Kassia Siegel (AK Bar No. 0106044)
Kristen Monsell (admitted *pro hac vice*)
Emily Jeffers (admitted *pro hac vice*)
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
Phone: (510) 844-7100
Facsimile: (510) 844-7150
Email: ksiegel@biologicaldiversity.org
kmonsell@biologicaldiversity.org
ejeffers@biologicaldiversity.org

Attorneys for Plaintiff
Center for Biological Diversity

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

RYAN ZINKE, *et al*.

Defendants.

Case No. 3:18-cv-00064-SLG

PLAINTIFF'S MOTION TO COMPEL
COMPLETION OF THE ADMINISTRTIVE RECORD
PURSUANT TO LOCAL RULE 16.3 AND MEMORANDUM IN SUPPORT

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1-A	List of References Cited in Comment Letter Submitted Nov. 9, 2009 Missing from the Administrative Record
2	Email from James Wilder, U.S. Fish and Wildlife Service to Shaye Wolf, Center for Biological Diversity, Re: 90-day comments – Lit cited (Nov. 12, 2009)
3	Letter from Shaye Wolf, Center for Biological Diversity to the U.S. Fish and Wildlife Service, Re: Comments on the Status Review for the Pacific Walrus (2010)
3-A	List of References Cited in Comment Letter Submitted 2010 Missing from the Administrative Record
4	Email from Patrick Lemons, U.S. Fish and Wildlife Service to Shaye Wolf, Center for Biological Diversity, Re: comment letter on Pacific walrus listing determination (July 28, 2017)
5	Excerpts of the Certified List of the Administrative Record in *Alaska Oil & Gas Ass'n v. Pritzker*, No. 4:13-cv-00018-RRB (D. Alaska)
6	Letter from Timothy Ragen, Marine Mammal Commission to Rowan W. Gold, U.S. Fish and Wildlife Service (Jan. 3, 2011)
7	List of references cited in Dec. 21, 2016 comments from Center for Biological Diversity missing from the administrative record
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9	Taylor, Rebecca L. et al., Demography of the Pacific walrus (*Odobenus rosmarus divergens*) in a changing Arctic, Marie Mammal Science, First published: 02 Sept. 2017
10	Peer Review Comments on the U.S. Fish and Wildlife Service's Draft Status Assessment Report on the Pacific Walrus (Dec. 2016)
11	Letter from Dr. Grant Hilderbrand, U.S. Geological Survey to Dr. James G. MacCracken, U.S. Fish and Wildlife Service, Re: USGS review of the USFWS Draft Species Status Assessment of the Pacific Walrus (Jan. 9, 2017)
12	Letter from Peter Thomas, Marine Mammal Commission to Patrick Lemons, U.S. Fish and Wildlife Service, Re: Marine Mammal Commission Review of Draft Species Status Assessment of the Pacific Walrus (Jan. 30, 2017)
13	Summary Report of Independent Peer Reviews of the Service's draft status assessment (June 2017)
14	Executive Summary from U.S. Fish and Wildlife Service Species Status Assessment for the Pacific Walrus, Version 1.1 (Sept. 2016)
15	Emails exchanged between Kaitlyn Poirier, U.S. Department of Justice and Kristen Monsell, Center for Biological Diversity from July 16, 2018 through July 20, 2018
16	Emails exchanged between Kaitlyn Poirier and Meredith Flax, U.S. Department of Justice and Kristen Monsell, Center for Biological Diversity from July 27, 2018 through Aug. 3, 2018

Pursuant to Local Rule 16.3, the Court's May 16, 2018 Order, Dkt. No. 13, and the Joint Stipulation of July 23, 2018, Dkt. No. 15, Plaintiff Center for Biological Diversity ("Center") hereby moves for an order: (1) compelling completion of the administrative record filed by Federal Defendants on July 9, 2018, Dkt. No. 14; and (2) requiring Federal Defendants to produce a privilege log identifying and justifying any claims of privilege for materials that continue to be withheld. This Motion is necessary because the current administrative record designated by Federal Defendants excludes numerous documents that were directly or indirectly considered by the agency in reaching the decision that is the subject of this litigation.

INTRODUCTION

This Motion seeks to ensure that the Court has before it the necessary record to determine whether the U.S. Fish and Wildlife Service ("Service")'s decision to deny the Pacific walrus protection under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544; 82 Fed. Reg. 46,618 (Oct. 5, 2017), complied with the law. The key question in this litigation is whether the Service violated the ESA and basic tenets of administrative law in determining that listing the walrus as threatened or endangered was not warranted—particularly when the previous administration concluded that the walrus warrants listing under the ESA because climate change will destroy the sea ice habitat the species needs to survive within the foreseeable future.

The judicial review provision of the Administrative Procedure Act ("APA") provides the standard of review for resolving these issues. *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1075–76 (9th Cir. 2006); 5 U.S.C. § 706(2)(A). When reviewing an agency decision under section 706(2) of the APA, review is generally limited to the administrative record, and a court must consider "the whole record or those parts of it cited by a party." 5 U.S.C. § 706.

But the Service has not submitted the "whole record" for review in this case. First, the

Service omitted numerous scientific studies and other documents, including studies documenting the substantial loss of the walrus's sea ice habitat projected through at least the end of the century, that were before the agency in making its decision. Second, the Service omitted an unknown number of draft documents, emails, peer review reports, and other internal and external communications regarding the agency's decision whether to list the walrus under the ESA. Third, if the Service believes that these internal communications and other documents are exempt from disclosure under the deliberative process (or other) privilege, it must justify that claim and produce a privilege log. Meaningful judicial review of the Center's claims cannot proceed without these records. The Center therefore requests that the Court order the production of the withheld documents so that they may be considered by the Court.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Service's 2011 Finding that the Pacific Walrus Warrants Protection Under the ESA and its 2017 Reversal of that Finding

In February 2008, the Center petitioned the Service to list the Pacific walrus as a threatened or endangered species under the ESA because of the considerable threats to the species from climate change, and the loss of its sea ice habitat in particular. AR 1, PW0000001-99. The petition highlighted the importance of sea ice for the walrus's essential life functions; detailed the extensive scientific information demonstrating that climate change is causing, and will continue to cause, a dramatic loss of the sea ice habitat the species needs to survive; and explained the significant negative impacts that loss of sea ice was already having, and would continue to have, on the Pacific walrus. *Id.*

The Service failed to respond to the Center's petition within 90 days as required by the ESA. *See* 16 U.S.C. § 1533(b)(3)(A). The Center filed litigation in federal court in Alaska to compel the agency to respond to the petition. *Ctr. for Biological Diversity v. U.S. Fish and*

Wildlife Serv., No. 3:08-cv-00265-JWS (D. Alaska filed Dec. 3, 2008). Pursuant to a settlement agreement, the Service issued a 90-day finding in September 2009, in which it found the petition presented substantial information indicating that the petitioned action may be warranted, and began a status review to determine if listing the species was in fact warranted. 74 Fed. Reg. 46,548 (Sept. 10, 2009).

On November 9, 2009, the Center submitted extensive comments on the 90-day finding urging the Service to list the walrus under the ESA. Exh. 1. The letter described the most important scientific studies on the threats posed by climate change and ocean acidification to the Pacific walrus and the Arctic ecosystem. *Id.* The letter also discussed new information on Pacific walrus population structure and diet, and threats from offshore oil and gas development in the walrus's habitat. *Id.* The Center submitted the studies that the Center referenced in its comments to the agency along with its comments. *See id.* at 30-34; *see also* Exh. 2 (email from the Service requesting and acknowledging receipt of the studies referenced in the Center's comment letter).[1]

The Center submitted additional comments to the Service in 2010 to inform its status review. Exh. 3. The comments described recent studies documenting the extent of current and projected ocean acidification in the Arctic and impacts on benthic biomass from changes in sea ice extent, and the effects of these changes on Pacific walrus. *Id*. The Center submitted the scientific studies referenced in the comment letter to the Service. *See id.* at 14-15.

The Service again failed to comply with its statutory deadline to complete the status

[1] Given the number of scientific studies submitted by the Center to the Service that the agency omitted from the record, and Local Rule 5.3(e)(2)(B) which expresses a preference for excerpts of exhibits when electronically submitted documents have lengthy exhibits, the Center has submitted a list of references it cited in comments and submitted to the agency that are missing from the record, rather than submitting copies of the studies themselves. In the event the Court would prefer the studies themselves for purposes of deciding this Motion, the Center can provide the Court with the studies.

review and issue its 12-month finding, 16 U.S.C. § 1533(b)(3)(B), and the court approved an amended settlement agreement which required the Service to issue its 12-month finding by January 31, 2011. 76 Fed. Reg. 7,634 (Feb. 10, 2011). On February 10, 2011, the Service issued a 12-month finding that listing the Pacific walrus under the ESA was warranted. *Id.* In reaching this decision, the Service relied on climate change science through 2100 and concluded that climate change would destroy the walrus's essential sea ice habitat, that there were inadequate regulatory mechanisms to address this threat, and that the dramatic loss in essential habitat would cause substantial losses of abundance and a population decline that will continue into the foreseeable future. *Id*. at 7,643, 7,674. The Service did not list the species at the time, however, instead concluding that listing the species was precluded by other listing priorities. *Id.* The Service added the Pacific walrus to the list of candidate species. *Id.*

The Center and the Service subsequently entered into another settlement agreement over species lingering on the candidate list. 82 Fed. Reg. at 46,642. The settlement agreement required the Service to submit a proposed rule to list the Pacific walrus or a finding that the species did not warrant ESA-listing to the Federal Register by September 30, 2017. *Id*.

Following the settlement agreement, the Center submitted additional comments to the Service to inform the Service's listing determination. AR 23, PW0000231, AR 40, PW0000727. The comments, submitted on December 21, 2016 and July 28, 2017, presented science published since the agency's 2011 determination on the key threats to the Pacific walrus, including rapid sea ice loss and ocean acidification; evidence of harm to the Pacific walrus resulting from anthropogenic climate change; and the inadequacy of existing regulatory mechanisms to reduce the greenhouse gas pollution driving climate change and sea ice loss. *E.g.*, AR 23, PW0000231. The Center submitted copies of the scientific studies referenced in each of the comment letters to

the Service. *See* AR 23, PW0000254-58 (references cited in 2016 letter and submitted to the Service); AR 40, PW0000731 (references cited in 2017 letter and submitted to the Service); Exh. 4 (email from the Service stating it will read and consider the Center's comments as it moves through the listing process).

The Service issued a final listing decision that published in the Federal Register on October 5, 2017. 82 Fed. Reg. at 46,618. The Service prepared a Species Status Assessment for the Pacific Walrus ("status assessment") to help inform its decision. *Id.* at 46,643. According to the Service, the status assessment "summarizes and documents the biological information [it] assembled, reviewed, and analyzed to inform [its] finding." *Id.* In its 2017 decision, the Service changed its position from its 2011 decision, and concluded that the Pacific walrus does not warrant listing under the ESA. *Id*. at 46,644.

II. The Current Lawsuit and the Administrative Record

The Center filed this case challenging the Service's decision that the Pacific walrus does not warrant protection under the ESA on March 8, 2018. Dkt. No. 1. The Service filed a notice of appearance of counsel and answer to the Center's complaint on May 11, 2018, Dkt Nos. 11, 12, and filed the administrative record on July 9, 2018. Dkt. No. 14.

The certified list of the contents of the administrative record consists of 31 pages and lists 471 total documents. Dkt. 14-2. Of these, 421 are scientific studies and the remaining documents consist largely of the Service's final decision documents, other publically available documents, and notes from government to government tribal consultation. *See id.* The record contains only *two* emails, one of which consists of a Service employee forwarding a copy of a letter from the Center to other Service employees, AR 6, PW0000152, the other of which consists of a brief discussion regarding whether a formal response to a letter from the Center is needed. AR 24,

PW0000259.[2]

The Center has reviewed the record and identified two categories of documents that the Service considered, either directly or indirectly, but did not include in the designated record. First, the Service did not include numerous public comments and scientific studies bearing on the agency's decision. These documents include:

- Comments from the Center to the Service on the agency's 90-day finding that listing the Pacific walrus may be warranted submitted on November 9, 2009 (Exh. 1);
- Comments from the Center to the Service to inform its status review of the Pacific walrus submitted in 2010 (Exh. 3);
- Comments from the Marine Mammal Commission[3] to the Service regarding whether to list the Pacific walrus submitted on January 1, 2011 (Exh. 6);
- Scientific studies and other documents referenced in the Center's 2009 comment letter, copies of which were submitted to the agency along with the comment letter (Exh. 1 at 30-34, Exh. 1-A);
- Scientific studies and other documents referenced in the Center's 2010 comment letter, copies of which were submitted to the agency along with the comment letter (Exh. 3 at 14-15, Exh. 3-A);
- Scientific studies and other documents referenced in the Center's comment letter submitted on December 21, 2016, copies of which were submitted to the agency along with the comment letter (AR0000254-58, Exh. 7);
- Studies referenced in the Center's comment letter submitted on July 28, 2017, copies of which were submitted to the agency along with the comment letter (AR0000731, Exh. 8);
- A study entitled: Taylor, Rebecca L. et al., Demography of the Pacific walrus (*Odobenus rosmarus divergens*) in a changing Arctic, Marie Mammal Science, First published: 02 September 2017 (Exh. 9).

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[2] In contrast, the certified list of the contents of the administrative record for other ESA-listing decisions for Arctic species threatened by climate change and the loss of their sea ice habitat were hundreds of pages and consisted of thousands of documents, including drafts of decision documents, emails, and other internal and external communications, and descriptions of withheld documents. *See, e.g.*, Exh. 5 (excerpts of certified list of administrative record in *Alaska Oil & Gas Ass'n v.* Pritzker, No. 4:13-cv-00018-RRB (D. Alaska), a case challenging the listing of the bearded seal under the ESA, consisting of over 400 pages and over 3,550 documents).

[3] The Marine Mammal Commission is an entity created by the Marine Mammal Protection Act to advise federal agencies on scientific matters regarding marine mammals, including whether a species of marine mammal should be listed under the ESA. 16 U.S.C. § 1402(a)(6).

Second, the Service failed to include draft documents, emails, and other internal and external communications related to its listing decision, or a privilege log attempting to justify the withholding of these documents. For example, the Service's record fails to include:

- Peer reviewers comments on the Service's draft status assessment (Exh. 10);
- Comments from the Marine Mammal Commission on the Service's draft status assessment (Exh. 12);
- Comments from the U.S. Geological Survey on the Service's draft status assessment (Exh. 11);
- Notes from meetings of the team the Service assembled to recommend whether it should list the walrus;
- Drafts of its status assessment and decision documents (Exh. 14);
- Emails and other internal and external communications relating to the listing of the Pacific walrus.

Counsel for the Center alerted counsel for the Service that the record was incomplete and informed the Service's counsel of the comment letters and numerous scientific studies that were missing from the record. Exh. 15 at 2. The Center's counsel also noted that the Service had apparently withheld draft documents, peer review reports, emails, and other internal and external communications related to the agency's listing decision that should have been included in the records or, at the very least, identified on a privilege log. *Id.*

Counsel for the Service subsequently notified counsel for the Center that the Service would re-examine the record to determine if any of the documents the Center identified should have been included in the record. Exh. 15 at 1. The parties then filed a joint stipulation extending the deadline for the Center to file a record-related motion in order to provide the parties the opportunity to attempt to resolve the record issue without involving the Court. Dkt. No. 15.

In a subsequent email, the Service's counsel notified the Center's counsel that the Service has re-examined the record and will include the Taylor, et al. 2017 study and a January 2017 personal communication inadvertently omitted from the record in a supplement to the record. Exh. 16 at 2. The Service's counsel also stated that the Service will supplement the record "with

all of the studies submitted by [the Center] that [the Service] directly or indirectly considered following the publication of the 12-month warranted but precluded finding on February 10, 2011" and that the Service "is also re-examining the record to make sure that all other scientific studies directly or indirectly considered by FWS after the February 10, 2011 12-month finding have been included in the record." *Id*. The Service has not yet filed the supplemental record or otherwise indicated what documents it intends to include in the supplemental record beyond the Taylor study and the personal communication. Counsel for the Service indicated that the agency anticipates completing the supplement to the record by August 17. Exh. 16 at 1.

Additionally, the Service's counsel noted that it is the Service's position "that the February 10, 2011 12-month finding and the determinations that are at issue in this case are two separate federal actions. Therefore, the [Service] considers the February 10, 2011 date to demarcate the beginning of a new federal action and will only consider the scientific studies that were submitted by [the Center] after that time." *Id*.

In that same email, the Service's counsel also represented that it is the Service's position that all internal and external communications regarding the listing decision, draft documents, comments from other agencies on the draft status assessment, and peer review reports on the draft status assessment are deliberative and therefore not part of the administrative record. *Id.* at 2–3. Counsel for the Service also stated that "[i]t is the government's position that it is not legally required to submit a privilege log." *Id.* at 3.

This appears to be a new position because other cases challenging ESA listing decisions, including decisions whether to list Arctic species threatened by sea ice loss from climate change, have included such records. *See infra* pp. 18–20 (discussing cases relying on such records); *see also* Exh. 5 (excerpts of certified list of administrative record in case challenging the listing of

the bearded seal under the ESA); U.S. Dep't of Justice, Env't & Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record at 3–4 (Jan. 1999) (Department of Justice guidance document advising agencies to include internal documents, such as communications and meeting minutes, and privilege logs, in administrative records).[4]

Because the Center and the Service disagree as to the scope of the record, the Center is filing the instant Motion now to avoid further delay in resolving the merits of this case.

ARGUMENT

I. The Service Must Submit the "Whole Record" and Cannot Exclude Documents Detrimental to its Case

Review pursuant to section 706(2) of the APA generally must be based on the "whole record or those parts of it cited by a party" before the Service at the time of its listing decision. 5 U.S.C. § 706(2); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The principle that administrative review must be based on the whole record before the agency is central to section 706(2) of the APA. *See Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a reviewing court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.").

The Ninth Circuit has repeatedly emphasized that the "whole record" subject to review under the APA is not merely the record designated and submitted by an agency:

> The "whole record" includes everything that was before the agency pertaining to the merits of its decision. An incomplete record must be viewed as a "fictional account of the actual decision-making process." . . . If the record is not complete,

[4] The Department of Justice's guidance document is available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf. Although the guidance is outdated and nonbinding, the Ninth Circuit still finds it "persuasive." *In re United States*, 875 F.3d 1200, 1208 (9th Cir. 2017), *vacated*, 138 S. Ct. 443 (2017).

> then the requirement that the agency decision be supported by "the record" becomes almost meaningless.

Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (citations omitted).

"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." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citations omitted); *see also see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (same). As the District of Columbia has explained, "[t]he agency may not skew the record in its favor by excluding pertinent but unfavorable information. . . Nor may the agency exclude information on the grounds that it did not 'rely' on the excluded information in its final decision." *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) (citation omitted); *see also Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, No. C-06-4884-SI, 2007 U.S. Dist. LEXIS 81114, at *12 (N.D. Cal. Oct. 18, 2007) ("materials should not be excluded simply because defendants did not 'rely' on them in arriving at the final decision.").

"Courts . . . may grant a motion to complete the administrative record where the agency has not submitted the 'whole' record." *Oceana, Inc. v. Pritzker*, No. 16-cv-06784-LHK, 2017 U.S. Dist. LEXIS 96067, at *4 (N.D. Cal. June 21, 2017) (quoting 5 U.S.C. § 706). Although the agency's designation of the record is presumed complete, a plaintiff can overcome this presumption by "identify[ing] the allegedly omitted materials with sufficient specificity and identify[ing] reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record." *Sierra Club v. Zinke*, No. 17-cv-07187-WHO, 2018 U.S. Dist. LEXIS 107682, at *7 (N.D. Cal. June 26, 2018) (citation omitted). A plaintiff can also "rebut the presumption of completeness by showing that the agency applied

the wrong standard in compiling the record." *Oceana v. Pritzker*, 2017 U.S. Dist. LEXIS 96067, at *5 (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. 01-640-RE, 2005 U.S. Dist. LEXIS 16655, at *10 (D. Or. March 3, 2005)). When seeking to complete a record, "[t]he plaintiff need not show bad faith or improper motive to rebut the presumption." *Id.* at *5–6.[5]

Here, the Service submitted a partial, cherry-picked record that omits documents directly or indirectly considered by the agency decisionmaker or subordinates. The Center has satisfied its burden to demonstrate that the Service must complete the administrative record because: (1) the record is entirely devoid of huge swathes of material, including numerous scientific studies, comment letters, internal analyses and discussions (via email or otherwise), and drafts of documents; (2) the Service has communicated its legally incorrect view that scientific studies and other documents submitted to the agency by the Center prior to February 10, 2011 are not part of the administrative record; (3) the Service has communicated its legally incorrect view that deliberative materials, including peer review comments, emails, and other communications that the agency deems deliberative, do not belong in the administrative record; and (4) the Center has demonstrated that such documents do exist.

A. <u>The Service Must Complete the Administrative Record by Adding Scientific Studies and Comment Letters Submitted to the Agency by the Center</u>

The Service has failed to include numerous scientific studies and other documents directly and indirectly considered by the agency when making the decision challenged in this case. It is undisputed that when considering whether the Pacific walrus warranted listing under

[5] The standard for granting a motion to complete the record is distinct from the standard for granting a motion to supplement the record with extra-record documents. *See, e.g.*, *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1253 & n. 5 (D. Colo. 2010) (explaining the difference between completion and supplementation of the record and how "confusion [between the two] has significant consequences for courts and litigants").

the ESA, the Service had before it numerous comment letters from the Center, which included references to hundreds of scientific studies, copies of which were included with the comment letters. These comment letters and scientific studies included information bearing directly on the listing decision, for example studies on Arctic sea ice concentration, walrus biology, and the ability (or lack thereof) of the walrus to adapt to changing sea ice conditions. Yet the administrative record, as filed by the Service, is missing comment letters submitted by the Center in 2009 and 2010, as well as numerous scientific studies referenced in those letters. Exhs. 1, 1-A, 3, 3-A. The record is also missing numerous scientific studies referenced in the Center's 2016 and 2017 comment letters. Exhs. 7, 8. These documents were properly before the agency when it made its decision, were "directly or indirectly considered" by the Service, and must be included in the administrative record.

"The whole record encompasses 'all the evidence that was before the decision-making body.'" *Sierra Club v. Zinke*, 2018 U.S. Dist. LEXIS 107682, at *6 (citing *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982)). The Service cannot in good faith argue that the letters and scientific studies identified by the Center as excluded from the administrative record, *see* Exhs. 1, 1-A, 3, 3-A, 7, 8, were not properly before it. *See Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 817 (D.C. Cir. 1975) (finding that the record in a rule-making case is comprised of comments received, among other documents). These studies and comments were submitted to the Service in response to requests for comments at various stages of the listing process and pertain directly to the question before the agency: namely, whether the Pacific walrus warranted listing under the ESA. The Service specifically acknowledged receipt of the comment letters, *see, e.g.*, Exhs. 2, 4, and states on its website that it "analyze[s] information received in public

comments" in making listing determinations.[6]

Even if the Service did not rely on a particular study, that study must be included in the administrative record if it was before the agency at the time of the decision. "Evidence includes documents *contrary to the agency's position* and 'all documents and materials directly or indirectly considered by agency decision-makers.'" *Sierra Club v. Zinke*, 2018 LEXIS 107682, at *6 (emphasis added) (citing *Thompson*, 885 F.2d at 555). Indeed, courts have routinely rejected arguments that documents generated during the decisionmaking process may be excluded from the record because the agency did not rely on them. *See, e.g.*, *Fund for Animals*, 391 F. Supp. 2d at 197 ("Nor may the agency exclude information on the grounds that it did not 'rely' on the excluded information in its final decision."); *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996) ("[A] document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record") (citation omitted). Case law in the Ninth Circuit is clear that the standard that the whole record includes "everything that was before the agency pertaining to the merits of a decision." *Portland Audubon Soc'y*, 984 F.2d at 1548. Failing to include documents that the Service had before it, and that bear directly on the decision at hand, would be a "fictional account of the actual decisionmaking process." *Id.* (citation omitted).

Scientific studies are particularly necessary to complete the administrative record in the ESA listing context, when the agency must base its decision "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The best available science mandate reflects a Congressional directive to ensure that decisions made under the ESA are informed by reliable knowledge applied using a structured approach. *See id.* § 1533(a)(1) (the

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[6] U.S. Fish and Wildlife Service, "Listing a Species as a Threatened or Endangered Species" (Aug. 2016), *available at* https://www.fws.gov/endangered/esa-library/pdf/listing.pdf.

factors the Service must consider in deciding whether to list a species); *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 680, 684 (9th Cir. 2016) (describing listing determination process). In this case, where the agency made a finding in 2011 that the walrus warranted listing because climate change would destroy the sea ice habitat it needs to survive, but then six years later came to an opposite conclusion, an examination of the best available science is especially important. Because the instant litigation concerns whether the Service's action was arbitrary or capricious in light of the ESA's best available science mandate, a complete record is necessary to demonstrate that the agency ignored relevant, available science.

B. The Service Cannot Exclude Documents Prior to February 10, 2011 from the Administrative Record

The designated record also excludes documents based on an arbitrary decision regarding the appropriate time frame for the administrative record. The Service considers the 12-month finding date of February 10, 2011 to demarcate the beginning of a new federal action and considers only the scientific studies and comment letters that were submitted after February 10, 2011 to be part of the administrative record. Exh. 16 at 2. Therefore, the Service has not included the Center's comments from 2009 and 2010, and has omitted numerous scientific studies referenced and attached to those letters. *Id.* In so doing, the Service has arbitrarily and improperly limited the scope of the administrative record. The Service's proffered justification for shortening the time frame is unpersuasive and unsupported by case law, and this Court should direct the Service to complete the administrative record to include documents that predate the 12-month finding.

The decision before the agency—whether the Pacific walrus warranted listing under the ESA—began with the Center's submission of the listing petition in 2008. Indeed, the Service itself acknowledges that the record in this case precedes the 12-month finding by including the

listing petition in the administrative record. *See* AR 1, PW0000001-99. In addition to including the 2008 listing petition, the record also includes the 90-day finding. *See* AR 4, PW0000102-104. Thus, the contention that all documents dated prior to February 10, 2011 should be excluded from the record directly contradicts the Service's own recognition that the administrative record does include documents pre-dating the 2011 12-month finding. *Cf. People of State of Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-03508-EDL, 2006 U.S. Dist. LEXIS 15761, at *12-13 (N.D. Cal. Mar. 16, 2006) (rejecting the same argument on the grounds that "[i]t is inconsistent with the Forest Service's own recognition that the administrative record does include documents pre-dating February 2004 as reflected in its inclusion of other documents dating from 2001 in the record submitted to the Court").

The agency cannot simply ignore documents created before a certain date if they are relevant. *Id.*; *see also Citizens to Preserve Overton Park*, 401 U.S. at 420 (stating that review "is to be based on the full administrative record that was before the Secretary at the time he made his decision.). The record designated by the Service is not the "whole record"—it omits a large number of documents submitted prior to the arbitrary cutoff date designated by the Service.

The information contained in the missing documents which predate the 2011 12-month finding bears directly on the Pacific walrus listing decision before the agency. For example, the 2009 and 2010 comment letters from the Center described the most important scientific studies providing key information on the threats posed by climate change and ocean acidification to the Pacific walrus and the Arctic ecosystem. Exhs. 1, 3. The letters also discussed new information on Pacific walrus population structure and diet, and threats from offshore oil and gas development in the walrus's habitat. *Id.* And the Center submitted the scientific studies that it referenced along with its comments. *See, e.g.*, Exh. 2, Exh. 3 at 13. The Service cannot now

exclude documents and scientific studies that it finds unfavorable to their position by creating an artificial time limit on the decision.[7] *Sierra Club v. Zinke*, 2018 U.S. Dist. LEXIS 107682, at *6 ("The whole record . . . includes documents contrary to the agency's position").

The decision encompassed within the 2011 12-month finding and the decision at issue here is all one and the same—whether the Pacific walrus warrants listing under the ESA. The Court, therefore, should order the Service to include documents that predate February 10, 2011, including comments and scientific studies submitted by the Center.

II. The Administrative Record Should Include Records that Reflect the Agency's Decisionmaking Process, Including Internal Communications

The "whole record" comprises all documents, including not only relevant comment letters and scientific studies submitted to the agency, but also internal and external communications, records that reflect the agency's decisionmaking process, and drafts of decision documents. *E.g.*, *Thompson*, 885 F.2d at 555; *People of the State of Cal. ex rel. Lockyer*, 2006 U.S. Dist. LEXIS 15761, at *9–10; *see also* Guidance on Compiling the Administrative Record at 3-4 (confirming that these types of communications belong in the administrative record). Thus, the Service must include these documents in the administrative record index and either place them in the record, or support their exclusion with a privilege log. *See In re Nielsen*, No. 17-3345, 2017 U.S. App. LEXIS 26821, at *10 (2d Cir. Dec. 27, 2017) ("Allowing the Government to determine which portions of the administrative record the reviewing court may consider would impede the court from conducting the 'thorough, probing, in-depth review' of the

[7] Furthermore, as discussed *supra*, the ESA requires the Service to make all listing decisions solely based upon the best available science. 16 U.S.C. § 1533(b)(1)(A). The 2009 and 2010 comment letters and scientific studies include the best known information on the walrus's biology and threats to the species' sea ice habitat. *See* Exhs. 1, 3. If the Service's position is that they did not consider those comment letters and referenced studies, they are admitting they failed to take into account the best available science when making their final listing decision.

agency action with which it is tasked") (citation omitted).

Here, the record generally contains only official final documents and publicly-available documents, such as the agency's final decision and academic articles. Dkt. No. 14-2. The record contains no internal or external correspondence regarding its listing decision (save for two emails regarding letters received from the Center), no notes from internal agency meetings regarding the listing decision, no peer review reports, and no drafts of the Service's decision documents.

The Service does not dispute that these materials are missing from the record. Instead, the Service has explained its new policy that deliberative materials are not part of the administrative record. Exh. 16 at 2–3. The Service's policy is wrong, and confuses the narrow and qualified deliberative process privilege with the scope of the record it must produce in the first instance.

That these materials might reflect internal deliberations does not automatically exclude them from the record. As the Northern District of California has explained, "[t]here can be no doubt that under some circumstances, pre-decisional deliberative communications may go to the heart of the question of whether an agency action was arbitrary and capricious, an abuse of discretion or otherwise inconsistent with the law under Section 706(2) of the APA." *Desert Survivors v. U.S. Dep't of the Interior*, 231 F. Supp. 3d 368, 382 (N.D. Cal. 2017). Accordingly, "the government is wrong to assert that these types of materials, as a categorical matter, should be excluded from the [administrative record]." *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574-VC, 2017 U.S. Dist. LEXIS 5642, at *2–3 (N.D. Cal. Jan. 10, 2017); *see also In re Nielsen*, 2017 U.S. App. LEXIS 26821, at *13 ("the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded").

That is particularly true for listing decisions under the ESA where the statute specifically

commands the Service to base its decision *solely* on the basis of the best scientific information available. 16 U.S.C. § 1533(b)(1)(A); *see also Nw. Envt'l Advocates v. Envt'l Prot. Agency*, No. 05-1876-HA, 2009 U.S. Dist. LEXIS 10456, at *21 (D. Or. Feb. 11, 2009) (noting that "Congressionally mandated scientific decisions . . . are less likely to result in the creation of documents which might 'expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency'" and are therefore less likely to be protected by deliberative process privilege, and ordering agency to produce draft documents) (citation omitted); *N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1284 (10th Cir. 2001) ("the word 'solely' is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species") (citing H.R. Rep. No. 97-567, pt. 1, at 29 (1982)).

The Ninth Circuit regularly considers internal documents—including agency emails and draft documents—in reviewing agency decisions under the APA. *See, e.g.*, *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 499–502 (9th Cir. 2014) (relying heavily on "internal [agency] emails" and "draft scenario[s]" to find agency action unlawful under the APA); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 768–69 (9th Cir. 2007) (citing agency "internal memoranda" to determine an agency's finding was arbitrary and capricious under the APA); *'Īlio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1096–97 (9th Cir. 2006) (relying on meeting minutes and comments in draft document); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 862–63 & n. 4 (9th Cir. 2005) (citing U.S. Army Corps staff emails); *see also Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1147 (D. Ariz. 2002) (finding draft biological opinion relevant in determining whether changes from the draft to final were necessary).

Courts also regularly consider the findings of peer reviewers on proposed listing rules or

draft status assessments in reviewing an agency's decision to list, or not to list, a species as threatened or endangered under the ESA. *See, e.g.*, *Alaska Oil & Gas Ass'n*, 840 F.3d at 676–77 (referencing peer reviewers' comments on biological report on bearded seals in reviewing agency's decision to list the species); *Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 989 (D. Mont. 2016) (referencing the findings of peer reviewers on proposed rule to list the wolverine in reviewing decision to withdraw proposed rule); *Ctr. for Biological Diversity v. Salazar*, 794 F. Supp. 2d 65, 86 n. 25, 99 (D.D.C. 2011) (citing comments from the Marine Mammal Commission as a peer reviewer on the Service's status assessment of the polar bear and comments from the U.S. Geological Survey on a draft final rule in a case challenging the Service's decision to list the polar bear as threatened); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 950 (D. Or. 2007) (relying on comments of peer reviewers in reviewing agency's decision to withdraw a proposed ESA-listing of Oregon coast coho salmon). Similarly, courts have considered notes from the meetings of experts convened by the Service to evaluate the status of a species in determining whether to list that species under the ESA. *Desert Survivors v. U.S. Dep't of the Interior*, No. 16-cv-01165-JCS, 2018 U.S. Dist. LEXIS 81922, at *39-45 (N.D. Cal. May 15, 2018) (discussing meeting notes from biologists on a team convened by the Service to evaluate the status of the greater sage grouse and make a recommendation whether the Service should list the species).

While the lack of a privilege log leaves the Center and the Court guessing about what is missing, it is clear that there are significant gaps which could hinder the Court's ability to properly assess the lawfulness of the Service's decision not to list the walrus. *See Portland Audubon Soc'y*, 984 F.2d at 1548 ("If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless."). For example, a

document in the record refers to a meeting of the "listing decision team," AR33, PW0000387, but the record contains no notes, minutes, or transcripts from that meeting. Moreover, a partial response to a request sent by the Center to the Service under the Freedom of Information Act for documents related to the agency's decision whether to list the walrus reveals the existence of several relevant documents considered by the Service but not included in the record. These documents include peer review comments on the Service's draft status assessment of the Pacific walrus, Exh. 10, a summary report of peer review comments on the draft status assessment, Exh. 13, comments from other federal agencies on the draft status assessment, Exhs. 11, 12, and drafts of decision documents. Exh. 14.

Without reviewing these documents—and an unknown number of other documents—the Court may be limited in its ability to fully determine whether the Service relied on proper factors, offered a reasoned explanation, and made a rational connection between the facts found and choices made. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also N.M. Cattle Growers Ass'n*, 248 F.3d at 1284 (noting that the ESA prohibits the agency from considering economics or any other factor not related to the biological status of a species in making listing decisions). As the Second Circuit recently recognized, "[a]llowing the Government to determine which portions of the administrative record the reviewing court may consider would impede the court from conducting the thorough, probing, in-depth review of agency action with which it has been tasked." *In re Nielsen*, 2017 U.S. App. LEXIS 26821, at *10 (citations omitted). Therefore, the Court should order the Service to complete the administrative record with all missing deliberative documents.

III. The Service Must Create a Privilege Log To Assert Privilege Over a Document

To the extent the Service withholds documents from the administrative record based on

privilege, it must create a privilege log. "Privilege logs are required when a party intends to withhold documents based on the deliberative process privilege." *Sierra Club v. Zinke*, 2018 U.S. Dist. LEXIS 107682, at *16. This is because "[t]he only way to know if privilege applies is to review the deliberative documents in a privilege log." *Id.*; *see also Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 17-05211-WHA, 2018 U.S. Dist. LEXIS 38460, at *31–32 (N.D. Cal. Mar. 8, 2018) (noting that "every court in [the Northern District of California] to consider the issue . . . has required administrative agencies to provide a privilege log in withholding documents that otherwise belong in the administrative record."). But the Service has not produced a privilege log. Absent such a log, the Center has no way to challenge any assertion of privilege and this Court has no way to evaluate the claim.

For the privilege to apply, a document must be both (1) "predecisional" or "antecedent to the adoption of agency policy;" and (2) "deliberative," meaning "it must actually be related to the process by which policies are formulated." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988). "Because the privilege 'is centrally concerned with protecting the process by which *policy* is formulated,' only those materials that bear on the formulation or exercise of agency policy-oriented judgment fall within the privilege." *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000) (quoting *Petroleum Information Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992)). The privilege does not apply to purely factual matters, or to factual portions of otherwise deliberative documents. *See, e.g.*, *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014) (rejecting broad claim of deliberative process privilege where agency did not even "tr[y] to segregate" factual aspects of documents or explain how they would "expose the agency's decision-making process"); *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1120 (9th

Cir. 1988) (refusing to extend deliberative process privilege protection to "factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy, or opinion") (quotation omitted).

Even if a document falls within the scope of the privilege, the privilege is limited. "A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the Government's interest in non-disclosure." *Fed. Trade Comm'n v. Warner Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see also United States v. Grace*, 455 F. Supp. 2d 1140, 1144 (D. Mont. 2006) ("Once the court has satisfied itself that the assertion of privilege is proper it must [then] make a determination that the agency's interest in withholding the documents outweighs the moving party's interest in securing them."). The factors to be considered in this determination include: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *Warner Communications*, 742 F.2d at 1161.

Accordingly, the Service cannot simply "pretend[] the protected material wasn't considered," by withholding it wholesale without so much as a privilege log. *Inst. for Fisheries Res.*, 2017 U.S. Dist. LEXIS 5642, at *3. Rather, to justify any withholdings, the Service must produce a privilege log that provides a detailed explanation of the documents withheld and the grounds for asserting the privilege, to allow the Center and the Court a meaningful opportunity to determine whether withholding the document was appropriate. *See Nw. Envt'l Advocates v. Envt'l Prot. Agency*, No. 05-1876-HA, 2008 U.S. Dist. LEXIS 2115, at *11 (D. Or. Jan. 7, 2008) ("Because the agencies bear the burden of establishing that a privilege applies, they must reveal, through a detailed log, the documents excluded from the record. Absent such a log, plaintiff has

no way to challenge assertion of the privilege, and this court has no way to evaluate the claim.").

The Ninth Circuit recently upheld a district court's decision to require a privilege log and to evaluate documents allegedly protected by the deliberative process privilege *in camera. In re United States*, 875 F.3d at 1210, *cert. granted, judgment vacated,* 138 S. Ct. 443 (2017).[8] In upholding the decision, the Ninth Circuit noted that "many district courts within this circuit have required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases," and concluded that it was not clear error for the district court to do so. *Id.* Likewise, the Second Circuit recently upheld a district court's decision to require the government to supplement its administrative record or produce a privilege log, stating that "without a privilege log, the District Court would be unable to evaluate the Government's assertions of privilege." *In re Nielson*, 2017 U.S. App. LEXIS 26821, at *13.

The same is true here. Because the Service has failed to produce a privilege log, neither the Center nor the Court can evaluate whether the records the Service has deemed "deliberative" are subject to the privilege or whether the privilege outweighs their importance for judicial review. To the extent the Service is invoking the privilege to hide from view *all* internal documents—including any descriptions of withheld documents in an index or privilege log—such secrecy nullifies the APA's goals of ensuring that agencies act in a rational and lawful manner when taking action. *See Citizens to Preserve Overton Park*, 401 U.S. at 416. Moreover, the Service's refusal to even disclose the existence of allegedly privileged improperly shifts the burden to the Center to demonstrate that the privilege was improperly asserted, which is

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[8] The Supreme Court vacated the Ninth Circuit's decision upon concluding that the district court should have first decided pending motions to dismiss before requiring completion of the administrative record, and did not rule on the government's arguments that the district court's order regarding the record was overly broad. *In re United States*, 138 S. Ct. at 445.

impossible where the agency does not even acknowledge the existence of the material.

Thus, in addition to ordering the Service to complete the administrative record that includes the missing deliberative documents, the Court should also order the Service to file a privilege log that provides a detailed description of any withheld documents, along with a detailed justification for the basis for withholding any particular document.

CONCLUSION

For the foregoing reasons, the Center respectfully requests the Court to order the Service to complete the administrative record by including the documents referenced above and all other materials it considered directly or indirectly in deciding whether to list the Pacific walrus; and to order the Service to produce a privilege log identifying any material the agency withholds from the record on the basis of the deliberative process or other privilege and explaining the basis of the withholding. Absent production of the whole record, the Court cannot properly fulfill its judicial oversight role.

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Respectfully Submitted,

/s/ Kristen Monsell
Kristen Monsell
/s/ Emily Jeffers
Emily Jeffers
Center for Biological Diversity
1212 Broadway, Ste. 800
Oakland, CA 94612
Phone: 510-844-7137
Email: kmonsell@biologicaldiversity.org
ejeffers@biologicaldiversity.org

Attorneys for Plaintiff