UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILEY GILL, et al., *Plaintiffs*, v. DEPARTMENT OF JUSTICE, et al, *Defendants*.	No. 3:14-cv-03120-RS FURTHER SUPPLEMENTAL JOINT CASE MANAGEMENT STATEMENT

The Parties to the above-entitled action jointly submit this FURTHER SUPPLEMENTAL JOINT CASE MANAGEMENT STATEMENT pursuant to the Court's August 25, 2015 Order (ECF No. 62), in which the Court instructed the parties to set forth a proposed schedule for cross-summary judgment motions. This supplemental statement provides the parties' proposed schedules and justifications for their respective positions.

Plaintiffs propose that the Court set cross-motions for summary judgment for early 2016 to allow for motion practice related to the sufficiency of Defendants' proffered Administrative Record and for limited and targeted discovery related to the Court's jurisdiction. Defendants propose that summary judgment briefing proceed immediately. As explained below, Plaintiffs' objections to the sufficiency of the administrative record can be addressed under Rule 56(d).

I. Plaintiffs' Position

Plaintiffs contend that two substantial issues must be resolved before briefing on summary judgment – whether the Administrative Record as to Defendant PM-ISE's Functional Standard is complete and whether Plaintiffs are entitled to seek discovery related to the Court's jurisdiction. Neither of these issues was resolved by the Court's ruling (ECF No. 60) on Plaintiffs' motion to seek discovery related to Defendant DOJ's Standard for suspicious activity reporting. Plaintiffs are mindful that this is a case management statement and not a brief, but

respectfully submit that proceeding to briefing on summary judgment without prior resolution of these two issues would severely prejudice Plaintiffs and short-circuit the meet and confer process. At the same time, resolution of these issues prior to summary judgment would facilitate the orderly resolution of this case.

As to the need to seek jurisdictional discovery, Plaintiffs bear the burden on jurisdictional issues, which cannot be waived by Defendants, Defendants are in the exclusive possession of facts bearing on issues they disputed at the motion to dismiss stage, Plaintiffs have a right to develop a factual record sufficient to meet their burden before this Court and on appeal, and Rule 56(d) would not be an adequate mechanism for protecting their right to do so in this case. Moreover, the parties are currently meeting and conferring over the adequacy of the Administrative Record. To the extent that process does not resolve their dispute, the issue should be litigated through noticed motions prior to briefing on summary judgment, so that the Court has before it the whole Administrative Record.

A. Procedural History

The parties have disputed the propriety of discovery in this action from the outset. Plaintiffs have raised the need for discovery and record development in the following three areas: (1) jurisdictional issues; (2) Defendant PM-ISE's Functional Standard; and (3) Defendant DOJ's Suspicious Activity Reporting ("SAR") Standard. *See* ECF No. 59 at 4-5; *see also* ECF No. 36 at 7-10; ECF No. 40 at 7-9.

On March 12, 2015, the Court held a case management conference in which Defendants argued that review in this case should be limited to the Administrative Record. Plaintiffs argued that discovery was needed as to the issuance of each of the two agency actions challenged in this case – Defendant PM-ISE's Functional Standard and Defendant DOJ's SAR Standard. The Court agreed that Defendants should file an administrative record on the PM-ISE Functional Standard and invited Plaintiffs to submit a brief setting forth Plaintiffs' argument as to why discovery on DOJ's SAR Standard was appropriate. At the March 2015 case management

conference, Plaintiffs also emphasized the need for discovery of facts bearing on the Court's jurisdiction. *See* ECF No. 40 at 7-8; *see also Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Defendants did not dispute that review of facts outside the administrative record is appropriate for assessing Plaintiffs' standing (*see* ECF No. 36 at 6:23-24) and suggested that the parties might enter into stipulations. The Court recommended that Plaintiffs pursue Defendants' invitation to explore stipulations and delay taking discovery related to standing until after Defendants filed the Administrative Record for the PM-ISE's Functional Standard and the Court ruled on Plaintiffs' motion regarding discovery on the DOJ Standard. The Court's Minute Order instructed Defendants to provide an Administrative Record and also ordered the parties to meet and confer on further case management issues. *See* ECF No. 41. The parties have followed the Court's instructions.

On June 4, 2015, Plaintiffs filed a motion regarding discovery on the DOJ Standard. *See* ECF No. 50.

On June 16, 2015, Defendants filed the Administrative Record for Defendant PM-ISE's Functional Standard. *See* ECF Nos. 52-53.

Consistent with the Court's suggestion at the March 12, 2015 case management conference, Plaintiffs deferred seeking discovery on standing issues pending resolution of their motion on the DOJ Standard and instead sought to meet and confer with Defendants on both standing and the adequacy of the Administrative Record submitted by the PM-ISE. On July 28, 2015, Plaintiffs sent a detailed letter explaining why the Administrative Record was incomplete and exploring the feasibility of entering into factual stipulations that would eliminate or narrow the need for jurisdictional discovery.

On August 12, 2015, the parties filed a Joint Case Management Statement, updating the Court as to the status of discovery/record development in each of the three contested areas. *See* ECF No. 59. As to DOJ's SAR Standard, the JCMS noted that Plaintiffs' motion was pending before the Court. *Id.* at 4. As to jurisdiction, the parties noted, among other things, that they

were exploring potential factual stipulations. *Id.* at 5. As to the PM-ISE Functional Standard, the JCMS stated: "Plaintiffs have concerns that [the administrative] record is incomplete, but the parties are currently meeting and conferring in an attempt to resolve these concerns without motion practice." *Id.* at 5. Plaintiffs expressly identified the potential need for motion practice over the adequacy of the Administrative Record and stated that scheduling summary judgment was premature until threshold discovery issues were resolved. *Id.* at 3, 6.

On August 14, 2015, the Court issued an order denying Plaintiffs' motion to seek discovery regarding DOJ's SAR Standard and inviting the parties to submit a supplemental case management conference statement. *See* ECF No. 60.

On August 21, 2015, the parties submitted a supplemental case management statement in which Plaintiffs informed the Court about a recent incident involving the FBI's questioning of close family members of one of the Plaintiffs in this action and cited the incident as an issue about which discovery was appropriate and necessary because it sheds light on standing.

On August 25, 2015, Defendants responded to Plaintiffs' July 28, 2015 meet and confer letter. Defendants contended that the Administrative Record for the PM-ISE's Functional Standard is complete, invited Plaintiffs to identify any additional documents they believed missing from the record, and stated that they were not currently willing to enter into Plaintiffs' proposed factual stipulations regarding standing and "final agency action."

The same day, the Court issued an order continuing the case management conference then-set for August 27, 2015 and instructing the parties to file a further case management conference statement proposing a summary judgment schedule. *See* ECF No. 62. The Order stated that "[t]he only subject area that plaintiffs identify as potentially requiring discovery...is the issue of standing." *Id.* at 2. The Court further stated:

> Defendants' challenge to standing at the pleading stage was rejected. It is contemplated that the cross-motions for summary judgment referred to above will be limited to review on the administrative record of the propriety of the challenged agency actions. Because defendants have not proposed that any discovery go forward in advance of those motions, it is unclear how they would advance a challenge to standing that differed from what they

> presented in the motion to dismiss. In the event defendants nevertheless elect to include a further standing challenge as part of their motion, plaintiffs should respond based on such evidence and arguments as they presently possess, and if they deem it necessary, also seek relief under Rule 56(d). [*Id.*]

On August 31, 2015, Plaintiffs responded to Defendants' August 25, 2015 letter, further detailing Plaintiffs' concerns about the incomplete nature of the PM-ISE's Administrative Record, identifying 55 categories of documents missing from the Record, and observing that Defendants' response to Plaintiffs' proposed stipulations on jurisdictional issues underscored the need for discovery. Plaintiffs requested that Defendants respond to their request to complete the Administrative Record by September 10, 2015.

B. Plaintiffs' Motion to Complete the Administrative Record Should Be Resolved Before Briefing on Summary Judgment

Where an agency fails to produce a complete administrative record or the administrative record is insufficient to allow the court to conduct the review required by the APA, plaintiffs can seek to complete and/or supplement the record.[1] To facilitate orderly resolution of the claims in this case, the Court should address whether the Administrative Record is complete *before* briefing on summary judgment.

In reviewing agency action under the Administrative Procedure Act, "the court shall review the *whole record* or those parts of it cited by a party." 5 U.S.C. § 706 (emphasis added); *see also Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) (reversible error to "proceed[] with … review on the basis of a partial and truncated record").

Plaintiffs have substantial concerns that the Record is not complete; these concerns should be resolved through a noticed motion. Plaintiffs contend the Record is incomplete because (1) Defendants have inappropriately narrowed its scope to materials considered in the development of only one discrete portion of the Functional Standard, even though the Complaint

[1] *See, e.g., Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 781 (N.D. Ind. 1996) (granting in part motion to complete and supplement the record).

expressly challenges the Functional Standard as a whole;[2] (2) Plaintiffs have identified 55 categories of documents that the Record itself makes clear were considered by the agency but are missing from the Record compiled by Defendants;[3] and (3) Defendants have admittedly withheld "deliberative" materials but have refused to produce a privilege log, thus precluding an evaluation by Plaintiffs or the Court as to the propriety of these withholdings.[4]

To allow for an orderly presentation of issues, the Court should determine whether the Record is complete before briefing on summary judgment proceeds. To engage in judicial review under the APA, the Court "must have access to the full record.... [Summary judgment] is

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[2] Defendants must "file the entire administrative record pertinent to the omissions identified in the complaint." *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287, 292 (D.C. Cir. 1975). They "cannot define the record by compartmentalizing" portions of the Functional Standard. *Cf. Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 36-37 (N.D. Tex. 1981) (agency could not narrowly define record by "attach[ing]" "labels … to the stages of its decisional process" and "omitting from the record all materials compiled by 'the agency' before rendering the final decision"). Plaintiffs challenge the Functional Standard – not only its definition of "suspicious activity" but also the process for collecting, maintaining, and disseminating suspicious activity reports set forth in the Functional Standard. *See, e.g.*, Compl. at ¶¶ 42, 51, 162, 168 & Prayer for Relief.

[3] *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) ("The 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.") (internal quotation marks, citation omitted); *High Sierra Hikers Ass'n v. U.S. Dep't of Interior*, 2011 WL 2531138, *9 (N.D. Cal. June 24, 2011) (granting motion to augment record as to internal agency documents regarding proposed environmental assessment that were considered by the agency).

[4] *See Tafas v. Dudas*, 530 F. Supp. 2d 786, 801 (E.D. Va. 2008) ("when claiming deliberative process privilege…the government must comply with formal procedures necessary to invoke the privilege, including the provision of a privilege log") (internal quotation marks, citation omitted"); *Tenneco Oil. Co. v. Dep't of Energy*, 475 F. Supp. 299, 319 (D. Del. 1979) ("DOE must identify documents … with sufficient specificity to enable this Court meaningfully to evaluate whether the information sought involves the internal deliberative process by which a decision or agency position was reached."); *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. Atty. Bull., vol. 42, no. 1 at 9 (Feb. 2000) ("[i]f documents and materials are determined to be privileged or protected, the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they are being withheld").

premature until such time as the Court is satisfied the 'full' record has been submitted." *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 39 (N.D. Tex. 1981) (requiring "complete ... Administrative Record ... before DOE's Motion for Summary Judgment is entertained").[5] Defendants rely upon *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007), but plaintiffs' challenge to the adequacy of the record in that case was heard on a noticed motion before briefing on summary judgment, which is the process Plaintiffs propose here.[6]

Moreover, Plaintiffs have been diligent in raising and attempting to resolve their concerns and could not have brought a motion to complete the Administrative Record earlier.[7] At the time the Court issued its August 25, 2015 Order directing the parties to propose a summary judgment briefing schedule, the parties were still in the process of meeting and conferring over whether the Administrative Record is complete.[8]

C. Discovery Related to the Court's Jurisdiction Should Be Conducted Before Briefing on Summary Judgment

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[5] *See also State of Calif. v. U.S. Dep't of Labor*, 2014 WL 1665290 *3 (E.D. Cal. Apr. 24, 2014) ("court will decide [defendants' motion for summary adjudication] after ruling on plaintiffs' motion to supplement the administrative record"); *Autotel v. Bureau of Land Mgmt.*, 2013 WL 5564135 *2 (D. Nev. Oct. 7, 2013) (parties did not move for summary judgment *because* plaintiffs moved to supplement the record), *order vacated in part on reconsideration*, 2015 WL 1471518 (D. Nev. Mar. 31, 2015).

[6] The case management order in *McCrary* expressly provided plaintiff the opportunity to seek discovery or to complete the record *before* summary judgment. *See* Case No. 06-cv-04174-JW, ECF No. 21 at ¶ 4 ("In the event that Plaintiff pursues discovery or files an objection to the record, Plaintiff shall file his motion for summary judgment within 45 days after the completion of discovery or supplementation of the record, whichever is later, which contemplates a ruling by this Court on any motions for a protective order that may be sought by Defendants.").

[7] Plaintiffs' motion to *complete* the record will identify known documents that were considered but not included in the Administrative Record. After Defendants complete the record, it may still be necessary to *supplement* the record. *See Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (setting forth conditions under which court may supplement record with extra-record materials).

[8] *See* ECF No. 59 at 3:15-18 (discussing parties' meet and confer over Plaintiffs' concerns that Administrative Record incomplete and potential need for motion practice over issue), 4:27-5:4 (same); 6:18-19 (stating Plaintiffs' position that "the scheduling of summary judgment or trial dates would be premature before the threshold discovery issues are resolved").

Plaintiffs will suffer prejudice if they are unable to conduct discovery related to the Court's jurisdiction *before* the parties submit briefing on summary judgment. Rule 56(d) is not an adequate mechanism for protecting their right to develop the factual record in this case.

The rule limiting review to the administrative record in APA cases does not apply to jurisdictional questions, *Nw. Entl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997), and therefore does not bar Plaintiffs from conducting discovery on the issue of standing. The Court's August 25, 2015 Order suggests no such discovery would be necessary unless Defendants "elect to include a further standing challenge as part of their motion" for summary judgment. ECF No. 62 at 2. But Defendants cannot waive objections to subject matter jurisdiction and it is the Plaintiffs' burden to establish standing.

Relatedly, Plaintiffs cannot rest on the Court's rejection at the pleading stage of Defendants' challenge to Plaintiffs' standing. In their motion to dismiss, Defendants disputed Plaintiffs' standing by arguing that Plaintiffs cannot "credibly" allege that their injuries stemmed from Defendants' conduct and that "merely being the subject of an SAR, in the national database" does not constitute a cognizable injury-in-fact. *See* Order Denying Motion to Dismiss (ECF No. 38 at 7). Opposing these arguments requires further fact development – regarding the extent to which third parties reported Plaintiffs as suspicious because of Defendants' standards and the consequences of being the subject of a SAR in a national database. The latter subject entails information in Defendants' exclusive control. Even if the Court were to reject Defendants' standing arguments on summary judgment – such that Plaintiffs need not develop these facts to prevail on summary judgment – an appellate court might accept those arguments. Plaintiffs are entitled to develop a factual record sufficient to meet their burden before this Court and on appeal.

For the same reason, Rule 56(d) is not sufficient to protect Plaintiffs' right to develop a factual record establishing their standing. That provision affords relief upon a showing by a nonmovant that "it cannot present facts essential *to justify its opposition*." Fed. R. Civ. P. 56(d)

(emphasis added). If, on summary judgment, Defendants elect not to challenge standing, or to challenge standing only on select grounds, Plaintiffs cannot invoke Rule 56(d) to justify obtaining discovery. But such an election would not prevent Defendants from raising on appeal challenges to standing they chose not to raise at summary judgment. *See, e.g., City of Los Angeles v. County of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) (arguments regarding Article III standing "cannot be waived by any party"). Plaintiffs will therefore be severely prejudiced if they are unable to take jurisdictional discovery before briefing proceeds on summary judgment.

In addition, because Defendants assert that "final agency action" is a question of subject matter jurisdiction, *see* ECF No. 21 at 23 (motion to dismiss); 36 at 2:6-10 (JCMS), Plaintiffs are entitled to discovery related to that issue as well.

Plaintiffs attempted to propose factual stipulations related to standing and final agency action, but the parties' meet and confer was not fruitful.[9] Plaintiffs propose to serve limited discovery related to standing and final agency action on or before September 17, 2015. Depositions regarding the written responses may also be necessary. To the extent Defendants contest Plaintiffs' right to obtain such discovery, the question should be litigated on a motion for a protective order or motion to compel.

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Plaintiffs therefore propose the following schedule:

Sept. 10, 2015	Parties to complete meet and confer over completeness of the administrative record
Sept. 17, 2015	Plaintiffs to propound initial written discovery related to Court's jurisdiction

[9] Plaintiffs have consistently reserved their right to seek discovery on facts outside the administrative record that bear on the Court's jurisdiction. *See* ECF Nos. 36 at 7-8, 40 at 7-8, 59 at 5; ECF No. 50, n. 4. Plaintiffs have not propounded jurisdictional discovery to date based on the Court's suggestion at the March 12, 2015 CMC that they defer doing so until after the ruling on Plaintiffs' motion regarding the DOJ Standard and after exploring potential factual stipulations, but are now prepared to do so.

Sept. 24, 2015	Plaintiffs to file motion to complete the Administrative Record
Oct. 29, 2015	Hearing on Plaintiffs' motion to complete the Administrative Record
Jan. 28, 2016	Defendants to file motion in support of summary judgment (40 pages)
March 3, 2016	Plaintiffs to file opposition and cross-motion (45pages)
April 7, 2016	Defendants to file opposition and reply (40 pages)
April 21, 2016	Plaintiffs to file reply (35 pages)

II. Defendants' Position

Consistent with the Court's Order that the parties submit a schedule for briefing summary judgment, Defendants' position is that this case is ready to proceed to summary judgment without any additional motion practice. As Plaintiffs' recitation of the procedural history in this case shows, the Court has already entertained significant preliminary proceedings in this Administrative Procedure Act ("APA") case. Among other things, Defendants have filed an administrative record regarding the issuance of the Functional Standard challenged by Plaintiffs, and the Court has denied Plaintiffs' motion to expand that administrative record to include a purportedly separate "DOJ Standard". To the extent that Plaintiffs assert that there any additional factual issues relevant to the resolution of this action that are not addressed by the administrative record that has been filed, those issues will most efficiently be identified and explained through summary judgment briefing and, as noted in the Court's recent order, under Rule 56(d).

This Further Supplemental Joint Case Management Statement is not the appropriate context to brief the issues raised by Plaintiffs concerning the appropriateness of discovery related to their standing to bring these claims or the completeness of the administrative record. As the Court has noted, Plaintiffs will have the opportunity to explain their position that the administrative record is incomplete and that jurisdictional discovery must be permitted through summary judgment briefing—and if necessary, the filing of a Rule 56(d) affidavit. *See* Dkt. 60, 8/14/15 Order Denying Motion for Leave to Conduct Discovery at 4 ("If in the course of such

motion practice, the need for targeted discovery on particular issues, generally consistent with APA proceedings, becomes manifest, the question of permitting discovery can be revisited."); Dkt. 62, 8/25/14 Order Continuing Case Management Conference and Directing Supplemental Filing ("In the event defendants nevertheless elect to include a further standing challenge as part of their motion, plaintiffs should respond based on such evidence and argument as they presently possess, and if they deem it necessary, also seek relief under Rule 56(d)."). Indeed, in light of the Court's prior rulings, Defendants do not anticipate making any standing arguments based on the submission of factual evidence in connection with their motion for summary judgment.

Though summary judgment is the more appropriate context to address the issues raised by Plaintiffs, Defendants believe it necessary to respond briefly in light of the detailed arguments they have made in this joint statement. Considerable deference is given to the agency to determine whether the administrative record is complete. As this Court has itself stated, "[a]n agency's designation and certification of the administrative record is treated like other established administrative procedures, and thus entitled to a presumption of administrative regularity." *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) (Seeborg, J.).

Consistent with that discretion, the Program Manager acted appropriately in compiling an administrative record including the documents he relied upon (directly and indirectly) in issuing the definition of suspicious activity utilized in the Functional Standard. Despite the inclusion of allegations in the Complaint relating to other aspects of the Nationwide SAR Initiative ("NSI"), the claims asserted in the Complaint unambiguously challenge the permissibility of the standard by which SAR information is collected and shared in connection with the NSI. Compl. ¶¶ 42–52, 159– 64, 167–68; *see also* Dkt. 38, 2/20/2015, Order Denying Motion to Dismiss at 1 ("Plaintiffs contend that defendants Department of Justice ("DOJ") and the Program Manager-Information Sharing Environment ("PM-ISE") have issued protocols utilizing an overly broad standard to define the types of activities that should be deemed as having a potential nexus to terrorism."). And Plaintiffs specifically allege in the Complaint that this "SAR standard" is the

definition of suspicious activity in the Functional Standard. *Id.* ¶ 44 ("[Functional Standard 1.5] sets forth the following standard for suspicious activity reporting: '[o]bserved behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity.").

Plaintiffs are also incorrect that deliberative material should be included in the administrative record or else identified in a privilege log. To the contrary, courts have held that deliberative materials need not be designated as part of the administrative record because "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law—unless there is a showing of bad faith or improper behavior." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Likewise, "[s]ince deliberative documents are not part of the administrative record, an agency that withholds these privileged documents is not required to produce a privilege log to describe the documents that have been withheld." *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009).

Accordingly, Plaintiffs' objections to the adequacy of the administrative record are without basis. The administrative record is complete. In any event, as the Court recognized, Plaintiffs are able to raise any concerns they have with the completeness of that record through the briefing of summary judgment under Rule 56(d). Defendants therefore propose the following briefing schedule, with the following proposed page limits:

October 8, 2015	Defendants to file motion in support of summary judgment (40 pages)
November 19, 2015	Plaintiffs to file opposition and cross-motion (45 pages)
January 14, 2016	Defendants to file opposition and reply (40 pages)
February 4, 2016	Plaintiffs to file reply (35 pages)

Dated: September 4, 2015

/s/ Linda Lye

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CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. In addition, the Court makes the further orders stated below:

IT IS SO ORDERED.

Dated:

UNITED STATES DISTRICT/MAGISTRATE JUDGE