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Chapter 9

THE PROJECT PROPONENT, THIRD-PARTY CONTRACTORS, AND THE ADMINISTRATIVE RECORD

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I. Introduction

Congress enacted the Administrative Procedure Act ("APA") in 1946 in response to the perceived need to impose a check on the executive branch of government that had experienced tremendous expansion during the New Deal period. Legal scholars generally consider it the most important legislation pertaining to the modern regulatory state. In 1950, Justice Robert H. Jackson remarked: "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects."¹ In the environmental law arena, the 1970 passage of the National Environmental Policy Act ("NEPA") has received similar veneration as we celebrate its 40th anniversary: "Acknowledging the decades of environmental neglect that had significantly degraded the Nation's landscape and damaged the human environment, the law was established to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."²

But in the routine world of the environmental practitioners and their clients, the intersection of the APA and NEPA often present a treacherous path through agency bureaucracy and eventually to the courts where years of good faith efforts to coordinate with a federal agency and the agency's NEPA consultant at a cost of millions of dollars in studies can be nullified by the simple words, "arbitrary and capricious" and "vacated and remanded." This article describes the sometimes precarious role of the project proponent in the NEPA process, the federal agency's typical use of third-party contractors to prepare an environmental impact statement ("EIS"), and the compilation, use, and judicial review of the administrative record.

II. The Project Proponent's Delicate Role

Intuitively, one would think that the party with the most knowledge of the project and the most at stake if the NEPA process is inadequate, often has the least involvement in preparing the EIS or EA. Ironically, after submitting the application for approval which triggers the NEPA process, the project proponent can be virtually shut out of the NEPA process except for submitting comments like any other member of the public. And at least in the Ninth Circuit, the project proponent may not even be allowed to intervene to assist federal defendants defend and [9-3] the court understand the project. Yet knowing how to appropriately engage in the NEPA process can make the difference regarding the ultimate defensibility of the document.

The leading case currently addressing the improper influence of a project proponent and its technical consultant on the NEPA process is *Colorado Wild, Inc. v. Forest Service*.³ In that case, the court granted a preliminary injunction enjoining construction of a road to facilitate development of the Village at Wolf Creek in part because of an "improper relationship that developed between" the Forest Service's EIS contractor and the project proponent, as evidenced by the following:

- “email correspondence indicating that” the proponent and NEPA contractor “were in routine communication regarding the substance, scope and timing of the FEIS,” which communication was prohibited by the third-party memorandum of agreement between the Forest Service and the project proponent.
- The failure of the Forest Service, which knew of the direct communication, “to collect and to investigate these communications and include them in the administrative record so it and the public could assess whether” the relationship between the NEPA contractor and the project proponent “had violated the integrity of the NEPA and decision-making process.”

Some agencies have cited this case as authority prohibiting any communication between the project proponent and the NEPA contractor during the NEPA process. Other agencies have allowed communication between the NEPA contractor and the project proponent (or the project proponent's technical consultant) unless agency personnel participate in the communication.

A. Discretion to Prepare the Environmental Assessment

The CEQ regulations provide an agency may permit an applicant (or applicant's contractor) to prepare an environmental assessment (“EA”). Nevertheless, the agency must “make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.”⁴ In practice, some agencies (such as BLM) routinely allow the project proponent to prepare the EA, while some agencies (such as the Department of Energy) rarely do. The amount of oversight an agency gives to a project proponent prepared EA depends on the nature, scope, complexity, and controversy surrounding the project. Even though a project arguably does not result in significant impacts on the environment, the mere fact of public controversy surrounding the project may be sufficient for the agency to exercise its discretion to require preparation of an EIS.⁵

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B. Pre-Scoping and Scoping Process

Mindful of the length of the bureaucratic process and the need to commence the NEPA process as soon as possible, many companies seeking to obtain a right-of-way, permit, or other approval submit a cursory application or plan pursuant to the regulations governing the particular grant or entitlement. For non-controversial and non-complex projects, this approach may be appropriate. However, for controversial and complex projects, cursory submissions during the “pre-scoping” phase of the project may miss an excellent opportunity. Prior to the formal public scoping, the project proponent has the luxury of working with the agency to carefully define the project's scope, purpose, location and other detailed aspects which, if carefully done, will greatly facilitate the formal scoping process and preparation of the draft. During the pre-scoping period, the project proponent typically has the ability to work more closely with agency personnel than is allowed after commencement of the formal scoping process. Once the project application is deemed complete, formal scoping begins, which is defined by the CEQ regulations as “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping.”⁶

BLM's NEPA Handbook contemplates both “internal” and “external” scoping. Internal scoping includes the federal agency, together with cooperating agencies, meeting to:

- formulate and refine the purpose and need.
- identify any connected, cumulative, or similar actions associated with the proposal.
- start preparation for cumulative effects analysis.
- decide on the appropriate level of documentation.
- develop a public involvement strategy.

- decide other features of the NEPA process.⁷

BLM and other agencies are not prohibited from working closely with the project proponent (or the proponent's outside technical consultant) to help further define the project's purpose and need, impacts, and alternatives during the internal scoping process prior to external scoping. Yet, some agencies practice the rule of thumb that the commencement of the scoping process ends access to the agency and its contractors during the NEPA process. Experienced agency project managers generally recognize that throughout the NEPA process, agency counsel and counsel for the project proponent can and should work together to address legal sufficiency issues that arise during the NEPA process. Such an approach in no way taints the NEPA process nor runs afoul of the approach taken by the court in *Colorado Wild, Inc. v. Forest Service*. Indeed, the regulations governing NEPA permit federal agencies to require an applicant to [9-5] participate in the NEPA process by providing environmental information to the agency.⁸ Under the regulations, while the agency may use the information an applicant submits in the EIS either directly or by reference, the agency must independently evaluate the information and is responsible for its accuracy.⁹ The intent of the regulations is that "acceptable work not be redone, but that it be verified by the agency."¹⁰ One court has held that the participation of a party with a financial interest in a project in drafting an EIS does not automatically invalidate the EIS. "[T]he ultimate question ... is whether the financial interest of [the interested party] compromised the objectivity and integrity of the NEPA process."¹¹

C. Project Purpose and Need

In theory, the "purpose and need" statement contained in an EIS briefly explains "the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."¹² In practice, however, it must not inappropriately limit the reasonable range of alternatives. Courts have cautioned agencies not to put forward a purpose and need statement that is so narrow as to "define competing 'reasonable alternatives' out of consideration (and even out of existence)."¹³

A question that commonly arises is whether the agency should defer to the project proponent's articulation of the purpose and need for the project. The Tenth Circuit has held that where "the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor."¹⁴ The D.C. Circuit has noted that "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action."¹⁵ Similarly, the 7th Circuit has observed that "where a federal agency is not the sponsor of a project, the 'consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'"¹⁶

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D. Responding to Public Comments

A critical requirement under NEPA is responding to significant comments submitted by the public (or other interested agencies) on the draft EIS. The agency must respond to comments by adding to or modifying its analysis, making factual corrections, or explaining why the analysis does not require revision citing sources, authorities or reasons for its position.¹⁷ The agency must also circulate the response to comments in the final EIS. Failure to satisfy the requirement to adequately respond to comments can result in invalidation of the EIS.¹⁸

The public and other interested agencies sometimes submit comments which require additional information and project details that may only be in the possession of the project proponent. In other instances, the comments are submitted by project opponents who challenge the legal sufficiency or legal assumptions underlying key aspects of the project analysis which may go to the heart of the proponent's proposed mitigation, avoidance measures, the preferred alternative, etc. When forming responses to such comments, the lead federal agency routinely seeks information and input from the project proponent in order to prepare an accurate and legally sufficient response. When this occurs, project opponents might try to argue that any participation by the project applicant in evaluating and responding to public comments taints the NEPA process. Such an argument was

recently made in a case involving the expansion of gold mining operations on BLM lands. In *South Fork Band v. Dep't of Interior*, the plaintiffs argued that by permitting the project applicant "to submit responses to public comments, the BLM compromised the objectivity and integrity of the NEPA process."¹⁹ The court rejected the contention based on the following. First, the court cited 40 C.F.R. § 1506.5(a) which allows the project proponent to participate in the NEPA process by providing environmental information to the agency.²⁰ Second, unlike other cases, the memorandum of understanding between BLM and the proponent "placed the ultimate responsibility for responding to public comments with the [NEPA] contractor, the MOU did not prevent the contractor from soliciting input on the responses from [the proponent]."²¹ Third, rather than accepting [the proponent's] responses without any inquiry into the responses' accuracy, the BLM actively and substantially participated in preparing the responses that were ultimately included in the Final EIS. Thus, the record [9-7] indicates that the BLM actively participated in the comment review and response process and was ultimately responsible for the content of the Final EIS."²²

E. Compliance with Parallel Regulatory Requirements

In the author's experience, an issue that continues to bedevil agencies and their contractors is the interface of NEPA with other regulatory requirements especially where the project proponent is responsible for compliance with regulatory requirements germane to the NEPA process. The primary example of this is the Clean Water Act ("CWA") § 404 process. Without careful coordination of the NEPA and CWA, project delays can occur and legal sufficiency can be compromised for a variety of reasons. First, the NEPA and CWA § 404 both have alternatives analysis requirements that overlap but differ in important respects. Under NEPA, the agency shall consider "reasonable alternatives not within the jurisdiction of the lead agency."²³ Under the CWA § 404(b)(1) Guidelines, the Corps shall *deny* an application for a 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."²⁴ Thus, if a CWA 404 individual permit is required for a project and the NEPA preferred alternative described in the EIS does not satisfy the CWA § 404(b)(1) Guidelines, the project may require major design revisions in order to satisfy the more stringent CWA alternatives analysis requirements. Second, if a CWA § 404 permit is required and the Corps is not a cooperating agency to the lead agency preparing the EIS arising from other NEPA triggers, the Corps would not be able to adopt the EIS without undertaking its own detailed legal sufficiency review and recirculating the EIS.²⁵ Again, this becomes a serious issue because when the Corps complies with NEPA in connection with a CWA § 404 individual permit, it must satisfy itself that both alternatives analysis requirements are satisfied. Third, the environmental baseline for evaluating impacts to waters of the United States and wetlands is typically a delineation that has gone through the Corps' jurisdictional determination process. In this manner, the analysis relating to impacts to waters for both NEPA and CWA § 404 permitting purposes can apply to the same wetlands and jurisdictional waters. Because the legal obligation to obtain a jurisdictional determination and CWA falls on the project proponent (not the lead agency for NEPA purposes), the proponent must work closely with both the lead federal agency and the Corps to ensure a common understanding of impacted jurisdictional waters. Fourth, impacts to waters of the United States from a project often become the focus of litigation to challenge a project. If the timing and process to comply with both NEPA and CWA § 404 are not coordinated (or merged), project opponents can effectively get "two bites at the apple" to challenge the project and use information arising from the CWA § 404 process (which often sequentially follows the NEPA process) to argue that the NEPA process [9-8] failed to address significant impacts to waters of the United States.²⁶ To avoid this risk, coordinating and even merging the NEPA and CWA 404 is helpful, as some agencies' guidance recommends,²⁷ although in practice this is difficult to do given that the 404 process often calls for more detailed design information than is normally available at the time of the NEPA process.

III. Third-Party NEPA Contractor

A. Contractor Selection and Engagement

The CEQ regulations provide that the agency "must select the consulting firm, even though the applicant pays for the cost of preparing the EIS."²⁸ This requirement, however, does not prevent the project proponent from soliciting qualified contractors for consideration by the agency. The agency remains responsible for providing oversight of the contractor's work and ensure accuracy of the

analysis contained in the EIS.²⁹ In contrast, an EA may be prepared by the proponent or a consultant selected by the project proponent, although the agency must still “make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.”³⁰ Even where the agency agrees to preparation of an EA, rather than an EIS, the agency may still exercise its discretion to require that the agency or the agency's consultant prepare the EA rather than the proponent.

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Regarding the preparation of an EIS by a third-party contractor to be paid by the project proponent, the agency typically requires a written contract which spells out the relationship between the project proponent and contractor, and a memorandum of understanding between agency and the project proponent. For example, the BLM NEPA Handbook provides: “This MOU must: establish the roles and responsibilities of each party; and specify that all costs of using a contractor in the preparation of the NEPA document will be borne by the applicant.”³¹

B. Conflicts of Interest

The CEQ regulations require that, to avoid an actual or perceived conflict of interest, the consultant preparing an EIS “execute a disclosure statement ... specifying that [it has] no financial or other interest in the outcome of the project.”³² Consultants facing potential conflicts should interpret this provision “broadly to cover any known benefits other than general enhancement of professional reputation.”³³ Financial benefits subject to the conflict of interest provision include “any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of....”³⁴ In resolving allegations of conflicts of interest by NEPA contractors, courts have inquired whether the alleged conflicts compromised “the objectivity and integrity of the NEPA process.”³⁵ One court has held that “[a] contractor with an agreement, enforceable promise or guarantee of future work has a conflict of interest.”³⁶ A contractor is not disqualified from preparing a NEPA document for an agency when the firm was previously “involved in developing initial data and plans for the project” so long as that prior involvement between the proponent and the consultant is disclosed to the agency.³⁷ One court has found a conflict of interest, and required remedial measures, where the consultant was contractually obligated to prepare a finding of no significant impact before it prepared the underlying environmental assessment.³⁸ A NEPA document prepared by a [9-10] contractor with a conflict of interest may result in a court or the agency determining that the NEPA document and the NEPA process itself has been compromised.³⁹

IV. Use and Abuse of the Administrative Record

The Administrative Procedure Act (“APA”) provides a right of action against agencies and officers of the United States to persons adversely affected or aggrieved by agency actions where no other statute provides such a right.⁴⁰ The APA provides that in reviewing final agency action “the court shall review the *whole record* or those parts of it cited by a party.”⁴¹ Strictly speaking, the requirement to physically compile documents reviewed by the agency decisionmaker does not arise until judicial review has commenced (i.e., when the complaint is filed). For simple agency decisions undertaken during a short period of time, delaying the compilation of the administrative record until a lawsuit commences may be perfectly acceptable. As a practical matter - for complex cases undertaken over a long period of time involving multiple agency personnel and cooperating agencies - failure to compile and maintain the administrative record as the NEPA process unfolds virtually guarantees that the administrative record will be compiled in a haphazard and potentially incomplete manner. As explained in BLM's NEPA Handbook, “The administrative record is the paper trail that documents the BLM's decision-making process and the basis for the BLM's decision. The administrative record establishes that you complied with relevant statutory, regulatory, and agency requirements, demonstrating that you followed a reasoned decision-making process. It is imperative that the BLM maintain complete and well organized files (indexed or searchable) of environmental documents and supporting records in its administrative record.”⁴² Thus, at the beginning of the NEPA process, agencies should develop protocols governing procedures to compile and ensure the adequacy of the administrative record.

A. Administrative Record and Standard of Review

The APA empowers a reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁴³ "An agency action is arbitrary and capricious if the agency ... entirely 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 [if the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁴⁴ In [9-11] determining whether an agency's decision was arbitrary and capricious, "a court may not substitute its judgment for that of [the] agency."⁴⁵ The arbitrary and capricious standard of review requires that courts give the agency deference "[s]o long as the record demonstrates that the agencies in question followed the NEPA procedures, which require agencies to take a 'hard look' at the environmental consequences of the proposed action, the court will not second-guess the wisdom of the ultimate decision."⁴⁶ The courts disallow a agency to explain or justify the decision with post-hoc rationalization provided by counsel or by the agency in documentation that post-dates the decision.⁴⁷ Accordingly, the success of defending the NEPA analysis and the "record of decision" depends largely on the adequacy of the administrative record.⁴⁸

B. Compiling and Certifying the Administrative Record

If the administrative record has been compiled and indexed during the NEPA process, agency personnel need only ensure that it is complete prior to certification. If it has not been compiled and indexed, that must occur. It sometimes takes up to six months to do so for complex projects. The agency decisionmaker "certifies" through a declaration that the index of documents identified on the administrative record is complete. The Department of Justice attorney files the certified index to the administrative record with the court. Some court rules recognize that this is the standard practice.⁴⁹ Given the size of most administrative records, the [9-12] court generally does not require filing a hard copy, but sometimes requires a digital copy of the entire administrative record. Parties are usually given a courtesy copy of the administrative record.

C. Documents Normally Included in the Administrative Record

A number of administrative agencies have issued guidance addressing what agency personnel should include and exclude in the administrative record.⁵⁰ BLM included in its NEPA Handbook, as Appendix 10, the following types of documents that "may" be included in the administrative record:

General Information

- *Federal Register* Notices
- Interdisciplinary Team or Project Team Membership
- Preparation Plans
- Contract Information (if the project is contracted)

Public Information

- Public Involvement Plans
- Public Information Documents (letters, notices)
- News Reports and Clippings
- General Correspondence
- Meeting and Workshop Records (attendance lists, announcements)
- Scoping Report

- BLM Responses to Comments (if not included in the environmental document)
- Protests or appeals and the BLM's responses
- Mailing Lists
- Public Comments (from all phases of the project)

External Communications

- Other Federal Agencies
- Cooperating Agencies
- Tribes
- State and Local Agencies
- Elected Officials (Governor, County commissioners, city officials, and so forth)
- Organizations
- Individuals
- Freedom of Information Act (FOIA) Requests and Responses

Internal Communications

- Project Management Correspondence
- Interdisciplinary Team-Project Team Correspondence (meeting notes, agendas)
- FOIA exempt documents
- Quality Assurance Determination

Background Material/Supporting Information

- Data and Data Standards
- Metadata

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- References
- Analyses (of alternatives, environmental consequences)
- Appendixes
- Special Reports (ACEC Report, Reasonably Foreseeable Development Scenarios, Mineral Assessments, Wild and Scenic River Suitability Assessments)
- Biological Assessments or Opinions
- Section 106 Consultation

Environmental Documents

- Draft EIS

- Final EIS
- Record of Decision or Decision Record

The most detailed agency guidance pertaining to the contents of the administrative record issued to date is the Department of Interior, Office of the Solicitor issued "Standardized Guidance on Compiling a Decision File and an Administrative Record" on June 27, 2006 (the "DOI Guidance"). It provides more detailed explanation regarding what documents are normally included in the administrative record, as follows.

Substantive Documents. The administrative record should include the following three categories of "substantive documents": (a) "That were relied upon or considered by the agency, regardless of whether they support or oppose the agency's position;" (b) "That were available to the decision-maker at the time the decision was made (i.e, considered by staff involved in the decision process as it proceeded through the agency), regardless of whether they were specifically reviewed by the decisionmaker"; and (c) "Even if the Administrative Record Coordinator believes the relevant documents are privileged."⁵¹ Based on the foregoing, one might think that DOI intends to produce privileged documents to the public and the courts as part of the administrative record. As explained below, this is not the case. Rather, DOI recommends including and identifying privileged documents in the *index* to the administrative record, but withholding from the public administrative record.

"Primary," "Supporting," and "Relevant" Documents. The DOI Guidance describes three categories of documents: primary documents, relevant documents, and supporting documents. Primary documents "record the agency action that is or may be challenged" and typically consist of those documents signed by the decision-maker such as the EIS and record of decision, biological opinions, resource management plans, and final rule making documents. Relevant documents are "documents that bear a logical connection to the matter considered and that contain information related to the agency decision at issue. Documents are always relevant if they are procedurally required by statute or regulation as part of the decision-making process." **Supporting documents** include "those documents that affect the substance of the primary documents or the decision."⁵²

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Special Categories of Supporting Documents. The DOI Guidance identifies the following categories of supporting documents which are sometimes overlooked from inclusion in the administrative record.

- "Departmental, Office, and Bureau policies, guidelines, directives and manuals;
- Documents contained in previous administrative records that were relied upon or considered in the decision-making process (even if not being challenged by the current litigation);
- Documents that have been released to the public, such as through a FOIA request, or are available to the public, including on the Internet;
- Communications and other information received from the public and other agencies and any responses to those communications. These communications can be unsolicited, the result of informal communications (such as between agencies), or part of a formal process such as comments received during NEPA public scoping or during rulemaking. If a consultant or contractor received or compiled public or agency comments, those comments and any reports or summaries should also be included in the administrative record;
- Articles, books and other publications. If a copy is made, be sure to cite the appropriate sources and follow applicable copyright laws;
- Technical information, monitoring data, sampling results, survey information, engineering reports or studies, and other factual information or data;
- Documents cited as a reference of a primary document, such as a bibliography of an Environmental Impact Statement;

- Reports and other information compiled by consultants and contractors;
- Memoranda to the file, created contemporaneously to the creation of the document, that further explain the content of relevant electronic communications and their attachments, meetings, and phone conversations;
- Electronic communications or other internal communications, such as emails and their attachments, which contain factual information, substantive analysis or discussion, or that document the decision-making process;
- Minutes, transcripts of meetings, and other memorializations of telephone conversations and meetings, including personal memoranda or handwritten notes that were circulated to colleagues or added to the Decision File; and
- Drafts of primary or relevant documents indicating substantive deliberations or discussions.”⁵³

D. Documents Normally Excluded in the Administrative Record

The DOI Guidance provides examples of documents which normally “should not be included in an AR.”

- “Documents that are not relevant to the decision-making process;
- Documents that were not in the agency's possession at the time the decision was made;

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- Electronic communications, including emails, which do not contain factual information, a substantive analysis or discussion, or information documenting the agency decision-making process;
- Personal notes, journals, appointment calendars or memorializations maintained by an individual solely for personal use and not circulated to colleagues or added to the agency file; and
- Drafts of documents that simply agree with previous drafts or represent mere grammatical edits and do not contain significant additional substantive comments.”⁵⁴

Emails. Agencies routinely grapple with whether to include emails in the administrative record. Emails provide a challenge because emails generally are prepared with a high degree of candor and informality because the author generally does not contemplate that they will make it into the public record. Accordingly, the approach the DOI Guidance takes is that judgment must be exercised on a case-by-case basis to determine whether to include an email in the administrative record. “Only electronic information and electronic communications, such as emails, that contain relevant factual information, a substantive analysis or discussion that formed a material part of the decision-making process, or that actually document the agency decision-making process should be included in the administrative record. As a general rule of thumb, the great majority of email ‘chatter’ about a decision need not be included in the administrative record ... [E]mails that are exchanged between the agency decision-maker, other agencies, stakeholders or representatives from outside parties should also generally be included if they substantively document the decision process ... Ideally, employees should use care in drafting and sending emails to avoid later confusion in interpreting the chain of communication. Emails with numerous attachments or that contain a commingling of personal and agency information and email chains with multiple parties and topics can lead to confusion and misinterpretation of the intended communication, especially when a long period of time has passed and the reader is less familiar with the subject matter. It may be difficult for an outside party, such as a court, to determine the actual context of an email or portion of an email without relevant attachments or all the emails in a chain. When several separate responses are sent in reply to one original message, the original message should remain attached to each of the responses.”⁵⁵

Personal Memorializations. The DOI Guidance also addresses the difficult issue of determining when “memorializations” prepared by agency staff must be included in the administrative record.

"[D]ocuments that were created solely for an employee's personal convenience, even if they help that employee perform his or her official duties, should not be included in the administrative record.... The following types of documents, although they may be appropriate for inclusion in the Decision File, typically should not be included in the administrative record: ... Personal notes, journals, appointment calendars or memorializations maintained by an individual solely for personal use and not circulated to colleagues or added to the agency file.... However, documents that an employee was required to create or maintain or that were distributed to or relied on by colleagues and/or the decision-maker and contain information related to the decision-making process should typically be included in an [9-16] administrative record. If an employee takes relevant handwritten notes at a meeting and later give copies of his or her notes to colleagues who were unable to attend the meeting, the notes should be included in an administrative record if there is not other documentation of the meeting. However, in those situations where a personal memorialization is the only evidence that a relevant meeting occurred or contains substantive evidence relevant to the decision-making process, it may be necessary to include a personal memorialization in an administrative record."⁵⁶

Draft Documents. Another issues often befuddling to administrative agencies is whether to include draft documents into the administrative record. The DOI Guidance takes the following approach: "Only drafts that help substantiate and evidence the decision-making process should be included in the administrative record. Drafts of documents that simply agree with previous drafts or represent primarily grammatical edits or were not circulated outside the author's immediate office or working group typically should not be included in an administrative record."⁵⁷ Case law supports the view that administrative drafts are not required to be included in the administrative record.⁵⁸

Discretion to Exclude Documents from the Administrative Record. The DOI Guidance assumes that each agency has a substantial amount of discretion to decide which documents should be included in the administrative record or, put differently, many documents represent a close call as to the appropriateness for their inclusion. Such deference is assumed in the following statement found in the DOI Guidance: "The following types of documents, although they may be appropriate for inclusion in the Decision File, typically should not be included in the administrative record."⁵⁹ In other words, some documents might normally be excludable but if they are needed to provide further explanation of the agency's decision, they can be included in the administrative record as a matter of discretion. In the author's opinion, the approach taken by the DOI constitutes a reasonable and common sense approach to determining the content of the administrative record. Nevertheless, two important drawbacks arise from DOI's approach of exercising substantial discretion in determining the content of the administrative record. First, as a practical matter sifting through mountains of documents and electronic files (especially emails) can be a costly and labor intensive effort which can delay production of the administrative record for months. Not surprisingly, some agencies opt for the "throw it all in" approach. For that reason, many DOJ attorneys cringe when they read the plaintiff's brief and see for the first times the flippant, unprofessional and even outrageous statements made by agency personnel in emails and other documents that have been included in the administrative record. Second, courts do not necessarily view agencies as having such broad discretion to determine the content of the administrative record. A recent NEPA decision [9-17] adverse to the government from the Ninth Circuit appears to limit the deference a court is willing to give agencies in deciding which documents to exclude relevant documents from the administrative record. "The whole record is not necessarily those documents that the agency has compiled and submitted as the administrative record; the court must look to all the evidence that was before the decision-making body."⁶⁰ However, courts have also held that documents that were not literally presented to the decisionmaker, but were before the agency staff and thus were indirectly considered by the decisionmaker, must be included.⁶¹

E. Deliberative Process Privilege

Public Policy Considerations. Perhaps the most vexing problem is whether and how to include in the administrative record documents subject to the "deliberative process privilege." The Supreme Court has explained that the deliberative process privilege was developed to protect "the decision making processes of government agencies," and that "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." The underlying premise of the privilege is that agency decision-making might be impaired if discussions within the agency were

subject to public review, thereby discouraging “frank discussion of legal or policy matters.”⁶² Other courts have explained that “[j]udicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision. To require the inclusion in an agency record of documents reflecting internal agency deliberations could hinder candid and creative exchanges regarding proposed decisions and alternatives, which might, because of the chilling effect on open discussion within agencies, lead to an overall decrease in the quality of decisions.”⁶³ Thus, courts have consistently recognized three policy purposes underlying the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are [9-18] finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.⁶⁴

Test for Determining Deliberative Process Privileged Documents. Determining the scope of the deliberative process privilege has sometimes caused confusion with both the agencies hoping to invoke the privilege and the judiciary applying the privilege. Normally, in order to be protected by the deliberative process privilege, a document must be both “predecisional” and “deliberative.” A predecisional document is one “prepared in order to assist an agency decisionmaker in arriving at his decision,” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”⁶⁵ A document is deliberative if it “reflects the give-and-take of the consultative process.”⁶⁶ For example, documents revealing disagreement among agency personnel about the conclusions in a Biological Opinion were protected by the deliberative process privilege because they comprised part of a process by which the agency's decisions and policies were formulated.⁶⁷

Burden of Proof. To invoke the deliberative process privilege, normally the government must demonstrate through a declaration of the decisionmaker the “precise and certain reasons” for maintaining the confidentiality of the requested documents.⁶⁸ Thereafter the burden shifts to the party seeking to overcome the privilege by establishing sufficient need for the sought after documents based on four factors: “(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.”⁶⁹

Factual Data. Purely factual material generally is not considered deliberative. Normally, when non-privileged information and privileged information are co-mingled in the same document, agency counsel work with agency personnel to redact (i.e., blackout) the privileged information from the document.⁷⁰ Nevertheless, the fact/opinion distinction should not be applied mechanically. Rather, the relevant inquiry is whether “revealing the information [9-19] exposes the deliberative process.”⁷¹ However, some largely factual material can be withheld under the deliberative process privilege if the documents, although factual, were nevertheless “process-oriented” and “functional” and could not be arranged, segregated, or redacted in a way that would overcome the privilege.⁷²

Identification in the Administrative Record. The DOI Guidance contemplates that the agency will identify privileged documents on a privilege log submitted with the administrative record.⁷³ Generally, this practice is not followed by other agencies in NEPA cases, but is more commonly applied to administrative records involving rulemaking and permit decisions.

F. Supplementing and Challenging the Scope of the Administrative Record

Limiting judicial review to the administrative record review is supported by a large body of Supreme Court jurisprudence.⁷⁴ For that reason, in NEPA and other record review cases, courts typically reject a plaintiff's attempt to offer extra-record evidence that was not first [9-20] considered by the agency as part of the NEPA process.⁷⁵ For good reason, the adequacy of an agency's analysis must rise or fall based on the administrative record available to and relied upon by the agency decisionmaker.⁷⁶

Each circuit applies a slightly different test for determining when a plaintiff can supplement the administrative record. For example, the Ninth Circuit recognizes that at the district court level,

extra-record evidence is admissible if it fits into one of four 'narrow' exceptions: (1) if supplementation is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.⁷⁷ Confusion currently exists regarding supplementation of the administrative record in NEPA cases.⁷⁸ It is interesting to note that there has been a slow but steady loosening of the test for determining when to supplement the administrative record since the Supreme Court's consideration of the issue involving a NEPA challenge to a controversial highway project in *Citizens to Preserve Overton Park, Inc. v. Volpe*.⁷⁹

Some courts have recognized a looser standard to allow consideration of extra-record evidence in NEPA cases. For example, the Ninth Circuit has held that "a district court may extend its review beyond the administrative record and permit the introduction of new evidence in NEPA cases where the plaintiff alleges 'that an [EIS] has failed to mention a serious [9-21] environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug.'"⁸⁰ Nevertheless, even in NEPA cases, other courts presume that the agency "properly designated its record absent clear evidence to the contrary" with the burden of proof resting on the plaintiff seeking to supplement.⁸¹ The presumption of completeness of administrative record can be overcome by submitting to the court relevant documents obtained through Freedom of Information Act requests but which were not identified in the index to the administrative record.⁸²

In addition to filing motions to supplement the administrative record with specific documents, plaintiffs in NEPA cases have also resorted to other procedural challenges to the scope and/or content of an administrative record. It is not uncommon to see the filing of a "motion for order clarifying the scope of the administrative record" or even a "motion to complete the administrative record." For example, in one case plaintiffs moved among other things for an order declaring that certain database tables and maps were improperly excluded from the administrative record, and compelling BLM to conduct an additional search of its files, to produce an additional set of documents, and to explain its search methods in writing. The court granted the motion, explaining that the government decisionmaker's declaration explaining the methodology used to search the agencies files and compile the administrative record was too vague and conclusory.⁸³

While the exception, some courts have allowed or ordered supplementation of the administrative record with testimony of agency officials. "Where the administrative record fails to disclose the factors considered by the agency, a reviewing court may require additional findings or testimony from agency officials to determine if the action was justified, or where necessary for background information or for determining whether the agency considered all relevant factors including evidence contrary to the agency's position, or where necessary to [9-22] explain technical terms or complex subject matter involved in the action."⁸⁴ Whether applied to NEPA case or other record review cases, allowing agency officials to present post-decisional testimony or even written submissions seems contrary to APA record review principles and applicable Supreme Court jurisprudence. Moreover, if the government itself attempts to supplement its own record, as a practical matter to do so constitutes an admission that the administrative record is insufficient to support the agency's decision. In such case, the normal remedy is a remand.⁸⁵ For that reason, agencies rarely supplement the record with new information or post-decision analysis.

V. Judicial Review

A. Intervention by the Project Proponent

Judicial review is not expressly provided under NEPA. Rather, judicial review arises under the APA.⁸⁶ In many instances the plaintiff files the action against both the lead federal agency and the project proponent to ensure that the court has jurisdiction to enjoin construction and impose other injunctive relief on both the government and the project proponent in the event the plaintiff prevails. However, if the plaintiff only names the federal agency as the defendant, one would assume that the project proponent - which may have invested millions of dollars in project development costs including preparation of the EIS and provided much of the underlying data which may be subject to challenge - would routinely be granted intervention as a right under Rule 24(a)(2) of the Federal

Rules of Civil Procedure. Not so in the Ninth Circuit. In a leading case, *Kootenai Tribe v. Veneman*, the court concluded that “private parties do not have a ‘significant protectable interest’ in NEPA compliance actions.”⁸⁷ The rationale for the rule “is that, because NEPA requires action only by the government, only the government can be liable under NEPA. Because a private party cannot violate NEPA, it cannot be a defendant in a NEPA compliance action.”⁸⁸ The Ninth Circuit applies this rule even if the intervener movant is a non- [9-23] federal public entity such as water district or municipal government.⁸⁹ In other circuits, project proponents (whether private or non-federal government entities) routinely are granted full intervener status.⁹⁰ The Ninth Circuit rule declining intervention to project proponents (and other parties with the requisite interests under Rule 24(a)(2) is currently being reconsidered en banc.⁹¹

B. Coordination with Government Counsel

Assuming the project proponent is granted intervener status, the next issue is whether and how counsel for the project proponent coordinates briefing with the government's counsel. In some instances, the court orders coordination of briefing (or even the filing of a joint brief) to avoid redundancy. Short of a court order, depending on the particular Department of Justice attorney assigned the case, the government's counsel may sometimes cite to vague policies of the government never sharing briefs with counsel for private parties prior to their filing. In such cases, it often is in the project proponent's best interest to prepare a brief well in advance and provide a courtesy copy to the government to ensure consistency and accuracy. In other instances, the government's counsel readily agrees to coordinate closely all briefing and to even divide up issues as appropriate. The main objective is to avoid the government and the project proponent from taking inconsistent or even contradictory positions which could erode the confidence level the court might otherwise reach especially in highly contentious or complicated cases.

The views expressed in this paper are solely those of the author (or authors).

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FOOTNOTES

¹ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40-41 (1950).

² Council on Environmental Quality, “NEPA's 40th Anniversary” http://ceq.hss.doe.gov/current_developments/nepaat40.html.

³ *Colorado Wild, Inc. v. U.S. Forest Serv.*, 523 F.Supp.2d 1213 (D. Colo. 2007).

⁴ 40 C.F.R. §1506.5(b).

⁵ In determining whether an EIS, rather than an EA, is required based on the potential significance of the affect on the environment, the CEQ regulations require consideration of both “context and intensity.” Including within the definition of “intensity” is “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial. *Id.* §1508.27(b)(4).

⁶ 40 C.F.R. § 1501.7.

⁷ BLM NEPA Handbook H-1790-1 § 6.3.1 (2008).

⁸ 40 C.F.R. § 1506.5(a).

⁹*Id.*

¹⁰*Id.*

¹¹*Ctr. for Biological Diversity v. Fed. Highway Admin.*, 290 F.Supp.2d 1175, 1186 (S.D. Cal. 2003).

¹²*Id.* § 1502.13.

¹³*Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997); *see, also, Alaska Wilderness Recreation and Tourism Association v. Morrison*, 67 F.3d 723 (9th Cir. 1995).

¹⁴*Citizens' Committee to Save our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002).

¹⁵*Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (“When an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application.”) (citation omitted).

¹⁶*Env'tl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 684 (7th Cir. 2006) (citations omitted).

¹⁷40 C.F.R. § 1503.4.

¹⁸*Dubois v. Dep't of Agric.*, 102 F.3d 1273, 1288 (1st Cir. 1996).

¹⁹*South Fork Band v. Dep't of Interior*, 2010 WL 3419181 (D. Nev. Aug. 25, 2010).

²⁰“Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project.” EIS contractor should be “chosen solely by the lead agency, or by the lead agency in cooperation with the cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest.” 40 C.F.R. § 1506.5(c).

²¹*Id.* at *4. In this manner, the court distinguished *Colorado Wild, Inc. v. Forest Service* where the agreement apparently did prohibit communication between the NEPA contractor and the project proponent.

²²*Id.*

²³40 C.F.R. §1502.14(c).

²⁴40 C.F.R. § 230.10(a). “The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.3(q).

²⁵40 C.F.R. § 1506.3.

²⁶For example, in *North Idaho Community Action Network v. USDOT*, 545 F.3d 1147 (9th Cir. 2008), environmental groups argued in part that the NEPA analysis of impacts from dredging and filling of waters of the United States was inadequate based on information they had obtained from the ongoing Clean Water Act § 404 permitting process. The Ninth Circuit rejected this argument, noting that at the time the NEPA process was underway, the agencies had undertaken a robust evaluation of impacts to

waters from the project. The court noted that the agencies (FHWA and Idaho Transportation Department) “could not adequately or meaningfully evaluate the environmental impacts of any potential dredging until they had more information, which depended at least in part on ongoing discussions with the Army Corps of Engineers and the Clean Water Act permitting process.... Once additional information regarding the proposed dredging was available, the Agencies performed the 2006 Reevaluation to analyze the dredging and its projected impacts, and to determine whether the new information required the preparation of a SEIS or a supplemental EA.” *Id.* at 1154. Had the agencies not prepared a reevaluation (a document allowed under FHWA highway regulations) the case may have come out differently even though the lack of more detailed analysis of dredging and filling was simply a matter of the timing of the CWA 404 process which sequentially happened to follow the NEPA process.

²⁷See FHWA, Army Corps, EPA, *Applying the Section 404 Permit Process to Federal Aid Highway Projects* at 11-3 (1988) (“Concurrent processing of NEPA and Section 404 issues is possible under existing regulations and is supported by agency early coordination policies.”).

²⁸See 40 C.F.R. § 1506.5(c) (authorizing the use of an EIS prepared “by a contractor selected by the lead agency”); *CEQ Forty Most Asked Questions*, Question 16, 46 Fed. Reg. 18,026, 18,031 (1981) (authorizing “the preparation of EISs by contractors paid by the applicant” in which “the applicant ... contracts directly with a consulting firm for its preparation”).

²⁹40 C.F.R. § 1506.5(c).

³⁰*Id.* § 1506.5(b).

³¹BLM NEPA Handbook H-1790-1 § 13.5 (2008).

³²40 C.F.R. § 1506.5(c);

³³See *CEQ Forty Most Asked Questions*, Question 17a, 46 Fed. Reg. at 18,031.

³⁴*Id.* Question 17b (“[A] firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no such separate interests or arrangements, and if the contract for the EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist.”).

³⁵See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991).

³⁶*Ass'n Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1128 (10th Cir. 1998) (quoting 42 U.S.C. § 4332; 40 C.F.R. § 1506.5(c)).

³⁷*CEQ Forty Most Asked Questions*, Question 17a, 46 Fed. Reg. at 18,031.

³⁸*Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002).

³⁹See 60 Fed. Reg. 47,180 (Sept. 11, 1995) (Bureau of Reclamation taking a voluntary remand and agreeing to prepare a new EIS due to conflict of interest of NEPA contractor that also worked on design of dam project).

⁴⁰5 U.S.C. § 702.

⁴¹*Id.* § 706 (emphasis added).

⁴²BLM NEPA Handbook H-1790-1 § 13.4.1 (2008).

⁴³5 U.S.C. § 706(2)(A).

⁴⁴*Utah Environmental Congress v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007); *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928 (9th Cir. 2003) (“Agency action will be set aside ‘if the agency relied on factors which Congress has not intended for it to consider, entirely 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.’”).

⁴⁵*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁴⁶*Utahns for Better Trans. v. United States Dep't of Trans.*, 305 F.3d 1152, 1163 (10th Cir. 2002).

⁴⁷“[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. The agency must make plain its course of inquiry, its analysis and its reasoning. After-the-fact rationalization by counsel in briefs or argument will not cure noncompliance by the agency with these principles.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

⁴⁸The “record of decision” is required for project approvals subject to NEPA. The CEQ regulations require that “each agency shall prepare a concise public *record of decision*” which shall: “(a) State what the decision was. (b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable.... (c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.” 40 C.F.R. § 1505.2.

⁴⁹Fed. R. App. P. 17(b) (“The agency must file: (A) the original or a certified copy of the entire record or parts designated by the parties; or (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties”).

⁵⁰Department of Interior, Office of the Solicitor, “Standardized Guidance on Compiling a Decision File and an Administrative Record” (Jun. 27, 2006) (the “DOI Guidance”).

⁵¹DOI Guidance at 5.

⁵²*Id.* at 6.

⁵³*Id.* at 7-8.

⁵⁴DOI Guidance at 8.

⁵⁵*Id.* at 8-9.

⁵⁶*Id.* at 8-10.

⁵⁷DOI Guidance at 10.

⁵⁸*National Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1178 n.19 (9th Cir. 2004) (rejecting consideration of a draft report because “we note that the report is a preliminary draft and does not reflect the final views of the EPA”).

⁵⁹DOI Guidance at 8. The documents referred to in this statement are those set forth *supra* pp. 14-15 and note 8.

⁶⁰*Conservation Northwest v. Rey*, 674 F.Supp.2d 1232, 1242 (W.D. Wash. 2009) (citing *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982)).

⁶¹*Haynes v. United States*, 891 F.2d 235, 238 (9th Cir. 1989) (“While it may be true that the entire record was not before the Secretary for the original decision, ... the administrative record consists of those materials in the agency record at the time the decision was made.... At the time the decision was made, the agency case file contained all those documents relied upon in subsequent decisions.”).

⁶²*NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975).

⁶³*E.g.*, *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002); *Center for Biological Diversity v. Norton*, 336 F. Supp. 2d 1155, 1162 (D.N.M. 2004) (In denying a motion to supplement the administrative record, the court held that “the documents contain internal discussions among agency personnel with respect to policy issues, recommendations, and summaries of issues to discuss, and comments and views from biologists that are being debated by the agency. Thus, the Court concludes that the documents should be protected from disclosure so as to protect the integrity of governmental decision making and to avoid interference with candid and frank communications needed for future listing decisions of this nature.”).

⁶⁴*See also California Native Plant Society v. EPA*, 2008 WL 930154 *3 (N.D. Cal., April 3, 2008) (“The privilege protects the decision making process at large, and a document need not lead to a specific decision, let alone a final decision, in order to be protected. Agencies are and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.”) (citations omitted).

⁶⁵*Assembly of the State of California v. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).

⁶⁶*Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C.Cir.1992).

⁶⁷*Sierra Club v. Kempthorne*, 488 F.Supp.2d 1188, 1190-1191 (S.D. Ala. 2007).

⁶⁸*Pacific Gas & Electric Co. v. United States*, 70 Fed. Cl. 128, 136-137 (2006).

⁶⁹*Modesto Irrigation District v. Gutierrez*, 2007 WL 763370 *6 (E.D. Cal., March 9, 2007).

⁷⁰*See* DOI Guidance at 11 (“The Office of the Solicitor will review the documents to ensure that any privileged information the agency wants to withhold is removed or redacted and adequately documented.”).

⁷¹*Assembly of the State of California v. Dep't of Commerce*, 968 F.2d at 921-22.

⁷²*Nevada v. Dep't. of Energy*, 517 F.Supp.2d 1245,1262 (D. Nev. 2007); *see also Edmonds Institute v. U.S. Dep't of Interior*, 460 F. Supp. 2d 63, 70 (D.D.C. 2006) (“Numerical and other non-narrative data has also been withheld when its collection or analysis reflects the exercise of policy-related judgment”).

⁷³DOI Guidance at 13 (“In addition to the administrative record index, a separate privilege index must be generated if the agency is withholding any protected or privileged information. A privilege index (also referred to as a privilege ‘log’) should include only those documents where a privilege or protection is

being asserted. The content of a privilege index is similar to the content of an administrative record index, and includes an explanation of the privilege asserted. Once complete, a copy of the privilege index should be physically kept with the privileged and protected documents. The Administrative Record Coordinator should not include any of the underlying privileged information in the administrative record index or the privilege index.”). This approach is consistent with the BLM NEPA Handbook. The BLM NEPA Handbook states that “Not all information in the administrative record is necessarily available to the public; information that is confidential must be marked as such.” BLM NEPA Handbook H-1790-1 § 13.4.1 (2008).

⁷⁴*Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (“[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.”) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (stating that “review is to be based on the full administrative record” that was before the agency at the time of its decision). Daniel R. Mandelker, *NEPA Law and Litigation* § 4.36 (2008) (“Supreme Court decisions hold, subject to limited exceptions, that district courts should base judicial review on an agency’s administrative record and not take new evidence to supplement the record.”); Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 Cal. L. Rev. 929, 930 (July 1993) (explaining that courts refuse to consider evidence that was not first presented to the agency, “[R]eview of agency action is limited to an examination of the record compiled by the agency at the time it made its decision.”).

⁷⁵*E.g., Hammond v. Norton*, 370 F. Supp. 2d 226, 257 (D.D.C. 2005) (rejecting plaintiffs’ extra-record evidence in a challenge to agency’s decision not to prepare an SEIS).

⁷⁶*Camp v. Pitts*, 411 U.S. 138 (1973) (holding that the agency’s decision must stand or fall on the record before the agency at the time of the decision); *cf. Florida Power & Light Co. v. U.S. Nuclear Regulatory Comm’n*, 470 U.S. 729, 744 (1985).

⁷⁷*Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Dep’t of Agriculture*, 499 F.3d 1108, 1117 (9th Cir. 2007).

⁷⁸*Wildearth Guardians v. Forest Serv.*, 2010 WL 1413112 (D. Colo. Apr. 1, 2010) (citing noting confusion in standard governing supplementing administrative record in NEPA and other cases). The test from *American Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985), that had previously been applied in NEPA and other record review cases stated that the five “extremely limited” exceptions, any of which when demonstrated require the district court to review “extra-record materials” are: (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials, (2) the record is deficient because the agency ignored relevant factors it should have considered in making its decision, (3) the agency considered factors that were left out of the formal record, (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues, and (5) evidence coming into existence after the agency acted demonstrates that the actions were right or wrong.”

⁷⁹In order to conduct an “inquiry into the mental processes of administrative decisionmakers... there must be a strong showing of bad faith or improper behavior before such inquiry may be made.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

⁸⁰*Nat’l Audubon Soc’y v. U.S. Forest Serv.*, 46 F.3d 1437, 1447-48 (9th Cir.1993); see also *Citizens for Alternative to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) (“In dealing with scientific and technical evidence, extra-record evidence ‘may illuminate whether an [environmental impact statement] has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism ... under the rug’”) (citations omitted); *Wildearth Guardians v. Forest Serv.*, 2010 WL 1413112

(D. Colo. Apr. 1, 2010); *Independent Turtle Farmers of Louisiana, Inc. v. United States*, 703 F.Supp.2d 604, 610-11 (W.D. La. 2010) (“[T]he record rule is not absolute. Courts routinely consider extra-record evidence in cases implicating the National Environmental Policy Act of 1969.”); *Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir.1999); *accord Coliseum Square Ass’n. Inc. v. Jackson*, 465 F.3d 215, 247 (5th Cir.2006) (“Extra-record evidence may be admitted if necessary to determine whether an agency has adequately considered adverse environmental impacts.”).

⁸¹ *Wildearth Guardians v. Forest Serv.*, 2010 WL 1413112 (D. Colo. Apr. 1, 2010) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir.1993)).

⁸² *Wildearth Guardians v. Forest Serv.*, 2010 WL 1413112.

⁸³ *Center for Biological Diversity v. BLM*, 2007 WL 3049869 (N.D. Cal. 2007).

⁸⁴ *Franklin Savings Ass’n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10th Cir. 1998).

⁸⁵ *Pit River Tribe v. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010) (upholding district court's remand guidance to agencies, explaining “the relief commonly awarded for NEPA violations lends further support to this course of action. Our courts have long held that relief for a NEPA violation is subject to equity principles. For example, in *Conner v. Burford*, we held that certain gas leases need not be invalidated, even though those leases had been sold in violation of NEPA. 848 F.2d 1441, 1461 (9th Cir.1988). Rather, we held that it was sufficient to enjoin “any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA” and to instruct that “future environmental analysis by the federal agencies shall not take into consideration the commitments embodied in the ... leases already sold.”).

⁸⁶ The APA provides a right of action against agencies and officers of the United States to persons adversely affected or aggrieved by agency actions where no other statute provides such a right. 5 U.S.C. § 702.

⁸⁷ 313 F.3d 1094, 1107 (9th Cir. 2002); *see also Portland Audubon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989).

⁸⁸ *Kootenai Tribe*, 313 F.3d at 1108.

⁸⁹ *See, e.g., Or. Natural Desert Ass’n v. Shuford*, 2006 WL 2601073 at *3 (D. Or. Sept. 8, 2006) (citing *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995) and *Churchill County v. Babbitt*, 150 F.3d 1072 (9th Cir. 1998)).

⁹⁰ *See, e.g., Sierra Club v. Van Antwerp*, 526 F.3d 1353 (11th Cir. 2008); *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428 (8th Cir. 2004); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964 (3d Cir. 1998); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994).

⁹¹ *The Wilderness Society and Prairie Falcon Audubon, Inc. v. U.S. Forest Serv.*, No. 09-35200 (9th Cir.), *rehearing en banc granted* (Sept. 30, 2010).