

1 BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

2 MELINDA L. HAAG
3 United States Attorney

4 ANTHONY J. COPPOLINO
5 Deputy Branch Director

6 PAUL G. FREEBORNE
7 Senior Trial Counsel
8 Va. Bar No. 33024

9 KIERAN G. GOSTIN
10 Trial Attorney
D.C. Bar. No. 1019779

11 Civil Division, Federal Programs Branch
12 U.S. Department of Justice
13 P.O. Box 883
14 Washington, D.C. 20044
15 Telephone: (202) 353-0543
16 Facsimile: (202) 616-8460
17 E-mail: paul.freeborne@usdoj.gov

18 *Attorneys for the Defendants*

19
20 **UNITED STATES DISTRICT COURT**
21 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

22 WILEY GILL; JAMES PRIGOFF; TARIQ
23 RAZAK; KHALID IBRAHIM; and AARON
24 CONKLIN,

25 Plaintiffs,

26 v.

27 DEPARTMENT OF JUSTICE, *et al.*,

28 Defendants.

No. 3:14-cv-03120 (RS)

**NOTICE OF MOTION AND
MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION FOR
RELIEF FROM NONDISPOSITIVE
PRETRIAL ORDER OF MAGISTRATE
JUDGE**

NOTICE OF MOTION FOR RELIEF

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendants hereby move for relief from portions of Magistrate Judge Kandis A. Westmore’s Order Granting in Part and Denying in Part Plaintiffs’ Motion to Complete Administrative Record, Dkt. No. 88. A proposed order granting the motion is attached hereto.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 The Magistrate Judge recently issued an order granting in part and denying in part
3 Plaintiffs’ motion to complete the administrative record compiled by the federal
4 government in connection with this Administrative Procedure Act (APA) case. The
5 Magistrate Judge held that the record should contain

6 all documents and materials directly or indirectly considered by the
7 agency in deciding (1) to adopt a standard that is broader than 28 C.F.R.
8 Part 23 and authorizes the collection, maintenance, and dissemination of
9 information even in the absence of reasonable suspicion of criminal
activity, in conflict with 28 C.F.R. Part 23 and (2) to promulgate such a
standard without public notice and comment. Dkt. 88 at 10.

10 The Magistrate Judge ordered Defendants to “revisit” the record to ensure that it
11 contained all such documents and to provide a certification explaining their search and its
12 results. *Id.* at 10–11. The Magistrate Judge also ordered Defendants to produce a
13 privilege log for any documents withheld under the deliberative process privilege. *Id.* at
14 11.

15 Several aspects of this ruling are contrary to law and should be set aside. *See Fed.*
16 *R. Civ. P. 72(a); Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010) (“The
17 magistrate’s legal conclusions are reviewed *de novo* to determine whether they are
18 contrary to law.”). First, the Magistrate Judge ordered Defendants to reassess the record
19 based on her determination that the agency’s certification was inadequate, but the law is
20 clear that this is not an adequate basis to overcome the presumption of administrative
21 regularity that attaches to an agency’s compilation of an administrative record. Second,
22 the requirement that the record include documents considered by the agency in deciding a
23 procedural issue—whether to promulgate a standard without public notice and
24 comment—lacks any basis in the law. An administrative record includes only material
25 considered in making substantive challenged decisions evaluated under the APA’s
26 arbitrary and capricious standard, not material considered in making procedural
27 determinations, which undergo no such judicial review. Third, the Magistrate Judge

1 incorrectly relied on two non-controlling cases in departing from the majority rule that no
2 privilege log is required when deliberative documents are omitted from an administrative
3 record.

4 **II. ARGUMENT**

5 **A. The Magistrate Judge Erred in Ordering Defendants to Revisit the** 6 **Administrative Record**

7 The Magistrate Judge held that the record should contain all documents directly or
8 indirectly considered by the agency in deciding to adopt a standard that is broader than 28
9 C.F.R. Part 23. The Program Manager for the Information Sharing Environment (PM-
10 ISE) has already submitted a record on behalf of Defendants containing all such
11 documents. Nonetheless, the Magistrate Judge erroneously determined that the
12 certification provided by the PM-ISE in connection with the administrative record
13 “suggests noncompliance with the standard according to which an administrative record
14 should be compiled,” Dkt. No. 88 at 9, because the certification states that it contains the
15 “information considered in” making that decision, rather than “*all* documents and
16 materials *directly or indirectly* considered” in making that decision. *Id.* at 10 (emphasis
17 added).

18 The Magistrate Judge misconstrued the law in determining that these linguistic
19 differences (the omission of the terms “all” and “directly or indirectly”) can satisfy
20 Plaintiffs’ burden of establishing clear evidence that the record is incomplete. “[I]n the
21 absence of clear evidence to the contrary, courts presume that [public officers] have
22 properly discharged their official duties” in compiling an administrative record.
23 *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) (Seeborg, J.)
24 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971));
25 *see also In re Delta Smelt Consol. Cases*, No. 1:09-CV-1053 OWW DLB, 2010 WL
26 2520946, at *2 (E.D. Cal. June 21, 2010). Plaintiffs bear the burden of rebutting this
27 presumption and must establish clear evidence that specific documents and materials
28 were considered by the agency in making the challenged decision but not included in the

1 record. *See Winnemem Wintu tribe v. U.S. Forest Serv.*, No. 2:09-CV-01072-KJM-KJ,
2 2014 WL 3689699, at *10 (E.D. Cal. July 24, 2014); *Wildearth Guardians v. U.S. Forest*
3 *Serv.*, 713 F. Supp. 2d 1243, 1253 (D. Colo. 2010).

4 The law is clear that the wording of a certification submitted by the agency is an
5 insufficient basis to overcome that presumption. As one Court has explained,

6 [Plaintiffs’ contention that the record is incomplete because of the wording
7 of the certification] is meritless. Although . . . many . . . federal agencies
8 . . . file[] certifications with administrative records as a matter of practice,
9 certifications are not required by the APA or any other law. . . . Nor have
10 Plaintiffs cited any authority for the proposition that a purportedly
inadequately worded certification—or even the complete absence of a
certification—defeats the presumption of regularity to which the
administrative record is entitled, and this Court has found none.

11 *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 18 (D.D.C. 2013); *see also See Cnty. of*
12 *San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 77 (D.D.C. 2008); *TOMAC v. Norton*,
13 193 F. Supp. 2d 182, 195 (D.D.C. 2002).

14 The cases the Magistrate Judge relied upon do not diminish this “clear evidence”
15 standard. In *Winnemem Wintu Tribe*, 2014 WL 3689699, the Court held that the use of
16 an incorrect standard in a certification constituted “reasonable, non-speculative grounds”
17 to determine that a record is incomplete. In that case, however, the agency had applied a
18 completely erroneous standard—the agency included the documents that were “relevant”
19 to a claim rather than all documents that were “considered” in making a challenged
20 decision. *Id.* at *11. Here, the agency applied the correct legal standard, but simply
21 worded that standard differently. As noted, there is no requirement under the APA that
22 an agency submit any certification in connection with an administrative record, let alone
23 one that contains the words “all” and “directly or indirectly”. The presumption of
24 regularity assumes that the record includes all documents considered, directly or
25 indirectly.

26 But even if the omission of these terms from the certification could support an
27 inference that the certification is inadequate, this inadequacy alone would not be a
28

1 sufficient basis to order reassessment of the record. As the cases cited by the Magistrate
 2 Judge demonstrate, Plaintiffs are still required to identify specific materials considered by
 3 the agency in making the challenged decision that are missing from the record. *See*
 4 *Winnemem Wintu Tribe*, 2014 WL 3689699 at *11 (plaintiffs “identified . . . materials
 5 allegedly omitted from the record with sufficient specificity” to rebut the presumption of
 6 regularity); *Trout Unlimited v. Lohn*, C05-1128C, 2006 WL 1207901, at *3 (W.D. Wash.
 7 May 4, 2006); *People of the State of Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, Nos. 05-
 8 03508 EDL & C05-04038 EDL, 2006 WL 708914, at *2 (N.D. Cal. March 16, 2006).
 9 Because the Magistrate Judge made no determination that specific documents had been
 10 incorrectly omitted from the record, she erred in requiring the PM-ISE to reassess the
 11 record based solely upon speculation arising from the wording of the certification.¹

12 **B. An Administrative Record Does Not Include Deliberations Regarding**
 13 **Procedural Matters, Such as Whether to Engage in Rulemaking**

14 The Magistrate Judge also erred in requiring the PM-ISE to search for all
 15 documents directly or indirectly considered by the agency in deciding whether “to
 16 promulgate [the challenged] standard without public notice and comment.” Dkt. 88 at 10.
 17 As noted previously, Dkt. No. 52, Defendants do not agree that the Functional Standard is
 18 a rule subject to notice-and-comment rulemaking. But even if it were, in the context of
 19 an informal rulemaking, the administrative record consists of the following materials, to
 20 the extent they exist:

- 21 (1) the notice of proposed rulemaking; (2) comments submitted by
 22 interested persons; (3) hearing transcripts, if any; (4) other factual
 23 information considered by the agency; (5) reports of advisory committees,
 if any; and (6) the agency’s statement of basis and purpose.

24 *Nat’l Ass’n of Chain Drug Stores v. U.S. Dep’t of Health & Human Servs.*, 631 F. Supp.
 25 2d 23, 26 (D.D.C. 2009) (citing cases). Thus, the administrative record is limited to

26 ¹ In any event, there is no requirement that an agency, as ordered by the Magistrate here,
 27 Dkt. No. 88 at 10-11, explain its search and results. *See Trout Unlimited*, 2006 WL
 28 1207901, at *3 (requiring agency to file amended certification that record includes
 documents considered, directly or indirectly, not explanation of search)

1 materials considered by the agency in making the substantive decision that is being
2 challenged. It does not include material considered in making decisions challenged by
3 the Plaintiffs as procedurally deficient—such as a challenge to an agency’s decision
4 whether to engage in notice-and-comment rulemaking—because those materials have no
5 bearing on the substantive decision that Plaintiffs are challenging in this case. Neither
6 Plaintiffs nor the Magistrate Judge identified any legal authority that would require the
7 inclusion of such materials in the record. And it is no answer to state, as the Magistrate
8 Judge did, Dkt. No. 88 at 10 n. 9, that a search of such materials would pose no great
9 burden, where there is no legal basis to order the search.

10 **C. A Privilege Log of Deliberative Material Is Not Required**

11 Also contrary to the Magistrate Judge’s ruling, Dkt. No. 88 at 11, a privilege log
12 is not required to identify deliberative material not included in an administrative record.
13 Under the APA, the permissibility of an agency’s decision is evaluated on the basis of the
14 reasonableness of the agency’s stated reasons for that decision at the time the decision is
15 made. *See Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). Because the
16 subjective motivation of the agency is not material to the Court’s objective review of the
17 agency’s reasoning, the agency is not required to include in the record internal, pre-
18 decisional documents reflecting the agency’s deliberations. *See San Luis Obispo Mothers*
19 *for Peace v. NRC*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (*en banc*) *cert. denied*, 479 U.S.
20 923 (1986); *Town of Norfolk v. U.S. Army Corps of Eng’rs*, 968 F.2d 1438, 1455-58 (1st
21 Cir. 1992); *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312-13
22 (S.D.N.Y. 2012); *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 18 (D.D.C. 2009).

23 As a corollary to the rule that deliberative documents are not part of the
24 administrative record, the vast majority of courts have also held that deliberative
25 documents omitted from an administrative record do not need to be identified on a
26 privilege log. *See, e.g., Stand Up for California! v. United States Dep’t of Interior*, 71 F.
27 Supp. 3d 109, 123 (D.D.C. 2014); *California v. U.S. Dep’t of Labor*, No. 2:13-CV-
28 02069-KJM, 2014 WL 1665290, at *4 (E.D. Cal. Apr. 24, 2014) (citing *Cook Inletkeeper*

1 v. *U.S. E.P.A.*, 400 F. App'x 239, 240 (9th Cir. 2010)); *Dist. Hosp. Partners, L.P. v.*
2 *Sebelius*, 971 F. Supp. 2d 15, 33 (D.D.C. 2013) *aff'd sub nom. Dist. Hosp. Partners, L.P.*
3 *v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015); *Am. Petroleum Tankers Parent, LLC v. United*
4 *States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013); *Great Am. Ins. Co. v. United States*, No.
5 12 C 9718, 2013 WL 4506929, at *9 (N.D. Ill. Aug. 23, 2013); *Nat'l Ass'n of Chain*
6 *Drug Stores*, 631 F. Supp. 2d at 27. As explained by one court, "The law is clear:
7 predecisional and deliberative documents are not part of the administrative record to
8 begin with, so they do not need to be logged as withheld from the administrative record."
9 *Oceana, Inc. v. Locke*, 634 F. Supp. 2d 49, 52 (D.D.C. 2009) *rev'd on other grounds*, 670
10 F.3d 1238 (D.C. Cir. 2011).

11 In departing from this majority approach, the Magistrate Judge relied on a non-
12 controlling decision by another magistrate in the Northern District of California and the
13 absence of any controlling authority in the Ninth Circuit on this issue.² However, that
14 case—*Lockyer*, No. C05-03508 EDL, 2006 WL 708914, at *4—does not discuss this
15 issue in any detail or address the significant number of cases that have held that no
16 privilege log is required because deliberative documents are not part of a properly
17 compiled administrative record in the first place. In the absence of any controlling
18 authority in the Ninth Circuit, this Court should follow the majority approach, which
19 provides a persuasive rationale consistent with APA principles for not requiring a
20 privilege log.

21 **III. CONCLUSION**

22 For the aforementioned reasons, Defendants request that the Court grant their
23 motion and set aside the Magistrate Judge's Order.

24
25
26 ² The Magistrate Judge also cited another case—*Ctr. for Biological Diversity v. U.S.*
27 *Bureau of Land Mgmt.*, No. C-06-4884-SI, 2007 WL 3049869, at *6 (N.D. Cal. Oct. 18,
28 2007)—where the Court ordered that three documents withheld as deliberative be
provided for *in camera* review

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

January 15, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MELINDA L. HAAG
United States Attorney

ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ Paul G. Freeborne
PAUL G. FREEBORNE
Senior Trial Counsel
Va. Bar No. 33024

KIERAN G. GOSTIN
Trial Attorney
D.C. Bar. No. 1019779

Attorneys for the Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2016, I electronically filed the foregoing on the Clerk of the Court using the CM/ECF system, which will send notice of this filing to all parties.

/s/ Paul G. Freeborne
PAUL G. FREEBORNE