No. _____

IN THE
Supreme Court of the United States

BLUE MOUNTAINS BIODIVERSITY PROJECT,
Petitioner,

v.

SHANE JEFFRIES, IN HIS OFFICIAL CAPACITY AS OCHOCO NATIONAL FOREST SUPERVISOR, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

David A. Strauss
Sarah M. Konsky
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC
1111 E. 60th Street
Chicago, IL 60637

Thomas C. Buchele
EARTHRISE LAW CENTER
10101 S. Terwilliger Blvd.
Portland, OR 97219

Jesse A. Buss
Bridgett A. Chevalier
WILLAMETTE LAW GROUP, PC
411 Fifth Street
Oregon City, OR 97045

Matthew S. Hellman
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20016
(202) 639-6000
mhellman@jenner.com

Michael T. Brody
Andrew L. Osborne
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

QUESTION PRESENTED

The Administrative Procedure Act provides that courts "shall review the whole record" in adjudicating agency action. 5 U.S.C. § 706. Lower courts are divided over whether an agency's allegedly deliberative materials—memoranda and other iterative documents that an agency creates and considers in undertaking agency action—are a part of the "whole record" on judicial review. Most courts have concluded that the "whole record" means what it says: deliberative materials are a part of the administrative record, and the agency must produce a privilege log if it seeks to withhold deliberative documents.

In the decision below, the Ninth Circuit joined the D.C. Circuit in holding that materials an agency deems "deliberative" are categorically excluded from the administrative record. The Court of Appeals further held that because, in its view, deliberative materials are not part of the administrative record, the agency need not produce a privilege log identifying the withheld materials absent a showing the agency acted in bad faith or engaged in other misconduct in classifying the documents as deliberative.

The question presented is:

Whether the Administrative Procedure Act, which requires an agency to produce its "whole record" for judicial review, permits an agency to categorically and unilaterally exclude from the administrative record materials that the agency deems deliberative.

PARTIES TO THE PROCEEDING

Petitioner is the Blue Mountains Biodiversity Project.

Respondents are Shane Jeffries, in his official capacity as Ochoco National Forest Supervisor, and the United States Forest Service, an agency of the United States Department of Agriculture.

RELATED PROCEEDINGS

Blue Mountains Biodiversity Project v. Jefferies, No. 2:20-CV-02158-SU, 2021 WL 3683879 (D. Or. Aug. 19, 2021)

Blue Mountains Biodiversity Project v. Jeffries, No. 2:20-CV-2158-MO, 2021 WL 5150659 (D. Or. Sept. 29, 2021)

Blue Mountains Biodiversity Project v. Jeffries, No. 2:20-CV-02158-MO, 2022 WL 4466928 (D. Or. Sept. 26, 2022)

Blue Mountains Biodiversity Project v. Jeffries, 72 F.4th 991 (9th Cir. 2023)

Blue Mountains Biodiversity Project v. Jeffries, 99 F.4th 438 (9th Cir. 2024)

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
RELATED PROCEEDINGS ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISION INVOLVED 1
INTRODUCTION 2
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE PETITION 10
I. The Question Presented Has Divided The Lower Courts. 10
II. The Ninth Circuit's Decision Is Wrong 14
III. The Question Presented Is Important And Recurring. 22
CONCLUSION 24

Appendix A
Blue Mountains Biodiversity Project v. Jeffries, 99 F.4th 438 (9th Cir. 2024) 1a
Appendix B
Blue Mountains Biodiversity Project v. Jeffries, 72 F.4th 991 (9th Cir. 2023) 41a

Appendix C
Blue Mountains Biodiversity Project v. Jeffries, No. 20-cv-02158, 2022 WL 4466928 (D. Or. Sept. 26, 2022) 59a

Appendix D
Minutes of Proceedings, *Blue Mountains Biodiversity Project v. Jeffries*, No. 20-cv-02158, 2021 WL 5150659 (D. Or. Sept. 29, 2021)..... 80a

Appendix E
Blue Mountains Biodiversity Project v. Jeffries, No. 20-cv-02158, 2021 WL 3683879 (D. Or. Aug. 19, 2021)..... 82a

TABLE OF AUTHORITIES

CASES

American Farm Bureau Federation v. United States EPA, No. 1:11-CV-0067, 2011 WL 6826539 (M.D. Pa. Dec. 28, 2011) 15

Armament Services International Inc. v. Attorney General United States, 760 F. App'x 114 (3d Cir. 2019) 15

Bar MK Ranches v. Yuetter, 994 F.2d 735 (10th Cir. 1993) 18

Bartell Ranch LLC v. McCullough, No. 321CV00080, 2022 WL 2093053 (D. Nev. June 10, 2022) 23

Brotherhood of Locomotive Engineers & Trainmen v. Federal Railroad Administration, 972 F.3d 83 (D.C. Cir. 2020) 15

Burlington Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454 (1987) 13

Camp v. Pitts, 411 U.S. 138 (1973) 19

Casa De Maryland v. United States Department of Homeland Security, 924 F.3d 684 (4th Cir. 2019) 15

Casey v. Berryhill, 853 F.3d 322 (7th Cir. 2017) 15

Center for Biological Diversity v. United States Fish & Wildlife Service, No. 2:19-CV-14243, 2020 WL 2732340 (S.D. Fla. May 26, 2020) 11, 12

Chen v. Mayor & City Council of Baltimore, 574 U.S. 988 (2014) 13

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 2, 9, 14, 17, 19

Clinch Coalition v. United States Forest Service, 597 F. Supp. 3d 916 (W.D. Va. 2022) 10, 12

Defenders of Wildlife v. Department of the Interior, No. 18-2090, Order (4th Cir. Feb. 5, 2019), ECF No. 70 12

Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57 (2000) 13

Exxon Mobil Corp. v. Mnuchin, No. 3:17-CV-1930-B, 2018 WL 4103724 (N.D. Tex. Aug. 29, 2018) 11

Friends of the Clearwater v. Higgins, 523 F. Supp. 3d 1213 (D. Idaho 2021) 15, 21

Gillum v. Commissioner, 676 F.3d 633 (8th Cir. 2012) 16

Inland Empire-Immigrant Youth Collective v. Nielsen, No. 17-CV-2048, 2019 WL 13240629 (C.D. Cal. Apr. 8, 2019) 22

Lamps Plus, Inc. v. Varela, 587 U.S. 176 (2019) 13

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024) 4, 24

Lynce v. Mathis, 519 U.S. 433 (1997) 13

Majali v. United States Department of Labor, 294 F. App'x 562 (11th Cir. 2008) 16

Medina County Environmental Action Ass'n v. Surface Transportation Board, 602 F.3d 687 (5th Cir. 2010) 16

Meister v. United States Department of Agriculture, 623 F.3d 363 (6th Cir. 2010) 15

Miami Nation of Indians of Indiana v. Babbitt, 979 F. Supp. 771 (N.D. Ind. 1996) 11

Morgan v. United States, 304 U.S. 1 (1938) 9

Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 3, 15

National Council of Negro Women v. Buttigieg, No. 1:22-CV-314, 2024 WL 1287611 (S.D. Miss. Mar. 26, 2024) 11, 12

New York v. Wolf, No. 20-CV-1127, 2020 WL 2049187 (S.D.N.Y. Apr. 29, 2020) 12

In re Nielsen, No. 17-3345, slip op. (2d Cir. Dec. 27, 2017), ECF No. 171 ..... 11, 12

Oak Grove Technologies, LLC v. United States, 156 Fed. Cl. 594 (2021), *aff'd in part, rev'd in part on other grounds*, __ F.4th __, No. 22-1557, 2024 WL 4138392 (Fed. Cir. Sept. 11, 2024) 11

Oceana, Inc. v. Ross, 920 F.3d 855 (D.C. Cir. 2019) 9, 12, 13

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture, 35 F.4th 1225 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1000 (2023) 16

Save the Colorado v. Spellmon, No. 18-CV-03258, 2023 WL 2402923 (D. Colo. Mar. 7, 2023) 2, 10, 11, 12

Sierra Club v. United States Army Corps of Engineers, No. 2:20-CV-00396, 2022 WL 2953075 (D. Me. July 26, 2022) 12

Sierra Club v. United States Fish & Wildlife Service, No. 2:20-CV-13, 2021 WL 5634131 (M.D. Fla. Dec. 1, 2021) 13

Sierra Club v. Zinke, No. 17-CV-7187, 2018 WL 3126401 (N.D. Cal. June 26, 2018) 22

South Carolina Coastal Conservation League v. Ross, 431 F. Supp. 3d 719 (D.S.C. 2020) 11, 12

State v. United States Immigration & Customs Enforcement, 438 F. Supp. 3d 216 (S.D.N.Y. 2020) 11, 12

Texas General Land Office v. Biden, No. 7:21-CV-00272, 2023 WL 2733388 (S.D. Tex. Mar. 31, 2023) 13

In re United States, 583 U.S. 29 (2017) .. 4, 8, 14, 18, 23

United States Fish & Wildlife Service v. Sierra Club, Inc., 592 U.S. 261 (2021) 21

United States v. Morgan, 313 U.S. 409 (1941) 19

Utahns for Better Transportation v. United States Department of Transportation, 305 F.3d 1152 (10th Cir. 2002), *modification on reh'g*, 319 F.3d 1207 (10th Cir. 2003) 16

Veterans Contracting Group, Inc. v. United States, 920 F.3d 801 (Fed. Cir. 2019) 15

STATUTES

5 U.S.C. § 552(a)(4)(B) 20

5 U.S.C. § 552(a)(8)(A)(i)(I) 20

5 U.S.C. § 552(b)(5) 20

5 U.S.C. § 706 ..... 1, 2, 14

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The Magistrate Judge for the United States District Court for the District of Oregon's opinion is not published but is reproduced in the Appendix hereto at Pet. App. 82a. The district court's Minutes of Proceedings is not published but is reproduced in the Appendix hereto at Pet. App. 80a. The district court's opinion is not published but is reproduced in the Appendix hereto at Pet. App. 59a. The Ninth Circuit's opinion is reported at 72 F.4th 991 and reproduced in the Appendix hereto at Pet. App. 41a. The Ninth Circuit's amended opinion and divided order denying rehearing en banc is reported at 99 F.4th 438 and reproduced in the Appendix hereto at Pet. App. 1a.

JURISDICTION

The Ninth Circuit entered judgment on July 3, 2023, and denied a petition for rehearing en banc on April 16, 2024. Pet. App. 41a. On July 10, 2024, this Court extended the deadline to file a petition for writ of certiorari to September 13, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Section 706 of Title 5 of the U.S. Code, which states in relevant part:

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

INTRODUCTION

Judicial review under the Administrative Procedure Act ("APA") requires courts to "review the whole record," 5 U.S.C. § 706, meaning "the full administrative record that was before the Secretary at the time he made his decision," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

This case presents a straightforward and recurring question of statutory interpretation that has divided lower courts: whether materials the agency deems "deliberative" are categorically excluded from the "whole record" under the APA. In the decision below, the Ninth Circuit joined the D.C. Circuit in answering yes. But the "growing consensus" in the lower courts is that the whole record means the whole record, including deliberative documents that were before the agency when it took action. *Save the Colo. v. Spellmon*, No. 18-CV-03258, 2023 WL 2402923, at *4 (D. Colo. Mar. 7, 2023) (cataloging authority).

Under the APA and this Court's precedent, the Ninth and D.C. Circuits are wrong. Deliberative materials—such as memoranda, drafts, emails, letters, and other materials considered by the agency in reaching a decision—are documents before the agency at the time it makes a decision. There is no basis for treating these materials as outside the "full" and "whole" administrative record. Indeed, their very name—deliberative documents—bespeaks that they are documents that were before the agency and informed its decision-making. These documents can and do illuminate the issues that are at the core of judicial

review of administrative action: whether the agency acted arbitrarily, whether it took a hard look at the problem before it, or whether it provided an explanation for its decision that, in fact, ran counter to the evidence before the agency. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A rule that allows agencies to unilaterally excise documents from the record because they are deliberative, however, creates a one-way ratchet that undermines effective judicial review. When deliberative documents support agency action, the agency may include such documents in the administrative record while leaving out others that call into question the quality of its reasoning. But when deliberative materials call into question the legality of agency action, the agency has unilateral discretion to shield those documents from a court. Judicial review of the "whole record" does not mean the record that the agency selects.

The decision below emphasized that deliberative documents may be subject to privilege. But the answer for privileged documents is a privilege log subject to judicial oversight, not silent exclusion. If an agency believes that documents that it relied upon are privileged, it can log those documents and make an assertion of privilege that can be tested by the opposing party and assessed by the reviewing court. Under the rule adopted below, the agency may simply withhold documents altogether without any mechanism to challenge such exclusions, essentially self-adjudicating

the validity of its own assertion of privilege. To be sure, the courts adopting this rule have left open exceptions for when the agency withholds documents in bad faith. But litigants will have little ability to challenge the exclusion of documents they do not know about, regardless of whether the agency acts in bad or good faith.

What the "whole record" means is a question that implicates nearly every case under the APA. It strikes at the core of judicial review of agency action, which "cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record." *In re United States*, 583 U.S. 1029, 1030 (2017) (Breyer, J., dissenting from the grant of stay). By permitting agencies to designate materials "deliberative" with no meaningful review of those decisions, the decision below "place[s] a finger on the scales of justice in favor of the most powerful of litigants, the federal government." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2285 (2024) (Gorsuch, J., concurring) (quotation marks omitted).

This Court should grant the petition to address this disputed, recurring, and important question, and reverse because the decision below is inconsistent with the text of the APA and this Court's precedent.

STATEMENT OF THE CASE

In 2015, the National Forest Service ("Service") approved the Walton Lake Restoration Project—a logging project sited within a 218-acre recreation area in an Oregon forest. The project included replacing the site's trees—which were infested with laminated root rot and bark beetles—with disease-resistant ones. The Blue Mountains Biodiversity Project ("Blue Mountains") sued and sought a preliminary injunction to enjoin the Service's 2015 decision.

The district court entered Blue Mountains' requested injunction, and the next day, the Service withdrew its 2015 decision "to allow additional analysis of the proposed activities." Pet. App. 45a (quotation marks omitted). A few days later, the Service stated that it would undertake "[a]dditional planning and analysis . . . with the goal of releasing an Environmental [Assessment ("EA")]." Pet. App. 45a (alterations in original) (quotation marks omitted).

The Service released two EAs and accompanying decision notices in 2017 and 2020, respectively. After the Service issued the 2017 EA, it withdrew it later that same year, citing a need for "additional dialogue and analysis." Pet. App. 46a (quotation marks omitted). The Service then issued a 2020 revised EA that analyzed four action alternatives, including a no-action alternative. The Service selected the alternative that authorized thirty-five acres of sanitation logging and 143 acres of commercial and noncommercial thinning to reduce the risk of wildfires and bark beetle infestation. The 2020 decision notice stated that the Project "provides the best

opportunity for long-term public enjoyment of this area, with fewer risks of falling trees, and more longevity in the large ponderosa pines that provide much of the scenic quality" and found that there would be no significant environmental impact. Pet. App. 46a (quotation marks omitted).

Blue Mountains then challenged the 2020 decision notice. The Service filed the administrative record in early 2021, and Blue Mountains later filed a motion to compel completion of the administrative record, or, in the alternative, a privilege log detailing why certain documents had been withheld. Blue Mountains sought to compel completion of the administrative record with certain documents from the Service's 2016 administrative record that were omitted from its 2021 record, "162 documents produced to [it] pursuant to a Freedom of Information Act ('FOIA') request," and other related documents pertinent to its claims. Pet. App. 85a.

Specifically, Blue Mountains sought the Service's past reports, emails, and internal communications. Pls.' Mot. 12-13, 14-17, ECF No. 10, *Blue Mountains Biodiversity Project v. Jefferies*, No. 2:20-CV-02158-SU, 2021 WL 3683879 (D. Or. Aug. 19, 2021). FOIA revealed documents directly relevant to the administrative challenge, including documents concerning the logging contract for the area surrounding the Lake and the Service's National Environmental Policy Act analysis. Alternatively, Blue Mountains requested a privilege log identifying the documents or information withheld with specificity. *Id.* The magistrate judge recommended

denying Blue Mountains' motion to compel and declined to order the Service to produce a privilege log. Pet. App. 82a-96a. The magistrate judge concluded that the documents sought were "deliberative materials" "not properly part of the administrative record." Pet. App. 95a.

The district judge adopted the magistrate judge's reasoning and denied the motion to complete the record but again preliminarily enjoined any logging for the Project. Pet. App. 80a-81a. The district court later granted the Service partial summary judgment and dissolved the preliminary injunction against the 2020 project. Pet. App. 59a-79a. Blue Mountains appealed.

The Ninth Circuit affirmed the district court's judgment. Pet. App. 41a-58a. The court acknowledged that "[n]o previous Ninth Circuit opinion addresses whether deliberative materials are part of the 'whole record'" and that "[d]istrict courts in this Circuit are split on the issue." Pet. App. 48a. But based on two "well-settled" legal principles, Pet. App. 48a, the court concluded that deliberative materials were not part of the administrative record and that the agency need not produce a privilege log absent "a showing of bad faith or improper behavior." Pet. App. 49a (quotation marks omitted). The court came to that conclusion primarily on the ground that an agency is entitled to a presumption of regularity and that the lawfulness of agency action is based on the reasons offered by the agency. Pet. App. 49a.

A divided Ninth Circuit denied Blue Mountains' petition for rehearing en banc. Judge Berzon, joined by

three other judges, dissented from the denial of rehearing en banc. Pet. App. 20a-40a. The dissent argued that the panel decision was "not only wrong but is likely to reduce APA review in many instances to a charade." Pet. App. 24a. The dissent observed that "the Supreme Court has never 'limit[ed] the "full administrative record" to those materials that the agency unilaterally decides should be considered by the reviewing court.'" Pet. App. 22a-23a (quoting *In re United States*, 583 U.S. at 1030 (Breyer, J., dissenting from the grant of a stay)). Further, the dissent reasoned, "for purposes of APA review, '[t]he whole record' includes *everything* that was before the agency pertaining to the merits of its decision." Pet. App. 26a (citation omitted). The dissent concluded that the majority's decision would be "damaging to judicial review of agency action," setting "a new baseline in which the government need not justify its claims of privilege except in limited circumstances, as yet unexplained." Pet. App. 34a.

The dissent further noted that the panel decision likely contradicted this Court's unanimous indication in *In re United States*, 583 U.S. 29 (2017), that "district courts could potentially 'compel the Government to disclose [ ] document[s] that the Government believes is privileged' so long as the court 'first provid[es] the Government with the opportunity to argue the issue.'" Pet. App. 25a (quoting *In re United States*, 583 U.S. 29, 32 (2017) (alterations in original)). This Court there "declined to adopt the government's view of its unilateral power to designate the administrative record." Pet. App. 25a. "Instead, the Court explained

that if the threshold arguments were resolved in favor of the district court's jurisdiction, then the district court 'may consider whether narrower amendments to the record are necessary and appropriate.'" Pet. App. 25a (quoting *In re United States*, 583 U.S. at 32). Therefore, the dissent noted, this Court did not hold that "the district court was precluded from expanding the record at all, absent a showing of some unusual circumstance, or that the agency could decide for itself which material was deliberative." Pet. App. 26a.

Moreover, the dissent reasoned, the two Supreme Court opinions relied on by the panel opinion, *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420, and *Morgan v. United States*, 304 U.S. 1, 18 (1938), are both inapposite. Neither concerned the scope of an administrative record or whether a privilege log is required. And the panel's reliance on the D.C. Circuit's decision in *Oceana, Inc. v. Ross*, 920 F.3d 855 (D.C. Cir. 2019), was misplaced because that court relied on the same Supreme Court cases. Separately, the D.C. Circuit's emphasis on deliberative materials' discoverability was incorrect because "the concept of discoverability has no bearing on the meaning of the 'whole record' for APA cases." Pet. App. 33a.

Finally, the dissent concluded that the panel's decision was "damaging to judicial review of agency action" in three distinct ways. Pet. App. 34a. First, the decision will make "governmental mistakes or misconduct … unlikely to come to light" because "[t]he opinion sets a new baseline in which the government need not justify its claims of privilege except in limited

circumstances, as yet unexplained." Pet. App. 34a. Second, the decision "creates a tension with [] FOIA case law, which requires the government to supply a privilege log to justify withholding of documents claimed to be deliberative." Pet. App. 34a (internal quotations omitted). And third, "the decision fails to acknowledge that deliberative materials are central in cases in which the decisionmaker's subjective intent is properly at issue." Pet. App. 34a.

Blue Mountains timely filed this petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. The Question Presented Has Divided The Lower Courts.

The lower courts acknowledge that they are sharply divided on the question of whether deliberative documents are part of the administrative record.

On one side of the divide are the courts that have joined the "growing consensus" that deliberative materials are a part of the administrative record. *Save the Colo.*, 2023 WL 2402923, at *4. These courts hold that the administrative record consists of the "'full administrative record that was before [the agency] at the time [it] made [the] decision,'" and that to exclude deliberative materials as categorically irrelevant "leads to the strange result wherein the agency may claim documents are relevant for purposes of developing its final rule but irrelevant for purposes of the court's review of that final rule." *Clinch Coal. v. U.S. Forest Serv.*, 597 F. Supp. 3d 916, 921, 923 (W.D. Va. 2022)

(quoting *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 419-20).

Accordingly, these courts require agencies to "submit a log if they withhold privileged materials from an [administrative record]." *Save the Colo.*, 2023 WL 2402923, at *4. *See, e.g.*, *State v. U.S. Immigr. & Customs Enf't*, 438 F. Supp. 3d 216, 220 (S.D.N.Y. 2020); *S.C. Coastal Conservation League v. Ross*, 431 F. Supp. 3d 719, 725 (D.S.C. 2020); *Oak Grove Techs., LLC v. United States*, 156 Fed. Cl. 594, 600-01 (2021), *aff'd in part, rev'd in part on other grounds*, __ F.4th __, No. 22-1557, 2024 WL 4138392 (Fed. Cir. Sept. 11, 2024); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 2:19-CV-14243, 2020 WL 2732340, at *5 (S.D. Fla. May 26, 2020); *Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930-B, 2018 WL 4103724, at *2 (N.D. Tex. Aug. 29, 2018); *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996); *Nat'l Council of Negro Women v. Buttigieg*, No. 1:22-CV-314, 2024 WL 1287611, at *5-6 (S.D. Miss. Mar. 26, 2024).

Although no circuit has issued a precedential decision holding that deliberative materials are part of the administrative record, the Second and Fourth Circuits have each issued influential nonprecedential decisions adopting that rule. The Second Circuit found that "the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded." *In re Nielsen*, No. 17-3345, slip op. at 3 (2d Cir. Dec. 27, 2017), ECF No. 171. And it emphasized that "without a privilege log, the District Court would be unable to evaluate the

Government's assertions of privilege." *Id.* The Fourth Circuit reached an analogous conclusion in its order in *Defenders of Wildlife v. Dep't of the Interior*, No. 18-2090, Order (4th Cir. Feb. 5, 2019), ECF No. 70, requiring that the Government submit a privilege log to identify documents it withheld under the guise of the deliberative-process privilege.

Many lower courts, both within and without the Second and Fourth Circuits, have relied on these opinions in holding that deliberative documents are part of the administrative record. *See, e.g.*, *U.S. Immigr. & Customs Enf't*, 438 F. Supp. 3d at 218 (looking to 2d Cir. holding in *In re Nielsen*); *New York v. Wolf*, No. 20-CV-1127, 2020 WL 2049187, at *2 (S.D.N.Y. Apr. 29, 2020) (same); *Clinch Coal.*, 597 F. Supp. 3d at 925 (looking to 4th Cir. holding in *Defenders of Wildlife*); *Nat'l Council of Negro Women v. Buttigieg*, 2024 WL 1287611, at *4 (looking to both the 2nd Cir. and 4th Cir. holdings); *Save the Colo.*, 2023 WL 2402923, at *4 (same); *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 2:20-CV-00396, 2022 WL 2953075, at *3 (D. Me. July 26, 2022) (same); *Ctr. for Biological Diversity*, 2020 WL 2732340, at *4; *S.C. Coastal Conservation League v. Ross*, 431 F. Supp. 3d at 725 (same).

On the other side of the divide are the courts, now joined by the Ninth Circuit, which hold that deliberative materials are not part of the administrative record, and further, that the agency has no obligation to log such materials. The D.C. Circuit adopted that rule in *Oceana, Inc. v. Ross*, 920 F.3d 855 (D.C. Cir. 2019), where it held that "predecisional and deliberative documents 'are not

part of the administrative record to begin with,' so they 'do not need to be logged as withheld from the administrative record.'" *Id.* at 865 (citation omitted). Far fewer lower courts have also adopted that rule. *See, e.g.*, *Tex. Gen. Land Off. v. Biden*, No. 7:21-CV-00272, 2023 WL 2733388, at *6 (S.D. Tex. Mar. 31, 2023) ("[P]rivileged materials are not proper for inclusion in the administrative record and thus Defendants are not required to produce a privilege log."); *Sierra Club v. U.S. Fish & Wildlife Serv.*, No. 2:20-CV-13, 2021 WL 5634131, at *3 (M.D. Fla. Dec. 1, 2021) ("Defendants did not have to produce a privilege log detailing the documents protected by deliberative process privilege[.]").

Given the number of lower court decisions addressing the question presented, further percolation is unlikely to yield significant insight.[1] The lower courts are divided on this question, and only this Court can authoritatively answer it. Review is warranted.

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[1] This Court will grant certiorari where a nonprecedential opinion or order supplies the basis for a circuit divide. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 180 (2019) (granting certiorari with a single unpublished decision on one side of a circuit disagreement); *Chen v. Mayor & City Council of Balt.*, 574 U.S. 988, 988 (2014) (same); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 61 (2000) (same); *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 460 (1987) (same); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (same but with an "unpublished order" from the Eleventh Circuit).

II. The Ninth Circuit's Decision Is Wrong.

Review is also warranted because the decision below is inconsistent with the APA's text and this Court's precedent.

A. The APA provides that, in judicial review of agency action, the court "shall review the whole record[.]" 5 U.S.C. § 706. The "whole record," this Court has held, means "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420. Otherwise, "judicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record." *In re United States*, 583 U.S. at 1030 (Breyer, J., dissenting from the grant of a stay). Meaningful judicial oversight depends upon the review of "all relevant materials presented to the agency, including not only materials supportive of the government's decision but also materials contrary to the government's decision." *Id.* at 1030-31.

Drafts, letters, emails, and other materials that the agency considered in taking action are materials "before" the agency. Indeed, it is inherent in the very label "deliberative" that these are documents that the agency considered. Such materials may shed light on core questions of judicial review. For example, a deliberative memorandum or email may reveal that the agency has "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference

in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. *See also, e.g.*, *Friends of the Clearwater v. Higgins*, 523 F. Supp. 3d 1213, 1227 (D. Idaho 2021) ("There can be no doubt that under some circumstances, pre-decisional deliberative communications may go to the heart of the question of whether an agency action was arbitrary and capricious, an abuse of discretion or otherwise inconsistent with the law under Section 706(2) of the APA." (quotation marks omitted)).

And in practice, courts regularly consider such materials in reviewing agency action. *See, e.g.*, Pet. App. 28a (Berzon, J., dissenting) (collecting cases where courts have "routinely reviewed letters, drafts, emails, and other nonfinal materials in the course of evaluating the lawfulness of agency action"); *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 98-115 (D.C. Cir. 2020) (relying on emails, letters, and drafts to vacate agency action); *Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 375 (6th Cir. 2010) (relying on emails in the administrative record to find agency action unlawful); *Am. Farm Bureau Fed'n v. U.S. EPA*, No. 1:11-CV-0067, 2011 WL 6826539, at *9 (M.D. Pa. Dec. 28, 2011) (holding that "email chain[s] should be included" in the administrative record, even though "they related only to draft[s]").[2]

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[2] *See also Armament Servs. Int'l Inc. v. Att'y Gen. U.S.*, 760 F. App'x 114, 118-20 (3d Cir. 2019); *Veterans Contracting Grp., Inc. v. United States*, 920 F.3d 801, 803-05 (Fed. Cir. 2019); *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 705 (4th Cir. 2019); *Casey v. Berryhill*, 853 F.3d 322, 326-28 (7th Cir. 2017);

For example, in *Ranchers Cattleman Action Legal Fund United Stockgrowers of America*, the United States Department of Agriculture did not contest that deliberative materials should be part of the administrative record. There, after the plaintiff reviewed past FOIA requests and notified the agency via a status report that deliberative emails were potentially excluded from the record, the agency agreed to supplement the record without claiming that the documents were privileged. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am.*, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 35 F.4th 1225, 1235 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1000 (2023). The emails, in turn, aided the court in its review of the lawfulness of the agency's action. *Id.* at 1242-48.

B. The Ninth Circuit based its contrary holding on two "principles governing judicial review of agency action under the APA." Pet. App. 48a. First, it concluded that "the whole record," under the APA "is ordinarily 'the record the agency presents,'" Pet. App. 48a (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)). Thus, according to the Ninth Circuit, the record an agency submits for review is "subject to a presumption of regularity" and "barring clear evidence

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Gillum v. Commissioner, 676 F.3d 633, 644-45 (8th Cir. 2012); *Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 690-99 (5th Cir. 2010*); Majali v. U.S. Dep't of Lab.*, 294 F. App'x 562, 568 (11th Cir. 2008); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1166-68, 1170-72 (10th Cir. 2002), *modification on reh'g*, 319 F.3d 1207 (10th Cir. 2003).

to the contrary," a court will "presume that an agency properly designated the Administrative Record." Pet. App. 48a (quotation marks omitted). Second, the Ninth Circuit determined that a reviewing court must "assess the lawfulness of agency action based on the reasons offered by the agency," and therefore, "[d]eliberative documents, which are prepared to aid the decisionmaker in arriving at a decision, are ordinarily not relevant." Pet. App. 48a.

Neither rationale withstands scrutiny. As to the first rationale, a "presumption of regularity" has no bearing on whether material belongs in the "whole record" in the first place. As this Court has held, the presumption of regularity "is not to shield [agency] action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415. The question is thus not in the first instance whether the agency can be trusted to identify deliberative documents, but whether the *rule* should be that deliberative documents can be categorically excluded based on agency say-so. As Judge Berzon correctly noted, "[T]he presumption of regularity is a presumption that the agency has done what it is supposed to do; it does not tell us what the agency is supposed to do … [nor] describe the breadth of the record that should be produced and so does not explain to what the presumption attaches." Pet. App. 29a-30a. (Berzon, J., dissenting).

Moreover, the APA's judicial review framework does not give the agency unilateral discretion to determine what the record is. As Justice Breyer put it, this Court

has never "read *Overton Park* to limit the 'full administrative record' to those materials that the agency unilaterally decides should be considered by the reviewing court." *In re United States*, 583 U.S. at 1030 (Breyer, J., dissenting from grant of stay); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (agency "may not unilaterally determine what constitutes" the record). The Ninth Circuit's holding, however, does just that, giving agencies unilateral and unreviewable discretion to determine the scope of the "whole record." But if the agency's unilateral determination were all that mattered, there would be no point in invoking a "presumption of regularity" in the first place.

Nor are such documents properly excluded on the ground that only the agency's stated reasons matter or that its "subjective" views are irrelevant. True, agency action is judged by the agency's stated reasons, but the adequacy of those reasons is measured against the information that was before the agency. A reviewing court cannot conduct that assessment without looking at all the materials that were before the agency. If internal memoranda show that certain agency actions will create a redressable injury, and the final action does not account for that issue, then that could demonstrate the agency's decision to move forward with the action is arbitrary and capricious. The Ninth Circuit's position makes that review impossible. The result is that reviewing courts will be unable to discharge their judicial review responsibilities under the APA.

Similarly, the Ninth Circuit's reliance on the general limitation against probing "mental processes of administrative decisionmakers" is inapposite. Pet. App. 31a (quotation marks omitted) (Berzon, J., dissenting). That principle concerns the generation of new material, such as deposing an agency decisionmaker, which goes beyond the record before the agency. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420; *United States v. Morgan*, 313 U.S. 409, 422 (1941). Seeking extrinsic, after-the-fact evidence is generally not appropriate because agency decisions are judged by the material in front of the agency at the time it made its decision. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). The principle announced in those cases does not apply to pre-decisional deliberative documents because it "concern[s] the propriety of *post-decisional* testimony of administrative decisionmakers, which obviously was not part of the administrative record because it did not exist at the time the agency made its decision." Pet. App. 32a (Berzon, J., dissenting). Deliberative materials, however, are before the agency at the time a decision is made, and their inclusion would not require the production of any post-decisional evidence.

C. The decision below also creates tension between Section 706 and another part of the APA—FOIA. FOIA expressly permits agencies to withhold from disclosure certain documents, including "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in

litigation with the agency." 5 U.S.C. § 552(b)(5). In the FOIA context, the burden is on the government to claim the deliberative privilege, withheld documents must generally be logged, and the privilege is not categorical or absolute. *See id.* § 552(a)(4)(B), (a)(8)(A)(i)(I). As the dissent below explained:

> There is no basis in the APA for providing litigants challenging agency action with less access to public documents than is available to interested members of the public under FOIA. Notably, APA review requires consideration of the "whole record," with no express exceptions, 5 U.S.C. § 706, whereas FOIA includes several express exemptions to public access, 5 U.S.C. § 552(b).

Pet. App. 38a (Berzon, J., dissenting). By failing to require agencies to even produce a privilege log, withheld documents are acknowledged under FOIA but remain a mystery under Section 706. There is no statutory warrant for that irrational outcome.

Nor does the APA require a plaintiff to go through the FOIA process to obtain documents that should be included in the administrative record in the first place. As this case demonstrates, even when a litigant fortuitously goes through the separate FOIA process, any documents received will not automatically become part of the administrative record. If the agency refuses to supplement the record, APA plaintiffs must engage in additional litigation to supplement the administrative record on a case-by-case basis. The APA does not

require plaintiffs to jump through so many loops to secure meaningful judicial review.

D. The Ninth Circuit was also wrong to grant agencies a blanket presumption in favor of deliberative process privilege. The deliberative process privilege is a form of executive privilege that "shields from disclosure documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 267 (2021) (internal quotation marks omitted). But like any other litigant, if an agency has a valid privilege claim, it cannot unilaterally withhold responsive documents without providing a privilege log that accounts for the whole record. "[T]he correct way to address the tension between APA review and deliberative process privilege is for [the agency] either to file a privilege log or submit allegedly privileged documents for in camera review." *Friends of the Clearwater*, 523 F. Supp. 3d at 1227 (citing authority).

Nor is it any answer to say that a plaintiff can seek relief if it can show agency malfeasance or the agency has excluded materials that are not deliberative. Pet. App. 11a-12a. First, the APA's "whole record" requirement means that these materials should be included in the first place—the statute places no burden on a litigant to make a separate showing to trigger that obligation. Yet under the Ninth Circuit's approach, the agency is permitted to exclude altogether documents that it deems deliberative. In other words, it is not

malfeasance that keeps the material out; it is the wrong rule.

Finally, even if malfeasance were relevant, there would be no consistent and workable way for a litigant or a court to discover such malfeasance given the demanding bar for discovery in APA cases, the agency's unilateral control of the administrative record, and the Ninth Circuit's holding that deliberative documents need not be accounted for in a privilege log. Pet. App. 34a (Berzon, J., dissenting) ("Without a privilege log … governmental mistakes or misconduct are unlikely to come to light."); *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. 17-CV-2048, 2019 WL 13240629, at *6 (C.D. Cal. Apr. 8, 2019) ("[I]t would be very difficult, if not impossible, for an APA plaintiff to challenge a claim of deliberative process privilege or to make the required showing of need necessary to overcome the privilege without at least some description of the document over which privilege is asserted."); *Sierra Club v. Zinke*, No. 17-CV-7187, 2018 WL 3126401, at *5 (N.D. Cal. June 26, 2018) ("The only way to know if privilege applies is to review the deliberative documents in a privilege log.").

III. The Question Presented Is Important And Recurring.

The question in this case—regarding the scope of the "whole record" to support judicial review—arises in almost every APA challenge. The Ninth Circuit's holding sharply hampers judicial review under the APA by permitting agencies, in every case, to secretly

designate materials as "deliberative" materials to shield them from litigants and reviewing courts.

The rule below thus permits, if not encourages, perverse outcomes. An agency can present a "whole record" by excluding unhelpful deliberative materials while including those that bolster its reasoning and manufacture a favorable record. Without a privilege log, there is no realistic way to know that the agency has done so. Even if the agency is acting in good faith, it may erroneously exclude documents that a court would conclude *are not* deliberative, let alone not subject to a privilege. Or an agency may exclude broad swaths of documents it has not even reviewed for any valid privilege. *See, e.g.*, *Bartell Ranch LLC v. McCullough*, No. 321CV00080, 2022 WL 2093053, at *2, *4 (D. Nev. June 10, 2022) (court-ordered privilege log revealed that an agency "had not reviewed between six and eight thousand of those documents before withholding them as deliberative"). The rule shields such errors from judicial review entirely. The APA's "whole record" requirement exists to check exactly this: unreviewable agency authority.

Judicial review under the APA "cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record." *In re United States*, 583 U.S. at 1030 (Breyer, J., dissenting from the grant of stay). The rule below gives license to agencies to introduce deliberative documents when they are favorable, yet omit them when they undercut its reasoning, regardless of the role the document may have played in the agency's

decision-making process. And without a privilege log, it is nearly impossible to know that the agency is doing so. The upshot of the decision below, therefore, is that the agency enjoys a degree of unilateral discretion over the scope of discoverable material that would be unthinkable for any other litigant. In effect, the Ninth Circuit's holding "place[s] a finger on the scales of justice in favor of the most powerful of litigants, the federal government." *Loper Bright Enters.*, 144 S. Ct. at 2285 (Gorsuch, J., concurring).

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

David A. Strauss
Sarah M. Konsky
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC
1111 E. 60th Street
Chicago, IL 60637

Thomas C. Buchele
EARTHRISE LAW CENTER
10101 S. Terwilliger Blvd.
Portland, OR 97219

Jesse A. Buss
Bridgett A. Chevalier
WILLAMETTE LAW GROUP, PC
411 Fifth Street
Oregon City, OR 97045

Matthew S. Hellman
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20016
(202) 639-6000
mhellman@jenner.com

Michael T. Brody
Andrew L. Osborne
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

APPENDIX

TABLE OF CONTENTS

Appendix A
Blue Mountains Biodiversity Project v. Jeffries, 99 F.4th 438 (9th Cir. 2024)..... 1a

Appendix B
Blue Mountains Biodiversity Project v. Jeffries, 72 F.4th 991 (9th Cir. 2023)..... 41a

Appendix C
Blue Mountains Biodiversity Project v. Jeffries, No. 20-cv-02158, 2022 WL 4466928 (D. Or. Sept. 26, 2022) 59a

Appendix D
Minutes of Proceedings, *Blue Mountains Biodiversity Project v. Jeffries*, No. 20-cv-02158, 2021 WL 5150659 (D. Or. Sept. 29, 2021)..... 80a

Appendix E
Blue Mountains Biodiversity Project v. Jeffries, No. 20-cv-02158, 2021 WL 3683879 (D. Or. Aug. 19, 2021)..... 82a

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon non-profit corporation,

Plaintiff-Appellant,

v.

SHANE JEFFRIES, in his official capacity as Ochoco National Forest Supervisor; UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture,

Defendants-Appellees.

No. 22-35857

D.C. No. 2:20-cv-02158-MO

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted March 30, 2023
Seattle, Washington

Filed July 3, 2023
Amended April 16, 2024

Before: Jacqueline H. Nguyen and Andrew D. Hurwitz, Circuit Judges, and Dean D. Pregerson,* District Judge.

Order;
Opinion by Judge Hurwitz;
Statement Respecting Denial of Rehearing En Banc by Judge Berzon

SUMMARY**

Environmental Law

The panel filed (1) an order denying a petition for panel rehearing, denying a petition for rehearing en banc, and amending the opinion filed on July 3, 2023; and (2) an amended opinion affirming the district court's summary judgment in favor of the U.S. Forest Service in an action brought by Blue Mountains Biodiversity Project ("BMBP") alleging that the Service's approval of the Walton Lake Restoration Project violated the National Environmental Policy Act ("NEPA"), the National Forest Management Act, and the Administrative Procedure Act ("APA").

The Forest Service developed the Project to replace trees infested with laminated root rot and bark beetles with disease-resistant trees. In May 2016, the Service contracted with T2, a private company, for logging to

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

implement the decision. The Service issued a revised Environmental Assessment ("EA") in July 2020 and a revised decision notice in December 2020. BMBP filed this action challenging the 2020 decision notice. The Service filed an administrative record ("AR") in 2021.

The panel first addressed BMBP's argument that the AR was incomplete. First, BMBP argued that deliberative materials were part of the "whole record" and that a privilege log was required if they were not included in the AR. The panel held that deliberative materials are generally not part of the AR absent impropriety or bad faith by the agency. Because deliberative materials are not part of the administrative record to begin with, they are not required to be placed on a privilege log. The district court did not abuse its discretion by declining to order the production of a privilege log. Second, BMBP argued that all documents in the 2016 AR should be in the AR for this case. BMBP contended that the documents in the 2016 AR were necessarily before the agency in the 2020 process because the Project was a continuation of the withdrawn one. The panel held that BMBP's arguments failed to overcome the presumption of regularity. The 2020 decision notice expressly stated that the Forest Service began the NEPA process again in 2019. The record also supported the Service's contention that it included only documents from previous NEPA analyses that were considered in the 2020 decision. The panel concluded that the district court acted within its discretion in denying the motion to supplement the AR.

The panel next addressed whether the Service violated NEPA by approving the Project. First, the

panel held that BMBP failed to establish that the logging contract with T2 improperly committed resources under any standard. There is also no evidence that the agency merely engaged in post hoc rationalization in the 2020 decision. Second, the panel rejected BMBP's contention that the EA diluted the significance of some impacts by analyzing them on too large a scale. The BMBP did not show why the choice of a broader context in the challenged instances was arbitrary or capricious. Also, the regulations list ten non-exhaustive relevant factors for consideration. The panel held that whether the factors were assessed individually or cumulatively, the record did not establish a clear error of judgment in the Service's intensity findings, which "refers to the severity of impact" within the selected context. 40 C.F.R. § 1508.27(b).

The panel affirmed the judgment of the district court and lifted the previous stay of its order dissolving the preliminary injunction.

In a statement respecting the denial of rehearing en banc, Judge Berzon, joined by Wardlaw, Paez, and Koh, wrote that the panel's holding permits government agencies to sanitize the record available to reviewing courts, thereby severely curtailing meaningful judicial review of administrative action. The panel's opinion conflicts with case law by holding that materials protected by the deliberative process privilege were not part of the "whole record" for purposes of judicial review under the APA. Judge Berzon would hold that if government agencies wish to withhold documents in APA cases based on a privilege, they should have to provide a privilege log with justification for each

document for which they assert a privilege, as they must do under Freedom of Information Act precedent.

COUNSEL

Jesse A. Buss (argued) and Bridgett A. Chevallier, Willamette Law Group, Oregon City, Oregon; Thomas C. Buchele, Earthrise Law Center, Lewis & Clark Law School, Portland, Oregon; for Plaintiff-Appellant.

Robert P. Stockman (argued) and Joan M. Pepin, Attorneys; Sean C. Duffy, Trial Attorney; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Rick Grisel, Attorney, Office of the General Counsel, United States Department of Agriculture, Portland, Oregon; Rebecca Harrison, Senior Counsel; Todd Kim, Assistant Attorney General; United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

Kelly K. Simon, American Civil Liberties Union Foundation of Oregon, Portland, Oregon; Cody Wofsy, Katrina Eiland, and Hannah Schoen, American Civil Liberties Union Foundation, San Francisco, California; for Amici Curiae American Civil Liberties Union, Immigrants' Rights Project, and American Civil Liberties Union of Oregon.

J. Patrick Hunter, Southern Environmental Law Center, Asheville, North Carolina, for Amici Curiae South Carolina Coastal Conservation League, Charleston Waterkeeper, Chattooga Conservancy, MountainTrue, Wild Virginia, Conservation Law Foundation, Clinch Coalition, Virginia Wilderness Committee, Cherokee Forest Voices, and Defenders of Wildlife.

Amy van Saun, Center for Food Safety, Portland, Oregon; Andrew R. Missel, Advocates for the West, Portland, Oregon; Jennifer Best, Director, Wildlife Law Program Friends of Animals, Centennial, Colorado; for Amici Curiae Environmental Organizations and Law Professors.

ORDER

The opinion filed on July 3, 2023, and appearing at 72 F.4th 991, is AMENDED as follows:

At 72 F.4th at 997, add the following footnote immediately after the sentence beginning with "Deliberative documents, which are prepared to aid the decision-maker in arriving at a decision":

> "[T]he deliberative process privilege shields from disclosure documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *United States Fish and Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 267 (2021) (cleaned up); *see also F.T.C. v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (same). The privilege does not apply, however, to any factual information upon which the agency has relied. *In re United States*, 875 F.3d 1200, 1211-12 (9th Cir. 2017) (Watford, J., dissenting) (citing *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993)).

At 72 F.4th at 997, delete:

> We agree, however, with the D.C. Circuit that "a showing of bad faith or improper behavior" might justify production of a privilege log to allow the district to determine whether excluded documents are actually deliberative.

and replace with:

> But whether materials are in fact deliberative is subject to judicial review, and in appropriate circumstances district courts may order a privilege log to aid in that analysis. For example, we agree with the D.C. Circuit that "a showing of bad faith or improper behavior" might justify production of a privilege log to allow the district to determine whether excluded documents are actually deliberative.

With these amendments, the panel unanimously voted to deny the petition for panel rehearing. Judge Nguyen voted to deny the petition for rehearing en banc, and Judges Hurwitz and Pregerson so recommend.

The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, **Dkt. 39,** is DENIED. No further petitions for rehearing en banc will be considered. Judges Forrest and Johnstone did not participate in the deliberations or vote in this case.

OPINION

HURWITZ, Circuit Judge:

This case involves claims by the Blue Mountains Biodiversity Project ("BMBP") that the approval of the Walton Lake Restoration Project by the U.S. Forest Service violated the National Environmental Policy Act, the National Forest Management Act, and the Administrative Procedure Act. The district court granted summary judgment against BMBP on all claims relevant to this appeal. We affirm.

BACKGROUND

Walton Lake is a 218-acre recreation site in the Ochoco National Forest in Oregon. The Forest Service developed the Walton Lake Restoration Project ("Project") to replace trees infested with laminated root rot and bark beetles with disease-resistant ones. In 2015, relying on a regulation that excludes the sanitation harvest of trees to control disease and insects from some National Environmental Policy Act ("NEPA") requirements, 36 C.F.R. § 220.6(e)(14) (2015), the Service issued a decision memorandum approving the Project. In May 2016, the Service contracted with T2, a private company, for logging to implement that decision. Although no logging has yet occurred, the T2 contract remains in place.

BMBP sued, challenging the 2015 decision, and the district court preliminarily enjoined the logging on October 18, 2016. The next day, the Service withdrew its decision "to allow additional analysis of the proposed activities." On October 21, 2016, the Service stated that it would undertake "[a]dditional planning and

analysis . . . with the goal of releasing an Environmental [Assessment ("EA")]."[1]

The Service issued an EA and a decision notice approving the Project in 2017 but withdrew the decision notice later that year, citing a need for "additional dialogue and analysis." The Service issued a revised EA in July 2020 and a revised decision notice in December 2020. The revised EA analyzed four alternatives, including a no-action alternative. The selected alternative authorizes thirty-five acres of sanitation logging and 143 acres of commercial and noncommercial thinning to reduce the risk of wildfires and bark beetle infestation. The 2020 decision notice stated that the Project "provides the best opportunity for long-term public enjoyment of this area, with fewer risks of falling trees, and more longevity in the large ponderosa pines that provide much of the scenic quality"; found that there would be no significant environmental impact; and made four Project-specific amendments to the Ochoco National Forest Plan.

BMBP then filed this action challenging the 2020 decision notice. The Service filed an administrative record ("AR") in early 2021. A magistrate judge recommended denial of BMBP's motion to compel completion of the AR and declined to order the Service to produce a privilege log, concluding that certain documents sought by BMBP were deliberative materials, and BMBP did not establish that some documents in the AR filed in response to the 2016 suit

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[1] The district court granted BMBP's motion to dismiss the 2016 suit on June 19, 2017.

were "before the agency" in its 2020 decision. The district judge adopted the magistrate judge's reasoning and denied the motion, but again preliminarily enjoined any logging for the Project.

The district court later granted the Service summary judgment on all but one of BMBP's claims. It concluded that the logging contract with T2 was not an "irreversible and irretrievable commitment" of resources because it could be unilaterally modified or terminated. It also held that the Service reasonably found that the Project would not have a significant environmental impact and thus reasonably declined to prepare an environmental impact statement ("EIS"). The court entered a final judgment and dissolved the preliminary injunction.[2] BMBP timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.[3]

DISCUSSION

I.

We first address BMBP's argument that the AR is incomplete. The Administrative Procedure Act ("APA") requires us to "review the whole record," 5 U.S.C. § 706, including "all documents and materials directly or indirectly considered by agency decision-makers," *Thompson v. U.S. Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989) (cleaned up). BMBP argues that deliberative

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[2] The district court stayed its order dissolving the preliminary injunction, however, pending our decision on a motion for a stay pending appeal. We granted that stay and expedited this appeal.

[3] The Service has not appealed the district court's grant of summary judgment to BMBP on one of its NEPA claims.

materials are part of the "whole record" and that a privilege log is required if they are not included in the AR. It also contends that all documents in the 2016 AR should be in the AR for this case.

A.

No previous Ninth Circuit opinion addresses whether deliberative materials are part of the "whole record." District courts in this Circuit are split on the issue. *See Save the Colorado v. U.S. Dep't of the Interior*, 517 F. Supp. 3d 890, 896–97 (D. Ariz. 2021) (collecting cases). The District of Columbia Circuit, however, has held that deliberative materials are generally not part of the AR absent impropriety or bad faith by the agency. *See Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019). We agree.

Our holding rests on two well-settled principles governing judicial review of agency action under the APA. First, "the whole record," 5 U.S.C. § 706, is ordinarily "the record the agency presents," *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). "[L]ike other official agency actions, an agency's statement of what is in the record is subject to a presumption of regularity." *Goffney v. Becerra*, 995 F.3d 737, 748 (9th Cir. 2021). Thus, barring "clear evidence to the contrary," we "presume that an agency properly designated the Administrative Record." *Id.* (cleaned up).

Second, we assess the lawfulness of agency action based on the reasons offered by the agency. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Deliberative

documents, which are prepared to aid the decision-maker in arriving at a decision, are ordinarily not relevant to that analysis.[4] *See Oceana*, 920 F.3d at 865; *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("[I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Morgan v. United States*, 304 U.S. 1, 18 (1938) (noting it is "not the function of the court to probe the mental processes of the Secretary in reaching his conclusions"). Because deliberative materials are "not part of the administrative record to begin with," they are "not required to be placed on a privilege log." *Oceana*, 920 F.3d at 865 (cleaned up). But whether materials are in fact deliberative is subject to judicial review, and in appropriate circumstances district courts may order a privilege log to aid in that analysis. For example, we agree with the D.C. Circuit that "a showing of bad faith or improper behavior" might justify production of a privilege log to allow the district to determine whether excluded documents are actually deliberative. *Id.*; *see*

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[4] "[T]he deliberative process privilege shields from disclosure documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *United States Fish and Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 267 (2021) (cleaned up); *see also F.T.C. v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (same). The privilege does not apply, however, to any factual information upon which the agency has relied. *In re United States*, 875 F.3d 1200, 1211-12 (9th Cir. 2017) (Watford, J., dissenting) (citing *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993)).

also In re United States, 875 F.3d 1200, 1211–12 (9th Cir. 2017) (Watford, J., dissenting) (discussing potential circumstances justifying expansion of the AR), *vacated*, 138 S. Ct. 443, 445 (2017).

But, BMBP does not assert any misconduct by the Service, nor does it contend that specific documents were improperly classified as deliberative. Although we leave for another day a detailed exploration of the precise circumstances under which a district court can order the production of a privilege log, the court here did not abuse its discretion by declining to do so in this case.

B.

BMBP also contends that the documents in the 2016 AR were necessarily before the agency in the 2020 process because the Project is a continuation of the withdrawn one. In so arguing, BMBP cites statements by the Service suggesting that the 2020 decision relied on an "additional" NEPA analysis, a District Ranger's description of that analysis as a "continuation of the Walton Lake Restoration analysis and documentation," and the Service's reliance on a 2015 Forest Health Report before the district court and an appellate motions panel.

BMBP's arguments, however, fail to overcome the presumption of regularity. *See Goffney*, 995 F.3d at 748. The 2020 decision notice expressly stated that "[t]he Forest Service began the NEPA process again in 2019 with a scoping letter dated August 7, 2019." The phrase "additional analysis" is not inconsistent with preparing a new AR to support a new NEPA analysis. Nor do the views of a single Service employee necessarily reflect

those of the agency or its ultimate decision-maker. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007). The record also supports the Service's contention that it included only documents from previous NEPA analyses that were considered in the 2020 decision. For example, the Service did not cite the 2015 Forest Health Report in its 2020 decision, relying instead on a new 2019 Forest Health Report. And, the Service's citations to the 2015 Report in prior court proceedings did not involve the validity of the 2020 decision but rather a separate 2017 decision to close sections of the recreation site because of safety concerns.

We place a thumb on the scale against supplementation of the AR, *see Goffney*, 995 F.3d at 747–48, and BMBP has not demonstrated how the inclusion of "over two thousand pages that the Service had included in the 2016 AR," would "identify and plug holes in the administrative record," *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (cleaned up). Because BMBP "has not met its heavy burden to show that the additional materials sought are necessary to adequately review the Forest Service's decision," *id.*, the district court acted within its discretion in denying the motion to supplement the AR.

II.

We next address whether the Service violated NEPA by approving the Project. NEPA imposes "a set of action-forcing procedures that require that agencies take a hard look at [the] environmental consequences" of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (cleaned up). "Although these procedures are almost certain to affect

the agency's substantive decision, . . . NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.*

A.

The Council on Environmental Quality ("CEQ") issues regulations to guide agencies in determining what actions are subject to NEPA requirements. *See* 40 C.F.R. § 1500.3.[5] Those regulations prohibit an agency from "commit[ting] resources prejudicing selection of alternatives" or taking actions that would "[l]imit the choice of reasonable alternatives." *Id.* §§ 1502.2(f), 1506.1(a)(2). BMBP contends that the logging contract with T2 violated these regulations. The parties dispute whether an improper commitment of resources must be "irreversible and irretrievable," *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (cleaned up), or something less. We need not decide that issue, however, because BMBP has failed to establish that the contract improperly committed resources under any standard.

Under the contract, T2 will receive $78,262 to remove non-commercial timber and about $36,000 worth of harvested commercial timber. Critically, the Service reserved the right to "terminate this contract, or any part hereof, for its sole convenience," at which point T2 "shall immediately stop all work." 48 C.F.R. § 52.212-4(l); *see WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008) (stressing that the Service "clearly retained the authority to change course or to alter the plan it was

[5] Unless otherwise indicated, all citations are to the 2019 version of the Code of Federal Regulations.

considering implementing"); *see also Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 206 (4th Cir. 2005) (holding that preparatory activities did not violate NEPA in part because that they did not "include cutting even a single blade of grass in preparation for construction"). T2 has not conducted any logging under the contract because the Service has not issued a notice to proceed. And, given the district court's preliminary injunction against logging, which has been stayed pending appeal, no logging can occur until this case is resolved. *See supra* note 2. Nor has the Service made any payments to T2.

There is also no evidence that the agency "merely engaged" in "post hoc rationalization" in the 2020 decision. *Nat'l Audubon Soc'y*, 422 F.3d at 199. BMBP argues that an internal email by a Service employee suggests that termination of the contract would cost the Service appropriated dollars and prevent funding of a new project. But, another Service employee explained in the same email chain that any future work under the contract "must adhere to what is in the new NEPA decision" and that pending the outcome of that decision, the Service might need to "terminate[ ] and resolicit[ ]" the contract.

Rather than rely on "the alleged subjective intent of agency personnel divined through selective quotations from email trails," we "look to . . . the environmental analysis itself." *Id.* The EA contains no indication that the T2 contract prejudiced or limited the consideration of alternatives. After analyzing the effects of no action and several alternatives that reduced or eliminated commercial logging, the Service chose the Project

because it "best meets the Purpose and Need of Action," would "better meet the management objectives of the area," and "provides the best opportunity for long-term public enjoyment of this area." The Service also stated that it "considered all reasonable alternatives and would not be limited in choice because the final service agreement or other tool of implementation would be written to align with the final decision."

B.

NEPA mandates an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An agency need not, however, prepare an EIS if it prepares an EA that "briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757–58 (2004). Significance depends on an action's "context" and "intensity." 40 C.F.R. § 1508.27. "Although . . . review under the arbitrary and capricious standard is deferential," an agency's finding of no significant impact is arbitrary or capricious if the petitioner has raised "substantial questions whether a project may have a significant effect on the environment." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212–14, 1216 (9th Cir. 1998) (cleaned up).

1.

"Context simply delimits the scope of the agency's action, including the interests affected." *In Defense of Animals v. U.S. Dep't of the Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014) (cleaned up); *see* 40 C.F.R. § 1508.27(a)

(listing potential contexts). Although the agency should be mindful "that use of a larger analysis area can dilute the apparent magnitude of environmental impacts," "[i]dentifying the appropriate geographic scope is a task assigned to the special competency of the appropriate agency." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 943 (9th Cir. 2014) (cleaned up).

BMBP contends that the EA diluted the significance of some impacts by analyzing them on too large a scale. However, "[a]lthough 40 C.F.R. § 1508.27(a) suggests that site-specific actions are generally evaluated in the context of a project locale, nothing in the regulation prohibits the [Service] from exercising its discretion to apply a [larger] analysis when appropriate." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1127 (9th Cir. 2012). And BMBP has not shown why the choice of a broader context in the challenged instances was arbitrary or capricious. *See Ctr. for Cmty. Action & Env't Just. v. FAA*, 18 F.4th 592, 599 (9th Cir. 2021) (noting that the petitioner bears the burden of persuasion); *cf. Anderson v. Evans*, 371 F.3d 475, 489–92 (9th Cir. 2004) (explaining why the local context was especially relevant for assessing whether the project's effects would be controversial).

Indeed, BMBP concedes in its briefing that the 2020 decision "acknowledges the highly-localized nature of the Project's effects" and that the EA contains a "*disclosure* of local impacts." The Service extensively analyzed various local impacts—including those on scenic integrity, on late and old structure stands, and on threatened and endangered species. And, the EA explained why it chose certain broader contexts for

analysis in other instances. The record fails to establish that the agency's decisions about context were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

2.

Intensity "refers to the severity of impact" within the selected context. 40 C.F.R. § 1508.27(b). The regulations list ten non-exhaustive relevant factors for consideration, including the "[u]nique characteristics of the geographic area"; the "degree to which the effects . . . are likely to be highly controversial"; the "degree to which the action may establish a precedent for future actions with significant effects"; and whether the action "threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." *Id.* Whether the factors are assessed individually or cumulatively, the record does not establish a "clear error of judgment" in the Service's intensity findings. *Blue Mountains Biodiversity Project*, 161 F.3d at 1211 (cleaned up).

Although the EA described Walton Lake as "unique" because it boasts a high number of visitors and is "the only Developed Recreation Management Area that has a lake with the combination of moist mixed conifer and dry mixed conifer forest surrounding it," the Service reasonably found that the Project would affect neither the lake itself, nor "the diversity of tree species in the project area around Walton Lake." The Service also reasonably concluded that the Project "would not substantially affect the use of the area as a recreation site" because the infested area was already closed to

recreational uses for safety reasons. And BMBP does not challenge the Service's conclusion that the Project would not affect any of the "unique" characteristics listed in the regulation. *See* 40 C.F.R. § 1508.27(b)(3).

The record also does not suggest that the Project is highly controversial. *See id.* § 1508.27(b)(4). "A project is highly controversial if there is a *substantial dispute* about the size, nature, or effect of the major Federal action," which "exists when evidence . . . casts serious doubt upon the reasonableness of an agency's conclusions." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019) (cleaned up). But, a project is not rendered highly controversial simply because "qualified experts disagree." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992). Rather, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

The Service concluded that the Project was not highly controversial because its potential effects were well-established or supported by the best available science. Citing a range of research, the Service found "no evidence that the proposed treatments would exacerbate" laminated root rot. It also decided against stump removal because of "soil disturbance" and "the high cost of removing stumps."

The scientific studies cited by BMBP do not render these findings arbitrary or capricious. One acknowledges that "an appropriate strategy" is "based on several factors"; another expresses some skepticism about sanitation harvesting but also notes the potential

effectiveness of "spacing trees through thinning, by removing stumps, or by planting and managing resistant and immune trees species"; and a third does not discuss sanitation harvesting at all. Although BMBP also cites Dr. Chad Hanson's opinion that logging would "likely increase [laminated root rot] occurrence," the Service reviewed that opinion but ultimately concluded that the overall evidence weighed against its conclusions. One negative comment does not establish high controversy. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1243–44 (9th Cir. 2005).

It was also reasonable for the Service to conclude that the Project is unlikely to establish a precedent for future actions. *See* 40 C.F.R. § 1508.27(b)(6). The Service explained that "no other known Developed Recreation Management Areas . . . have a laminated root rot problem on the Ochoco National Forest." The Service found that the Project is "site-specific" and "any future decision would need to go through the NEPA process." Even if other sites might one day develop similar infestation issues, that does not necessarily make this Project precedential, "especially since any other [project] would be subject to its own NEPA analysis." *WildEarth Guardians*, 923 F.3d at 674.

The Service's decision also reasonably accounted for federal, state, and local laws. *See* 40 C.F.R. § 1508.27(b)(10). Although forest plan amendments that "may create a significant environmental effect" require an EIS, there is an exception for "every plan amendment . . . that applies only to one project or activity." 36 C.F.R. § 219.13(b)(3). The amendments to the Ochoco National Forest Plan at issue are each related to one project.

CONCLUSION

We **AFFIRM** the judgment of the district court and lift our previous stay of its order dissolving the preliminary injunction.

BERZON, Circuit Judge, with whom WARDLAW, PAEZ, and KOH, Circuit Judges, join, respecting the denial of rehearing en banc:

The panel's holding in this case permits government agencies to sanitize the record available to reviewing courts, thereby severely curtailing meaningful judicial review of administrative action. I respectfully disagree with this court's refusal to reconsider the panel opinion en banc.

The Administrative Procedure Act ("APA") mandates that, when considering challenges to the lawfulness of agency action, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. This court has long held that the "whole record" consists of all documents and materials considered by the agency before making its decision. *See Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993); *Thompson v. U.S. Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989); *see also, e.g.*, *Goffney v. Becerra*, 995 F.3d 737, 747 (9th Cir. 2021) (citing *Portland Audubon Soc'y*, 984 F.2d at 1548); *Pac. Choice Seafood Co. v. Ross*, 976 F.3d 932, 942 (9th Cir. 2020) (same).

In keeping with our precedents, the Supreme Court has never "limit[ed] the 'full administrative record' to

those materials that the agency unilaterally decides should be considered by the reviewing court." *In re United States*, 583 U.S. 1029, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting from the grant of a stay). "[J]udicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record." *Id.* That is because "[e]ffective review depends upon the administrative record containing all relevant materials presented to the agency, including not only materials supportive of the government's decision but also materials contrary to the government's decision." *Id.*[1]

In conflict with our case law, the decision here holds that materials protected by the deliberative process privilege are not part of the "whole record" for purposes of judicial review under the APA. *Blue Mountains Biodiversity Project v. Jeffries*, 72 F.4th 991, 996–97 (9th Cir. 2023). The deliberative process privilege applies to "documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated," but does not protect "[p]urely factual material." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

According to the panel opinion, because deliberative documents are—says the panel—not part of the "whole

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[1] As I explain later, although in dissent as to the stay, Justice Breyer later joined the unanimous merits opinion in *In re United States*, 583 U.S. 29, 31–32 (2017) (per curiam), which was consistent with the analysis in his stay dissent. *See infra* at Part I.

record," the government ordinarily need not prepare a privilege log indicating the basis for excluding "deliberative" documents as privileged. *Blue Mountains*, 72 F.4th at 997. Under the opinion, absent a *showing* of bad faith or impropriety (or perhaps some other exception, not articulated), the government may routinely and unilaterally withhold all documents it deems "deliberative" without providing any account to the court or the litigants of the basis for excluding those documents. That holding is not only wrong but is likely to reduce APA review in many instances to a charade.

I.

In *In re United States*, the federal government advanced in the Supreme Court the same position taken by the opinion in this case: that review of agency decisions under the APA "must be based exclusively on the documents that the Government itself unilaterally selected for submission to the District Court." *In re U.S.*, 138 S. Ct. at 372 (Breyer, J., dissenting from the grant of a stay). The district court in *In re United States* had determined that the record designated by the government was incomplete, and so ordered the government to complete the administrative record and produce a privilege log. *See Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324, *7–8 (N.D. Cal. Oct. 17, 2017). After we upheld the district court's decision on mandamus review, *In re United States*, 875 F.3d 1200 (9th Cir. 2017), the government sought review in the Supreme Court. The Supreme Court granted a stay to consider the government's mandamus request. *In re U.S.*, 138 S. Ct. at 371. Joined by three justices in dissent

from the grant of the stay Justice Breyer maintained that the Supreme Court has never held that the "whole record" in APA cases is whatever documents the government unilaterally designates as the administrative record. *In re U.S.*, 138 S. Ct. at 372.

The Supreme Court subsequently granted certiorari and issued a unanimous opinion in *In re United States*. 583 U.S. 29 (2017) (per curiam). That opinion allowed the district court's order to remain in place and declined to adopt the government's view of its unilateral power to designate the administrative record. *Id.* at 31–32.

More specifically, the Court in *In re United States* held that the district court should have first resolved two threshold jurisdictional arguments that "if accepted, likely would eliminate the need for the District Court to examine a complete administrative record." *Id.* at 31–32. But the Court did not disapprove the district court's order directing the government to complete the administrative record and produce a privilege log. *See id.* at 32. Instead, the Court explained that if the threshold arguments were resolved in favor of the district court's jurisdiction, then the district court "may consider whether narrower amendments to the record are necessary and appropriate." *Id.* The Supreme Court further indicated that the district court could potentially "compel the Government to disclose [] document[s] that the Government believes is privileged" so long as the court "first provid[es] the Government with the opportunity to argue the issue." *Id.*

In other words, consistent with Justice Breyer's earlier dissent from the stay order, the Supreme Court's unanimous opinion made clear that the district court had

power either to maintain its existing order for completion of the administrative record and production of a privilege log, or to "narrow[]" it, as long as the government had a chance to litigate the question of privilege. *Id.* The Supreme Court's merits opinion did *not* hold—as did the panel opinion in this case—that the district court was precluded from expanding the record at all, absent a showing of some unusual circumstance, or that the agency could decide for itself which material was deliberative. And Justice Breyer obviously understood the merits opinion as consistent with the analysis in his earlier stay dissent—an analysis squarely contrary to the panel opinion in this case—as he joined the merits opinion.

II.

In keeping with the view that prevailed in *In re United States*, our Circuit has repeatedly held that for purposes of APA review, "'[t]he whole record' includes *everything* that was before the agency pertaining to the merits of its decision." *Portland Audubon Soc'y*, 984 F.2d at 1548 (emphasis added). *See also, e.g.*, *Pac. Choice Seafood Co.*, 976 F.3d at 942 (same); *Goffney*, 995 F.3d at 747 (same); *Thompson*, 885 F.2d at 555.

Our requirement that the administrative record be complete is critical for effective judicial review. In APA agency review cases, private parties may not introduce new facts, and discovery is ordinarily not available. As the Supreme Court has observed, "the focal point for judicial review" in APA cases "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "[T]he general rule [is]

that agency actions are to be judged on the agency record alone, without discovery." *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982).

Our Circuit law is clear that, given that judicial review is limited to the administrative record, the administrative record must be complete. "If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." *Portland Audubon Soc'y*, 984 F.2d at 1548; *accord In re United States*, 138 S. Ct. at 372 (Breyer, J., dissenting from the grant of a stay). Accordingly, *Portland Audubon Society* explained that "a record that does not include all matters on which the [agency] relied does not constitute the 'whole record' required for judicial review," and "the failure to include all materials in the record violates the Administrative Procedure Act." *Id.* at 1536–37. Further, "[w]hen it appears the agency has relied on documents or materials not included in the record, supplementation is appropriate." *Id.* at 1548.

Thompson similarly held that "[t]he whole administrative record . . . is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record." 885 F.2d at 555; *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) ("An agency may not unilaterally determine what constitutes the Administrative Record"). Instead, "[t]he 'whole' administrative 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 (internal quotation marks and citation omitted).

More recently, in *Pacific Choice Seafood Company*, we rejected an argument that in reviewing a National Marine Fisheries Service decision, we should "examine only the Service's [final] decision memoranda while ignoring" earlier materials, analyses, and reports produced by a regional fishery management council during a "years-long deliberative process" that preceded the Service's final decision. 976 F.3d at 936, 942. Emphasizing that the "whole record" includes "everything that was before the agency," we noted that the plaintiff "offer[ed] no authority supporting its assertion that we should focus exclusively on the Service's memoranda from the very end of the administrative process." *Id.* at 942. *See also id.* at 943 (relying in part on "the extensive discussion of [applicable] factors presented at each step of the rulemaking process" in concluding that the agency had engaged in reasoned decisionmaking).

Consistent with these precedents, we have routinely reviewed letters, drafts, emails, and other nonfinal materials in the course of evaluating the lawfulness of agency action. For example, *Barnes v. U.S. Department of Transportation*, 655 F.3d 1124 (9th Cir. 2011), considered a statement made by a Federal Aviation Authority ("FAA") official while commenting on a draft document related to an environmental assessment of a new airport runway. *Id.* at 1133. The government contended that we should disregard the statement because it was "made in the early stages of the administrative process" and "that courts must focus on

the final action by an agency." *Id.* We disagreed, explaining that the Supreme Court has not held that "such preliminary determinations are irrelevant in any context . . . or that they may not be considered when reviewing an agency action." *Id.* at 1134. We also considered "a series of emails in the administrative record" reflecting concerns raised by FAA employees about the proposed project. *Id.* at 1135. *See also, e.g.*, *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 499–501 (9th Cir. 2014) (considering "internal [agency] emails," draft tables or charts, and commentary by agency staff on proposed scenarios); *Earth Island Institute v. Hogarth*, 494 F.3d 757, 768–69 (9th Cir. 2007) (relying on an administrative record that included "internal memoranda" as well as draft "talking points").

The holding here that the "whole record" does not include deliberative material cannot be reconciled with these precedents. Under our case law, drafts and other non-final documents may properly be reviewed by the court as part of the "whole record," unless the government justifies its decision to withhold such documents in a privilege log.

III.

Aside from creating an intracircuit conflict, the reasons provided in the opinion in support of its holding on the administrative record issue are seriously flawed.

A.

The opinion "rests" in part on the principle that "an agency's statement of what is in the record is subject to a presumption of regularity." *Blue Mountains*, 72 F.4th at 996–97. But the presumption of regularity is a

presumption that the agency has done what it is supposed to do; it does not tell us what the agency is supposed to do. More specifically, the presumption does not describe the breadth of the record that should be produced and so does not explain to what the presumption attaches. That is, if the legal rule is that the record is everything that was before the agency (as our precedents have long held), then we can presume—but not conclusively—that what is presented was everything before the agency. So the presumption has nothing to do with what is actually in an appropriate administrative record in the first instance.

B.

The opinion also reasons that "[d]eliberative documents, which are prepared to aid the decision-maker in arriving at a decision, are ordinarily not relevant" to judicial review of the lawfulness of agency action. *Blue Mountains*, 72 F.4th at 997. In support of this proposition, the opinion relies on *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977), and *Morgan v. United States*, 304 U.S. 1, 18 (1938). *See Blue Mountains*, 72 F.4th at 997. Neither case supports the panel's conclusion.

Overton Park involved a challenge to the Secretary of Transportation's decision to authorize the construction of a highway through a public park. 401 U.S. at 406. In announcing his decision, the Secretary made no formal findings. 401 U.S. at 407–08. The Supreme Court explained that judicial "review is to be based on the full administrative record that was before

the Secretary at the time he made his decision." *Id.* at 420. But because of the inadequacy of the existing record in that case, the Court held that post-decisional fact development was perhaps necessary for effective judicial review:

> The court may require the administrative officials who participated in the decision *to give testimony explaining their action*. Of course, *such inquiry* into the mental processes of administrative decisionmakers is usually to be avoided. . . . And where there are administrative findings that were made at the same time as the decision, . . . there must be a strong showing of bad faith or improper behavior before *such inquiry* may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

Id. (emphasis added) (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941) (hereinafter *Morgan II*)).

Similarly, in *Morgan*, after the district court received testimony from the Secretary of Agriculture about his decisional process, the Supreme Court observed that "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." 304 U.S. at 14, 18; *see also Morgan II*, 313 U.S. at 422.[2]

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[2] The Supreme Court in *Morgan*, a case concerning an adjudicative proceeding, reversed the district court's decision because the plaintiffs were not provided with sufficient information about the

Thus, both cases concern the propriety of *post-decisional* testimony of administrative decisionmakers, which obviously was not part of the administrative record because it did not exist at the time the agency made its decision. *See In re United States*, 138 S. Ct. at 373 (Breyer, J., dissenting from the grant of a stay). "Probing a decisionmaker's subjective mental reasoning—what was at issue in *Morgan* and *Overton Park*—is distinct from the ordinary judicial task of evaluating whether the decision itself was objectively valid, considering all of the materials before the decisionmaker at the time he made the decision." *Id.* Neither *Morgan* or *Overton Park* concerns the scope of the administrative record reviewed under the APA or supports the conclusion that deliberative documents actually before the agency when reaching its decision are not part of the administrative record. Nor do they concern the circumstances warranting a privilege log.

C.

The opinion also heavily relies on the D.C. Circuit's decision in *Oceana, Inc. v. Ross*, 920 F.3d 855 (D.C. Cir. 2019). *Blue Mountains*, 72 F.4th at 996–97. *Oceana*, in turn, relied on *In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 156 F.3d 1279, 1279–80 (D.C. Cir. 1998) (opinion on petition for rehearing). And *In re Subpoena Duces Tecum* relied on *Morgan*, *Overton Park*, and *Camp* in concluding that "[a]gency deliberations *not part of the record* are deemed immaterial." *Id.* at 1279–80 (emphasis added). That

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government's position to satisfy the requirement of a full and fair hearing. *Morgan*, 304 U.S. at 18–19, 22.

statement indicates that agency deliberations can be "part of the record," and says nothing about the treatment of agency deliberations that *are* part of the record.

Yet, *Oceana* seized on this statement—which like the Supreme Court cases the panel opinion in this case cites, references *extra-record* discovery into the decisionmaker's subjective motivations—to conclude that deliberative documents that *were* before the agency are not part of the administrative record. *See* 920 F.3d at 865 (citing *In re Subpoena Duces Tecum*, 156 F.3d at 1279, 1280). As far as I can tell, no other Circuit has adopted the D.C. Circuit's wrongheaded approach. Moreover, as discussed, *Oceana*'s conclusion conflicts with our Circuit's controlling precedents.

Oceana also asserts that "[b]ecause predecisional documents are 'immaterial,' they are not 'discoverable.'" 920 F.3d at 865 (citation omitted). But the concept of discoverability has no bearing on the meaning of the "whole record" for APA cases. Again, discovery is ordinarily not available in APA review cases. *See supra* at Part II. As the "whole record" is not determined through discovery, the discovery-related concept of "relevan[ce]," *see* Fed. R. Civ. Proc. 26(b)(1), is not helpful for purposes of defining the "whole record." Instead, as our case law reflects, the "whole record" consists of everything that was "directly or indirectly considered" by the agency. *Thompson*, 885 F.2d at 555 (emphasis and quotation marks omitted).

IV.

In other key respects as well, the decision in this case is damaging to judicial review of agency action. The opinion sets a new baseline in which the government need not justify its claims of privilege except in limited circumstances, as yet unexplained. Without a privilege log, however, governmental mistakes or misconduct are unlikely to come to light. The panel's holding also creates a tension with Freedom of Information Act ("FOIA") case law, which requires the government to supply a privilege log to justify withholding of documents claimed to be deliberative. And the decision fails to acknowledge that deliberative materials are central in cases in which the decisionmaker's subjective intent is properly at issue. *See, e.g. Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573–74 (2019).

A.

Although the opinion purports to "leave for another day a detailed exploration of the precise circumstances under which a district court can order the production of a privilege log," it concludes that the district court properly declined to order a privilege log here because Blue Mountains Biodiversity Project "does not assert any misconduct by the Service, nor does it contend that specific documents were improperly classified as deliberative." *Blue Mountains*, 72 F.4th at 997.

Absent a privilege log, it is very unlikely—absent public announcements or a leak by government officials—that litigants will be able to point to "specific" documents improperly excluded. The reason is obvious—they will be unaware that such documents

exist. *See, e.g.*, *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG SHKx, 2019 WL 13240629, at *6 (C.D. Cal. Apr. 8, 2019) ("[I]t would be very difficult, if not impossible, for an APA plaintiff to challenge a claim of deliberative process privilege or to make the required showing of need necessary to overcome the privilege without at least some description of the document over which privilege is asserted."); *Sierra Club v. Zinke*, No. 17-CV-07187-WHO, 2018 WL 3126401, at *5 (N.D. Cal. June 26, 2018) ("The only way to know if privilege applies is to review the deliberative documents in a privilege log.").

Importantly, agencies may inadvertently omit material from the administrative record without acting in bad faith. In *Bartell Ranch LLC v. McCullough*, No. 3:21-CV-00080-MMD-CLB, 2022 WL 2093053, at *3 (D. Nev. June 10, 2022), for example, the Bureau of Land Management had a practice of assuming that only the documents that individual agency staff had added to a case file as they were generated should be produced as the record, and that all documents *not* added to the case file were deliberative. *Id.* As a result of that practice, neither the agency nor its counsel looked outside the case file for record documents, nor did they make any individualized determinations about whether the six to eight thousand emails they excluded were actually deliberative. *Id.* Had the court not ordered the agency to provide a privilege log, the agency's error would never have come to light. *Id.*

An agency may also make a legal error in determining which documents to exclude, such as when it applies an incorrect legal standard when compiling the

record. *See, e.g.*, *Inland Empire-Immigrant Youth Collective*, 2019 WL 13240629, at *4 (recognizing that "[t]he application of an incorrect standard" provides reason to believe the record produced by the agency is incomplete) (quotation marks and citation omitted). The possibility that the agency may apply an incorrect legal standard in excluding deliberative material from the administrative record is far from theoretical. Without the understanding that the "whole record" includes deliberative material and may require a privilege log identifying such material, errors of this kind will remain hidden from the litigants and the court, and the outcome of the case could well be affected.

For these reasons, if the government wishes to exclude from the record material before the agency as deliberative, it should have to identify those specific documents and justify their exclusion in a log provided to the court.

B.

The process just described is the one we have long followed in cases under another provision of the APA—the Freedom of Information Act—when the government claims that deliberative material is exempt from disclosure. There is no reason the process should be different here.

"The statute known as the FOIA is actually a part of the Administrative Procedure Act (APA)." *U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 754 (1989). FOIA Exemption 5 permits the government to avoid disclosure of "inter-agency or intra-agency memorandums or letters that would not be

available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption "allows agencies to withhold privileged information, including documents revealing an agency's deliberative process." *Transgender L. Ctr. v. Immigr. & Customs Enf't*, 46 F.4th 771, 782 (9th Cir. 2022).

Under FOIA, the government has the burden of demonstrating that a claimed privilege applies. *See id.* at 781; 5 U.S.C. § 552(a)(4)(B). "[O]ur caselaw . . . demands a careful document-by-document review" to determine whether the agency has met its burden to show that the deliberative process privilege applies. *Transgender L. Ctr.*, 46 F.4th at 786. To aid the court's determination, government agencies seeking to avoid disclosure of public records must submit a "*Vaughn* index," which "'identif[ies] the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption.'" *Id.* at 781 (quoting *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 989 (9th Cir. 2009)); *see Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973). "[T]he purpose of the index is . . . to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Transgender L. Ctr.*, 46 F.4th at 782 (quotation marks and citation omitted).

In FOIA cases, the deliberative process privilege is not absolute. Instead, "[w]e have held that '[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.'"

Karnoski, 926 F.3d at 1206 (quoting *Warner*, 742 F.2d at 1161); *see also* 5 U.S.C. § 552(a)(8)(A)(i)(I). There is no basis in the APA for providing litigants challenging agency action with *less* access to public documents than is available to interested members of the public under FOIA. Notably, APA review requires consideration of the "whole record," with no express exceptions, 5 U.S.C. § 706, whereas FOIA includes several express exemptions to public access, 5 U.S.C. § 552(b).

The incongruity between FOIA and the APA, 5 U.S.C. § 706, created by the panel's decision is seriously inefficient for litigants, agencies, and the courts. To obtain access to the complete administrative record or identify what documents may exist, litigants seeking to challenge agency action will first have to file FOIA requests and then litigate the agency's decision to claim a FOIA exemption, potentially running into statute of limitations problems for the APA action while the FOIA process inches forward. Agencies will have to respond to and litigate those FOIA requests. And the courts will have to resolve both FOIA claims and APA challenges.

C.

Finally, but importantly, an agency's subjective motivations sometimes *are* critical in APA cases. In cases in which the legal claim places the agency's subjective intent directly at issue—such as a claim that plausibly alleges that the decisionmaker's intent was discriminatory or retaliatory—deliberative materials actually considered will be central to judicial review. Such materials can be identified only if included in the whole record and, if appropriate, a privilege log.

The opinion does not except such cases from the rule it establishes about the limited scope of the administrative record. Yet the D.C. Circuit's decision *In re Subpoena Duces Tecum*, relied on by *Oceana*, held that in cases that "directly call into question the agency's subjective intent," the subjective motivation of the decisionmakers *is* at issue, and the deliberative process privilege is inapplicable. *See* 156 F.3d at 1280; *see also In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir.), on reh'g, 156 F.3d 1279 (D.C. Cir. 1998).

Department of Commerce likewise reflects that inquiry into an administrative agency's mental processes *is* permitted where the decisionmakers' motives are at issue. There, the Supreme Court held that inquiry into a decisionmaker's "mental processes" was appropriate where there was evidence in the administrative record that the Secretary of Commerce's stated reasons for his decision were pretextual. 139 S. Ct. at 2573–74. *Department of Commerce* reflects that the decisionmaker's subjective motivations are at issue when the claim is that the agency's stated reasons for its decision were "contrived." *See id.* at 2575–76. It follows that when such claims are alleged, deliberative documents *are* directly on point and, for that reason as well as those generally applicable, may not be excluded from the administrative record.

The holding in this case that "deliberative materials are 'not part of the administrative record to begin with,'" and that only "the reasons offered by the agency" matter, *Blue Mountains*, 72 F.4th at 997, contains no recognition that this rule would fatally undermine cases

in which the basis for the challenge to the agency's decision is that there were *other* reasons, not expressed in the official explanation of the agency's decision, that were actually determinative. The recognition that there may be unspecified circumstances in which challengers may be able to come forward with evidence of bad faith or impropriety and then have access to deliberative material does not fill that gap. Without access to the "whole record," including a privilege log of assertedly deliberative material, the only way to begin to make a showing of illicit motivation or pretext would be through public statements by decisionmakers or leaks from government insiders.

* * *

In sum, if government agencies wish to withhold documents in APA cases based on a privilege, they should have to provide a privilege log with a justification for each document for which they assert a privilege, as they must do under our FOIA precedents. Without a complete record or a privilege log to aid in the determination of whether the record is complete, government agencies will have the last word on what information other litigants and the court may see, and effective judicial review of government action under the APA will be severely undermined. Our court should have heard this case en banc to eliminate this serious threat to meaningful judicial review of agency action.

Appendix B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon non-profit corporation, *Plaintiff-Appellant*, v. SHANE JEFFRIES, in his official capacity as Ochoco National Forest Supervisor; UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture, *Defendants-Appellees*.	No. 22-35857 D.C. No. 2:20-cv-02158-MO OPINION

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted March 30, 2023
Seattle, Washington

Filed July 3, 2023

Before: Jacqueline H. Nguyen and Andrew D. Hurwitz, Circuit Judges, and Dean D. Pregerson,* District Judge.

Opinion by Judge Hurwitz

SUMMARY**

Environmental Law

The panel affirmed the district court's summary judgment in favor of the U.S. Forest Service in an action brought by Blue Mountains Biodiversity Project ("BMBP") alleging that the Service's approval of the Walton Lake Restoration Project violated the National Environmental Policy Act ("NEPA"), the National Forest Management Act, and the Administrative Procedure Act.

The Forest Service developed the Project to replace trees infested with laminated root rot and bark beetles with disease-resistant ones. In May 2016, the Service contracted with T2, a private company, for logging to implement the decision. The Service issued a revised Environmental Assessment ("EA") in July 2020 and a revised decision notice in December 2020. BMBP filed this action challenging the 2020 decision notice. The Service filed an administrative record ("AR") in 2021.

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel first addressed BMBP's argument that the AR was incomplete. First, BMBP argued that deliberative materials were part of the "whole record" and that a privilege log was required if they were not included in the AR. The panel held that deliberative materials are generally not part of the AR absent impropriety or bad faith by the agency. Because deliberative materials are not part of the administrative record to begin with, they are not required to be placed on a privilege log. The district court did not abuse its discretion by declining to order the production of a privilege log. Second, BMBP argued that all documents in the 2016 AR should be in the AR for this case. BMBP contended that the documents in the 2016 AR were necessarily before the agency in the 2020 process because the Project was a continuation of the withdrawn one. The panel held that BMBP's arguments failed to overcome the presumption of regularity. The 2020 decision notice expressly stated that the Forest Service began the NEPA process again in 2019. The record also supported the Service's contention that it included only documents from previous NEPA analyses that were considered in the 2020 decision. The panel concluded that the district court acted within its discretion in denying the motion to supplement the AR.

The panel next addressed whether the Service violated NEPA by approving the Project. First, the panel held that BMBP failed to establish that the logging contract with T2 improperly committed resources under any standard. There is also no evidence that the agency merely engaged in post hoc rationalization in the 2020 decision. Second, the panel rejected BMBP's contention that the EA diluted the significance of some impacts by

analyzing them on too large a scale. The BMBP did not show why the choice of a broader context in the challenged instances was arbitrary or capricious. Also, the regulations list ten non-exhaustive relevant factors for consideration. The panel held that whether the factors were assessed individually or cumulatively, the record did not establish a clear error of judgment in the Service's intensity findings, which "refers to the severity of impact" within the selected context. 40 C.F.R. § 1508.27(b).

The panel affirmed the judgment of the district court and lifted the previous stay of its order dissolving the preliminary injunction.

COUNSEL

Jesse A. Buss (argued) and Bridgett A. Chevallier, Willamette Law Group PC, Oregon City, Oregon; Thomas C. Buchele, Earthrise Law Center, Portland, Oregon; for Plaintiff-Appellant.

Robert P. Stockman (argued), Sean C. Duffy, and Joan M. Pepin, Attorneys; Todd Kim, Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice; Washington, D.C.; Rick Grisel, Attorney; Rebecca Harrison, Senior Counsel; Office of the General Counsel; Washington, D.C.; for Defendants-Appellees.

OPINION

HURWITZ, Circuit Judge:

This case involves claims by the Blue Mountains Biodiversity Project ("BMBP") that the approval of the Walton Lake Restoration Project by the U.S. Forest

Service violated the National Environmental Policy Act, the National Forest Management Act, and the Administrative Procedure Act. The district court granted summary judgment against BMBP on all claims relevant to this appeal. We affirm.

BACKGROUND

Walton Lake is a 218-acre recreation site in the Ochoco National Forest in Oregon. The Forest Service developed the Walton Lake Restoration Project ("Project") to replace trees infested with laminated root rot and bark beetles with disease-resistant ones. In 2015, relying on a regulation that excludes the sanitation harvest of trees to control disease and insects from some National Environmental Policy Act ("NEPA") requirements, 36 C.F.R. § 220.6(e)(14) (2015), the Service issued a decision memorandum approving the Project. In May 2016, the Service contracted with T2, a private company, for logging to implement that decision. Although no logging has yet occurred, the T2 contract remains in place.

BMBP sued, challenging the 2015 decision, and the district court preliminarily enjoined the logging on October 18, 2016. The next day, the Service withdrew its decision "to allow additional analysis of the proposed activities." On October 21, 2016, the Service stated that it would undertake "[a]dditional planning and analysis . . . with the goal of releasing an Environmental [Assessment ("EA")]."[1]

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[1] The district court granted BMBP's motion to dismiss the 2016 suit on June 19, 2017.

The Service issued an EA and a decision notice approving the Project in 2017 but withdrew the decision notice later that year, citing a need for "additional dialogue and analysis." The Service issued a revised EA in July 2020 and a revised decision notice in December 2020. The revised EA analyzed four alternatives, including a no-action alternative. The selected alternative authorizes thirty-five acres of sanitation logging and 143 acres of commercial and noncommercial thinning to reduce the risk of wildfires and bark beetle infestation. The 2020 decision notice stated that the Project "provides the best opportunity for long-term public enjoyment of this area, with fewer risks of falling trees, and more longevity in the large ponderosa pines that provide much of the scenic quality"; found that there would be no significant environmental impact; and made four Project-specific amendments to the Ochoco National Forest Plan.

BMBP then filed this action challenging the 2020 decision notice. The Service filed an administrative record ("AR") in early 2021. A magistrate judge recommended denial of BMBP's motion to compel completion of the AR and declined to order the Service to produce a privilege log, concluding that certain documents sought by BMBP were deliberative materials, and BMBP did not establish that some documents in the AR filed in response to the 2016 suit were "before the agency" in its 2020 decision. The district judge adopted the magistrate judge's reasoning and denied the motion, but again preliminarily enjoined any logging for the Project.

The district court later granted the Service summary judgment on all but one of BMBP's claims. It concluded that the logging contract with T2 was not an "irreversible and irretrievable commitment" of resources because it could be unilaterally modified or terminated. It also held that the Service reasonably found that the Project would not have a significant environmental impact and thus reasonably declined to prepare an environmental impact statement ("EIS"). The court entered a final judgment and dissolved the preliminary injunction.[2] BMBP timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.[3]

DISCUSSION

I.

We first address BMBP's argument that the AR is incomplete. The Administrative Procedure Act ("APA") requires us to "review the whole record," 5 U.S.C. § 706, including "all documents and materials directly or indirectly considered by agency decision-makers," *Thompson v. U.S. Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989) (cleaned up). BMBP argues that deliberative materials are part of the "whole record" and that a privilege log is required if they are not included in the AR. It also contends that all documents in the 2016 AR should be in the AR for this case.

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[2] The district court stayed its order dissolving the preliminary injunction, however, pending our decision on a motion for a stay pending appeal. We granted that stay and expedited this appeal.

[3] The Service has not appealed the district court's grant of summary judgment to BMBP on one of its NEPA claims.

A.

No previous Ninth Circuit opinion addresses whether deliberative materials are part of the "whole record." District courts in this Circuit are split on the issue. *See Save the Colorado v. U.S. Dep't of the Interior*, 517 F. Supp. 3d 890, 896–97 (D. Ariz. 2021) (collecting cases). The District of Columbia Circuit, however, has held that deliberative materials are generally not part of the AR absent impropriety or bad faith by the agency. *See Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019). We agree.

Our holding rests on two well-settled principles governing judicial review of agency action under the APA. First, "the whole record," 5 U.S.C. § 706, is ordinarily "the record the agency presents," *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). "[L]ike other official agency actions, an agency's statement of what is in the record is subject to a presumption of regularity." *Goffney v. Becerra*, 995 F.3d 737, 748 (9th Cir. 2021). Thus, barring "clear evidence to the contrary," we "presume that an agency properly designated the Administrative Record." *Id.* (cleaned up).

Second, we assess the lawfulness of agency action based on the reasons offered by the agency. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Deliberative documents, which are prepared to aid the decision-maker in arriving at a decision, are ordinarily not relevant to that analysis. *See Oceana*, 920 F.3d at 865; *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("[I]nquiry into the mental

processes of administrative decisionmakers is usually to be avoided."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Morgan v. United States*, 304 U.S. 1, 18 (1938) (noting it is "not the function of the court to probe the mental processes of the Secretary in reaching his conclusions"). Because deliberative materials are "not part of the administrative record to begin with," they are "not required to be placed on a privilege log." *Oceana*, 920 F.3d at 865 (cleaned up). We agree, however, with the D.C. Circuit that "a showing of bad faith or improper behavior" might justify production of a privilege log to allow the district to determine whether excluded documents are actually deliberative. *Id.*; *see also In re United States*, 875 F.3d 1200, 1211–12 (9th Cir. 2017) (Watford, J., dissenting) (discussing potential circumstances justifying expansion of the AR), *vacated*, 138 S. Ct. 443, 445 (2017).

But, BMBP does not assert any misconduct by the Service, nor does it contend that specific documents were improperly classified as deliberative. Although we leave for another day a detailed exploration of the precise circumstances under which a district court can order the production of a privilege log, the court here did not abuse its discretion by declining to do so in this case.

B.

BMBP also contends that the documents in the 2016 AR were necessarily before the agency in the 2020 process because the Project is a continuation of the withdrawn one. In so arguing, BMBP cites statements by the Service suggesting that the 2020 decision relied on an "additional" NEPA analysis, a District Ranger's

description of that analysis as a "continuation of the Walton Lake Restoration analysis and documentation," and the Service's reliance on a 2015 Forest Health Report before the district court and an appellate motions panel.

BMBP's arguments, however, fail to overcome the presumption of regularity. *See Goffney*, 995 F.3d at 748. The 2020 decision notice expressly stated that "[t]he Forest Service began the NEPA process again in 2019 with a scoping letter dated August 7, 2019." The phrase "additional analysis" is not inconsistent with preparing a new AR to support a new NEPA analysis. Nor do the views of a single Service employee necessarily reflect those of the agency or its ultimate decision-maker. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007). The record also supports the Service's contention that it included only documents from previous NEPA analyses that were considered in the 2020 decision. For example, the Service did not cite the 2015 Forest Health Report in its 2020 decision, relying instead on a new 2019 Forest Health Report. And, the Service's citations to the 2015 Report in prior court proceedings did not involve the validity of the 2020 decision but rather a separate 2017 decision to close sections of the recreation site because of safety concerns.

We place a thumb on the scale against supplementation of the AR, *see Goffney*, 995 F.3d at 747–48, and BMBP has not demonstrated how the inclusion of "over two thousand pages that the Service had included in the 2016 AR," would "identify and plug holes in the administrative record," *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010)

(cleaned up). Because BMBP "has not met its heavy burden to show that the additional materials sought are necessary to adequately review the Forest Service's decision," *id.*, the district court acted within its discretion in denying the motion to supplement the AR.

II.

We next address whether the Service violated NEPA by approving the Project. NEPA imposes "a set of action-forcing procedures that require that agencies take a hard look at [the] environmental consequences" of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (cleaned up). "Although these procedures are almost certain to affect the agency's substantive decision, . . . NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.*

A.

The Council on Environmental Quality ("CEQ") issues regulations to guide agencies in determining what actions are subject to NEPA requirements. *See* 40 C.F.R. § 1500.3.[4] Those regulations prohibit an agency from "commit[ting] resources prejudicing selection of alternatives" or taking actions that would "[l]imit the choice of reasonable alternatives." *Id.* §§ 1502.2(f), 1506.1(a)(2). BMBP contends that the logging contract with T2 violated these regulations. The parties dispute whether an improper commitment of resources must be "irreversible and irretrievable," *Metcalf v. Daley*, 214

[4] Unless otherwise indicated, all citations are to the 2019 version of the Code of Federal Regulations.

F.3d 1135, 1143 (9th Cir. 2000) (cleaned up), or something less. We need not decide that issue, however, because BMBP has failed to establish that the contract improperly committed resources under any standard.

Under the contract, T2 will receive $78,262 to remove non-commercial timber and about $36,000 worth of harvested commercial timber. Critically, the Service reserved the right to "terminate this contract, or any part hereof, for its sole convenience," at which point T2 "shall immediately stop all work." 48 C.F.R. § 52.212-4(l); *see WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008) (stressing that the Service "clearly retained the authority to change course or to alter the plan it was considering implementing"); *see also Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 206 (4th Cir. 2005) (holding that preparatory activities did not violate NEPA in part because that they did not "include cutting even a single blade of grass in preparation for construction"). T2 has not conducted any logging under the contract because the Service has not issued a notice to proceed. And, given the district court's preliminary injunction against logging, which has been stayed pending appeal, no logging can occur until this case is resolved. *See supra* note 2. Nor has the Service made any payments to T2.

There is also no evidence that the agency "merely engaged" in "post hoc rationalization" in the 2020 decision. *Nat'l Audubon Soc'y*, 422 F.3d at 199. BMBP argues that an internal email by a Service employee suggests that termination of the contract would cost the Service appropriated dollars and prevent funding of a new project. But, another Service employee explained

in the same email chain that any future work under the contract "must adhere to what is in the new NEPA decision" and that pending the outcome of that decision, the Service might need to "terminate[ ] and resolicit[ ]" the contract.

Rather than rely on "the alleged subjective intent of agency personnel divined through selective quotations from email trails," we "look to . . . the environmental analysis itself." *Id.* The EA contains no indication that the T2 contract prejudiced or limited the consideration of alternatives. After analyzing the effects of no action and several alternatives that reduced or eliminated commercial logging, the Service chose the Project because it "best meets the Purpose and Need of Action," would "better meet the management objectives of the area," and "provides the best opportunity for long-term public enjoyment of this area." The Service also stated that it "considered all reasonable alternatives and would not be limited in choice because the final service agreement or other tool of implementation would be written to align with the final decision."

B.

NEPA mandates an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An agency need not, however, prepare an EIS if it prepares an EA that "briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757–58 (2004). Significance depends on an action's "context" and "intensity." 40 C.F.R. § 1508.27. "Although . . . review under the arbitrary and capricious

standard is deferential," an agency's finding of no significant impact is arbitrary or capricious if the petitioner has raised "substantial questions whether a project may have a significant effect on the environment." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212–14, 1216 (9th Cir. 1998) (cleaned up).

1.

"Context simply delimits the scope of the agency's action, including the interests affected." *In Defense of Animals v. U.S. Dep't of the Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014) (cleaned up); *see* 40 C.F.R. § 1508.27(a) (listing potential contexts). Although the agency should be mindful "that use of a larger analysis area can dilute the apparent magnitude of environmental impacts," "[i]dentifying the appropriate geographic scope is a task assigned to the special competency of the appropriate agency." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 943 (9th Cir. 2014) (cleaned up).

BMBP contends that the EA diluted the significance of some impacts by analyzing them on too large a scale. However, "[a]lthough 40 C.F.R. § 1508.27(a) suggests that site-specific actions are generally evaluated in the context of a project locale, nothing in the regulation prohibits the [Service] from exercising its discretion to apply a [larger] analysis when appropriate." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1127 (9th Cir. 2012). And BMBP has not shown why the choice of a broader context in the challenged instances was arbitrary or capricious. *See Ctr. for Cmty. Action & Env't Just. v. FAA*, 18 F.4th 592, 599 (9th Cir. 2021) (noting that the petitioner bears the burden of

persuasion); *cf. Anderson v. Evans*, 371 F.3d 475, 489–92 (9th Cir. 2004) (explaining why the local context was especially relevant for assessing whether the project's effects would be controversial).

Indeed, BMBP concedes in its briefing that the 2020 decision "acknowledges the highly-localized nature of the Project's effects" and that the EA contains a "*disclosure* of local impacts." The Service extensively analyzed various local impacts—including those on scenic integrity, on late and old structure stands, and on threatened and endangered species. And, the EA explained why it chose certain broader contexts for analysis in other instances. The record fails to establish that the agency's decisions about context were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

2.

Intensity "refers to the severity of impact" within the selected context. 40 C.F.R. § 1508.27(b). The regulations list ten non-exhaustive relevant factors for consideration, including the "[u]nique characteristics of the geographic area"; the "degree to which the effects . . . are likely to be highly controversial"; the "degree to which the action may establish a precedent for future actions with significant effects"; and whether the action "threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." *Id.* Whether the factors are assessed individually or cumulatively, the record does not establish a "clear error of judgment" in the Service's

intensity findings. *Blue Mountains Biodiversity Project*, 161 F.3d at 1211 (cleaned up).

Although the EA described Walton Lake as "unique" because it boasts a high number of visitors and is "the only Developed Recreation Management Area that has a lake with the combination of moist mixed conifer and dry mixed conifer forest surrounding it," the Service reasonably found that the Project would affect neither the lake itself, nor "the diversity of tree species in the project area around Walton Lake." The Service also reasonably concluded that the Project "would not substantially affect the use of the area as a recreation site" because the infested area was already closed to recreational uses for safety reasons. And BMBP does not challenge the Service's conclusion that the Project would not affect any of the "unique" characteristics listed in the regulation. *See* 40 C.F.R. § 1508.27(b)(3).

The record also does not suggest that the Project is highly controversial. *See id.* § 1508.27(b)(4). "A project is highly controversial if there is a *substantial dispute* about the size, nature, or effect of the major Federal action," which "exists when evidence . . . casts serious doubt upon the reasonableness of an agency's conclusions." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019) (cleaned up). But, a project is not rendered highly controversial simply because "qualified experts disagree." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992). Rather, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

The Service concluded that the Project was not highly controversial because its potential effects were well-established or supported by the best available science. Citing a range of research, the Service found "no evidence that the proposed treatments would exacerbate" laminated root rot. I t also decided against stump removal because of "soil disturbance" and "the high cost of removing stumps."

The scientific studies cited by BMBP do not render these findings arbitrary or capricious. One acknowledges that "an appropriate strategy" is "based on several factors"; another expresses some skepticism about sanitation harvesting but also notes the potential effectiveness of "spacing trees through thinning, by removing stumps, or by planting and managing resistant and immune trees species"; and a third does not discuss sanitation harvesting at all. Although BMBP also cites Dr. Chad Hanson's opinion that logging would "likely increase [laminated root rot] occurrence," the Service reviewed that opinion but ultimately concluded that the overall evidence weighed against its conclusions. One negative comment does not establish high controversy. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1243–44 (9th Cir. 2005).

It was also reasonable for the Service to conclude that the Project is unlikely to establish a precedent for future actions. *See* 40 C.F.R. § 1508.27(b)(6). The Service explained that "no other known Developed Recreation Management Areas . . . have a laminated root rot problem on the Ochoco National Forest." The Service found that the Project is "site-specific" and "any future decision would need to go through the NEPA

process." Even if other sites might one day develop similar infestation issues, that does not necessarily make this Project precedential, "especially since any other [project] would be subject to its own NEPA analysis." *WildEarth Guardians*, 923 F.3d at 674.

The Service's decision also reasonably accounted for federal, state, and local laws. *See* 40 C.F.R. § 1508.27(b)(10). Although forest plan amendments that "may create a significant environmental effect" require an EIS, there is an exception for "every plan amendment . . . that applies only to one project or activity." 36 C.F.R. § 219.13(b)(3). The amendments to the Ochoco National Forest Plan at issue are each related to one project.

CONCLUSION

We **AFFIRM** the judgment of the district court and lift our previous stay of its order dissolving the preliminary injunction.

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

BLUE MOUNTAINS BIODIVERSITY PROJECT,

Plaintiff,

v.

SHANE JEFFRIES, et al.,

Defendants.

No. 2:20-cv-02158-MO

OPINION AND ORDER

MOSMAN, J.,

This matter comes before me on Plaintiff's Motion for Summary Judgment [ECF 66] and Defendants' Cross Motion for Summary Judgment [ECF 67]. Oral Argument was held on July 25, 2022, at which I GRANTED IN PART and DENIED IN PART both parties' Motions, for the reasons stated on the record. Minutes of Proceedings [ECF 80]. I also TOOK UNDER ADVISEMENT various claims and asked Plaintiff for a supplemental statement of authorities. *See* Statement of Supplemental Authority [ECF 81]. For the reasons below, I GRANT Defendants' motion and DENY Plaintiff's motion on all claims taken under advisement.

BACKGROUND

Plaintiff Blue Mountains Biodiversity Project ("BMBP") seeks vacatur of a United States Forest

Service ("Defendant" or the "Forest Service" or the "Service") decision, as well as declaratory and injunctive relief under the Administrative Procedure Act ("APA"). BMBP challenges the Decision Notice ("DN"), including the Finding of No Significant Impact ("FONSI"), and underlying Environmental Assessment ("EA") issued by Defendant approving the Walton Lake Restoration Project ("the project"), which is a logging proposal in the Ochoco National Forest ("ONF"). Am. Compl. [ECF 12] ¶ 1. The Amended Complaint alleges seven violations of the National Environmental Policy Act ("NEPA") and four violations of the National Forest Management Act ("NFMA"). Am. Compl. [ECF 12] ¶¶ 60–90. After various proceedings, Plaintiff moved for summary judgment; Defendants did likewise shortly thereafter. Pl.'s Mot. for Summ. J. [ECF 66]; Defs.' Cross Mot. for Summ. J. [ECF 67]. For those claims which I took under advisement after Oral Argument on July 25, 2022, I provide my decision and reasons below.

LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The initial burden for a motion for summary judgment is on the moving party to identify the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that burden is satisfied, the burden shifts to the non-moving party to demonstrate, through the production of evidence listed in Fed. R. Civ. P. 56(c)(1), that there remains a "genuine issue for trial." *Celotex*, 477 U.S. at 324. The non-moving party may not rely upon the

pleading allegations, *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995) (citing Fed. R. Civ. P 56(e)), or "unsupported conjecture or conclusory statements," *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). All reasonable doubts and inferences to be drawn from the facts are to be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Because BMBP's claims allege the Service violated NEPA and NFMA, they are governed by the APA. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). "When reviewing an agency's final decision, the court's duty on summary judgment is to determine whether the evidence in the administrative record permitted the agency to make that decision as a matter of law." *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, 855 F. Supp. 2d 1199, 1204 (D. Or. 2012). "This review is governed by the [APA's] arbitrary and capricious standard." *Id.* (citing 5 U.S.C. § 706(2)(A)).

"To determine whether an agency decision is arbitrary and capricious, the court should 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* at 1204 (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). "After considering the relevant factors, the agency must articulate a satisfactory explanation for its action, including a rational connection between the facts found and the agency's conclusions." *Id.* (citing *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008)).

"An arbitrary and capricious finding is necessary if the agency 'relied on factors Congress did not intent it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (citing *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010)). "Review under this standard is narrow, and the court may not substitute its judgment for the judgment of the agency." *Id.* "The court must be 'at its most deferential' when reviewing an agency's scientific determinations." *Id.* (citing *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

DISCUSSION

I. Claim 1, Count 2

BMBP argues that the Service violated NEPA by having an unreasonably narrow purpose and need statements in its EA. Pl.'s Mot. for Summ. J. [ECF 66] at 16. According to BMBP, the first and fourth statements unreasonably defined the purpose and need for the project too narrowly such that they ignore the Walton Lake area's ONF Plan management objectives and exclude reasonable alternatives that should be considered. *Id.*

NEPA requires agencies to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. An agency "may not define the objectives of its actions in terms so unreasonably narrow that only one alternative ... would accomplish the goals of the agency's action." *Nat'l Parks*

Conservation Ass'n v. BLM, 606 F.3d 1058, 1070 (9th Cir. 2010). An agency enjoys "considerable discretion" to define the purpose and need statement. *Id.* Further, the statement of purpose and need is evaluated under a "reasonableness" standard on appeal. *Id.*

A. First Purpose and Need Statement

The ONF Plan (the "Plan") designates the Walton Lake recreation area as a "Developed Recreation Management Area" with two sub-areas—a "Developed Site" and a "Visual Influence Area." Mot. for Summ. J. [ECF 66] at 18. The Plan provides for different restrictions on the two sub-areas. *Id.* For the Developed Site, the plan says, "[h]arvest only for the purpose of maintaining safe and attractive recreational sites." AR 1629. For the Visual Influence Area, the plan says, "[e]mphasize maintenance of large, ponderosa pine and western larch." *Id.* It goes on to state, "[p]recommercial thinning and commercial thinning may be done to meet the visual quality objectives and maintain healthy stands." *Id.*

BMBP contends that the first purpose and need statement—"[t]here is a need to curb the laminated root rot infestation where it occurs within the Developed Recreation Management Area around Walton Lake, to develop a healthy stand of vegetation, and provide for public safety," AR 7573—impermissible lumps together these two areas and "preordain[s]" the chosen alternative. Mot. for Summ. J. [ECF 66] at 18–19. By describing the issue as a "need" to curb laminated root rot ("LRR") in all areas of the Recreation Management Area, the statement makes it seem as if the Service's outcome would be the only one that would "curb" LRR

everywhere, according to BMBP. *Id.* Instead, each sub-area should have been considered on its own. *Id.*

The Service responds that the first purpose and need statement is consistent with the Plan's mandatory direction to prevent and suppress insect and disease outbreaks. Defs. Mot. for Summ. J. [ECF 67] at 31. The Plan contains forest health standards and guidelines that direct the Service to "[u]tilize all methods to prevent or suppress insect and disease outbreaks" and to "[e]mphasize detection and treatment of bark beetle and root disease occurrences, as these relate to providing a safe environment...." AR 1569. The Service argues that this standard applies to the entire Developed Recreation Area (that contains the two sub-areas) as a whole. Defs. Reply in Supp. of Mot. for Summ. J. [ECF 72] at 19. The EA confirms that these standards from the Plan apply to the entire Developed Recreation Area. *Id.* (citing AR 7575).

I find the Service's argument persuasive on this point. The purpose and need statement in the EA says that the LRR needs to be curbed in the larger Developed Recreation Management Area. When one reads the Plan and what it says should be done for the two sub-areas within the broader Developed Recreation Management Area, the EA and the Plan are not inconsistent. Generally speaking, to curb something means to restrain, or keep in check; alternatively, to check or control. *See Curb*, Merriam-Webster's Collegiate Dictionary (11th ed. 2005). I do not think that "curbing" LRR in some way violates the plan's requirement to "harvest only for the purpose of maintaining safe and attractive recreational sites" or thinning "done to ...

maintain healthy stands." In sum, I find neither the language nor the Service's reading and use of the purpose and need statement to be too narrow; nor are they arbitrary or capricious.

B. Fourth Purpose and Need Statement

The fourth purpose and need statement states: "There is a need to amend the Ochoco Land and Resource Management Plan." AR 7574. BMBP argues that "[b]y using elements of the preferred alternative to define the 'need' of the action, the Service put the cart before the horse, violating NEPA's requirement that the purpose and need be used to identify the alternatives." Pl.'s Mot. for Summ. J. [ECF 66] at 20. By including a need to amend the plan, any alternative that does not include a plan amendment is eliminated. *Id.* at 19. The Service counters that its regulations require the Service to "base a plan amendment on a preliminary identification of the need to change the plan." Defs.' Reply ISO Mot. for Summ. J. [ECF 72] at 18 (citing 36 C.F.R. § 219.13) ("When a plan amendment is made together with, and only applies to, a project or activity decision, the analysis prepared for the project or activity may serve as the documentation for the preliminary identification of the need to change the plan.")

The Service has the winning argument here. As noted, the Forest Service's regulations state that the Service must preliminarily identify the need to change the plan—and that is precisely what it did here. The Service's actions were therefore not arbitrary and capricious.

In light of the discussion and reasons given above, I GRANT the Service's motion and DENY BMBP's

motion as to both the first and the fourth purpose and need statements under Claim 1, Count 2.

II. Claim 1, Count 3

In determining whether a purpose and need statement is reasonable, the Ninth Circuit "first determine[s] whether the statement of purpose and need was reasonable, and then whether the range of alternatives considered was reasonable in light of that purpose and need." *League of Wilderness Def. v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). As noted above regarding Claim 1, Count 2, I find the purpose and need statements reasonable, so I must next consider BMBP's contentions about the range of alternatives considered. Under NEPA and applicable case law, the Forest Service has to include a brief discussion of "appropriate" and "reasonable" alternatives, but there is no correct number of alternatives required or proscribed. 36 C.F.R. § 220.7(b)(2) (Forest Service regulations implementing NEPA); 40 C.F.R. § 1508.9; *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1232, 1246 (9th Cir. 2005). The Forest Service's obligations under an EA are less than under an Environmental Impact Study ("EIS"). *Native Ecosystems*, 428 F.3d at 1246.

BMBP argues that the Service violated NEPA by failing to meaningfully consider an adequate range of alternatives in its EA. To BMBP, this failure is shown by the fact that the Service framed the Plan amendments and LRR elimination as project "needs," thereby spurning other choices that did not involve a Plan amendment or which would not entirely curb LRR in all areas. Pl.'s Mot. for Summ. J. [ECF 66] at 21.

Additionally, BMBP argues that the Forest Service should have considered an alternative that limited the logging to within 150 feet of the road. *Id.* at 23.

However, the Service did consider four alternatives, including the proposed action, and discussed them in detail. Defs.' Mot. for Summ. J. [ECF 67] at 33. It also considered six others but did not discuss them in detail. *Id.* No alternative was rejected based on whether or not the alternative required plan amendments. *Id.* One alternative, alternative three, did in fact limit logging to within 150' of the road; the Forest Service considered, but did not ultimately adopt, this alternative. *Id.*

In short, the Service did what it was required to do in its analysis of the alternatives. Its briefing thoroughly explains why, among the options, the Service made the choice it did. *See, e.g.*, Defs.' Mot. for Summ. J. [ECF 67] at 34. That the Service chose the alternative BMBP disliked is not actionable. I find the Walton Lake EA adequate and the Service's consideration of alternatives reasonable. I therefore GRANT the Service's motion and DENY BMBP's motion on Claim 1, Count 3.

III. Claim 1, Count 4

BMBP next alleges that the Forest Service's ongoing contract with T2 violates NEPA as an irretrievable commitment. The parties dispute both the applicable standard and its application to the facts of this case.

A. Applicable Standard

The Parties dispute what the applicable standard is for considering this claim. BMBP argues that an agency's action violates NEPA when it takes any pre-

NEPA action that commits resources in a way that "prejudice[s] [the] selection of alternatives before making a final decision," 40 C.F.R. § 1502.2(f), or may "limit the choice of reasonable alternatives." *Id.* § 1506.1(a)(2). On the other hand, the Service contends that the question to ask is whether there was an "irreversible and irretrievable commitment of resources." *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). After discussion at Oral Argument, Counsel for Plaintiff submitted a Supplemental Statement of Authority regarding this issue. Pl.'s Statement of Suppl. Authority [ECF 81].

Metcalf's "irreversible and irretrievable commitment of resources" standard originates from NEPA. *See* 42 U.S.C. § 4332. This statute requires all government agencies to include in "every report or recommendation on proposals for ... major Federal actions significantly affecting the quality of the human environment" various assessments of the environmental impact of that action, including a statement of "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.* § 4332(C)(v). Implicit in this requirement is the idea that resources for a project should not be irreversibly and irretrievably committed prior to taking the proposed action—or even assessing the proposed action. *Conner v. Burford*, 848 F.2d 1441, 1446 n.13 (9th Cir. 1988).

NEPA also created the Council on Environmental Quality ("CEQ"), which later was tasked with creating regulations to implement NEPA. *Id.* §§ 4342–4347; *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979). These

regulations are found at 40 C.F.R. §§ 1500.1–1508.2. The regulations' standards for the commitment of resources prior to an EA or an EIS are lower than what the statutory text requires, as the regulations preclude any "prejudicing selection of alternatives before making a final decision" (EISs) and "limit[ing] the choice of reasonable alternatives" (EAs and EISs). *Id.* §§ 1502.2(f), 1506.1(a)(2).

Given this area of contradiction between the statute and the regulations—it is much easier for a commitment to prejudice or limit alternatives than for it to be considered irreversible and irretrievable—the Ninth Circuit appears to have focused on the statutory language. Usually, it is the regulations that provide specificity, but here, the statutory text is a bit clearer and more workable than the broader, more uncertain regulations. As such, the Ninth Circuit has applied the "irreversible and irretrievable" standard to both pre-EIS and pre-EA resource commitments. "This court has interpreted [the NEPA] regulations as requiring agencies to prepare NEPA documents, such as an EA or an EIS, 'before any irreversible and irretrievable commitment of resources.'" *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). Similarly, *WildWest Inst. v. Bull*, 547 F.3d 1162 (9th Cir. 2008), notes that this standard comes not directly from the regulations, but from the court's "[c]onstruing" of them. *Id.* at 1168. In any event, the "irreversible and irretrievable" standard is precedent in the Ninth Circuit, and I will apply it.

Metcalf goes on to talk about the "point of commitment" to a particular proposal and states that if a contract amounts to a "surrender of the Government's

right to prevent activity in the area" then there was an irretrievable and irreversible commitment of resources. *Metcalf*, 214 F.3d at 1144. Alternatively, if the agency was free to follow a schedule or alter it as conditions warranted, there was no problematic commitment. *Id.*

B. Application

Here, the Forest Service entered into a contract with a company called T2 in 2016 for a logging contract it had tried and failed to implement at that time. Pl.'s Mot. for Summ. J. [ECF 66] at 11. BMBP argues that this act by the Service committed both natural resources (the old growth trees it has contracted with T2 for T2 to log) as well as financial resources (appropriated dollars) before the NEPA process was complete. *Id.* at 12–16. In support of its argument, BMBP cites an email from a Forest Service Contracting officer. The officer wrote, "[i]f the treatment prescription changes drastically or wood product value continues to decline[,] that contract awarded years ago will be terminated without performance[,] and we will lose those appropriated dollars and likely not have the funds to compete and complete a new project." *Id.* at 14–15 (citing AR 7897).

The Service responds by saying that the contract did not in any way bind or commit the Forest Service. Defs.' Mot. for Summ. J. [ECF 67] at 27, 29. As such, the Service argues the contract did not prejudice or limit the Forest Service's alternatives during the NEPA process; any other contentions are "conjecture." *Id.* at 29. To support its argument that no resources were irreversibly or irretrievably committed, the Service points to the fact that the Service could sign a new contract and terminate the existing contract, and the

amount paid to T2 was a relatively modest sum. *Id.* at 28–29. Furthermore, according to the Service, unappropriated funds are not a natural resource and therefore not subject to the "irreversible and irretrievable" standard. *Id.* at 29 n.13. At bottom, BMBP's claim rests on single, speculative email about annual appropriations, and it is uncertain if the email was ever seen by the Forest Supervisor or informed any decision-making whatsoever. Defs.' Reply in Supp. [ECF 72] at 16; Defs.' Resp. to Sur-Reply [ECF 79] at 2.

One email describing one contract does not transform that contract into an irreversible and irretrievable commitment. The Government did not surrender its rights; as the Service points out, it was free to sign a new contract or terminate the existing one as conditions warranted. The government maintained control over activity in the area at issue. I therefore GRANT the Service's motion and DENY BMBP's motion as to Claim 1, Count 4.

IV. Claim 1, Count 5 & Claim 2, Count 2

Under NEPA, agencies are required to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The burden is on the agency to demonstrate why an action is not significant and no EIS is required. *Metcalf*, 214 F.3d at 1142. Plaintiff's next argument is that the Service did not carry this burden of showing the project to be insignificant; according to Plaintiff, the FONSI in the DN inadequately describes why the project should be considered insignificant. Mot. for Summ. J. [ECF 66] at 26. Therefore, Plaintiff contends,

the project is significant under NEPA, and an EIS is required. *Id.*

The significance of an action is determined by looking at its (i) context and (ii) intensity. *Natl' Parks & Conserv. Ass'n v. Babbit*, 241 F.3d 722, 730 (9th Cir. 2001). I address these two factors in turn.

A. Context

Determining the relevant context boils down to two dispositive issues. First, I must consider the proper roles of the EA and the FONSI. Second, I must ensure the Service looked at the project's environmental impacts at the level required by regulation.

BMBP's argument as to the first issue is that the text of the FONSI does not consider the project's impacts within the local context of the Walton Lake Recreation Area. Pl.'s Mot. for Summ. J. [ECF 66] at 26. The Service's response is that the EA, which the FONSI explicitly relies upon, considers the impact in several contexts—including the locality, as required by the regulation—and provides a convincing statement of reasons. Defs.' Reply in Supp. [ECF 72] at 7. The Service points out that since the FONSI explicitly relies on the EA, looking *only* at the FONSI and not the EA would be myopic. *Id.* at 3; *see* AR 8731 (noting in the FONSI that "the information in the EA is more than adequate for me to determine that the effects are not significant").

The Ninth Circuit has made clear that courts may look to the EA to assess if an agency's statement of reasons for why a proposal is not significant are adequate. For example, in a recent case, the panel

explained that the "EA fail[ed] to articulate a science-based criteria for significance in support of its finding of no significant impact...." *350 Mont. v. Haaland*, 29 F.4th 1158, 1163 (9th Cir. 2022). This proposition shows that it is permissible for courts to refer to an EA to assess whether there are adequate statements of reasons made by the agency. As such, Defendants are correct in their assertions; Plaintiff's first challenge regarding context fails.

As to the second issue, BMBP contends that the Service did not look at the project's environmental impacts at the level required by regulation. By only looking at the project in a larger context, the Service purportedly dilutes the impact to the local Walton Lake area. Pl.'s Reply [ECF 71] at 24, 26. The Service responds that the only way to make the argument that the impact has been diluted is if one ignores the EA. Defs.' Reply [ECF 72] at 5. The Service then goes on to point out places in the record in which it considers a variety of contexts, including the local impact.

The relevant NEPA regulation at issue tells the agency to analyze actions "in several contexts such as society as a whole ... the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a) (2019). The Supreme Court has stated that the "particular identification of the geographic area within which [environmental impacts] may occur ... is a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 413–14 (1976). Upon review of the EA, it is apparent that the Service looked at the impact of the project on a variety of levels, including the locality level. Defs.' Reply in Supp. [ECF

72] at 4. Therefore, Plaintiff's second argument as to context also fails.

B. Intensity

When examining intensity, the severity of the environmental impact should be analyzed. There are ten factors that can be considered, but not all are relevant in every case. *See Bark v. Forest Serv.*, 958 F.3d 865, 869–70 (9th Cir. 2020). Here, the relevant factors are: (i) "the unique characteristics of the geographic area"; (ii) the "degree to which effects on the quality of the human environment are likely to be highly controversial"; and (iii) the "degree to which the action may establish a precedent for future actions with significant effects...." 40 C.F.R. § 1508.27(b)(3), (4), (6) (2019).

For the first factor, BMBP argues that the area is unique because it is the only recreation area with a lake and certain types of mixed conifer stands. Pl.'s Reply [ECF 72] at 29. Unfortunately for BMBP, these are not the types of unique features NEPA seeks to protect (such as historical or cultural resources, parklands, prime farmlands, wild and scenic rivers, or ecologically critical areas). 40 C.F.R. § 1508.27(b)(3). For example, the Ninth Circuit found Glacier Bay in Alaska to be an area with unique features. *National Parks & Conservation Ass'n v. Babbit*, 241 F.3d 722, 731 (9th Cir. 2001). While they are beautiful in their own ways, the Ochoco National Forest and the Walton Lake Recreation Area do not contain the unique features of Glacier Bay.

The second factor, "controversial," refers to "disputes over the size or effect of the action itself, not whether or how passionately people oppose it." *Wild*

Wilderness v. Allen, 871 F.3d 719, 728 (9th Cir. 2017). Here, BMBP vehemently opposes the proposed action. There is also a dispute over the size and effect of the action itself—BMBP argues that the action can be smaller (a different plan amendment could have been chosen) and that the impact on the Walton Lake Recreation Area is large for such a small area. Pl.'s Reply [ECF 71] at 28.

The final factor is whether the current project will establish a precedent for future agency actions. The Service argues that this project will not set a precedent because the plan amendments serve specific functions tied to specific characteristics of the present project, they have never been used before in the Ochoco National Forest, and there are no other Forest areas where similar amendments are planned or anticipated. Defs.' Reply [ECF 75] at 9. And in fact, while BMBP does claim that this project is unprecedented, it does not contend that the project will be used to establish new precedent after it. Pl.'s Mot. for Summ. J. [ECF 66] at 35.

In sum, for the three relevant sub-factors used to assess intensity, only one cuts in favor of Plaintiff; the other two strongly support Defendants' position. Referring back to the discussion of context, Plaintiff's arguments fail as to both of the issues analyzed. With only one sub-factor of the analysis supporting Plaintiff's contentions, I cannot find the project to be significant: the Service appropriately addressed the different contexts in the EA and adopted those findings in the FONSI, and the intensity factors also do not require a

significance finding under NEPA. As such, no EIS was required.

Furthermore, the standard for a "significant change" under NFMA and "significance" under NEPA are the same. 77 Fed. Reg. 68, 21238 (Apr. 9, 2012) ("This addition to the final rule makes the NEPA and NFMA findings of 'significance' one finding. If under NEPA a proposed amendment may have a significant effect on the environment and an EIS must be prepared, the amendment would automatically be considered a significant change to a plan."). In Claim 2, Count 2, BMBP argues that under NFMA, the forest plan amendments are "significant change" and therefore, should have been subject to additional procedures. Pls.' Mot. for Summ. J. [ECF 66] at 36. Because the amendments are not significant under NEPA, they cannot be a significant change under NFMA. As such, given the discussion above, I GRANT the Services' motion and DENY BMBP's motion as to both Claim 1, Count 5 and Claim 2, Count 2.

V. Claim 1, Count 7 & Claim 2, Count 4

BMBP's final arguments are that the soil analysis is improper under NEPA (Claim 1, Count 7) and also is inconsistent with the Forest Plan—therefore violating NFMA (Claim 2, Count 4). Pl.'s Mot. for Summ. J. [ECF 66] at 24 (referring to arguments made in Pl.'s Mot. for Prelim. Inj. [ECF 41] at 21).

A. NEPA Arguments

NEPA's "hard look" requirement necessitates that an agency's discussion must be complete and meaningful regarding the actual impact of the proposed project.

Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1172 (9th Cir. 2006); 40 C.F.R. §§ 1500.2, 1502.1 & 1502.8 (2019). It also must be written in plain language so that decisionmakers and the public can readily understand. *Id.*

BMBP seizes on both of these requirements, arguing that the Service failed to take a "hard look" when it did not provide meaningful statements regarding the impact of the proposed project on the soil. *Id.* at 23. In the alternative, BMBP contends that even if the Forest Service did take a "hard look" at the soil impact, it violated NEPA by failing to present the information in a way the public can readily understand and thereby impeded the public's participation. *Id.* at 24. In particular, BMBP takes issue with a chart that the Forest Service used to represent the total level of soil compaction and displacement. The chart must be read with the text around it for an individual to fully understand it, which BMBP claims impacts the participation of the public and decisionmakers.

The Service responds that the language in dispute—a table of figures—does not violate NEPA because the twelve-page Soil Specialist Report constitutes a "hard look" at the impact of the proposed project on the soil. Def.'s Resp. in Opp'n. [ECF 49] at 20. Next, Defendants state that the table, combined with language on the page directly after it, provides a narrative that details for the public the additional compaction and displacement that may occur. *Id.* at 21.

B. NFMA Arguments

BMBP's NFMA argument is that Forest Service violates the ONF plan because the plan allows for a

maximum 20% soil disturbance and the Forest Service anticipates exceeding the threshold. Pl.'s Mot. for Prelim. Inj. [ECF 41] at 24–25. BMBP contends that Defendants parsed the language of the plan inappropriately to find that the 20% threshold can be exceeded. Pl.'s Reply [ECF 54] at 21. Defendants respond they did not violate the Forest Plan because the text of the plan does not require a hard 20% cap on soil compaction and displacement. *Id.* at 22. Instead, the plan gives the Forest Service one year to get to the 20% maximum after any land management activity. *Id.*

After reviewing these disputed matters, I find that the Forest Service did not violate either NEPA or NFMA. The Service clearly took a hard look at the soil impacts: the impact of the four project alternatives was considered, and the separate Soil Specialist Report discusses each alternative in depth. As to Plaintiff's second NEPA argument, the language is readily understandable. Having to look at a table and the text immediately following it to determine the full meaning of the data in the table is not so difficult as to prevent the public or a decisionmaker's comprehension. It would require an unduly dim view of my fellow citizens' intelligence to find otherwise. Therefore, I do not think that the Forest Service violated NEPA in this manner.

As for NFMA, the plain language of the Forest Plan contemplates that at times, the soil disturbance will exceed 20%—but that through project implementation and restoration, soil compaction and displacement will return below the 20% threshold. I therefore do not agree with BMBP that the language provides for a rigid

20% threshold. As such, I find that the Forest Service did not violate NFMA.

In sum, I GRANT the Services' motion and DENY BMBP's motion as to both Claim 1, Count 7, and Claim 2, Count 4.

CONCLUSION

For the reasons stated above, I GRANT Defendants' Cross Motion for Summary Judgment [ECF 67] and DENY Plaintiff's Motion for Summary Judgment [ECF 66] on Claim 1, Count 2; Claim 1, Count 3; Claim 1, Count 4; Claim 1, Count 5; Claim 2, Count 2; Claim 1, Count 7; and Claim 2, Count 4.

IT IS SO ORDERED.

DATED this 26 day of September, 2022

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
Senior United States District Judge

Appendix D

BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon non-profit corporation, Plaintiff,

v.

Shane JEFFRIES, in his official capacity as Ochoco National Forest Supervisor; and United States Forest Service, an agency of the United States Department of Agriculture, Defendants.

Case No. 2:20-cv-2158-MO

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Filed 9/29/2021

Attorneys and Law Firms

Jesse Buss, Oregon City, OR, Thomas Charles Buchele, Earthrise Law Center, Portland, OR, for Plaintiff.

Sean C. Duffy, U.S. Department of Justice, Washington, DC, for Defendants.

MINUTES of Proceedings:

Judge Michael W. Mosman

Oral argument held. The Court adopts Judge Sullivan's Opinion and Order 40 on Plaintiff's Motion to Compel Completion of the Administrative Record. I overrule Plaintiffs Corrected Objections to Magistrate Judge's Order: Order on Motion to Compel 52. The Court dismisses as moot Plaintiff's Objections to Magistrate Judge's Order: Order on Motion to Compel 51. For the reasons stated on the record, the Court grants Plaintiff's Motion for Preliminary Injunction 41. Parties are

directed to submit to the Court a proposed form of injunction by 5:00 PM on Monday, October 4, 2021.

Appendix E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

BLUE MOUNTAINS BIODIVERSITY PROJECT,

Plaintiff,

v.

SHANE JEFFRIES; UNITED STATES FOREST SERVICE,

Defendants.

Civ. No. 2:20-cv-02158-SU

OPINION & ORDER

SULLIVAN, Magistrate Judge

The environmental challenge comes before the Court on Plaintiff's Motion to Compel Completion of the Administrative Record. ECF No. 10. The Court heard oral argument on July 29, 2021. ECF No. 39. For the reasons set forth below, the Motion is DENIED.

BACKGROUND

Plaintiff Blue Mountains Biodiversity Project brings this action under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* to challenge the Decision Notice ("DN"), Finding of No Significant Impact ("FONSI"), and Environmental Assessment ("EA") issued by the United States Forest Service and signed by Ochoco National Forest Supervisor Shane Jefferies in December 2020 (the "2020 Project"). Am. Comp. ¶ 1. ECF No. 12. The challenged decision involves a logging

project in the Walton Lake area of the Ochoco National Forest. *Id.* at ¶ 2. The Government lodged its administrative record in this case on March 26, 2021. ECF No. 13.

The Forest Service had previously planned a logging project in the same area in 2015 (the "2015 Project"), which Plaintiff challenged in *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Turner*, Case No. 2:16-cv-01648-MO. On October 6, 2016, Judge Mosman granted a motion for a preliminary injunction in *Turner* and enjoined the Forest Service from carrying out the 2015 Project. ECF No. 31 in Case No. 2:16-cv-01648-MO. Following the preliminary injunction, the Forest Service withdrew its final decision in the 2015 Project and opted to pursue additional analysis at the administrative level. Am. Compl. ¶ 43.

LEGAL STANDARD

The APA requires a court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706; *see also Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) ("[J]udicial review of agency action is limited to review of the administrative record."). The whole administrative record "consists of all documents and materials directly or indirectly considered by the agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted). An agency is entitled to a presumption that it properly designated the administrative record, known as the presumption of regularity or the presumption of completeness. *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017),

vacated on other grounds, ___ U.S. ___, 138 S. Ct. 443 (2017); *see also Goffney v. Becerra*, 995 F.3d 737, 748 (9th Cir. 2021) ("But like other official agency actions, an agency's statement of what is in the record is subject to a presumption of regularity," and courts "must therefore presume that an agency properly designated the Administrative Record absent clear evidence to the contrary." (internal quotation marks and citation omitted)). Agencies may also exclude documents reflecting internal deliberations and those that probe the "mental processes of administrative decision makers." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

To overcome this presumption, a party seeking supplementation of the administrative record "must show by clear evidence that the record fails to include documents or materials considered by [the agency] in reaching the challenged decision" and that the record as presented cannot allow substantial and meaningful judicial review. *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp.2d 1267, 1272, 1275 (D. Colo. 2010); *Save the Colorado v. U.S. Dep't of the Interior*, 517 F. Supp.3d 890, No. CV-19-08285-PCT-MTL, 2021 WL 390497, at *2 (D. Ariz. Feb. 4, 2021). There are four narrow reasons that justify expanding the administrative record: (1) supplementation is necessary to determine whether the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). When moving for a court order that an

agency supplement the administrative record with specific documents, a party must identify the documents and reasonable, non-speculative grounds for its belief that the documents were considered by the decision-makers involved in the determination. *Pinnacle Armor, Inc. v. United States*, 923 F. Supp.2d 1226, 1239 (E.D. Cal. 2013) (internal quotation marks and citation omitted). The plaintiff "must do more than imply that the documents at issue were in the agency's possession," and "must prove that the documents were before the actual decision makers involved in the determination." *Id.* (internal quotation marks and citation omitted, alterations normalized). The party seeking supplementation has a "heavy burden" of demonstrating that the excluded materials are necessary to adequately review the agency decision. *Fence Creek Cattle Co.*, 602 F.3d at 1131.

DISCUSSION

Plaintiff moves the Court for an order compelling the Forest Service to complete or supplement the administrative record by adding documents or categories of documents to the administrative record. Specifically, Plaintiff seeks to compel the addition of the administrative record from the 2015 Project litigated in *Turner*, as well as 162 documents produced to Plaintiff pursuant to a Freedom of Information Act ("FOIA") request. Plaintiff also seeks to compel the production of a privilege log detailing all documents withheld under a claim of privilege, particularly including documents withheld under a claim of deliberative process privilege or attorney work product privilege.

As a preliminary matter, Plaintiff contends that the presumption of regularity no longer applies in APA challenges. However, the Ninth Circuit has recently reaffirmed the presumption of regularity:

> The Administrative Procedure Act requires us to review an agency's action based on the whole record. That includes everything that was before the agency pertaining to the merits of its decision ... We have explained that a court reviewing an agency's action may examine "extra-record evidence" only in limited circumstances that are narrowly construed and applied. Such circumstances are present, for example, when the agency has relied on documents not in the record or when plaintiffs make a showing of agency bad faith. But like other official agency actions, an agency's statement of what is in the record is subject to a presumption of regularity. We must therefore presume that an agency properly designated the Administrative Record absent clear evidence to the contrary.

Goffney, 995 F.3d at 747-48 (internal quotation marks and citations omitted).

Consistent with that well-established standard, the Court will apply the presumption of regularity in assessing Plaintiff's motion.

I. Certification of the Record

In its Reply, ECF No. 21, Plaintiff raises a challenge to the presumption of regularity on the basis that the declaration certifying the record as complete is

defective. The Forest Service has certified the administrative record through the Declaration of Veronica Tischer, a paralegal specialist employed by the Forest Service. ECF No. 13-1. Tischer affirms that "[u]nder my direction and oversight, the Forest Service compiled and indexed the documents comprising its administrative record," and "[t]o the best of my knowledge and belief, the documents listed in the index are materials that have been considered, either directly or indirectly, by the relevant Forest Service officials in connection with their efforts in carrying out administrative tasks, activities, and constituent steps related to the Walton Lake Restoration Project on the Ochoco National Forest." Tischer Decl. ¶¶ 2-3.

Plaintiff contends that, because Tischer has only been employed by the Forest Service since 2020, she is not qualified to certify the completeness of a record that predates her employment. "An agency's designation and certification of the administrative record is treated like any other established administrative procedures, and thus entitled to a presumption of administrative regularity." *McCrary v. Gutierrez*, 495 F. Supp.2d 1038, 1041 (N.D. Cal. 2007). "Accordingly, in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties." *Id.* (internal quotation marks and citation omitted, alterations normalized). In this case, Plaintiff has offered no support for the contention that an agency employee must have had some personal involvement in a proposed project for the entire duration of the administrative process in order to oversee the compilation the record for that project or to certify that the record is complete to the best of her knowledge. The

Tischer Declaration is, like the rest of the administrative record, entitled to a presumption of regularity and Plaintiffs have failed to overcome that presumption.

Plaintiff also contends that the certification is defective because it fails to include materials constituting "constituent steps" in the reaching the final decision for the 2020 Project, but those issues are addressed in the following sections.

II. The Record of the 2015 Project

Plaintiff asserts that material from the *Turner* administrative record, which concerned the 2015 Project, should be included in the administrative record for the present case on the basis that the 2020 Project is merely a continuation of the withdrawn 2015 Project. In its Response, the Forest Service affirms that it "returned to the drawing board and undertook new analysis, sought and considered public input, issued an environmental assessment, and documented its decision in a decision notice." Def. Resp. at 5. ECF No. 19. The Forest Service also affirms that when materials from the administrative record of the 2015 Project were considered in making the final decision on the 2020 Project, those materials were included in the administrative record submitted in the present case. *Id.*

In *Safari Club Int'l v. Jewell*, No. CV-16-00094-TUC-JGZ, 2016 WL 7785452, at *4 (D. Ariz. July 7, 2016), an Arizona district court rejected a similar argument in favor of expanding the administrative record to include material from a prior decision: "Plaintiffs have not cited any authority and this Court could find none, permitting the supplementation of the administrative record based solely on the agency's consideration of evidence in

connection with an earlier, related rulemaking." *Id.* at *4. "Courts are cautioned against such indiscriminate expansion of the record, as it not only fails to give appropriate deference to the agency's designation of the record, but also threatens an improper *de novo* review of the agency action." *Id.*

In this case, the Court concludes that, after weighing the presumption in favor of regularity, Plaintiff has failed to make a sufficient showing that material included in the administrative record for *Turner* but not included in the administrative record in this case was "before the agency" in making the challenged decisions in the 2020 Project. The Court therefore declines to compel the agency to supplement the current administrative record with material from the administrative record in *Turner*.

III. FOIA Materials

Plaintiff contends that approximately 1,200 pages of material spread out over 162 documents acquired via requests made under FOIA should have been included in the administrative record. Plaintiff contends that the absence of these documents, and other unidentified documents allegedly withheld from the administrative record, overcome the presumption of regularity. The Forest Service asserts that these materials are "internal and deliberative" and not appropriate for inclusion in the administrative record. Def. Resp. 12-13. The Forest Service maintains that "deliberative materials are not part of the 'whole record' to begin with, and so were never 'withheld' on a claim of privilege." *Id.* at 13.

A. Deliberative Materials

In its Sur-Reply, ECF No. 36, the Forest Service clarifies that it has not withheld material, including those documents produced to Plaintiff under FOIA, under a claim of privilege, nor has it invoked privilege as to the FOIA documents during conferral between the parties. Rather, the Forest Service maintains that deliberative materials are not part of the "whole record" under the APA and, as a result, are not properly included in the administrative record without reference to privilege.

Broadly speaking, a document is considered deliberative if it reflects the give-and-take of the consultative process, and this includes recommendations, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinion of the writer, rather than the policy of the agency. *Nat'l Wildlife Fed. v. United States Forest Serv.*, 861 F.2d 1114, 1118-19 (9th Cir. 1988). "Courts rationalize that because probing an agency's deliberative process can be harmful, agencies may, in certain APA contexts, withhold documents to prevent injury to the quality of agency decisions by ensuring that the frank discussion of legal or policy matters in writing, within the agency, is not inhibited by public disclosure." *Save the Colorado*, 2021 WL 390497, at *3 (internal quotation marks and citation omitted).

"The Ninth Circuit has not squarely resolved whether deliberative documents must be part of the administrative record." *Save the Colorado*, 2021 WL 390497, at * 3. The Ninth Circuit has held that a district court's "decision to require a privilege log and evaluate

claims of privilege before including deliberative documents 'in the record was not clearly erroneous as a matter of law.'" *Id.* (quoting *In re United State*, 875 F.3d at 1210). District courts within the Ninth Circuit are split on whether the Government may withhold deliberative documents from the administrative record. Some courts have found that "because deliberative documents are limited to the agency's stated reasons and probe the mental processes of agency decision-makers, these materials are irrelevant and impermissible," while other courts have found that "deliberative materials are properly included under the Ninth Circuit's broad definition of 'the whole record.'" *Id.* (internal quotation marks and citations omitted, collecting cases).

In resolving this issue, "many courts look to D.C. Circuit case law in APA review cases, as the majority of such disputes occur in that circuit." *ASSE Int'l, Inc. v. Kerry*, Case No SACV 14-00534-CJC(JPRx), 2018 WL 3326687, at *2 (C.D. Cal. Jan. 3, 2018). "The D.C. Circuit has consistently held that, absent a showing of bad faith or improper behavior, 'deliberative documents are not part of the administrative record.'" *Save the Colorado*, 2021 WL 390497, at *3 (quoting *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019)); *see also In re United States Department of Defense and United States Environmental Protection Agency Final Rule*, Case Nos. 15-3751, et al., 2016 WL 5845712, at *2 (6th Cir. Oct. 4, 2016) ("Deliberative process materials are generally exempted from inclusion in the record in order to protect the quality of agency decisions by ensuring open and candid communications.").

In *Save the Colorado*, the district court concluded that deliberative documents are not properly part of the administrative record:

> The Court's task is to assess the lawfulness of the agency's action based on the reasons offered by the agency, not to probe the mental processes of agency decision-makers. Moreover, the Ninth Circuit has cautioned that forced disclosure of predecisional deliberative communications can have an adverse impact on government decision-making. Indeed, requiring disclosure of deliberative materials would chill the frank discussions and debates that are necessary to craft well-considered policy ... The absence of these documents does not overcome the presumption of regularity and the Department need not supplement the administrative record with deliberative materials.

Save the Colorado, 2021 WL 390497, at *4 (internal quotation marks and citations omitted).

The Court concurs with the reasoning of the district court in *Save the Colorado* and the D.C. Circuit. The Court concludes that deliberative materials are not properly part of the administrative record and so declines to order the Forest Service to supplement the administrative record with those materials. For the same reason, the Court likewise rejects Plaintiff's contention that the existence of other deliberative documents not included in the administrative record, beyond those produced in response to Plaintiff's FOIA request, would serve to overcome the presumption of

regularity with respect to the Forest Service's compilation of the administrative record in this case.

B. Specificity

"When moving for a court order to supplement the administrative record with specific documents, a party must identify the document and reasonable, non-speculative grounds for its belief that the documents were considered by the decision makers involved in the determination." *Save the Colorado*, 2021 WL 390497 at *7; *see also Oceana, Inc. v. Pritzker*, Case No. 16-cv-06784-LHK (SVK), 2017 WL 2670733, at *2 (N.D. Cal. June 21, 2017) (to overcome the presumption of regularity, "the plaintiff must identify the allegedly omitted materials with sufficient specificity and identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record." (internal quotation marks and citation omitted)).

In *Save the Colorado*, as in the present case, the plaintiff sought to introduce materials, including internal communications from the agency, that the plaintiff acquired via a FOIA request. *Save the Colorado*, 2021 WL 390497, at *7. The district court rejected the motion, finding that the plaintiff had "not made a particularized showing of what documents were omitted from the administrative record." *Id.*

In the present case, Plaintiff has supplied 1,200 pages of material it received from the Forest Service through a FOIA request but provides little in the way of specific argument concerning why these documents were improperly excluded from the administrative record beyond cryptic annotations in a spreadsheet listing the

documents. Buchele Decl Ex. F. ECF No. 11-6. The Court's own review reveals that these documents are largely deliberative materials consisting of email discussions between agency staff, proposed drafts, and other similar documents. As discussed in the previous section, the Court has concluded that such materials are not properly part of the administrative record.

IV. Privilege Log

Plaintiff asserts that the Forest Service must prepare a privilege log detailing all agency documents withheld from the administrative record on the basis that they were deliberative material.

There is a division of opinion among district courts within the Ninth Circuit about whether an agency should be obliged to produce a privilege log or submit allegedly privileged documents for in-camera review to test whether the documents are deliberative. *See, e.g.*, *Friends of the Clearwater v. Higgins*, ___ F. Supp.3d ___, Case No. 2:20-cv-00243-BLW, 2021 WL 827015, at *9-10 (D. Idaho March 4, 2021) (concluding that "the correct way to address the tension between APA review and deliberative process privilege is for Defendants either to file a privilege log or submit the allegedly privileged documents for in camera review.").

Another line of district court cases, including *Save the Colorado*, have reached a contrary conclusion, finding that deliberative materials did not belong in the administrative record and so there was no useful purpose served by ordering a privilege log and "[r]equiring the [Department] to identify and describe on a privilege log all of the deliberative documents would invite speculation into an agency's predecisional process

and potentially undermine the limited nature of review available under the APA." *Save the Colorado*, 2021 WL 390497, at *7-8 (internal quotation marks and citation omitted); *see also California v. U.S. Dep't of Labor*, No. 2:13-cv-02069-KJM-DAD, 2014 WL 1665290, at *13 (E.D. Cal. April 24, 2014) ("[B]ecause internal agency deliberations are properly excluded from the administrative record, the agency need not provide a privilege log.").

As discussed in the previous section, the Court agrees with the reasoning of *Save the Colorado* and has concluded that deliberative materials are not properly part of the administrative record. Consistent with that determination, the Court is likewise persuaded by the district court's reasoning in *Save the Colorado* concerning the production of a privilege log and concludes that such a log would be without useful purpose and would undermine the limited scope of the Court's APA review. Accordingly, the Court declines to order the production of a privilege log detailing the material excluded from the record as deliberative and likewise declines to order an *in camera* review of those documents.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion to Compel Completion of the Administrative Record, ECF No. 10, is DENIED.

It is so ORDERED and DATED this 19th day of August 2021.

/s/ Patricia Sullivan
PATRICIA SULLIVAN
United States Magistrate Judge