JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
ERIC WOMACK
Assistant Branch Director
LIAM C. HOLLAND
Liam.C.Holland@usdoj.gov
N.Y. Bar No. 5580378
Trial Attorney
Civil Division, Federal Programs Branch
P.O. Box No. 883
Washington, D.C. 20009
Telephone: (202) 514-4964
Facsimile: (202) 616-8470

Counsel for Defendants

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al. *Plaintiffs,* V. SONNY PERDUE, et al. *Defendants.*	Case No. 3:20-cv-1537 **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPLETE OR SUPPLEMENT THE ADMINISTRATIVE RECORD AND NOTICE OF CORRECTED ADMINISTRATIVE RECORD** Date: January 21, 2021 Courtroom: 3 – 17th Floor Hon. Richard Seaborg

Defendants, Sonny Perdue, Secretary of Agriculture; Bruce Summers, Administrator of the Agricultural Marketing Service; Jennifer Tucker, Ph.D., Deputy Administrator of the National Organic Program; and the United States Department of Agriculture (collectively, "Defendants," "USDA," or "NOP"), hereby oppose Plaintiffs' Motion to Complete or Supplement the Administrative Record, ECF No. 20.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Plaintiffs' motion to "complete or supplement" the administrative record is premised on a fundamental misunderstanding of the nature and scope of judicial review in a challenge to an agency action under the Administrative Procedure Act ("APA"). In an APA challenge, except in exceedingly narrow circumstances not present here, a district court's review is confined to "the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citation omitted). The agency is afforded a presumption that it properly designated the administrative record, which can only be rebutted by clear evidence to the contrary.

Despite those settled principles, Plaintiffs ask this Court to order Defendants to supplement the administrative record on which the USDA resolved Plaintiff Center for Food Safety ("CFS")'s January 2019 petition for rulemaking. Plaintiffs seek to add over one hundred pages of documents—some dating from nearly twenty-three years before CFS initiated the petition for rulemaking proceeding—based on Plaintiffs' speculation that these documents were considered by USDA in reaching a decision on the petition and because they are relevant to Plaintiffs' arguments supporting their motion for summary judgment. But that is not the standard.

In response to Plaintiffs' concerns, NOP undertook a comprehensive review of the materials certified to be part of the administrative record and the materials now submitted by Plaintiffs. As part of that review, NOP determined that two documents were inadvertently omitted from the administrative record. Accordingly, those documents are attached to this filing as part of a corrected administrative record. One of those documents is a document that Plaintiff here seeks to introduce. Aside from that one exception, however, Plaintiffs' materials were not considered, directly or indirectly, in reaching a decision on the petition for rulemaking at issue in this case, as explained in the attached sworn declaration of the Deputy Administrator of NOP, Jennifer Tucker—the decision maker with respect to that petition at issue here. *See* Tucker Decl. ¶¶ 4-7.

There are several reasons that the Court should deny Plaintiffs' motion. First, the controversy over the materials Plaintiffs seek to introduce is largely, if not entirely, immaterial. The reviewable issues in this case are purely legal and can be resolved without an administrative record. Indeed, Plaintiffs hardly refer to the material they seek to introduce to support their motion

for summary judgment. Second, the administrative record is limited to those documents that the agency actually considered, directly or indirectly, in resolving CFS's petition for rulemaking. And USDA did not consider the remaining documents that Plaintiffs now propose to add to the administrative record when USDA denied Plaintiffs' petition. *See* Tucker Decl. ¶¶ 4-7. Plaintiffs had ample opportunity to provide USDA with whatever documents they wanted USDA to consider in support of the petition for rulemaking when Plaintiffs first submitted their petition and while it was pending before the agency. Having failed to do so, Plaintiffs cannot now build a record in support of their petition for the first time on judicial review.

LEGAL STANDARD

Judicial review of agency action "is limited to 'the administrative record already in existence, not some new record made initially in the reviewing court.'" *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam)). That record comprises all documents and materials that the decision maker directly or indirectly considered. *See Thompson v. DOL*, 885 F.2d 551, 555 (9th Cir. 1988) (quoting *Exxon Corp. v. DOE*, 91 F.R.D. 26, 32 (N.D. Tex. 1981)). And because agency decisions are entitled to a "presumption of regularity," *Akiak Native Cmty. v. USPS*, 213 F.3d 1140, 1146 (9th Cir. 2000) (quoting *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)), a certified record is presumed to be complete "absent clear evidence to the contrary." *Cook Inletkeeper v. EPA*, 400 F. App'x 239, 240 (9th Cir. 2010) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)); *see also McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007); *Maritel, Inc v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006). "'When a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for the agency.'" *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 602 (quoting *Asarco, Inc v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)). Therefore, outside of certain "narrow exceptions," if the record lacks substantial evidence, courts generally remand to the agency for further proceedings rather than ordering supplementation of the record in the first instance. *See id*. at 603.

The administrative record "consists of all documents and materials directly or indirectly

considered by agency decision-makers." *Thompson*, 885 F.2d at 555 (emphasis omitted). It does not, however, include "every scrap of paper that could or might have been created." *Bay.org v. Zinke*, No. 1:17-cv-01176 LJO-EPG, 2018 WL 3965367, at *3 (E.D. Cal. Aug 16, 2018) (quoting *TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002)); *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (explaining that the "whole record" includes "all documents and materials that the agency directly or indirectly considered and nothing more nor less" (citation omitted)). An agency's mere possession of a document potentially relevant to a party's argument does not warrant its inclusion in the administrative record if it was not considered by the agency in the administrative proceeding under review. *See, e.g. Pac. Shores*, 448 F. Supp. 2d at 6 (agency "is not obligated to include every potentially relevant document existing within [the] agency"); *Safari Club Int'l v. Jewell*, NO. CV-16-00094-TUC-JGZ, 2016 WL 7785452, at *2 (D. Ariz. July 6, 2016) (cautioning "against permitting the admission of any relevant document contained in the agency's filing cabinet" as doing so "fails to give appropriate deference to the agency's designation of the record" (citation omitted)). "The APA specifically contemplates judicial review on the basis of the agency record *compiled in the course of informal agency action*," not compiled in the district court on judicial review. *Lorion*, 470 U.S. at 744.

ARGUMENT

Plaintiffs' arguments in support of their motion to complete or supplement the administrative record are without merit. Plaintiffs' claims arise under the APA, and ordinary record review principles apply to this case. Applying these principles, there is no basis to supplement the record with the proposed materials. No plaintiff placed them before USDA for its consideration in support of CFS's petition for rulemaking and USDA did not consider them in addressing CFS's petition for rulemaking. Moreover, the materials are immaterial to the parties' arguments on their cross-motions for summary judgment; the Court should deny Plaintiffs' motion on that basis alone.

I. PLAINTIFFS' OBJECTIONS TO THE CERTIFIED ADMINISTRATIVE RECORD ARE IMMATERIAL TO THE PARTIES' SUMMARY JUDGMENT CLAIMS—ROOTED IN USDA'S PURELY LEGAL REASONS FOR DENYING CFS'S PETITION, WHICH RAISED ONLY A PURELY LEGAL QUESTION

As explained in greater detail in Defendants' summary judgment briefing, Plaintiffs petitioned USDA to initiate a rulemaking to explicitly prohibit certification of hydroponic producers as organic. *See* AR 0001-23 . They argued that a categorical "prohibition of hydroponic production systems is required by the OFPA and implementing regulations because certain statutory and regulatory provisions use the word 'soil' and impose certain requirements to maintain or improve soil quality or engage in crop rotation and similar practices." *Id*. 1376-77. And they argued that other "regulations pertaining to 'cycling of resources,' the 'promotion of ecological balance' and conservation of biodiversity require NOP to [categorically] prohibit certification of hydroponic systems." *Id*. at 1376. The petition did not request that USDA exercise its discretion to consider the wisdom of prohibiting hydroponic production. *Id*. 0001-23; *see also* Pl's Mot. for Summ. J., ECF No. 22 at 11 ("Petitioners explained that organic certification of hydroponic systems is not permissible under OFPA").

NOP's response to the petition's purely legal claim was simple: the soil-related statutory and regulatory provisions do not "require that all organic production occur in a soil-based environment. Rather those provisions are applicable to production systems that *do* use soil." AR 1377. And USDA similarly concluded that its other regulations do not categorically prohibit hydroponic production from being eligible to be certified as organic. *Id*. So determining whether NOP arbitrarily or capriciously denied CFS's petition for rulemaking requires the Court to answer only whether NOP erroneously determined that neither the OFPA nor its regulations categorically prohibit organic certification of hydroponic production systems—a purely legal claim.

Because pure issues of law can be resolved without a factual basis of support in an administrative record, all of CFS's disputes with respect to the administrative record in this case are immaterial to this Court's ability to resolve CFS's claims. *See Mohammadi-Motlagh v. INS*, 727 F.2d 1450, 1452 (9th Cir. 1984) ("review [is] possible without an administrative record [if] only a question of law [is] presented"); *Dist. Hosp. Partners, LP v. Sebelius*, 794 F. Supp. 2d 162, 171 (D.D.C. 2011) (and cases cited therein) (citations omitted) ("The [D.C.] Circuit has ruled on the merits without an administrative record where the argument can be resolved with nothing more than the statute and its legislative history, such as where a plaintiff alleges that a regulation is

inconsistent with a statute, . . . or where a plaintiff alleges that an agency's action was not a 'formal administrative determination' under ERISA." (citation omitted)).

To be sure, in disagreeing with Plaintiffs' claims that NOP regulations pertaining to cycling or resources, promoting ecological balance, and conserving biodiversity categorically prohibit organic certification of hydroponic production systems, NOP also reasoned that the "[p]etiton provides no evidence that organic hydroponic systems hinder" these aims and NOP determined that it is at least possible for a hydroponic production system to meet these requirements on a case-by-case, site-specific basis. AR 1377. And now, at summary judgment, Plaintiffs advance a very narrow arbitrary and capricious claim—*i.e.*, that the agency's conclusion was erroneous because "commercial hydroponic operations do *not* actually meet OFPA's ecological and conservation-based requirements." ECF No. 22 at 24-25. But nothing Plaintiffs seek to introduce into the record at this stage has any bearing on that narrow issue. Plaintiffs' motion itself describes the reasons why they believe these additional materials support their claims, but none of those reasons has any bearing on the only claim for which they are even arguably relevant, *i.e.*, the arbitrary and capricious claim. *See* Mot. to Complete or Supplement the Administrative R., ECF No. 20 at 8-10. Thus, Plaintiffs' submitted materials are wholly immaterial to the Court's ultimate resolution of the parties' cross-motions for summary judgment. *Cf. Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."); *see also Dist. Hosp. Partners, LP*, 794 F. Supp. 2d at 171 (and cases cited therein).

Plaintiffs claim that their additional materials are relevant because they purportedly "sp[eak] to OFPA's legislative history and statutory design," *see, e.g.*, ECF No. 20 at 9. But those are questions of law, not subject to factfinding (whether through an administrative record or otherwise). Defendants also dispute whether this material should be considered in determining the OFPA's meaning, as explained in their memorandum opposing Plaintiffs' motion for summary judgment. But if this Court disagrees, that material can be considered to the extent it would constitute a legislative fact and "[j]udicial notice of legislative facts such as [them] are

unnecessary." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). *See* Fed. R. Evid. 201(a), advisory comm. note to 1972 amendments. In other words, there is no need for material providing evidence of legislative intent, like committee reports and floor statements of legislators, to be included in the administrative record in order for this court to review and consider it in determining the OFPA's meaning. And the same goes for indicia of the plain meaning of NOP regulations, like federal register notices. *See Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993).

At a minimum, Plaintiffs' motion should be denied as to those materials not cited or relied upon to support arguments in their motion for summary judgment. That motion hardly cites the materials they want to introduce in support of legal argument. This failure itself demonstrates the inconsequential nature of this motion to the issues this Court must address on summary judgment. Other than the Senator Leahy letter that Defendants agree is part of the administrative record, *see* Tucker Decl. ¶ 2, Plaintiffs rely only on six materials total from the many they seek to introduce to support legal argument. *See* ECF No. 22 at 19, 25-27.[1] Other than these handful of records, none of the 138 pages of materials that Plaintiffs seek to introduce into the administrative record is even arguably material to the summary judgment motions before this Court. Indeed, Plaintiffs do not cite anything in Exhibit D anywhere in their motion and do not cite Exhibit C anywhere in the arguments they make in their motion. *See* ECF No. 22. Plaintiffs' motion should, at a minimum, be denied as to these immaterial documents on that basis alone. *Cf. Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."); *see* 5 U.S.C. § 706 (providing that in conducting judicial review, the reviewing "court shall review the whole record *or those parts of it cited by a party*") (emphasis added).

[1] Specifically, Plaintiffs refer to Stevenson Decl. Ex. A at 9 (oral testimony by Nicole Dehne to NOSB in 2016), 42 (oral testimony by Dan Bensonoff to NOSB in 2016), 45-46 (statement of NOSB Vice Chair Chapman in 2016), 62-63 (oral testimony of Pete Johnson to NOSB in 2017), 70 (oral testimony of Gerald Davis to NOSB in 2017); Ex. B. at 3-4 (written comments to NOSB from NOFA-NY from 2017). *See* ECF No. 22 at 19, 25-27.

In sum, the Court may proceed to resolve the cross motions for summary judgment without resolving this immaterial dispute because the cross motions for summary judgment involve only issues of statutory and regulatory construction that can be resolved without resort to an administrative record. But even if this Court is inclined to consider Plaintiffs' motion to complete or supplement the administrative record, there is no reason to expand that inquiry beyond the few pages Plaintiffs rely upon in support of their argument.

II. THE ADMINISTRATIVE RECORD PROPERLY EXCLUDES THE MYRIAD EXTRA-RECORD MATERIAL SUBMITTED FOR THE FIRST TIME ON JUDICIAL REVIEW BECAUSE THEY WERE NOT CONSIDERED WHEN ADDRESSING CFS'S PETITION FOR RULEMAKING

A. PLAINITFFS HAVE WAIVED OBJECTIONS TO THE SCOPE OF THE ADMINISTRATIVE RECORD BY DECLINING TO BUILD A RECORD BEFORE THE AGENCY

In reviewing challenges to agency action under the APA, "[t]he district court sits as an appellate tribunal," reviewing the agency action based on the administrative record built before the agency. *See Marshall Cnty. Health Care Auth.*, 988 F.2d at 1225. "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate and under its practice." *Id*. "The very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the [litigant] pursue a certain course [before the agency], and later—if the outcome is unfavorable—claiming that the course followed was [] error." *Freytag v. CIR*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring).

Plaintiffs were free to submit whatever material they wished to provide for consideration in support of CFS's Petition for Rulemaking both when they submitted the petition and, further, while it was pending before USDA. But having failed to do so, they cannot, on judicial review,

subsequently attack the very administrative record they declined to build. Plaintiffs complain that "[t]here is no indication of how or why the Record was assembled to contain only transcript excerpts from NOSB meetings and certain comment letters, or what criteria USDA applied in assessing documents for inclusion—let alone any description of what was omitted or why" and characterize USDA's approach as a "selective" one. ECF No. 20 at 8. To be sure, the decision maker and her subordinates reviewed material on their own, in the absence of material provided by any Plaintiff in support of the petition for rulemaking. But a "selective" characterization presumes that USDA was offered the opportunity to consider whatever specific material Plaintiffs wanted included in the administrative record. USDA had no such opportunity and did not reject any material offered by any Plaintiff in support of the petition for rulemaking. The only material Defendants are aware of Plaintiffs introducing into the record was the petition for rulemaking itself, a twenty-three page document that is, of course, included in the administrative record on judicial review before this Court. AR 0001-23.

Throughout their brief, Plaintiffs assert that their "attached exhibits . . . are critical to the Court's review of Plaintiff's claim[s]." *See, e.g.*, ECF No. 20 at 8. But if the exhibits were critical to the claims Plaintiffs made in their petition to USDA, they should have provided them to the agency with authority to consider the underlying petition before the agency reached a decision. Because Plaintiffs failed to present these exhibits to the agency for consideration in support of the petition for rulemaking, they have waived any argument that the record does not include them on judicial review. *See Tucker*, 344 U.S. at 37.

B. PLAINTIFFS PROVIDE NO EVIDENCE OTHER THAN MERE SPECULATION THAT THE MATERIAL THEY CITE IS PART OF THE ADMINISTRATIVE RECORD

Plaintiffs assert that the certified Administrative Record is incomplete because it "omits" (1) "NOSB meeting transcripts of numerous significant discussions concerning the problems with organic certification of hydroponic operations, and omits relevant oral comments given at NOSB meetings from 2002 to 2017;" (2) "comments and input from organic stakeholders, including written comments made to the NOSB and exchanges between USDA and organic certifiers that directly addressed the issue of whether organic certification of hydroponic operations should be

prohibited;" (3) "presentations and internal communications within the USDA that demonstrate USDA's past position and understanding of whether hydroponic operations can be lawfully certified as organic under the OFPA." ECF No. 20 at 6. But USDA "is entitled to a strong presumption . . . that it properly designated the administrative record," *Bimini Superfast Operations LLC v. Winkowski*, 994 F. Supp. 2d 103, 105 (D.D.C. 2014), and the agency properly excluded that information from the record because, with one minor exception included in the Corrected Administrative Record, it did not consider it when adjudicating CFS's petition for rulemaking, *see* Tucker Decl. ¶¶ 4-7.

A certified record is presumed to be complete "absent clear evidence to the contrary." *Cook Inletkeeper*, 400 F. App'x at 240 (quoting *Bar MK Ranches*, 994 F.2d at 740); *see also McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007); *Maritel, Inc v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006). Courts in this district have found that "[t]o meet the clear evidence standard, a plaintiff must . . . identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record." *Ctr. for Food Safety v. Vilsack*, 2017 WL 1709318, at *3 (N.D. Cal. May 3, 2017) (citation omitted); *see also Gill v. Dep't of Justice*, 2015 WL 9258075, at *5 (N.D. Cal Dec. 18, 2015) (same). "It is insufficient for a plaintiff to simply assert that the documents are relevant, were before the agency at the time it made its decision, and were inadequately considered." *Vilsack*, 2017 WL 1709318, at *3 (citation omitted); *see also J.L. v. Cissna*, 2019 WL 2223803, at *1 (N.D. Cal. May 22, 2019) (same); *Gill*, 2015 WL 9258075, at *5 (same).

In this case, Plaintiffs do nothing more than the latter. Just because decades-old documents may rest somewhere in agency files does not make their inclusion in the administrative record appropriate when they were neither presented to nor considered by the actual decision makers involved in the process of making the challenged determination. *See Oceana, Inc v. Ross*, 290 F. Supp. 3d 73, 80 (D.D.C. 2018) (explaining that the question is whether "the relevant decisionmakers actually thought about or [at minimum] had these documents before them *in the process of making [the relevant] decision*") (emphasis added); *Stand Up for California! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 117 (D.D.C. 2014) ("An agency's possession of certain

records, as confirmed by their disclosure in response to a FOIA request, is not sufficient to show that the same records were considered by the agency in connection with a decision subject to APA challenge, and, consequently, mere possession triggers no requirement to include such records in the administrative record."); *Franks v. Salazar*, 751 F. Supp. 2d 62, 69 (D.D.C. 2010) ("Plaintiffs cannot merely assert that . . . materials were relevant or were before the Service when it made its decisions.")

Plaintiffs set forth two reasons for their belief that the vast quantity of records they believe are part of the administrative record were actually "thought about or . . . before [USDA] in the process of making a decision" on CFS's petition for rulemaking. *See Oceana, Inc.*, 290 F. Supp. 3d at 80. First, they cite "the Petition's emphasis on decades of stakeholder input." ECF No. 20 at 6 (citing AR 1-23). Second, they cite "the Petition Denial's consideration of the 'substantial deliberation and input on this topic between 1995 and 2017.'" *Id.* (quoting AR 1377). Neither provide any reason to conclude that NOP actually considered these particular materials in the process of addressing CFS's petition for rulemaking.

1. *To the Extent CFS's Petition References Generalized Stakeholder Input at All, CFS Has Not Established that the Petition Introduced the Specific Material Into the Administrative Record for USDA's Consideration that they Now Seek to Introduce for the First Time*

CFS's Petition cited a number of specific materials in support of its petition for rulemaking that USDA then prudently considered in resolving the petition. Accordingly, that material is in the administrative record. For example, CFS cited an article from the Cornucopia Institute titled "Is Hydroponic Organic?" in support of their contention that, while many certifying agents have certified hydroponic producers as "meet[ing] the standards of the organic law and regulations" others "do not certify hydroponics." AR 0020, AR 0020 n. 98, n. 101. Because USDA prudently read the article when deciding whether to grant or deny the petition, the article is included in the administrative record. *See* AR 0329-35. As another example, CFS cited the National Organic Standards Board's 2010 formal recommendation to prohibit certification of hydroponic production systems in support of its petition for rulemaking. AR 0014. Because USDA prudently reviewed the recommendation in considering whether to grant or deny CFS's petition, the 2010 NOSB

recommendation is included in the administrative record. AR 270-88.[2]

In contrast, the specific materials that Plaintiffs seek to introduce into the administrative record for the first time on judicial review are mentioned nowhere in the petition for rulemaking. For example, CFS seeks to introduce comments made to the NOSB during a public comment webinar on April 19, 2016, by Nicole Dehne, even though those comments are referenced nowhere in the Petition nor were those comments submitted to USDA for consideration alongside the petition, and even though the comments predate the initiation of the proceeding adjudicating the petition for rulemaking by several years. *See* Decl. of Meredith Stevenson, Ex. A, ECF No. 21-2 at 7-8. As another example, CFS seeks to introduce comments made to the NOSB at a 2002 public meeting by Sam Welsch. *See id.* at 19-23. These comments were made to the NOSB, not USDA, nearly twenty years before CFS initiated the proceeding at issue by filing the petition for rulemaking. Plaintiffs provide no plausible reason why any of these comments were considered when NOP (an entity distinct from NOSB) addressed CFS's petition for rulemaking nearly twenty years later in 2019.

Plaintiffs believe USDA considered these materials because, citing CFS's entire petition for rulemaking generally, they claim that their petition "*emphasi[zed]* . . . decades of stakeholder input." ECF No. 20 at 6. But Plaintiffs do not—and cannot—point to anything in the petition for rulemaking concretely presenting any of Plaintiffs' exhibits for USDA's consideration.[3]

---

[2] To be sure, the mere fact that documents were cited in CFS's petition for rulemaking, as opposed to presented to the agency in support of the petition for rulemaking, "alone does not show that the source document was before the agency decisionmaker." *See Oceana, Inc.*, 290 F. Supp. 3d 73, 79 (D.D.C. 2018). These documents were prudently considered by USDA in addressing the petition for rulemaking because CFS cited them in support of their petition and they were publicly available. Accordingly, they are properly certified as being part of the administrative record.

[3] The Petition for Rulemaking does address NOSB's 2010 recommendation to prohibit organic certification of hydroponic production systems, AR 0014, which, as explained *supra*, NOP considered in reaching a decision on the Petition for Rulemaking. In discussing the 2010 recommendation, the petition for rulemaking notes that the formal recommendation "integrated previous subcommittee discussions conducted in 2003, 2008, and 2009 on the subject of hydroponic production systems, made in response to public comment and input." *Id*. But this generalized description of the 2010 document is insufficient to establish that CFS presented any of the particular materials that might form part of NOSB's record in developing the 2010 recommendation to USDA for its consideration.

Accordingly, their purported "emphasis" is insufficient to establish that they presented any materials in Exhibits A, B, C, and D, to NOP for its consideration in reaching its decision on the petition for rulemaking, let alone to establish that USDA in fact considered those materials. In sum, nothing in CFS's petition clearly establishes that anything in Exhibits A, B, C, or D, "were presented to the agency, to whom, and under what context." *See Pac. Shores Subdivision*, 448 F. Supp. 2d at 7; *see also Thompson*, 885 F.2d at 555 (concluding that "correspondence [that] was sent to the ALJ," as he reached a decision "approv[ing] the recommended order" was part of the administrative record).

2. Plaintiffs Provide Nothing But Mere Speculation that Materials Referenced in the Petition Denial Include Those They Now Seek to Include; Materials NOP did Consider are Fully Accounted For in the Certified Administrative Record as Corrected

Plaintiffs next purport to find support for their belief that the vast quantity of material in their Exhibits A, B, C, and D were actually "thought about or . . . before [USDA] in the process of making a decision" on CFS's petition for rulemaking, *see Oceana, Inc.*, 290 F. Supp. 3d at 80, in NOP's statement of reasons for denying the petition. Plaintiffs point out, correctly, that NOP explained that it denied the petition in part "[b]ased on the . . . substantial deliberation and input on [hydroponic production] between 1995 and 2017 from a variety of sources, including the NOSB, public stakeholders, and the Hydroponics Task Force." AR 1377. But nothing about that statement indicates that USDA was referring to the materials in Exhibits A through D.

Despite the robust record that NOP diligently developed while reaching a decision on CFS's petition for rulemaking, Plaintiffs offer nothing but speculation that, in their view, NOP actually considered substantially more, such as all of the documents in Exhibits A through D. For example, Plaintiffs simply assert that "[t]here can be no real dispute that [their materials] were considered, given USDA's description of the basis of its decision, Plaintiffs' reference to this input, and the highly controversial nature of the challenged decision." ECF No. 20 at 7. But none of these bases indicate that NOP considered every single "document contained in [USDA's] filing cabinet[s]" and created over the span of twenty-five years having something to do with hydroponic organic production. *See Safari Club Int'l*, 2016 WL 7785452, at *2. NOP actually considered, directly or indirectly, the materials in the certified administrative record, as corrected. *See* Tucker

Decl. ¶¶ 2-7.

It is true that in some limited circumstances, a plaintiff may make "a strong showing that the Administrative Record certified to [a] court is incomplete" where "[i]ncompleteness is evident from the record's face." *See Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 34 (N.D. Tex. 1981) (cited in *Thompson*, 885 F.2d at 555). In these cases, something about the record makes it implausible that the agency only considered what was purportedly certified as the administrative record. For example, *Exxon Corp.* involved an administrative proceeding in which an agency initiated an enforcement action against an oil company. *Id*. at 31. The agency's office of hearing and appeals ("OHA") affirmed a regional administrator's remedial order against the company by a written decision. *Id*. at 32. The oil company sought judicial review, but the purported administrative record consisted "solely of two copies of [the oil company's] Appeal of the Remedial Order . . . , [the company's] Application for Stay of the Remedial Order . . . , the Decision and Order of the [agency] granting a stay . . . , and the Decision and Order of [the] Office of Hearings and Appeals." *Id.* "The remaining pages [were] copies of letter correspondence between Exxon and the agency concerning administrative matters." *Id*. "Not an iota of documentary 'evidence' ha[d] been furnished," and the "Record [did] not even contain Exxon's 'written reply' to the agency's Notice of Probable Violation, which the Regional Administrator states was a document considered in reaching the finding of the violation, and which is referred to throughout the Remedial Order and OHA Decision." *Id*. at 34.

In this case, in stark contrast, nothing about the fact that NOP acknowledged that it denied CFS's petition for rulemaking "[b]ased on the . . . substantial deliberation and input on [hydroponic production] between 1995 and 2017 from a variety of sources, including the NOSB, public stakeholders, and the Hydroponics Task Force" makes the certified administrative record suspect: the administrative record is jam-packed with the very materials reflecting that very deliberation and input that NOP actually considered directly or indirectly in addressing the petition for rulemaking. *See* AR 1377; Docket Item 19-1.

"The administrative record in this case consists of [1382] pages of reports, correspondence, studies, and analyses," *see Pac. Shores*, 448 F. Supp. 2d at 7, the vast majority of which represent

materials reflecting the substantial deliberations cited in NOP's statement of reasons for denying the petition, *see* AR 1377; Docket Item 19-1. "The sheer volume and complexity of this administrative record suggests that it is complete." *See Pac. Shores*, 448 F. Supp. 2d at 7. Moreover, the agency action at issue here is a decision *not to act* at all which, if anything, an agency must be permitted to make without substantial analysis or a robust record. *Cf. FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 514-15 (2009) (citation omitted) (promulgating or rescinding a regulation "requires 'a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance.'") (emphasis in original). Nothing about the robust record of the materials NOP actually considered directly or indirectly in reaching a conclusion on CFS's petition indicates that the record is incomplete. *See Pac. Shores*, 448 F. Supp. 2d at 7.

Plaintiffs rely on *People of State of Cal. ex rel Lockyer v. U.S. Dep't of Agriculture*, 2006 WL 708914 (N.D. Cal. Mar. 16, 2006), but that opinion erroneously applies governing law. *See* ECF No 20 at 6, 8. In *Lockyer*, the court asserted that "[t]o be complete, the administrative record must contain materials that are directly or indirectly *related* to the agency's decision, not just those materials that the agency relied on." 2006 WL 708914, at *12 (emphasis added). The *Lockyer* court cited *Thompson* for that erroneous statement of law. But *Thompson* provides the correct one: "The whole administrative record . . . consists of all documents and materials directly or indirectly *considered* by agency decision-makers and includes evidence contrary to the agency's position." 885 F.2d at 556 (emphasis altered from original and citation omitted). Material *considered* directly by a decision maker or indirectly through a subordinate as part of administrative adjudication differs drastically from materials *related* to an agency's decision regardless of whether it was considered at all by anyone directly or indirectly. Indeed, a broad "related" rule would undermine the rule that "judicial review of agency action is limited to review of the record on which the administrative decision was based." *Thompson*, 885 F.2d at 555.[4]

[4] This case is meaningfully different than *Center for Environmental Health v. Perdue*, 2019 WL 3852493 (N.D. Cal. May 6, 2019). In that case, which is based on a unique set of facts, this Court concluded that "it [was] implausible that the comments on" a rule proposing options for procedurally addressing a livestock standards rule "were not considered in crafting" a

Plaintiffs also invoke *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993), and assert that there was "impropriety in the process" that has created "an appearance of irregularity." *See Portland*, 984 F.2d at 1548; ECF No 20 at 6. But Plaintiffs' purported improprieties are meritless. First, they speculate that the material they seek to add to the record was considered by the agency, that is not the case. *See* Tucker Decl. ¶¶ 4-7. Second, they argue that USDA applied "an improper standard to assemble the record," because USDA excluded pre-decisional, deliberative materials. ECF No. 20 at 6. But Plaintiffs' motion expressly excludes such materials from the scope of relief. *See id*. at 5 ("Plaintiffs' present motion focuses only on the non-privileged documents that USDA failed to produce."). Even if Plaintiffs had demonstrated any impropriety as such—which Defendants dispute, *see, e.g.*, *Portland Audubon Soc.*, 984 F.2d at 1549—the error would, by definition, be harmless because Plaintiffs are not seeking such materials here. *See id*. at 1548 (a showing of impropriety requires "the agency [to] then show [it] to be harmless"). Thus, Plaintiffs cannot obtain relief on this basis.

In any event, a closer look at the materials Plaintiffs seek to belatedly add to the administrative record further undermines their argument that NOP considered them in reaching a decision on the CFS Petition.

i. Public Testimony and Comments to NOSB and Written Comments to NOSB and USDA

First, Plaintiffs seek to add "every oral comment made to the NOSB regarding the compatibility of hydroponic operations with soil-based regulations" to the administrative record. ECF No. 20 at 8. But contrary to Plaintiffs' assertion that "USDA stated in the Petition Denial [that] it had considered them," ECF No. 20 at 8, USDA said no such thing, AR 1377. What it said is that it considered "the substantial deliberation and input on [hydroponics] between 1995 and

---

subsequent rule that ultimately withdrew the livestock rule "given the relatively short period of time between the issuance of these two rules and the fact that both rules contemplated withdrawal of the" livestock rule. *Id*. at *4. The Court determined that the "two rules were part of a *relatively short* 'ongoing decision-making process.'" *Id*. (emphasis added). In contrast, Plaintiffs seek to introduce public comments that are two decades old and made before discrete entities like the NOSB. Unlike the blurry lines between purportedly different but substantially similar proceedings in *Perdue*, in this case, the proceeding adjudicating CFS's petition for rulemaking had a clear start date: when the petition was submitted in January 2019.

2017 from a variety of sources, including the NOSB, public stakeholders, and the Hydroponic Task Force," which did not involve reviewing *every* public comment to any entity located somewhere in USDA's files having something to do with this longstanding controversial issue. *See* AR 1377. *See* Tucker Decl. ¶ 5 (explaining that NOP considered a representative sampling of materials). It would be absurd to think that USDA reviewed every single comment over decades about this topic in addressing CFS's petition. What NOP *did* consider is included in the administrative record. *See id*. at ¶¶ 2-7.

Plaintiffs also argue that their "attached exhibits . . . are critical to the Court's review of Plaintiff's claim . . . that the Petition Denial creates an inconsistent standard in the organic marketplace." ECF No. 20 at 8; *see also id*. at 10 (written "comments speak to Plaintiffs' claim that the Petition Denial creates an inconsistent marketplace"). But accommodating a party's litigation strategy on judicial review is not a recognized basis for supplementing the administrative record, let alone concluding that the records were, in fact, considered by USDA.[5]

Plaintiffs argue that these "comments belong [in] the Administrative Record because they stemmed from deliberations and processes described in the Petition and the Petition Denial." ECF No. 20 at 9; *see also id.* at 10 (discussing written comments to NOSB). But this reasoning improperly conflates discrete agency actions, sometimes relating to entirely different agencies. The discrete agency action at issue in this case is NOP's determination with respect to CFS's petition for rulemaking. The record accordingly includes *only* the materials NOP considered

[5] This Court should disregard Plaintiffs' suggestion that the record includes only materials "in favor of organic certification of hydroponic operations without considering any other stakeholders opposed." ECF No. 20 at 10. To the contrary, the administrative record includes a representative sample of viewpoints from across the spectrum with respect to hydroponic certification that NOP directly or indirectly considered while it determined how to address CFS's petition for rulemaking. For example, it includes the Hydroponic and Aquaponic Task Force Report, which USDA explicitly referenced in the Petition Denial, *see* AR 1376, and which itself consists of two separate subcommittee reports. *See* AR 0437-0632. One subcommittee advocated that "organic production should take place in soil," *id*. at 0441, whereas the other argued that "it is critically important to consider hydroponic and aquaponic production systems as eligible for organic certification." *Id*. at 0555. These diverse viewpoints, among others that NOP considered and found throughout the administrative record, supports NOP's undisputed conclusion that "[o]rganic hydroponic systems have been controversial. Some groups support the organic certification of these systems, while others are opposed to their certification." AR 1375.

directly or indirectly in the process of reaching a conclusion with respect to that petition. It does not *also* include all of the materials NOSB—a separate entity from NOP[6]—considered directly or indirectly in its process of issuing recommendations to NOP in 2002, 2006, 2008, 2016, or 2017, unless any of those materials were actually considered by NOP in determining what action to take with respect to CFS's petition. *See, e.g.*, *Oceana, Inc.*, 290 F. Supp. 3d at 80; *Stand Up for California!*, 71 F. Supp. 3d at 117; *Franks*, 751 F. Supp. 2d at 69.[7]

ii. Organic Certifier Responses to Survey Issued in 2016.

Plaintiffs seek to add "organic certifiers' responses to surveys which the agency also admittedly considered." ECF No. 20 at 11. To be sure, NOP considered reports including the aggregate survey results in reaching a decision on CFS's petition for rulemaking. *See* AR 0383-87. USDA also considered disaggregated survey data that is included in the corrected administrative record. *See* AR 1380-82. But Plaintiffs assert that NOP actually considered more: the underlying survey questions and responses. ECF No. 20 at 11. "In order to prevail, [Plaintiffs] must provide concrete evidence and a non-speculative basis for concluding that the requisite decisionmakers considered the [individual questions and responses] as opposed to the aggregated [and disaggregated] data" in the survey results. *See Oceania, Inc.*, 290 F. Supp. at 81-82. The record makes clear that the data was compiled both for a presentation at a meeting back on April 25, 2016, and compiled into results in the form of a spreadsheet. *See* AR 0383-87, 1380-82. In these forms, USDA considered this data when determining whether to grant or deny CFS's petition for rulemaking in 2019. *See id*. "Put another way, the fact that the data was at one point [presented to USDA in the form of emails providing survey responses] does not . . . mean that . . . data was consulted, thought about, or even seen by agency decisionmakers" directly or indirectly through

---

[6] The differences between NOP and NOSB are discussed in this Court's opinion in *Center for Environmental Health v. Perdue*, 2018 WL 9662437, at *7 (N.D. Cal. Aug. 21, 2018).

[7] After reviewing Plaintiffs' Exhibits and materials, NOP realized that it inadvertently omitted the letter from Senator Leahy to USDA that Plaintiffs discuss. *See* Tucker Decl. ¶ 2; ECF No. 20 at 10-11. Defendants agree that NOP did, in fact, consider this letter and Defendants have accordingly supplemented the administrative record to include it. *See* Tucker Decl. ¶ 2. In any event, as explained *supra* at 5-6, the letter's inclusion is immaterial to the extent the court is reviewing it merely to ascertain "congressional intent of [the] OFPA." ECF No. 20 at 11.

their subordinates while addressing the petition at issue in this case. *Oceana, Inc.*, 290 F. Supp. 3d at 82.

Plaintiffs again argue that these responses are "essential" in "go[ing] to Plaintiffs' claim[s]." ECF No. 20 at 11. But, again, accommodating a party's litigation strategy on judicial review is not a recognized basis for supplementing the administrative record, let alone concluding that the records were, in fact, considered by NOP in addressing the petition for rulemaking.

iii. Internal Communications and Draft Documents

Finally, Plaintiffs assert that NOP considered "unprivileged inter-agency correspondence, presentation slides, and other communications that are essential to this Court's understanding of Plaintiffs' claims, which were made public in response to a FOIA request." ECF No 20 at 11. But "[a]n agency's possession of certain records, as confirmed by their disclosure in response to a FOIA request, is not sufficient to show that the same records were considered by the agency in connection with a decision subject to APA challenge, and consequently, mere possession triggers no requirement to include such records in the administrative record." *Stand Up for California!*, 71 F. Supp. 3d at 117. Here, like most of Plaintiffs' other claims, Plaintiffs rely on nothing to support their claim that NOP considered these documents in connection with the decision at issue in this case. To be sure, Plaintiffs cite presentation "slides [that] were viewed by staff members within USDA responsible for administering OFPA, and thus were directly considered by the Agency." ECF No. 20 at 12. But Plaintiffs provide no indication that they were considered by the agency at any time after the presentation was given in March 2016, years before CFS ever filed the petition for rulemaking that initiated the proceeding at issue in this case. *See id.* The actual certified administrative record reflects the fact that USDA did *not* in fact, re-review all of this material "in the process" of considering CFS's petition for rulemaking. *See, e.g.*, *Regents of Univ. of Cali. v. U. S. Dep't of Homeland Sec.*, 2017 WL 4642324, at *4 (N.D. Cal. Oct. 17, 2017). Having failed to introduce this material into the record while their petition was pending before the agency, this Court must now reject Plaintiffs' efforts to build a record for the first time on judicial review.

C. THE COURT SHOULD REJECT PLAINTIFFS' ALTERNATIVE ARGUMENT THAT THE COURT SHOULD SUPPLEMENT THE ADMINISTRATIVE RECORD WITH THEIR EXTRA-RECORD MATERIAL

Plaintiffs' argument in favor of supplementation falls short of overcoming the strong presumption against supplementation. Although agency action is limited to the administrative record, supplementation is permissible only if one of four limited conditions are met: when extra-record evidence

> (1) is necessary to determine whether the agency has considered all relevant factors and explained its decision, (2) is necessary to determine whether 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.

San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 992-93 (9th Cir. 2014) (quotations omitted). "These exceptions are to be narrowly construed, and the party seeking to admit extra-record evidence initially bears the burden of demonstrating that a relevant exception applies." *Id*. Here, Plaintiffs' conclusory arguments fail to overcome that burden. *See* ECF No. 20 at 13-14.

The exception that Plaintiffs invoke—"the documents . . . go to whether the Agency considered the relevant factors and sufficiently explained its decision," ECF No. 20 at 13—does not apply here for several reasons. "[T]he 'relevant factors' exception . . . is the most difficult to apply." *Locke*, 776 F.3d at 993. "Reviewing courts may admit evidence under this exception only to help the court understand whether the agency complied with the APA's requirement that the agency's decision be neither arbitrary nor capricious," *Id*.

Armed with this exception, Plaintiffs state that the "materials provide the court with insight into OFPA's legislative history, application of its statutory and regulator[y] provisions, and how USDA's interpretation has resulted in inconsistent organic standards." ECF No. 20 at 13. But Plaintiffs make no effort whatsoever to explain why these materials are "*necessary* to determine whether the agency considered all relevant factors." *Locke*, 776 F.3d at 992 (emphasis added) (citation omitted). In other words, even assuming that "the documents [Plaintiffs] seek[] to include 'might have supplied a fuller record,' they do not 'address issues not already there.'" *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1451 (9th Cir. 1996) (quoting *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986)). As explained *supra*, the administrative

record includes robust materials that include diverse viewpoints on the wisdom of certifying hydroponic production as organic, similar to the materials Plaintiffs seek to introduce in Exhibit A and B. *See, e.g.*, AR 0437-632. And Plaintiffs provide no explanation for why the disaggregated data they seek to introduce in Exhibit C addresses anything meaningfully different, for purposes of review, than the aggregated results of the same survey. *See id*. at 0383-87, 1380-82. The same goes for Exhibit D, which is not only duplicative of much of the material in the existing record but which, as explained *supra*, can hardly be necessary to explain how the agency action violated the APA when Plaintiffs never even cite the material once anywhere in support of their motion for summary judgment.

Plaintiffs also invoke the exception permitting supplementation when "supplementing the record is necessary to explain technical terms or complex subject matter." *See Locke*, 776 F.3d at 992; ECF No. 20 at 14. But again, Plaintiffs make no effort whatsoever to explain how. *Id*. And the Administrative Record contains ample technical analysis, not meaningfully different from what Plaintiffs now seek to submit. Accordingly, they fail to meet their "burden of demonstrating that [the] exception applies." *Locke*, 776 F.3d at 992. Similar to the issues with invoking the first exception, Plaintiffs fail to provide any example of a technical term or a complex subject matter that cannot be understood by reference to the material in the robust record, including numerous presentations and reports on the relevant terms and subject matter, created before the agency.

In sum, Plaintiffs had the opportunity to submit their materials while the decision was pending before the agency. Plaintiffs cannot make up for their failure to do so through a motion to supplement a now-closed administrative record.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion to complete or supplement the administrative record.

Dated: October 30, 2020

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ERIC WOMACK
Assistant Branch Director

/s/ Liam C. Holland
LIAM C. HOLLAND
Liam.C.Holland@usdoj.gov
N.Y. Bar No. 5580378
Trial Attorney
Civil Division, Federal Programs Branch
P.O. Box No. 883
Washington, D.C. 20009
Telephone: (202) 514-4964
Facsimile: (202) 616-8470

Counsel for Defendants