'n Brief 2 (citing 82 Fed. Reg. 59,989-90)).

Once again, members of the public received an opportunity to comment on the Proposed Withdrawal Rule. By the end of the comment period in January 2018, the public had submitted around 72,000 comments. In March 2018, the USDA issued the final Withdrawal Rule, which withdrew the OLPP Rule due to a new statutory interpretation and a "revised assessments of its benefits and burdens and the USDA's view of sound regulatory policy." 83 Fed. Reg. 10,775 (Mar. 13, 2018). Plaintiffs challenge this rule, alleging the USDA did not comply with APA.

On December 13, 2018, the USDA submitted a Proposed Administrative Record, which it represented as "a true, correct, and complete copy of the non-privileged documents that were directly or indirectly considered in connection with the March 13, 2018 Withdrawal Rule at issue in [this case]." The Proposed Administrative Record contains around 150,000 pages, including 72,000 public comments on the Proposed Withdrawal Rule, several public documents from the rulemaking docket, and approximately 30 pages of internal agency communications. It also includes the National Organic Standards Board's ("NOSB") recommendations from 2002, 2009,

2011, and 2017.[3] The Proposed Options Rule—which the USDA declined to adopt—is also included in the Proposed Administrative Record, however the 47,000 public comments submitted in response to that proposed rule are not.

The USDA acknowledges that it withheld certain internal documents, however the agency claims these omitted materials fall under either the deliberative process privilege or some other privilege. The agency did not, however, produce a privilege log identifying these documents or the privilege that purportedly applies to each one.

## III. LEGAL STANDARD

"Generally, judicial review of agency action is limited to review of the record on which the administrative decision was based." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Motions to complete the Administrative Record may be granted where the agency fails to submit the "whole record." *See* 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party"). The "whole record" 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 (quotation omitted); *see also Portland Audobon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (explaining that "[t]he 'whole record' includes everything that was before the agency pertaining to the merits of its decision.").

In general, any agency's Proposed Administrative Record is "entitled to a presumption of completeness." *Sierra Club v. Zinke*, No. 17-cv-07187, 2018 WL 3126401, at *3 (N.D. Cal. June 26, 2018); *Oceana, Inc. v. Pritzker*, No. 16-cv-06784, 2017 WL 2670733, at * 2 (N.D. Cal. June 21, 2017); *Gill v. Dep't of Justice*, No. 14-cv-03120, 2015 WL 9258075, at *4-5 (N.D. Cal. Dec. 18, 2015). "Clear evidence" must be presented by the plaintiffs to overcome this presumption. *Gill*, 2015 WL 9258075, at *5. "To meet this standard, the plaintiff must identify the allegedly omitted materials with sufficient specificity and 'identify reasonable, non-speculative grounds for

[3] The NOSB recommendations asked for in Plaintiffs' motion are in the Administrative Record without dispute as they were attached to the Center for Food Safety's comments on the Proposed Withdrawal Rule.

the belief that the documents were considered by the agency and not included in the record.'" *Oceana*, 2017 WL 2670733, at * 2 (quoting *Gill*, 2015 WL 9258075, at *5).

## IV. DISCUSSION

Plaintiffs seek completion of the Administrative Record with (1) all internal documents which the agency directly or indirectly considered, and (2) the 47,000 public comments submitted in response to the Proposed Options Rule. If the USDA wishes to withhold certain internal documents on the basis of privilege, Plaintiffs request production of a privilege log identifying the allegedly privileged documents.

### A. Internal Agency Documents

The USDA argues deliberative materials are not part of the Administrative Record in the first instance, therefore a privilege log documenting what records were withheld is not required. In the agency's view, requiring production of a privilege log of these materials would run contrary to the presumption of completeness. This argument is unpersuasive. In the Ninth Circuit, the "whole record" consists of "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 (quotation omitted). The broad definition in *Thompson* places all materials "directly or indirectly considered" into the Administrative Record in the first instance. Thus, contrary to the USDA's position, internal materials are part of the "universe of materials" considered by the agency, *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017), and must be included in the administrative record unless omitted on the basis of privilege. *See Sierra Club*, 2018 WL 3126401, at *3; *Burwell*, 2017 WL 89003, at *1 (citing *Thompson*, 885 F.2d at 555); *Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590, 2017 WL 1709318, at *4 (N.D. Cal. May 3, 2017).[4]

[4] Reasonable jurists can disagree on whether deliberative materials are properly characterized as part of an administrative record. Indeed, the D.C. Circuit recently held that deliberative materials are not part of the whole record because they are irrelevant. *Oceana, Inc. v. Ross*, No. 17-5247, slip op. at 15-16 (D.C. Cir. April 12, 2019). This reasoning is unpersuasive here in light of Ninth Circuit's broad definition of the "whole record." Moreover, "relevance" is not the standard in the Ninth Circuit for determining the scope of the record. Rather, the question is whether the agency

Courts in the Northern District of California have consistently required agencies seeking to assert deliberative process privilege to produce a privilege log. *Gill*, 2015 WL 9258075, at *7 (noting "courts in this district have required parties withholding documents on the basis of the deliberative process privilege to, at a minimum, substantiate those claims in a privilege log"). Furthermore, the deliberative process privilege is a "qualified one." *F.T.C. v. Warner Commc'n, Inc.*, 742 F.2d 1156, 1161. "A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Id.* Since the privilege is qualified and litigants may obtain deliberative materials in rare instances, it would be illogical to allow the USDA categorically to withhold documents without identifying them in a privilege log. Compelling the USDA to provide a privilege log turns the deliberative process privilege from a categorical one, as the USDA prefers, to one that is truly "qualified."

Defendants admits they withheld as privileged in this case "a voluminous number of documents" that they believe are subject to the deliberative process privilege. (Opp'n Brief at 18). There is, therefore, no doubt certain internal documents were considered by the agency and not included in the Proposed Administrative Record. By withholding documents it believed to be privileged without providing a privilege log, Defendants have failed to provide the "whole record."[5] *Burwell*, 2017 WL 89003, at *1; *Vilsack*, 2017 WL 1709318 at *3-4 ("Because Defendants do not dispute that they have excluded all such documents from the AR on the basis of deliberative process privilege, the Court [found] that the presumption of completeness is rebutted . . . ."). Accordingly, they must either produce all documents considered by the agency in crafting the Withdrawal Rule, including internal communications, or provide a privilege log specifying any

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directly or indirectly considered the documents or information in question.

[5] The Ninth Circuit has not ruled on the question whether an agency must produce privilege log when withholding documents on the basis of deliberative process privilege. The Court of Appeals has, upon mandamus review, held that requiring production of a privilege log under such circumstances does not qualify as clear error. *In re United States*, 875 F.3d 1200, 1210 (9th Cir. 2017) *vacated on other grounds*, 138 S. Ct. 443, 445 (2017).

documents withheld on the basis of privilege.

**B. Proposed Options Rule Public Comments**

Plaintiffs next argue a complete Administrative Record includes the 47,000 public comments on the Proposed Options Rule. The USDA included the Proposed Options Rule in the Proposed Administrative Record, but argues that because the Proposed Options Rule constituted a separate rulemaking decision, the public comments on that rule were not "before" the USDA when deciding whether to implement the Withdrawal Rule. Further, the USDA contends the comments on the Proposed Options Rule were not "focused on the specific statutory authority and cost/benefit issues underlying the Withdrawal Rule." (Opp'n Brief at 7). Again, the USDA's argument fails.

Plaintiffs respond by pointing to the Ninth Circuit ruling *In re United States*, 875 F.3d 1200 (9th Cir. 2017) *vacated on other grounds*, 138 S. Ct. 443, 45 (2017). That case dealt with the Department of Homeland Security's ("DHS") termination of the Deferred Action for Childhood Arrivals policy ("DACA"). In February 2017, then-DHS Secretary John Kelly affirmatively decided not to end DACA; however in September of that same year the Acting Secretary who replaced Kelly reversed course and sought to end the program. *Id.* at. 1207. Ultimately, the district court's order "that the government complete the record with documents considered by former DHS Secretary John Kelly in the course of deciding not to terminate DACA in February 2017" withstood mandamus scrutiny. *Id.* at 1209. The Ninth Circuit "recognize[d] that both decisions were part of an ongoing decision-making process regarding deferred action" and that materials considered "in the course of deciding against ending DACA in February 2017 did not cease to be 'before the agency' for purposes of the administrative record during that seven-month evolution in policy." *Id.* (citing *Thompson*, 885 F.2d at 555-56).

Here, the comments on the Proposed Options Rule that persuaded the USDA to delay the adoption of the OLPP Rule were still "before the agency" when the agency decided to create the Withdrawal Rule. Indeed, the USDA's stated rationale for both the delay and the ultimate Withdrawal Rule was their changed interpretation of the Organic Foods Production Act and their

changed view of the costs and benefits of the OLPP rule. *Compare* 82 Fed. Reg. 52,643 (Nov. 14, 2017) (choosing to delay a decision on the OLPP Rule because of "concerns regarding statutory authority for, and costs and benefits of, the OLPP rule . . . .") *with* 83 Fed. Reg. 10,775 (Mar. 13, 2018) (stating the USDA is withdrawing the OLPP rule based on new statutory interpretation and "revised assessments of its benefits and burdens and USDA's view of sound regulatory policy").

Moreover, it is implausible that the comments on the Proposed Options Rule were not considered in crafting the Withdrawal Rule given the relatively short period of time between the issuance of these two rules and the fact that both rules contemplated withdrawal of the OLPP rule. In sum, the two rules were part of a relatively short "ongoing decision-making process" regarding potential withdrawal of the OLPP rule, and the materials considered in the course of choosing option three of the Proposed Options Rule were still "before" the USDA when deciding to implement the Withdrawal Rule. The comments on the Proposed Options Rule must therefore be included in the Administrative Record in order to make the record whole.

## V. CONCLUSION

For the reasons set forth above, the motion to compel completion of the record is granted.

**IT IS SO ORDERED**.

Dated: May 6, 2019

RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California