IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAFER CHEMICALS, HEALTHY FAMILIES et al., *Petitioners,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY et al., *Respondents.* IPC INTERNATIONAL, INC. et al., *Respondents-Intervenors.*	Docket No. 17-72260 Consolidated with Docket Nos. 17-72501, 17-72968, 17-73290, 17-73383, 17-73390, 17-72260

PETITIONERS' MOTION TO COMPLETE THE ADMINISTRATIVE RECORDS OR, IN THE ALTERNATIVE, TO TAKE JUDICIAL NOTICE

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INTRODUCTION

Petitioners[1] respectfully move the Court to compel Respondents U.S. Environmental Protection Agency and Administrator Scott Pruitt (together, EPA or Agency) to complete the administrative records EPA certified for two interrelated rules it issued under the Toxic Substances Control Act (TSCA). EPA's incomplete administrative records impede the Court's meaningful review of the rules at issue. The initial certified records filed by EPA excluded numerous public comments that were part of the records; EPA only recently supplemented the certified records after being informed by Petitioners of their deficiencies. Even after supplementation, the certified records still improperly omit five categories of documents considered by EPA decision-makers in developing the rules: (1) materials from a meeting between EPA and industry representatives; (2) inter- and intra-agency memoranda raising serious concerns regarding EPA's last-minute changes to the rules; (3) late-filed comments regarding conflicts of interest involving Dr. Nancy Beck, the Assistant Deputy Administrator overseeing

[1] Petitioners include: Alaska Community Action on Toxics; Alliance of Nurses for Healthy Environments; Asbestos Disease Awareness Organization; Cape Fear River Watch; Environmental Defense Fund (EDF); Environmental Health Strategy Center (EHSC); Environmental Working Group (EWG); Learning Disabilities Association of America; Natural Resources Defense Council (NRDC); Safer Chemicals, Healthy Families (SCHF); Sierra Club; Union of Concerned Scientists; United Steelworkers; Vermont Public Interest Research Group; and WE ACT for Environmental Justice.

issuance of the rules; (4) a memorandum regarding conflicts posed by Dr. Beck's prior employment and conditions for her participation in agency business, including rulemaking; and (5) "scope documents." These documents were considered by EPA when it finalized the rules and should be included in the certified records. As to the scope documents, Petitioners alternatively ask the Court to take judicial notice.

Pursuant to 9th Cir. R. 27-1(5), Petitioners informed counsel for Respondents and Respondents-Intervenors of their intent to file this motion, and identified six categories of documents omitted from the certified records initially filed by EPA. EPA agreed that one category of documents, pre-proposal public comments, was part of the administrative records and agreed to add those documents to the certified records. Counsel for Respondents and Respondents-Intervenors indicated they are unable to take a position with respect to the five remaining categories in Petitioners' motion and reserve the right to respond after the motion has been filed.

BACKGROUND

This case involves challenges to two interrelated rules EPA issued in July 2017 to implement amendments to TSCA enacted through the Frank R. Lautenberg Chemical Safety for the 21st Century Act. *See* Pub. L. No. 114-182, 130 Stat. 448, 462-65 (2016). The 2016 TSCA amendments established new requirements for

EPA to evaluate existing chemicals to determine whether they pose "unreasonable risk[s] of injury to health or the environment." 15 U.S.C. § 2605(b)(1)(B)(i). Congress directed EPA to create a pipeline of chemicals to undergo evaluations by establishing "a risk-based screening process" for designating chemical substances as either high- or low-priority substances. *Id.* § 2605(b)(1)(A). For each chemical EPA designates as high-priority, it must conduct a "risk evaluation" to determine whether the "chemical substance presents an unreasonable risk of injury to health or the environment." *Id.* § 2605(b)(3)(A), (b)(4)(A).

Congress directed EPA to promulgate two rules to implement these new requirements. *Id.* § 2605(b)(1)(A), (b)(4)(B). These rules, known as the Framework Rules, establish the processes by which EPA will select, i.e., "prioritize," chemicals for risk evaluation and then evaluate the chemicals' risks. The prioritization and risk evaluation processes are critical to EPA's overall chemical risk management activities: the results of EPA's risk evaluations determine whether it must regulate chemicals to eliminate unreasonable risks to public health or the environment. *See id.* § 2605(a).

EPA began developing the rules in July 2016, holding public meetings and accepting written comments in advance of issuing proposed rules. Notice of Public Meetings and Opportunities for Public Comment, 81 Fed. Reg. 48,789, 48,789-90 (July 26, 2016). EPA issued the proposed Framework Rules in January 2017.

ER 60–78; ER 577–589.[2] The proposed Rules interpreted TSCA to require EPA to consider each chemical holistically during both prioritization and risk evaluation. *See* ER 582; ER 63. The proposed Rules required the scope of each risk evaluation to include all of the chemical's "conditions of use," i.e., "[all] circumstances . . . under which [EPA determines that the] chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of." ER 66; *see* ER 581; *see also* 15 U.S.C. § 2602(4). EPA accepted comments on the proposed Rules in writing until March 20, 2017. ER 60; ER 577. Petitioners submitted comments, *see*, *e.g.*, ER 680–94 (SCHF); ER 695–713 (NRDC); ER 714–48 (EDF); ER 749–60 (EWG); ER 386–411 (SCHF); ER 300–47 (NRDC); ER 514–28 (EWG), as did the American Chemistry Council (ACC), a Respondent-Intervenor, *see* ER 129–75; ER 412; ER 590–630.

Even as the rulemaking progressed, EPA was administering other provisions of TSCA, and as late as April 12, 2017, EPA continued to interpret TSCA to require that risk evaluations "encompass *all* manufacturing, processing, distribution in commerce, use, and disposal activities that the Administrator determines are intended, known, or reasonably foreseen." TSCA Section 21 Petition; Reasons for Agency Response, 82 Fed. Reg. 17,601, 17,603 (Apr. 12,

[2] Petitioners use "ER" to refer to the Excerpts of Record submitted concurrently with their Opening Brief. *See* 9th Cir. R. 30-1.

2017) (emphasis added); *see also* TSCA Section 21 Petition; Reasons for Agency Response, 82 Fed. Reg. 11,878, 11,880 (Feb. 27, 2017) (similar).

In April 2017, the Trump Administration appointed Dr. Beck, at the time the Senior Director of Regulatory Science Policy at ACC, to be Deputy Assistant Administrator for EPA's Office of Chemical Safety and Pollution Prevention (Office of Chemical Safety), which oversees EPA's TSCA program. *See* Motion Appendix (MA) 51-85.[3] In this role, Dr. Beck has the authority to provide policy and science direction to EPA staff on TSCA implementation. *See* MA 86-89.

EPA published the final Framework Rules on July 20, 2017. ER 28 (Prioritization Rule); ER 1 (Risk Evaluation Rule). Dr. Beck was directly involved in rewriting the final Rules, *see, e.g.*, MA 495-501, and the final Rules adopt several of the approaches she had lobbied EPA to take while she was working on behalf of ACC, in some cases word for word. *See* MA 527-39. The final Rules reflect a substantial departure from EPA's proposed approach to chemical risk evaluation. For the first time, EPA asserted that it has authority to both substantially narrow the statutory definition of "conditions of use" and to exclude activities that EPA itself has identified as "conditions of use" from its risk

[3] Petitioners have compiled the Declarations of Nancy S. Marks and Eve Gartner and exhibits thereto in a consecutively paginated appendix (Motion Appendix) for the Court's convenience.

evaluations and priority designations. ER 4-5.

Petitioners' consolidated petitions for review challenging both the Prioritization and Risk Evaluation Rules are pending before this Court. *See* Order, ECF No. 34. On September 20, 2017, EPA filed separate certified indices of the administrative records for each of the two Rules. Notice of Filing Certified Index to Admin. Record, No. 17-72260, ECF No. 16-1 (Sept. 20, 2017); Certified Index to Admin. Record, No. 17-1926 (4th Cir.), ECF No. 28-2 (Sept. 20, 2017) (collectively "Initial Certified Records").

On April 4, 2018, Petitioners informed Respondents and Respondents-Intervenors that the Initial Certified Records were incomplete and that they intended to file a motion to complete the record. EPA agreed that one category of documents, the pre-proposal comments submitted by the public, were part of the whole administrative records and should not have been omitted from the Initial Certified Records. Accordingly, EPA has agreed to supplement the records with respect to this single category of documents.[4]

STANDARD OF REVIEW

This Court will review the Framework Rules under the standards set forth in the Administrative Procedure Act (APA). *See* 15 U.S.C. § 2618(c)(1)(A) (citing 5

[4] Petitioners refer to the Initial Certified Records and the supplemental records filed by EPA collectively as the "Certified Records."

U.S.C. § 706 (courts shall set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law")). Although judicial review of agency action under the APA is based on the "whole record," 5 U.S.C. § 706; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971), "[t]he whole administrative record … is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record," *Thompson v. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks and citations omitted). Rather, the "whole" record consists of all documents "directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Id.*

The government's designation of an administrative record is entitled to a presumption of completeness; however, a petitioner may rebut this presumption with "clear evidence to the contrary." *Cook Inletkeeper v. EPA*, 400 F. App'x 239, 240 (9th Cir. 2010); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). To meet this standard, petitioners must (1) "identify the allegedly omitted materials with sufficient specificity" and (2) "identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record." *Oceana, Inc. v. Pritzker*, No. 16-cv-06784-LHK (SVK), 2017 WL 2670733, at *2 (N.D. Cal. June 21, 2017). Petitioners "need not show bad faith or improper motive." *Id.*

ARGUMENT

EPA unlawfully excluded from the Certified Records at least five categories of documents that are part of the whole record agency decision-makers considered in developing the Framework Rules.

EPA's Certified Records are not entitled to a presumption of completeness. First, EPA improperly excluded an entire category of documents, the pre-proposal public comments, *compare*, *e.g.*, ER 79-128, 290-94, 384-85, 429-80, 503-13, 590-630, *with* Initial Certified Records. EPA solicited these public comments and said they would be part of the rulemaking, 81 Fed. Reg. at 48,789-90, yet, it failed to include any of them in the Initial Certified Records and did not add the documents to the record until this error was pointed out by Petitioners. Second, and as explained below, Petitioners have provided clear evidence that five additional categories of documents, excluded by EPA from the Certified Records, were before EPA and considered by the Agency in formulating the Framework Rules, and are thus part of the whole administrative record. The substantial gaps in EPA's Certified Records that Petitioners have identified rebut the presumption of completeness.

Because EPA failed to include these five categories of documents in the Certified Records, the Court should order EPA to complete the Records, file amended indices, and produce to the Court and the parties copies of any withheld

documents not appended to the Marks Declaration. Without these documents, the Certified Records "must be viewed as a fictional account of the actual decisionmaking process." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (internal quotations omitted).

I. The whole records include materials from a November 2016 meeting requested by ACC and attended by EPA staff

EPA's Certified Records improperly exclude materials from a November 30, 2016, meeting between representatives of ACC and EPA officials at the Office of Management and Budget (OMB). *See* MA 12-13. During the meeting, ACC distributed two documents commenting on the TSCA rulemakings, which are attached to the OMB's log for the meeting. *See* MA 14-23. EPA's Certified Records do not include the log or the two documents distributed by ACC.

Because EPA considered ACC's representations during the meeting and the written comments it distributed, both the meeting log and the handouts are properly part of the administrative records. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (the "record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts…."). The records "must be [completed] to include" these contacts between EPA and outside parties, "so that proper judicial review may be conducted." *Portland Audubon Soc'y*, 984 F.2d at 1549; *see Rocky Mountain Wild v. Walsh*, No. 15-cv-0615-WJM, 2016 WL

8234665, at *5 (D. Colo. May 10, 2016) ("[M]eeting notes are evidence of what an agency discussed, and therefore evidence of what it considered."). Accordingly, EPA must complete the records with materials from the November 30, 2016, meeting, including ACC's comments, attached as Exhibits 1 through 3 of the Marks Declaration, MA 12-23. *See Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 141 (D.D.C. 2002) (completing record with comments submitted to EPA during meeting with industry representatives).

II. The whole records include memoranda concerning EPA's change of course in the final Framework Rules

EPA's Certified Records improperly exclude memoranda considered by EPA decision-makers addressing the approach to chemical risk evaluations EPA adopted in the final Framework Rules. On May 25, 2017, the Office of Chemical Safety solicited Final Agency Review on the Framework Rules from other EPA offices, and received memoranda raising concerns about changes in the Framework Rules. *See, e.g.*, MA 24-27, 28-30. EPA also received comments from other agencies raising similar concerns. *See, e.g.*, MA 31-50. EPA must complete the records with all of the Final Agency Review memoranda the Office of Chemical Safety received—including the two from the Office of Enforcement and Compliance Assurance and the Office of Water, attached as Exhibits 4 and 5 to the

Marks Declaration, MA 24-27, 28-30[5]—along with a memorandum responding to concerns raised by other federal agencies, attached as Exhibit 6 to the Marks Declaration, MA 31-50.

These memoranda were considered by the relevant decision-makers, and will enable the Court to meaningfully assess whether EPA's decision was "based on a consideration of the relevant factors," "whether there has been a clear error of judgment," or whether EPA "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). These memoranda concern whether, under EPA's revised approach to chemical risk evaluation, the Agency can comply with TSCA's command to evaluate whether a chemical substance "presents an unreasonable risk" to health or the environment, including an unreasonable risk to vulnerable subpopulations such as children, the elderly, and workers. 15 U.S.C. §§ 2605(b)(4)(A), 2602(12).

For example, the Office of Water explained that "important chemical exposure pathways" for certain chemicals that may contaminate groundwater and surface water "may not be included" in EPA's risk evaluations, leading to

[5] These two documents were published by the New York Times at https://www.documentcloud.org/documents/4113586-EPA-and-Toxic-Chemical-Rules.html#document/p156/a382948 (last accessed March 6, 2018), as attachments to the article by Eric Lipton, "Why Has the EPA Shifted on Toxic Chemicals? An Industry Insider Helps Call the Shots," *N.Y. Times*, Oct. 21, 2017.

"underestimation of the potential risks to human health and the environment." MA 29-30. The Office of Enforcement and Compliance Assurance also raised concerns about EPA's decision not to evaluate "legacy" substances and its approach to conditions of use: "If EPA prioritizes an entire chemical substance but subsequently evaluates and makes risk determinations on a subset of the conditions of use, the Agency may create potential regulatory compliance conflicts and uncertainty." MA 26. Similarly, two federal agencies noted EPA's definition of legacy use would exclude any consideration of firefighters' ongoing exposure to asbestos in building materials. MA 34. These memoranda were considered by EPA decision-makers and are directly relevant to whether EPA's final approach to prioritization and risk evaluation reflects reasoned decision-making.

When reviewing (and sometimes holding unlawful) agency action, this Court routinely relies on exactly these kinds of materials, including communications among or concerns voiced by an agency's own staff. *See, e.g.*, *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 906 (9th Cir. 2003) (considering internal EPA memoranda in rule challenge); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 768-69 (9th Cir. 2007) (considering internal memorandum and briefing packet in review of finding by Secretary of Commerce); *NRDC v. Pritzker*, 828 F.3d 1125, 1136 (9th Cir. 2016) (considering and relying on internal memorandum from National Marine Fisheries Service scientists when evaluating

the Service's action); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 479, 497-98 (9th Cir. 2011) (considering report from an "interdisciplinary" team at the Bureau of Land Management "criticiz[ing]" drafts of proposed new regulations, including the effects of the regulations on wildlife and biodiversity). Several district courts within the Circuit as well as other Courts of Appeals have concluded that internal agency communications are part of the administrative record. *See, e.g.*, *Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590-HSG (KAW), 2017 WL 1709318, at *4 (N.D. Cal. May 3, 2017); *In re Nielsen*, No. 17-3345, slip op. at 3-5 (2d Cir. Dec. 27, 2017).[6]

Without the whole record, including memoranda from EPA staff regarding EPA's change in course, the Court cannot "satisfy[] [itself] that the agency has made a reasoned decision" based on the relevant factors. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *see also Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (noting that while the documents submitted by the agency may "seem[] to support the rationality of [its] actions" a court might reach a different conclusion if it "had been aware of other information that was before the agency").

[6] A copy of this slip opinion is attached as Exhibit A for the Court's convenience.

III. The whole records include comments Petitioners submitted to EPA regarding Dr. Beck's conflicts of interest

EPA's Certified Records improperly exclude the supplemental comment letter that a subset of Petitioners submitted to EPA in June 2017 concerning conflicts posed by the appointment of Dr. Beck as Deputy Assistant Administrator for EPA's Office of Chemical Safety. *See* MA 51-85. Following Dr. Beck's appointment in April 2017, Petitioners promptly submitted a letter of concern to EPA on May 9, 2017. *See* MA 69-73. Petitioners then submitted the supplemental comment letter at issue here on June 13, 2017, detailing Dr. Beck's potential conflicts of interest, including the fact that Dr. Beck lobbied on behalf of the chemical industry on the precise rulemaking that she was overseeing as head of the Office of Chemical Safety. MA 51-85. In light of the fact that EPA's interpretation of TSCA's requirements for priority designations and risk evaluations dramatically changed course after Dr. Beck arrived at EPA, the supplemental comment letter is directly relevant to whether EPA's changed approach is the product of reasoned decision-making.

Prior to joining EPA, Dr. Beck was employed as the Senior Director of Regulatory Science Policy at ACC. MA 62-65. ACC is a registered lobbying organization and a leading advocacy arm of the chemical industry whose members include the nation's largest and most influential chemical manufacturers. MA 66-68. ACC submitted extensive comments to EPA on all aspects of TSCA

implementation, including the Framework Rules. *See* ER 79-128, 590-630, 761-87.

Dr. Beck was a leading figure in ACC's efforts to shape the Framework Rules to serve the chemical industry's interests and was responsible for developing ACC's preferred policies for TSCA implementation and the Framework Rules. For instance, Dr. Beck presented ACC's views and recommendations on the Framework Rules at an EPA public meeting on August 9, 2016. *See* ER 79-128 (noting that ACC provided oral comments at the August 9 meeting). Dr. Beck also signed and submitted detailed comments on behalf of ACC, outlining ACC's objectives for the upcoming Framework Rules. *See id.* On November 30, 2016, after EPA sent its proposed Framework Rules to OMB for review, Dr. Beck participated in a meeting at OMB attended by EPA staff regarding the Rules on behalf of ACC. *See* MA 74-75; *see also supra* pp. 9-10; MA 76-85. In sum, the supplemental comment letter documented that Dr. Beck was deeply engaged in ACC's efforts to influence the TSCA Framework Rules.

Therefore, Petitioners' supplemental comments are highly relevant to whether the Framework Rules are arbitrary and capricious. *See Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847-49 (E.D. Cal. 2008) (disqualifying biased agency head from participating in rulemaking because he "prejudged the merits of the rule"); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1174 (D.C. Cir.

1980) (evaluating whether to invalidate regulations where industry argued that EPA assistant administrator's participation in rulemaking was improper owing to his prior employment at a public interest organization involved in the rulemaking).

Petitioners sent this supplemental comment letter well before EPA promulgated the Framework Rules in late July 2017, and therefore, it was before the Agency during the rulemaking. That the letter was filed after the official close of the comment period does not allow EPA to exclude it from the administrative record as "the critical inquiry is whether these letters were before the [agency] *at the time of the decision*." *Thompson*, 885 F.2d at 556 (emphasis added); *Ad Hoc Metals Coal.*, 227 F. Supp. 2d at 140 (rejecting EPA's argument that "late-filed comments always can be ignored for purposes of the administrative record"). Indeed, these comments could not have been submitted before the comment period closed on March 20, 2017, because Dr. Beck was not appointed until April 2017.

These comments were necessitated by an event "of the agency's own initiative," the appointment of Dr. Beck, and EPA had sufficient time to take them into account prior to making a final decision. *See id.* ("While the comment period must end at some point, where highly relevant information comes to light one month later because of an agency's own initiative, prior to promulgation of a final rule and with a sufficient amount of time remaining that the ultimate decision can be influenced … such information should be included in the record."). Therefore,

the Court should compel EPA to complete the administrative records with Petitioners' supplemental comment letter, attached as Exhibit 7 to the Marks Declaration, MA 51-85.

IV. The whole records include the ethics memorandum directing Dr. Beck not to consider comments submitted by ACC

Similarly, EPA's Certified Records improperly exclude the June 8, 2017, memorandum from EPA's designated ethics official, Kevin Minoli, to Dr. Beck. MA 86-89. In this memorandum, Mr. Minoli prohibits Dr. Beck from "participat[ing] in any meetings, discussions or decisions that relate to any individual ACC comment [or] attend[ing] any meeting at which ACC is present," unless "(a) the subject matter of the discussion is a particular matter of general applicability, (b) other interested non-federal entities are present besides only ACC, and (c) [Dr. Beck is] not the only Agency official at the meeting." MA 88-89.

The constraints on Dr. Beck's participation in the Framework Rules rulemaking as Deputy Assistant Administrator, and whether Dr. Beck complied with those constraints, is directly relevant to whether the Framework Rules are the result of reasoned decision-making. *See supra* p. 16. As the recipient of the ethics opinion, Dr. Beck necessarily considered it while leading EPA's efforts to finalize the Framework Rules. The ethics memorandum, attached as Exhibit 8 to the Marks Declaration, MA 86-89, is therefore part of the whole administrative record.

V. The whole record for the Risk Evaluation Rule includes the scope documents developed in conjunction with and considered by EPA during the rulemaking

EPA's Certified Record for the Risk Evaluation Rule improperly excludes the initial "scope documents" developed as a package with the final Framework Rules and considered by EPA while it finalized the Rules. The Court should order EPA to complete the record for the Risk Evaluation Rule with these ten scope documents, Marks Decl. ¶¶ 11-20, MA 4-7, or, in the alternative, take judicial notice of them.

As required by the amended TSCA, EPA selected ten chemicals as the first to undergo risk evaluation. 15 U.S.C. § 2605(b)(2)(A); Risk Evaluation Scoping Efforts Under TSCA for Ten Chemical Substances; Notice of Public Meeting, 82 Fed. Reg. 6545 (Jan. 19, 2017). The first step in the risk evaluation process is publication of a "scope" of the evaluation describing "the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the Administrator expects to consider." 15 U.S.C. § 2605(b)(4)(D). EPA was required to publish the scope documents for these ten chemicals by June 19, 2017. *Id.*; *see* 82 Fed. Reg. at 6545 ("the scoping documents must be issued by June 19, 2017").

Rather than release the scope documents by the deadline, EPA decided to treat the scope documents and Framework Rules as an interrelated regulatory package and release both sets of documents on June 22, 2017. *See* MA 511-13. In

an email to Dr. Beck, an EPA official explained the Agency's decision to withhold the scope documents and release them on the same date as the Framework Rules because the Rules "provide important context" for the scope documents. MA 513. EPA announced and posted both on its website on the same day.[7] MA 519-22.

Thus, the scope documents for the first ten chemicals were developed concurrently with the Framework Rules and EPA staff considered the scope documents in developing the Framework Rules. The draft scope documents were circulated among the intra- and inter-agency reviewers of the draft Framework Rules, including Dr. Beck. *See* MA 508-10. The same EPA staff who developed the Framework Rules also coordinated the draft Rules and the draft scope documents to assure consistency and alignment. *See*, *e.g.*, MA 505-07, 508-10, 511-13, 514-16, 517-18. EPA's notice of the availability of the scope documents for public review explained that EPA had, "[t]o the extent possible, … aligned these scope documents with the approach set forth in the risk evaluation process." Notice of Availability, 82 Fed. Reg. 31,592, 31,593 (July 7, 2017).

[7] Regardless of whether the Court considers the scope documents for purposes of evaluating the merits of Petitioners' challenges to the Framework Rules, it can unquestionably consider them for standing purposes. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) (holding that a court may consider extra-record materials to determine whether it has jurisdiction over the matter before it); *see also Yurok Tribe v. Bureau of Reclamation*, 231 F. Supp. 3d 450, 470 (N.D. Cal. 2017).

Indeed, references in the scope documents further illustrate that they were developed together with the Framework Rules. For example, the Scope Document for Trichloroethylene states that it has been "aligned … with the approach set forth in the risk evaluation process rule." MA 430; *see also* MA 98, 349. Additionally, the scope documents include virtually verbatim language from the final Risk Evaluation Rule preamble explaining EPA's interpretation that it may narrow the definition of conditions of use and exclude activities it has identified as "conditions of use" from a risk evaluation. *Compare* MA 98, 160-61, *with* ER 4-5.

Because these scope documents were before EPA during the rulemaking, were treated by EPA as intertwined with the Framework Rules, were influenced by and illustrate EPA's revised approach to risk evaluation, and concern the effect of EPA's revised approach on the accuracy of its risk evaluations, the scope documents are part of the "informational base" before the Agency when it promulgated the Framework Rules. *See Dopico*, 687 F.2d at 654. The Court should compel EPA to include these scope documents in the certified record. *See, e.g.*, *Oceana*, 2017 WL 2670733 at *4-5 (holding that a report was before decision-makers and therefore was part of the whole administrative record, where the report was published after the final rule was issued, but a member of the team that

prepared the final rule attended a meeting at which the data underlying the report were presented).[8]

In the alternative, the scope documents are official government publications of which the Court should take judicial notice. These scope documents will assist the Court in understanding both the legal and technical implications of the challenged aspects of the Risk Evaluation Rule. The Rule provides only a generic description of what conditions of use of a chemical EPA claims authority to ignore when it conducts a risk evaluation, whereas the scope documents provide concrete illustrations of how the Rule operates.

The Court may take judicial notice of the scope documents because they were generated by EPA, posted on EPA's website, and announced in the Federal Register, and therefore, they are "matters of public record" that are not "subject to reasonable dispute." *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (quoting *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001)); *see, e.g.*, *Sierra Club v. EPA*, 762 F.3d 971, 975 n.1 (9th Cir. 2014) (taking judicial notice of an EPA memorandum as a public record); *United States v. 14.02*

[8] The Court can also consider the scope documents as extra-record material because they are "necessary to explain technical terms or complex subject matter." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). The scopes for individual chemicals explain the practical implications of the exclusionary approach to risk evaluation EPA adopted in the Risk Evaluation Rule.

Acres of Land More or Less in Fresno County, 547 F.3d 943, 955 (9th Cir. 2008) (taking judicial notice of a Department of Energy report).

CONCLUSION

Completion of the administrative records is necessary here because Petitioners have provided the requisite "clear evidence" that EPA omitted specific documents it considered in the development of the Framework Rules. Accordingly, Petitioners respectfully request that the Court grant their motion to compel EPA to complete the administrative records for each of the Framework Rules and order EPA to: include in the records the documents identified in paragraphs 3 through 20 of the Marks Declaration, as well as all Final Agency Review memoranda received by the Office of Chemical Safety but not identified in the Marks Declaration; file amended indices; and produce to the Court and the parties copies of any withheld documents not appended to the Marks Declaration. As to the scope documents, Petitioners alternatively ask the Court to take judicial notice.

April 16, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4975 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 and 14-point Times New Roman font.

Dated: April 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 16, 2018.

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Exhibit A

to Petitioners' Motion to Complete and Supplement the Administrative Records

E.D.N.Y.-Bklyn
16-cv-4756
17-cv-5228
Garaufis, J.
Orenstein, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand seventeen.

Present:

Barrington D. Parker,
Gerard E. Lynch,
Christopher F. Droney,
Circuit Judges.

In re Kirstjen M. Nielsen, Secretary of Homeland Security, 17-3345

Petitioner.*

Petitioner Kirstjen M. Nielsen, the Secretary of the Department of Homeland Security, seeks a writ of mandamus to stay discovery orders entered by the District Court that required the Government (1) to supplement the administrative record it filed with the District Court and (2) to file a privilege log, in litigation challenging the decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program.

Upon due consideration, it is hereby ORDERED that the mandamus petition is DENIED, and the stay of the District Court's discovery orders is LIFTED. Mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). To be entitled to mandamus relief, a petitioner must show (1) that it has "no other adequate means to obtain the relief [it] desires," (2) that "the writ is appropriate under the circumstances," and (3) that the "right to issuance of the writ is clear and undisputable." *In re Roman Catholic Diocese of Albany, Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (quoting *Cheney*, 542 U.S. at 380–81). We have "expressed reluctance to issue writs of mandamus to overturn discovery rulings," and will do so only "when a discovery question is of extraordinary significance or there is an extreme need for reversal of the district court's mandate before the case goes to judgment." *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) (internal quotation marks omitted). "Because the writ of mandamus is such an extraordinary remedy, our analysis of whether the petitioning party has a

* In accordance with Fed. R. App. P. 43(c)(2), the Clerk of Court is directed to amend the caption as set forth above.

clear and indisputable right to the writ is necessarily more deferential to the district court than our review on direct appeal," *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108–09 (2d Cir. 2013) (internal quotation marks omitted), and the writ will not issue absent a showing of "a judicial usurpation of power or a clear abuse of discretion," *In re City of New York*, 607 F.3d at 943 (emphasis omitted) (internal quotation marks omitted).

The Government argues that it cannot be ordered (1) to supplement its administrative record or (2) to produce a privilege log for materials withheld from the record. With respect to the Government's first argument, the Government's position appears to be that in evaluating agency action, a court may only consider materials that the Government unilaterally decides to present to the court, rather than the record upon which the agency made its decision. To the contrary, judicial review of administrative action is to be based upon "the full administrative record that was before the Secretary at the time [s]he made [her] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "The [Administrative Procedure Act ("APA")] specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) Allowing the Government to determine which portions of the administrative record the reviewing court may consider would impede the court from conducting the "thorough, probing, in-depth review" of the agency action with which it is tasked. *Overton Park*, 401 U.S. at 415.[1]

We have previously held that whether the complete record is before the reviewing court "may itself present a disputed issue of fact when there has been no formal administrative proceeding." *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). This is particularly true in a case like the one before us "where there is a strong suggestion that the record before the Court was not complete." *Id.* In such a situation, a court must "permit[] plaintiffs some limited discovery to explore whether some portions of the full record were not supplied to the Court." *Id.*

Plaintiffs in the District Court have identified specific materials that appear to be missing from the record. For example, in her memorandum terminating DACA, then-Acting Secretary Elaine C. Duke indicated that "[United States Citizenship and Immigration Services] has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the [original DACA] memorandum, but still had his or her application denied based solely upon discretion." Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, Dep't of Homeland Security (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca. Presumably, then-Acting Secretary Duke based this factual assertion upon evidence, yet that evidence is not in the record filed in the District Court. Additionally, in parallel litigation challenging the repeal of DACA in

[1] In arguing for a different rule, the Government cites language from *Florida Power* indicating that the "task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." 470 U.S. at 743–44 (citation omitted). However, the Government takes this language out of context. The *Florida Power* Court used this language in explaining that, ordinarily, additional factfinding in the District Court is inappropriate; the Court did not suggest that the Government may prevent a reviewing court from considering evidence that the agency considered by not filing that evidence as part of the administrative record in the reviewing court. *Id.* at 743–45.

the Northern District of California in which the Government filed the same administrative record, the District Court—following *in camera* review of documents considered during the repeal of DACA but not included in the record filed with the court—concluded that 48 of those documents were not subject to privilege. *See* Statement of District Court in Response to Application for a Stay at 3, *In re United States*, 583 U.S. ___, 2017 WL 6505860 (Dec. 20, 2017) (No. 17-801); *see also Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, Nos. C 17-05211, C 17-05235, C 17-05329, C 17-05380, 2017 WL 4642324, at *8 (N.D. Cal. Oct. 17, 2017). Also, as the Supreme Court pointed out, nearly 200 pages of the 256 page record submitted to the District Court consist of published opinions from various federal courts. *In re United States*, 2017 WL 6505860, at *1. It is difficult to imagine that a decision as important as whether to repeal DACA would be made based upon a factual record of little more than 56 pages, even accepting that litigation risk was the reason for repeal. Accordingly, "there is a strong suggestion that the record before the [District Court] was not complete," entitling the plaintiffs to discovery regarding the completeness of the record. *Dopico*, 687 F.2d at 654.

The Government also argues that it should not be required to produce a privilege log of documents that it withheld from the record on the basis of privilege because disclosure would "'probe the mental processes' of the agency." Full Pet. For Mandamus 22 (quoting *United States v. Morgan*, 304 U.S 1, 18 (1938)). First, while it is true that "review of deliberative memoranda reflecting an agency's mental process . . . is usually frowned upon, in the absence of formal administrative findings"—*e.g.*, in the case of "[a] nonadjudicatory, nonrulemaking agency decision"—"they may be considered by the court to determine the reasons for the decision-maker's choice." *Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (citations omitted). Thus, the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded. Second, without a privilege log, the District Court would be unable to evaluate the Government's assertions of privilege. *See Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 333 (2d Cir. 1977) (finding no abuse of discretion in District Court refusal to compel disclosure *after* it reviewed documents *in camera* and concluded they were protected by deliberative privilege).[2]

We are unpersuaded by the Government's argument that compliance with the orders would be overly burdensome due to the scope of the documents that it must review to comply with the District Court's order and the protracted timeline allowed for compliance. Administrative records, particularly those involving an agency action as significant as the repeal of DACA, are often quite voluminous. *See, e.g.*, *Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th

[2] We express no opinion at this juncture as to whether discovery is appropriate in connection with plaintiffs' non-APA claims. We note, however, that even if the Government were correct that a deliberative privilege prevents discovery with respect to the APA claims, the Government could not rely on such privilege to avoid all discovery with respect to plaintiffs' constitutional claims. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (holding that in the context of a suit against the Central Intelligence Agency, "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."); *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the [deliberative process] privilege as a shield.").

Cir. 2016) (noting that the administrative record "is more than a million pages long"); *Chem. Mfrs. Ass'n v. U.S. EPA*, 870 F.2d 177, 184 (5th Cir. 1989) (noting that the administrative record was 600,000 pages). Moreover, in order to accommodate the Government's concerns, the District Court three times modified the magistrate judge's discovery order, the first time by extending the deadline, the second time by limiting the order's scope to documents before the Department of Justice and the Department of Homeland Security, and the third time by limiting it to documents considered by then-Acting Secretary Duke or Attorney General Jefferson B. Sessions or their "first-tier subordinates—i.e., anyone who advised them on the decision to terminate the DACA program." *Batalla Vidal v. Duke***,** Nos. 16 CV 4756, 17 CV 5228, 2017 WL 4737280, at *5 (E.D.N.Y. Oct. 19, 2017). At oral argument, the Government conceded that the number of documents covered by the order, as modified, is approximately 20,000, a far smaller number than the Government's papers led this Court to believe. We are satisfied that under the circumstances, compliance with the District Court's order would not be an undue burden on the Government.

We have been particularly attentive to the Supreme Court's recent opinion granting certiorari and remanding to the District Court in parallel litigation in the Northern District of California. *See In re United States*, 2017 WL 6505860. Contrary to the Government's argument, however, we conclude that that decision does not strengthen the Government's position in the matter before this Court, because the posture of this case in the District Court here, and the orders issued by the District Court in this matter, are significantly distinguishable from those in the California case. Further, the Supreme Court did not decide the merits of the discovery dispute, instead remanding to the District Court to first resolve the Government's threshold arguments "that the Acting Secretary's determination to rescind DACA is unreviewable because it is 'committed to agency discretion,' 5 U.S.C. § 701(a)(2), and that the Immigration and Nationality Act deprives the District Court of jurisdiction." *Id.* at *2. In the case before this court, the District Court has already considered and rejected these threshold arguments. *Batalla Vidal v. Duke*, No. 16 CV 4756, 2017 WL 5201116, at *9, 13 (E.D.N.Y. Nov. 9, 2017). Of course, as the Supreme Court pointed out, the Government has the right to ask the District Court to certify its ruling for interlocutory appeal under 28 U.S.C. § 1292(b), and has announced its intention to do so. While we decline to reserve decision on this petition while the Government pursues an interlocutory appeal, it may be prudent for the District Court to stay discovery pending the resolution of such proceedings. *See In re United States*, 2017 WL 6505860, at *2.

We acknowledge that the Supreme Court noted that "[t]he Government makes serious arguments that at least some portions of the District Court's order are overly broad." *Id*. However, in the case pending in the Northern District of California, the District Court's discovery order applied to documents considered by persons "anywhere in the government," *id.*, which appears to include White House documents, creating possible separation of powers issues not at issue in this case, *see Cheney*, 542 U.S. at 382 ("[S]eparation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President.") The California order also appears to cover a far larger universe of documents than the contested orders before this Court. In contrast, here, the District Court's order covers only documents considered by then-Acting Secretary Duke and Attorney General Sessions, as well as their first-tier subordinates. The order thus does not encompass White House documents, and, as noted above,

the number of officials whose files would be reviewed, and the number of documents that would be involved in that review, would be dramatically fewer than in the case before the Supreme Court.

The Supreme Court also indicated that "the District Court may not compel the Government to disclose any document that the Government believes is privileged without first providing the Government with the opportunity to argue the issue." *In re United States*, 2017 WL 6505860, at *2. The District Court here has required only a privilege log, and has not ordered the production of any documents over which the Government asserts privilege. The order thus plainly contemplates an orderly resolution of any claims of privilege, and we are confident that the District Court will provide the Government with an opportunity to be heard on any claims of privilege it may assert.

We have considered Petitioner's additional arguments and find no basis for the extraordinary remedy of mandamus relief. Accordingly, the petition is DENIED, and the stay of the District Court's discovery orders is LIFTED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit