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12 *Avocado Heights (CAC)*

13 **BOARD OF ENVIRONMENTAL SAFETY,**
14 **DEPARTMENT OF TOXIC SUBSTANCES CONTROL**

15 IN THE MATTER OF:

16 Quemetco, Inc.
17 (a/k/a Ecobat Resources California,
18 Inc.)
19 720 S. Seventh Avenue
20 City of Industry, California 91746
21 EPA Facility Id. No. CAD066233966

22 Appeal of Temporary Authorization
23 Decision

Accessibility Note: The attachment in this document contains numerous exhibits which include scanned pages, a PowerPoint presentation, and numerous correspondence. We are currently working to ensure the entire PDF document is accessible.

Docket No. FY22/23-02

**(1) APPELLANT'S MOTION TO
COMPLETE THE PERMIT
RECORD; and (2) MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

*[Declaration of Angela Johnson
Meszaros filed concurrently]*

Action Filed: June 30, 2023

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Group, Nov. 2022) 5

James N. Saul, *Overly Restrictive Administrative Records and the
Frustration of Judicial Review* (2008) 38 Envtl. L. 1301 1

1 **MOTION**

2 Pursuant to Standing Order 23-01, the Clean Air Coalition of North Whittier
3 and Avocado Heights (CAC) hereby moves the Board of Environmental Safety
4 (Board or BES) to complete the record for CAC's appeal of the Department of Toxic
5 Substances Control Permitting Division's (Permitting) July 22, 2022, approval of a
6 Temporary Authorization Request made by Quemetco, Inc., (now Ecobat) to
7 authorize the operation of miscellaneous waste handling equipment at its facility.
8 Documents in CAC's possession are submitted concurrently.

9 Specifically, CAC moves the Board to complete the Administrative Record by
10 including the following omitted documents:

11 1. All documents Permitting included in the Administrative
12 Records from previous permit approvals for connected permitting
13 actions, including documents detailed in the Administrative Record
14 Index prepared by Permitting for the approval dated February 23,
15 2022, and the dockets for each appeal;

16 2. All records held by the Department of Toxic Substances Control
17 (DTSC),¹ including—but not limited to—correspondence, to, from, and
18 among DTSC, and/or Quemetco/EcoBat,² regarding the 2021
19 Temporary Authorization Request and/or approvals and/or appeals,
20 the February 2022 Class 2 Permit Modification Request and/or
21 approvals and/or appeals, and the 2022 Temporary Authorization
22 Request and/or approvals and/or appeals.

23 3. Ten specific documents that are relevant to CAC's appeal as
24 detailed in the attached Memorandum of Points and Authorities.

25 CAC's Motion to Complete the Permit Record is based upon this Motion; the
26

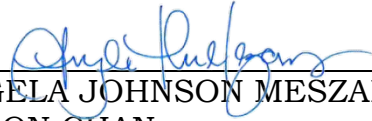
27 ¹ The term "Department of Toxic Substances Control" includes any and all divisions
28 and/or persons within the Department, including the Board of Environmental Safety.

² The term "Quemetco/EcoBat" includes any and all those acting at Quemetco/Ecobat's
direction or on its behalf.

1 attached Memorandum of Points and Authorities; the Declaration of Angela
2 Johnson Meszaros, filed concurrently; all pleadings, records, and files herein;
3 those matters of which this Board may take notice; and such oral argument this
4 Board may permit.

5 Counsel for CAC notified counsel for Permitting and counsel for
6 Quemetco/EcoBat of its intent to file this motion on July 26, 2023. Counsel for
7 Permitting advised that it intends to object to this motion. Counsel for
8 Quemetco/EcoBat advised that it does not have a position on the motion prior to
9 seeing it and will file any response it may have in accordance with Standing Order
10 23-01.

11
12
13 DATED: July 28, 2023



ANGELA JOHNSON MESZAROS
BYRON CHAN
EARTHJUSTICE

Attorneys for Appellant CAC

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Appellant Clean Air Coalition of North Whittier and Avocado Heights (CAC)
4 files this motion to secure a complete Administrative Record for its appeal of the
5 Department of Toxic Substances Control Permitting Division's (Permitting) July
6 22, 2022, approval of a Temporary Authorization Request made by Quemetco,
7 Inc., (now Ecobat) to authorize the operation of miscellaneous waste handling
8 equipment at its facility.

9 As set forth below, Permitting has proposed that the Board of
10 Environmental Safety (Board or BES) certify an administrative record that is
11 incomplete in that it excludes essentially all correspondence, the dockets of the
12 preceding appeals, and an unknown number of other documents, that are
13 relevant to this permitting decision because the documents were before the agency
14 when the July 2022 permitting decision was made or were properly before the
15 Board prior to this proceeding. Permitting has provided no explanation for why it
16 has excluded the documents that CAC moves this Board to include in the
17 administrative record.

18 Through this Motion, CAC seeks an order to complete the administrative
19 record by including ten identified documents in the administrative record. CAC
20 also seeks an order from this Board to Permitting to identify and include
21 documents that are currently unknown to CAC but are relevant to its permitting
22 decision because the documents were before the agency when the permitting
23 decision was made.³

24
25
26 ³ A motion to complete is proper here because the documents were before the decision
27 maker before its decisions were made. *See, e.g., James N. Saul, Overly Restrictive*
28 *Administrative Records and the Frustration of Judicial Review* (2008) 38 Envtl. L. 1301,
1319-1324 (attached as Exhibit B). ("Given the dynamic between the record rule and the
exceptions to it, there is an important distinction to be made between "supplementation"
and "completion" of the administrative record, though it is one that is seldom recognized
by courts or by agencies.")

II. BACKGROUND

CAC filed its underlying appeal on June 30, 2023.⁴ The appeal asserts that both as a matter of law and as a matter of fact, Permitting erred when it determined that Quemetco's request for a Temporary Authorization to operate two pieces of miscellaneous equipment at its City of Industry facility complied with the provisions of 22 CCR 66270.42(e). CAC seeks an order from this Board vacating and setting aside the unsupported permitting decision made by Permitting.

On May 2, CAC requested the final permit record for this appeal.⁵ On May 3, Gregory Forest, BES Attorney Advisor, responded to CAC's request with three "responsive" documents which "pending confirmation of DTSC" were described as "the entirety of the final permit record for this matter."⁶ CAC responded the same day noting that the record was incomplete because the July 2022 approval "came after a long series of events" beginning in February 2021 and that the record must be completed before CAC could file its appeal.⁷ Mr. Forest responded on May 3 to bring three DTSC attorneys and counsel for Quemetco into "these communications"⁸ and to "request[] that the Permitting Division provide any additional records necessary to complete the administrative record for this matter as soon as possible."⁹ CAC requested an update regarding the record preparation on May 10.¹⁰ On May 12, Mr. Forest followed up with Alex Mayer, DTSC Senior Staff Counsel, requesting that Permitting "either provide electronic copies or

⁴ Unless otherwise noted, all dates contained in this Memorandum occurred in 2023.

⁵ Email from A. Johnson Meszaros, Earthjustice, to S. Sharma and G. Forest, BES (May 2, 2023) (attached Exhibit E).

⁶ Email from G. Forest, BES, to A. Johnson Meszaros, Earthjustice (May 3, 2023) (attached as Exhibit F).

⁷ Email from A. Johnson Meszaros, Earthjustice, to S. Sharma and G. Forest, BES (May 3, 2023) (attached as Exhibit G).

⁸ Email from G. Forest, BES, to A. Johnson Meszaros, Earthjustice (May 3, 2023) (attached as Exhibit H).

⁹ Email from G. Forest, BES, to A. Mayer, DTSC (May 3, 2023) (attached as Exhibit I).

¹⁰ Email from A. Johnson Meszaros, Earthjustice, to S. Sharma and G. Forest, BES (May 10, 2023) (attached as Exhibit J)

1 inform the parties where those records may be located” by May 15.¹¹ That same
2 day, Mr. Mayer sent a letter from Wayne Lorentzen, Permitting Division Chief,
3 responding that “DTSC will continue to assemble the complete administrative
4 record for its decision” which it would finish by May 31.¹² As a result, CAC
5 requested an extension of time to submit its appeal.¹³ Mr. Forest and Swati
6 Sharma, BES Executive Officer, “granted” CAC an extension until June 30, to
7 provide time for Permitting to propose an administrative record, writing:

8 As a general premise, the Board expects that interested parties will
9 have unfettered access to the Final Permit Record when notice of the
10 final permit decision is provided under Sections 66271.9 and
11 66271.14, so that they are not prevented from engaging effectively in
12 the appeal process.

13 Even though the Decision at issue here is much narrower in scope
14 than a full permit renewal, and is not subject to Section 66271.17,
15 DTSC’s Permitting Division remains subject to the same obligation to
16 provide timely access to the records relied upon for the Decision.
17 Ensuring open access to permit records is a crucial element of the
18 appeal process.¹⁴

19 On May 31, Mr. Forest emailed a “link to access the administrative
20 record...as compiled by the Permitting Division staff of DTSC.”¹⁵ On June 22,
21 CAC wrote to Mr. Forest indicating that the permit record was not complete
22 because it failed to include all of the documents in the permitting record including
23 documents from prior permitting activities and “an unexplored number of
24 documents that are ‘contained in the supporting file’ for the permit, including
25 communications between and among the parties.”¹⁶ Despite this failure, CAC

26 ¹¹ Email from G. Forest, BES, to A. Mayer, DTSC (May 12, 2023) (attached as Exhibit K).

27 ¹² Email from A. Mayer, DTSC to G. Forest, DTSC (May 15, 2023) (attached as Exhibit L).

28 ¹³ Email from B. Chan, Earthjustice, to S. Sharma and G. Forest, BES (May 17, 2023)
(attached as Exhibit M).

¹⁴ Email from G. Forest, BES, to A. Mayer, DTSC, and B. Chan, Earthjustice (May 19,
2023) (attached as Exhibit P).

¹⁵ Email from G. Forest, BES, to B. Chan, Earthjustice (May 31, 2023) (attached as
Exhibit Q).

¹⁶ Email from A. Johnson Meszaros, Earthjustice, to G. Forest (June 22, 2023) (attached
as Exhibit S).

1 requested that ten documents be added to the permit record.¹⁷ On June 27, Ms.
2 Sharma and Mr. Forest “denied” CAC’s request and instead directed CAC to file
3 this motion no later than July 28.¹⁸

4 CAC filed its appeal of Permitting’s approval of Quemetco’s Temporary
5 Authorization Request on June 30, as directed, and files this timely Motion to
6 Complete the Permit Record.

7 **III. ARGUMENT**

8 Permitting is required to base its decisions on the permit record which
9 serves as the administrative record for the permit.¹⁹ The regulation details several
10 documents which “shall” be included in the administrative record, including
11 “other documents contained in the supporting file for the permit.”²⁰ Regardless of
12 whether the review is conducted inside this agency²¹ or before a court—the
13 permitting decision²² and any subsequent review must be based upon a review of
14 “the whole record.”²³ The “whole record” includes an “adequate and complete
15 administrative record” because it is essential to appropriate review.²⁴

16 DTSC’s regulations do not detail what are “other documents,” however this

17 ¹⁷ Ibid., at 4.

18 ¹⁸ Email from G. Forest, BES, to A. Johnson Meszaros, Earthjustice (June 27, 2023)
19 (attached as Exhibit T).

20 ¹⁹ 22 CCR § 66271.17(a) (“The Department shall base final permit decisions...on the
21 administrative record defined in this section.”)

22 ²⁰ 22 CCR § 66271.17(b)(5).

23 ²¹ See 40 CFR § 124.18, which mirrors and is cited as a “reference” for DTSC’s regulation.
24 There, the U.S. EPA specifically clarified that it changed the language of this section
25 before adoption to require that the administrative record be complete by the date the
26 permit is issued rather than 20 days after its issuance to “ensur[e] that the Regional
27 Administrator can base final decisions on the administrative record as a whole.” 45 Fed.
28 Reg. 33,290, 33,412 (May 19, 1980) (attached as Exhibit A).

²² 22 CCR § 66271.17(c) (“The record shall be complete on the date the final permit is
issued.”)

²³ See, e.g., Cal. Civ. Proc. Code § 1094.5(c) (“[A]buse of discretion is established if the
court determines that the findings are not supported by substantial evidence in the light
of the whole record.”) See also, *Bixby v. Pierno* (1971) 4 Cal. 3d 130, 144 (court to “review
the entire administrative record to determine whether the [agency’s] findings are
supported by substantial evidence and whether the agency committed any errors of
law...”)

²⁴ *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 373.

1 kind of catch-all phrase is found in statutes including the Administrative
2 Procedures Act²⁵ and the California Environmental Quality Act²⁶ and therefore
3 can underpin interpretation of the requirements for the administrative record
4 here.²⁷

5 Petitioners are “entitled to have the entire record of the administrative
6 proceedings presented to the court for review,”²⁸ including evidence that detracts
7 from the decision made.²⁹ CEQA’s administrative record provisions require that
8 the administrative record include “any other written materials relevant to the
9 respondent public agency’s...decision on the merits of the project, including...all
10 internal agency communications, including staff notes and memoranda related to
11 the project...except” privileged materials or materials exempt from the California
12 Public Records Act.³⁰ In analogous federal cases, courts have established that
13 “‘the whole record’ includes everything that was before the agency pertaining to
14 the merits of its decision,”³¹ and an agency may not exclude a document from the
15 record on the grounds that the agency chose not to “rely” on it.³² Further, federal
16 courts have found that “a document need not literally pass before the eyes of the
17 final agency decisionmaker to be considered part of the administrative record.”³³

18 Preparing the administrative record is “essentially a ministerial task,” and
19

20 ²⁵ Cal. Gov’t. Code § 11523 (“The complete record includes...any other papers in the
21 case.”)

22 ²⁶ Cal. Pub Res. Code § 21167.6(e) (“The record of proceedings shall include...any other
23 written materials....”)

24 ²⁷ See also, Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group,
25 Nov. 2022) ¶20:4.

26 ²⁸ *Chavez v. Civil Service Com.* (1978) 86 Cal.App.3d 324, 332.

27 ²⁹ See, e.g., *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945,
28 959 (“The ‘in light of the whole record’ language means that the court reviewing the
agency’s decision cannot just isolate the evidence supporting the findings and call it a
day, thereby disregarding other relevant evidence in the record.”)

³⁰ Cal. Pub Res. Code § 21167.6(e)(10).

³¹ See, e.g., *Portland Audubon Soc’y v. Endangered Species Comm.* (9th Cir. 1993) 984
F.2d 1534, 1548.

³² See, e.g., *Ad Hoc Metals Coalition v. Whitman* (D.D.C. 2002) 227 F. Supp. 2d 134, 139.

³³ *Clairton Sportsmen’s Club v. Pennsylvania Turnpike Com’n* (W.D. Pa. 1995) 882 F.Supp.
455, 465.

1 not a matter in which the agency has discretion.³⁴ As a result, Permitting may not
2 impede CAC's access to "the whole record" for review before this Board and
3 subsequently, if necessary, before a court.

4 **A. Permitting's Proposed Administrative Record is Incomplete.**

5 Permitting proposes to include only 44 documents in the administrative
6 record for a permitting effort that spanned three permitting decisions, two prior
7 appeals, and (at least) two and a half years. Not only does Permitting seek to
8 *exclude* documents it included in previous versions of the administrative record it
9 compiled for the extensive permitting history related to this permit, it also seeks to
10 *exclude* virtually all correspondence, the dockets of prior appeals, and untold
11 numbers of other records related to the permitting decision at issue here. These
12 exclusions result in an administrative record that is incomplete and that does not
13 include documents that are relevant because they were before the agency when it
14 made its permitting decision.

15 **B. The "Whole Record" for this Permit Includes Documents that Were**
16 **Part of the Class 2 Permit Modification Request, Appeal and**
Subsequent Withdrawal.

17 Permitting has engaged in three permitting efforts related to the equipment
18 and permit decision at issue here. These efforts ended in permitting decisions in
19 April 2021, February 2022, and finally, a July 2022 decision that is the subject of
20 this appeal. CAC alleges in this appeal that the April 2021 and February 2022
21 permitting decisions are inseparable from Permitting's July 2022 decision. While
22 Permitting included some documents from the April 2021 permitting decision, it
23 *excluded* all documents from the February 2022 permitting decision.

24 DTSC's regulations explicitly connect the Temporary Authorization approval
25 in April 2021 to Quemetco's subsequent Class 2 Permit Modification Request. A
26 facility's temporary authorization expires after 180 days.³⁵ Before the end of that
27

28 ³⁴ *Cnty. of Orange v. Superior Ct.* (2003) 113 Cal.App.4th 1, 11.

³⁵ 22 CCR § 66270.42(e)(1).

1 period, the facility must request a Class 2 or Class 3 permit modification “for the
2 activity covered in the temporary authorization” if it desires to continue the
3 temporarily permitted activity beyond the expiration date.³⁶ Because Quemetco
4 did wish to continue operating the equipment, DTSC’s regulation required
5 Quemetco to submit a Class 2 or Class 3 Permit Modification Request. And, as a
6 result, Quemetco did submit a Modification Request. DTSC released its
7 permitting decision for that request in February 2022. Quemetco withdrew its
8 Request in June 2022, leaving the equipment unpermitted. This led to Quemetco
9 submitting the Temporary Authorization Request and the subsequent July 2022
10 permitting decision that is the subject of this appeal. This administrative record
11 must reflect the Class 2 Permit Modification Request submission, decision, and
12 subsequent withdrawal.

13 Quemetco acknowledged that these permitting efforts are connected. First,
14 Quemetco’s application, which resulted in the July 2022 permit decision, set out
15 the permitting sequence, including its Class 2 Permit Modification Request.³⁷
16 Second, Quemetco asserted that an administrative record is not necessary at all
17 for a decision on CAC’s appeal of the July 2022 permit decision, writing that:

18 [CAC] fails to acknowledge the extensive appeal history related to
19 [Quemetco’s] dewatering project, and the fact that as part of those
20 prior appeals, DTSC has produced extensive documents constituting
21 the administrative record supporting those prior decisions on two
22 separate occasions. Because the temporary authorization request at
23 issue here is, in large part, based on the exact same information
24 DTSC relied upon in reaching those prior decisions, [CAC] largely has
25 already been provided with the final permit record”³⁸

26 ³⁶ 22 CCR § 66270.42(e)(4).

27 ³⁷ Quemetco, Temporary Authorization Request at 7–8 (“Quemetco has been seeking
28 approval for the Dewatering Project...since February 2021. Most recently, Quemetco
sought approval for a class 2 permit modification to operate the dewatering equipment.
While DTSC approved this request on February 23, 2022, that approval has been
stayed...”) (June 9, 2022) (Exhibit 7 to Declaration of Angela Johnson Meszaros (Johnson
Meszaros Decl.)).

³⁸ Letter from M. Williamson, Manatt, to S. Sharma, BES (May 18, 2023) (attached as
Exhibit O).

1 An administrative record is—in fact—required for this appeal and
2 Quemetco’s observations support including documents from the Class 2 Permit
3 Modification Request, approval, and appeal because those actions are relevant for
4 this proceeding’s administrative record.

5 Here, Permitting has proposed to exclude 42 of the 43 documents it has
6 already identified as relevant to the Class 2 Permit Modification Request and
7 determination.³⁹ It also proposes to exclude all the documents associated with
8 the appeal of DTSC’s approval of that request. Each of those documents is
9 relevant to CAC’s allegation that a permitting decision was made by DTSC on the
10 same equipment at issue here and all of that was before the agency when it
11 subsequently made the permitting decision at issue here.

12 **C. Permitting Must Include “Any Written Materials Relevant” to the**
13 **Project, Including All Agency Communications.**

14 The “whole of the record” includes any written materials that are relevant to
15 the project. In its June 30 appeal, CAC included ten documents which are part of
16 the permitting proceedings but were not included in Permitting’s proposed
17 administrative record. Nine of these documents are listed below. The tenth
18 document is discussed in Section D, *infra*.

Document Name
CAC, Appeal of Approval of Temporary Authorization Request for Quemetco (May 27, 2021) ⁴⁰
Quemetco, Additional Information for Pending Class 2 Permit Modification Request (Sept. 8, 2021) ⁴¹
Quemetco Inc., No. PAT-FY21/22-001, Petitioner’s Opening Brief in Support of Appeal of Quemetco Inc’s Temporary Permit Authorization (DTSC Permit Appeals Oct. 14, 2021) ⁴²

26 ³⁹ See Exhibit 5 to Johnson Meszaros Decl. (DTSC, Quemetco Class 2 Permit Modification
27 Administrative Record Index) (Mar. 11, 2022).

28 ⁴⁰ See Exhibit 1 to Johnson Meszaros Decl.

⁴¹ See Exhibit 2 to Johnson Meszaros Decl.

⁴² See Exhibit 3 to Johnson Meszaros Decl.

DTSC, Notice of Class 2 Permit Modification Approval (Feb. 23, 2022)⁴³

CAC, Appeal of Feb. 23, 2022, Auger Centrifuge Permit Mod. Request for Quemetco (Mar. 28, 2022)⁴⁴

Quemetco, Temporary Authorization Request (June 9, 2022)⁴⁵

Letter from M. Williamson, Manatt, to J. Rizzo, BES (June 29, 2022)⁴⁶

Permit Modifications for Hazardous Waste Management Facilities, 52 Fed. Reg. 35,838- 01 (proposed Sept. 23, 1987)⁴⁷

Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37,912- 01 (Sept. 28, 1988)⁴⁸

In addition to these documents, a complete record properly includes all relevant material related to the permitting effort beginning with the first discussion about permitting the equipment at issue here (which appears to have started long before the permit application was submitted) through the final decision on the appeal.

Permitting's proposed administrative record includes only 16 "e-mail" communications, *none* of which are internal communications related to the project. It is impossible to believe that during the multi-year, multi-permit process at issue here, Permitting sent and received only 16 e-mail messages and created, received, or reviewed only 44 documents. This impossibility is highlighted by the fact that on May 17, 2023, Earthjustice submitted a Public Records Act Request for documents "regarding the 2021 and 2022 Temporary Authorizations."⁴⁹ DTSC indicated that it had "received [our] PRA request, will comply, and [is] in the process of gathering and reviewing documents." DTSC "set

⁴³ See Exhibit 4 to Johnson Meszaros Decl.

⁴⁴ See Exhibit 6 to Johnson Meszaros Decl.

⁴⁵ See Exhibit 7 to Johnson Meszaros Decl.

⁴⁶ See Exhibit 8 to Johnson Meszaros Decl.

⁴⁷ See Exhibit 9 to Johnson Meszaros Decl.

⁴⁸ See Exhibit 10 to Johnson Meszaros Decl.

⁴⁹ Letter from B. Chan, Earthjustice, to D. Knight, DTSC (May 17, 2023) (attached as Exhibit N).

1 a schedule for rolling production starting on September 1, 2023.”⁵⁰ This DTSC
2 response suggests that a significant number of documents that were before the
3 agency when the permitting decision was made were not included in the permit
4 record despite the requirement that “the record shall be complete on the date the
5 final permit is issued.”⁵¹

6 Further, on November 14 and 15, 2022, the Board held a public workshop
7 and a public board meeting during which the “Hazardous Waste Permit Appeals
8 Process” was discussed. One of the topics of discussion was the “Administrative
9 Record” which included two slides outlining a non-exclusive list of items that
10 properly would be included in a permit appeals’ administrative record.⁵² The list
11 explicitly included “correspondence” as one of the categories of documents
12 included in the administrative record. In response to a question about whether
13 “communication among and between staff and the regulated industry” would be
14 included in the permit record, Board counsel responded “that would be one that is
15 part of the record...it’s in the regs.”

16 DTSC has not provided CAC with a complete administrative record because
17 it has not searched for, nor provided, all the documents that were before the
18 agency when the permitting decision was made.

19 **D. The Administrative Record Should Include CAC’s August 4, 2022,**
20 **Appeal**

21 The “whole of the record” includes CAC’s August 4, 2022, permit appeal⁵³
22 submitted to this Board. CAC timely submitted that document to the Board prior
23 to adoption of the current appeals process that required “any appeal filed with the

24 ⁵⁰ Email from C. Kane, DTSC, to B. Chan, Earthjustice (Jun. 7, 2023) (attached as Exhibit
25 R).

26 ⁵¹ 22 CCR § 66271.17(c).

27 ⁵² BES, PowerPoint Presentation at Hazardous Waste Permit Appeals Process Workshop at
28 12–13 (Nov. 14, 2022) (attached as Exhibit D). *See also* BES Hazardous Waste Permit
Appeals Process Workshop, YouTube at 1:16:55–1:21:10, 1:26:40–1:29:16 (Nov. 14,
2022), <https://www.youtube.com/watch?v=b5yY3nJGYo8> (transcript of 1:26:40–1:29:16
attached as Exhibit C).

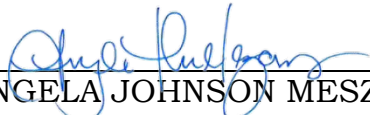
⁵³ *See* Exhibit 11 to Johnson Meszaros Decl.

1 Board before May 1, 2023 shall be deemed dismissed” unless a new notice of
2 appeal is filed before a date specified in the regulation.⁵⁴ As a result, the August
3 4, 2022, appeal document was superseded—as a document to initiate an appeal—
4 by the subsequent June 30, 2023, appeal document. Nonetheless, the previous
5 appeal document is relevant here because it is already before the Board and
6 provides relevant context to the Board as it conducts its review of Permitting’s
7 decision.

8 **CONCLUSION**

9 For all the reasons outlined above, CAC respectfully requests that the Board
10 grant its Motion to Complete the Permit Record with the documents described
11 herein.

12
13 DATED: July 28, 2023



ANGELA JOHNSON MESZAROS
BYRON CHAN
EARTHJUSTICE

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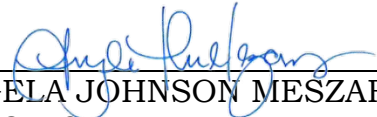
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⁵⁴ 22 CCR § 66271.72(f).

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to BES Standing Order No. 23-01(7)(e), this document contains 3849 words, excluding the caption page, tables, certificate of compliance, and attachments. The combined word count for the Motion to Complete the Permit Record and Memorandum of Points and Declaration of Angela Johnson Meszaros in support thereof is 4300 words.

DATED: July 28, 2023


ANGELA JOHNSON MESZAROS
BYRON CHAN
EARTHJUSTICE

Attorneys for Appellant CAC

**Index of Exhibits in support of
Motion to Complete the Permit Record**

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B	James N. Saul, Overly Restrictive Administrative Records and the Frustration of Judicial Review, 38 Env'tl. L. 1301 (2008)
C	Excerpt of Transcript of Board of Environmental Safety Hazardous Waste Permit Appeals Process Workshop (Nov. 14, 2022)
D	PowerPoint Presentation at Board of Environmental Safety Hazardous Waste Permit Appeals Process Workshop (Nov. 14, 2022)
E	Email from A. Johnson Meszaros, Earthjustice, to S. Sharma and G. Forest, BES (May 2, 2023)
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L	Email from A. Mayer, DTSC to G. Forest, DTSC (May 17, 2023)
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EXHIBIT A

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 124, and 125

[FRL 1453-5]

Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes consolidated permit program requirements governing the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), the National Pollutant Discharge Elimination System (NPDES) program and State Dredge or Fill ("404") programs under the Clean Water Act (CWA), and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act, for three primary purposes:

(1) To consolidate program requirements for the RCRA and UIC programs with those already established for the NPDES program.

(2) To establish requirements for State programs under the RCRA, UIC, and Section 404 programs.

(3) To consolidate permit issuance procedures for EPA-issued Prevention of Significant Deterioration permits under the Clean Air Act with those for the RCRA, UIC, and NPDES programs.

DATES: These regulations shall become effective as follows: All regulations shall become effective as to UIC permits and programs July 18, 1980, but shall not be implemented until the effective date of 40 CFR Part 146. All regulations shall become effective as to RCRA permits and programs November 19, 1980. Part 124 shall become effective as specified in § 124.21. All other provisions of the regulations shall become effective July 18, 1980. For purposes of judicial review under the Clean Water Act, these regulations will be considered issued at 1 p.m. eastern time on June 2, 1980; see 45 FR 26894, April 22, 1980. In order to assist EPA to correct typographical errors, incorrect cross-references, and similar technical errors, comments of a technical and nonsubstantive nature on the final regulations may be submitted on or before July 18, 1980. The effective

date will not be delayed by consideration of such comments.

Comments on the scope and applicability of Executive Order 11990 and Executive Order 11988 to RCRA, UIC, and NPDES permits must be submitted on or before July 18, 1980.

Comments on requirements for Class IV wells must be received by July 15, 1980.

There will be a hearing on the requirements for Class IV wells on July 8, 1980, from 9 a.m. to 5 p.m.

ADDRESSES: Comments of a technical and nonsubstantive nature, as well as the comments concerning the scope and applicability of Executive Order 11990 and Executive Order 11988, should be addressed to: Edward A. Kramer, Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460.

Comments on requirements for Class IV wells should be addressed to: Alan Levin, Director, State Program Division (WH-550), Office of Drinking Water, Environmental Protection Agency, Washington, D.C. 20460.

The Public Hearing on Class IV wells will be held at: HEW Auditorium, 330 Independence Avenue, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Edward A. Kramer, Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460, (202) 755-0750.

SUPPLEMENTARY INFORMATION:

Background

These final regulations consolidate requirements and procedures for five EPA permit programs. These regulations represent the major product of the Agency's permit consolidation initiative that began in the fall of 1978. They are based on the proposed consolidated permit regulations that were published in the *Federal Register* for comment on June 14, 1979 (44 FR 32854).

EPA program requirements and State program requirements are established for three programs:

- The Hazardous Waste Management (HWM) program under the Resource Conservation and Recovery Act (RCRA);
 - The Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA);
 - The National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA); and
- State program requirements only are established for:
- State section 404 "Dredge or Fill" programs under the CWA.

In addition, procedures for permit decisionmaking are established for the above four programs, and for

- The Prevention of Significant Deterioration (PSD) program under the Clean Air Act, where this program is operated by EPA or a delegated State agency under 40 CFR 52.21(v); these procedures do not apply to PSD permits issued by States to whom administration of the PSD program has been transferred. (See preamble to Part 124, Subpart C.)

These regulations are an important element of an Agency-wide effort to consolidate and unify procedures and requirements applicable to EPA and State-administered permit programs.

The Agency has also developed a single set of permit application forms for the programs covered by these regulations. These consolidated application forms are published elsewhere in today's *Federal Register*. They consist of a single general form to collect basic information from all applicants, followed by separate program-specific forms which collect additional information needed to issue permits under each program. The application forms in today's *Federal Register* include the general information form and the additional forms for certain water discharges under NPDES and for hazardous waste permits under RCRA.

When the draft consolidated application forms were published for public comment, they appeared along with a set of proposed NPDES regulations which were closely related to the contents of the application forms. Those accompanying regulations have now been integrated with the final NPDES regulations which appear as part of these consolidated permit regulations, and are summarized in the proper places in the preamble discussion. For a more thorough discussion and response to comments on those portions of the NPDES regulations, see the preamble to the consolidated application forms published elsewhere in today's *Federal Register*. Because the draft application forms and accompanying proposed NPDES regulations were originally published together, commented upon together, and are closely related, the detailed discussion of both forms and accompanying regulations has been retained in one place.

Many of the requirements in these regulations apply both to EPA programs and to State programs that receive EPA approval to operate in lieu of a Federal program in a particular State. These common requirements are intended to ensure that State permit programs satisfy minimum statutory and

environmental objectives, while at the same time recognizing that State laws, procedures, and management philosophies differ. EPA also seeks in these regulations to help States rationalize their own regulatory programs by removing or avoiding Federal obstacles to such efforts. These regulations allow greater coordination and cooperation in permit review and issuance between EPA and States with approved RCRA, UIC, NPDES, 404, or PSD programs in instances where a single facility or activity requires permits from both EPA and one or more State agencies.

Although nothing in these regulations would require a State to reorganize its permitting procedures, EPA encourages States to begin or continue efforts toward "one-stop" permitting or other forms of permit program consolidation.

The Agency anticipates a number of benefits to the environment, the regulated community, the general public, and its own institutional efficiency from permits consolidation:

- **Environmental Benefits:** Consolidation of permit requirements and processing procedures should result in more comprehensive management and control of wastes.
- **Regulatory Benefits:** More uniform procedures and permit requirements among EPA permit programs should result in more consistency and predictability for the regulated community, and in many instances this should reduce the costs of compliance. Consistent program requirements and a single set of application forms for EPA-issued permits should reduce paperwork and increase efficiency in processing permits.
- **Institutional Benefits:** The Agency has already experienced greater coordination, sharing of information, and resolution of inconsistencies and overlaps among the various programs during the development of these regulations. This high level of coordination and awareness is expected to continue.
- **Public Participation Benefits:** Procedures and opportunities for public participation in permit decisions and in State program approvals are more uniform and predictable under these regulations.
- **Resource Benefits:** Consolidating these permit programs should reduce the resources EPA needs to administer them over the next few years, compared with what the expanding scope of EPA permit programs would otherwise require. Consistent program requirements and use of the consolidated application forms should be particularly helpful in starting up and administering the two

new programs (RCRA hazardous waste and UIC) covered by these regulations. If States adopt similar approaches, resource benefits could also be realized at the State level.

Organization of Final Regulations

The final regulations replace 40 CFR Parts 122, 123, and 124, which were formerly used exclusively for NPDES program regulations. These Parts of the Code of Federal Regulations are being used because they already provide the skeleton for organizing permit regulations, namely:

- **PART 122—PERMIT REQUIREMENTS.**
- **PART 123—STATE PROGRAM REQUIREMENTS.**
- **PART 124—PROCEDURES FOR DECISIONMAKING.**

Parts 122, 123, and 124 have been organized into Subparts. Subpart A of each Part applies to each permit program included in that Part. Subsequent subparts set forth additional program-specific requirements for the individual programs.

Although the Agency has attempted to unify these regulations, statutory and programmatic considerations preclude complete uniformity. Thus, to review the regulations for a particular program, one must read both the general Subpart A plus any applicable program-specific subpart.

Summary of the Regulations

- **Part 122—Establishes definitions and basic permit requirements for EPA administered RCRA, UIC, and NPDES programs.** Part 122 also provides certain requirements applicable to State programs, including State 404 programs, but only to the extent Part 123 explicitly refers to Part 122 requirements. Part 122 spells out in detail who must apply for a permit; contents of the applications; what conditions must be incorporated into permits; when permits may be revised, reissued, or terminated; and other requirements.
- **Part 123—Establishes the requirements for State programs operated in lieu of EPA, after a program has received the approval of the Administrator.** In addition to the RCRA hazardous waste, UIC, and NPDES programs, Part 123 governs State section 404 programs for discharges of dredged or fill material into certain waters of the United States. After receiving the approval of the Administrator a State may issue section 404 permits, in lieu of the United States Army Corps of Engineers, in so-called "Phase II and III" waters (sometimes referred to as traditionally non-navigable waters). In addition, Part 123 contains the

procedures for EPA approval, revision, and withdrawal of a State program.

- **Part 124—Establishes the procedures to be followed in making permit decisions under the RCRA hazardous waste, UIC, PSD, and NPDES programs.** It includes procedures for public participation, for consolidated review and issuance of two or more permits to the same facility or activity, and for appealing permit decisions. Most requirements in Part 124 are only applicable where EPA is the permit-issuing authority. However, Part 123 requires States to comply with some of the Part 124 provisions, such as the basic public participation requirements of permit issuance.

Technical Requirements

Technical regulations containing requirements and criteria which apply to decisionmaking under the RCRA, UIC, NPDES, 404, and PSD programs have been developed separately from Parts 122-124. These regulations set the standards for the contents of permits issued under these programs and provide some of the technical bases for determining the adequacy of State programs and individual permit decisions.

The coverage and format of the consolidated permit regulations, and the location of the technical regulations which correspond to each program, are summarized in the following chart:

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(2) Several commenters argued against the provision in proposed § 124.18(b) for stays based on cross-effects. But because no commenter offered any alternative way to deal with the problems at which the section is aimed, the provision remains unchanged.

(3) Other commenters urged that permits (particularly permits for new facilities) should not be stayed pending Agency appeal proceedings. This comment has not been accepted for the reasons stated in the final NPDES regulations. See 44 FR 32883-32884 (June 7, 1979).

In addition, under 5 U.S.C. § 704, if the permit is not stayed, it becomes judicially reviewable immediately. This result makes little sense if an appeal within the Agency is pending, since both the court and the Agency would be reviewing the same permit simultaneously. However, in cases where an evidentiary hearing is granted on an NPDES permit (or on RCRA or UIC permit conditions which are associated with an NPDES permit), EPA, in recognition of the time it takes to conduct these hearings, has provided a mechanism (§ 124.60) by which the Presiding Officer at the hearing can authorize operations to begin before the date of final agency action if certain conditions are met. These conditions are based on those normally required for issuance of a preliminary injunction.

§ 124.17 Response to comments.

One commenter attacked the statement in the "comment" in proposed § 129.19 (now a part of the regulations) that EPA could document its response to comments by adding new material to the administrative record. The commenter argued that this would violate the standards set out in *Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375, 393-94 (D.C. Cir. 1973). EPA disagrees. That case addressed only the disclosure of data on which a proposed rule is based. Of course, there is no reason why the Agency cannot document in advance the course of action which it itself is proposing. What is involved here is a response to comments; not a proposal. The substance of those comments will not be known to EPA in advance since one of the major purposes of a comment period is to bring new material to the Agency's attention. Accordingly, it may often be impossible for the Agency to respond without making use of new material.

Many cases hold that an agency need not repropose an action if changes are made from the proposal. See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 632 n. 51

(D.C. Cir. 1973), which notes that rulemaking might never end if every change from the proposal required reproposal.

Similarly, if all new material in a response to comments required reproposal, the agency would be put to the unacceptable choice of either providing an inadequate response or embarking on the same kind of endless cycle of reproposals which the courts have already rejected.

§ 124.18 Administrative record for final permit where EPA is the permitting authority.

One commenter urged that the administrative record should be complete within 20 days after a final permit is issued, so that those who might wish to request further proceedings could make an informed decision on whether to go forward.

In response, EPA has changed this section to provide that the administrative record shall be complete on the date the permit is issued. By requiring the record to be assembled before the permit is issued, EPA has ensured that the Regional Administrator can base final decisions on the administrative record as a whole.

§ 124.19 Appeal of RCRA, UIC, and PSD permits.

(1) A number of commenters objected to the substantial showing required to justify an appeal to the Administrator. We agree with those commenters who stated that the Administrator has a broad power to review decisions under these programs. However, EPA's intent in promulgating these regulations is that (1) this power of review should be only sparingly exercised; (2) most permit conditions should be finally determined at the Regional level; and (3) review by the Administrator should be confined to cases which are important for the program as a whole, or are especially important in their own right. The proposed threshold showing is intended to further that purpose and has been retained.

(2) EPA rejects the suggestion for a 45-day time limit on *sua sponte* review by the Administrator. The 30-day time limit under this section parallels the 30-day period between the date the permit is issued and the date it becomes effective under § 124.15.

(3) One commenter suggested that the regulations explicitly require the Administrator to make findings when deciding an appeal. However, because this requirement is implicit in the establishment of a mechanism of appellate review itself, no change in the regulations is necessary.

(4) One commenter objected to PSD appeals on the grounds of delay. EPA believes that an appeal mechanism is necessary to ensure consistency in a national program and to provide central policy guidance. The best evidence is the ongoing informal appeal of PSD permits within EPA taking place without explicit regulatory provisions.

(5) Another commenter suggested that a permittee be allowed to appeal a permit on which it had not commented in order to address the possibility that the draft permit might have been acceptable to the permittee while the final permit contained unfavorable changes. This comment has been accepted and expanded to allow an appeal of the final permit by persons who failed to comment on the draft permit. The scope of such an appeal, however, is limited to whatever changes occurred between the draft and the final permit.

§ 124.20 Computation of time.

This section has been amended to include methods for computing time that conform with the Federal Rules of Civil Procedure.

Subpart B—Special Procedures Applicable to RCRA Permits (Reserved)

§ 124.31 Public notice of receipt of application and availability of summary.

EPA has deleted proposed § 124.31 from the final consolidated regulations. Although the preamble to the proposal stated that this section would ensure full public participation in the RCRA permit decision process, see 44 FR 34266. EPA has decided that this function is served equally well for all the permit programs at the general public notice stage under § 124.10 and that dual notification for RCRA applications is, therefore, unnecessary. The methods of public notice contained in § 124.10 have been specifically designed to encourage public participation in the permit decision process no matter what kind of permit is involved. EPA recognizes that RCRA permitting might be controversial and expects to conduct public hearings under § 124.12 where any interested person may submit oral or written statements and data on the RCRA issues.

Subpart C—Special Procedures Applicable to PSD Permits

A. Should PSD be Included?

Many commenters, beside generally opposing the notion of consolidation, particularly criticized the inclusion of PSD in the consolidation effort. These commenters argued that as PSD is a

EXHIBIT B

38 Env'tl. L. 1301

Environmental Law

Fall 2008

Comments

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OVERLY RESTRICTIVE ADMINISTRATIVE RECORDS AND THE FRUSTRATION OF JUDICIAL REVIEW

The seminal United States Supreme Court case of *Citizens to Preserve Overton Park v. Volpe* established the “record rule,” stating that courts reviewing the decisions of federal agencies under the Administrative Procedure Act must base their review solely on the record of the decision prepared by the agency unless one of a narrow class of exceptions applies. Because agency decisions stand or fall based on the content of the administrative record, environmental plaintiffs must assure themselves and the court that the record contains the full range of information that was available to the agency decision maker, and often the first real dispute in litigation with environmental agencies involves the exclusion of documents from the record that undermine the agency decision presented to the court.

Federal environmental agencies have recently attempted to limit the contents of the administrative record in order to shield from the probing eyes of courts the evidence of interagency dissent and controversy. They have done this primarily in three ways: first, they have issued guidance documents that instruct agency staff to strictly limit the contents of the record as it is compiled over the course of the agency decision-making process; second, they have argued in litigation that the agency has unilateral authority to define the contours of the record; and third, they have asserted the deliberative process privilege--without legal justification or the use of a privilege log--over records that demonstrate conflicting opinions among agency staff.

***1302** A growing number of courts have recognized that these efforts prevent reviewing courts from clearly understanding the process and nature of the agency decision at issue, thereby frustrating effective judicial review and undermining the objectives of the Administrative Procedure Act. With increasing frequency courts are ordering agencies to complete administrative records from which crucial documents have been incorrectly excluded and to justify their assertions of deliberative process privilege with the production of a privilege log identifying excluded documents. By doing so these courts strike an appropriate balance between the agency's need to provide for frank and open dialogue among staff and the public's interest in agency transparency and an opportunity for meaningful judicial review.

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I. Introduction

The record rule, as established by the United States Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe* (Overton Park),¹ serves a valuable function. It ensures that courts do not engage in free-roaming de novo review of agency decisions, instead leaving to the expert agencies the difficult task of scientific and policy assessment for which they were created in the first place. But *1303 in an era of closed government,² the record rule is increasingly abused by agencies seeking to protect their decisions from the probing eyes of the court. Federal agencies, and specifically environmental agencies, abuse the record rule in two alarming ways.

First, they blur the distinction between a complete administrative record, which the Supreme Court requires for effective judicial review, and a supplemented administrative record, which is appropriate only in certain circumstances when the complete record is insufficient.³ Courts also have difficulty discerning the difference between the two, and judicial review is hampered as a result.⁴ Because a reviewing court must ensure it has the full and complete record prior to engaging in review of an agency action,⁵ the burden that a plaintiff must meet before the court allows completion of the record should be significantly lower than the burden a plaintiff must meet before the court allows supplementation of the record with additional evidence.

Second, several federal agencies have begun to unilaterally withhold allegedly deliberative documents from the record without following the minimal procedures required to assert the deliberative process privilege.⁶ This makes it exceedingly difficult for plaintiffs to challenge an agency's claim of privilege, and leaves a court to guess whether it truly has before it the full and complete record. Procedures established under the Freedom of Information Act⁷ make clear that an agency seeking to prevent disclosure of allegedly deliberative documents must come forward with an assertion of privilege that is rationally justified, so that other parties have the opportunity to challenge the claim of privilege, and so the reviewing court may satisfy itself that the privilege is properly applied and in the public interest. A few courts have begun to recognize the necessity of these simple procedures,⁸ and they should be widely incorporated in the context of the administrative record.

Part II of this Comment gives a brief overview of judicial review of agency actions under the Administrative Procedure Act (APA),⁹ and describes the evolution of the so-called “record rule.” Part III addresses the judicial and administrative framework for the compilation and review of administrative records. Part IV details the ways agencies have begun to abuse the record rule, focusing on the difference between completing and supplementing the record, and the misapplication of the deliberative process privilege. Some contemporary judicial reactions to these attempts are examined, and I demonstrate why certain courts have provided a model by which these abuses can be reversed.

*1304 II. Judicial Review of Agency Decision Making

A. Agency Actions Under the Administrative Procedure Act

Federal agencies are subject to the required procedures of the APA.¹⁰ The APA generally contemplates two different types of agency actions, adjudications¹¹ and rulemakings,¹² and two different levels of procedural formality, formal and informal.¹³ The resulting four categories of agency actions are far from distinct, and it can often be a challenge distinguishing between them.¹⁴ For purposes of this Comment, I will address solely informal rulemakings, as that is by far the most prevalent type of agency action in the field of environmental regulation.¹⁵

The scope of judicial review of informal agency actions is contained in the APA, and is usually called “arbitrary and capricious” review.¹⁶ Just how far a reviewing court can go in examining an agency decision is a subject of much debate, and beyond the scope of this Comment. Suffice it to say that there exists a spectrum of scholarly opinion, ranging from full de novo review at one end to maximum deference to the agency at the other.¹⁷ Typically, when an agency decision is found to be arbitrary or capricious, it is remanded to the agency for further consideration or explanation.¹⁸

B. The “Record Rule” as Explained by the Supreme Court

Generally speaking, judicial review of informal agency actions is confined to a review of the record that was before the agency at the time it made its decision.¹⁹ This *1305 basic precept of administrative law, often called the “record rule,”²⁰ has only a marginal basis in the language of the APA itself, at least as applied to informal agency actions. Section 706 of the APA, which prescribes the scope of review of agency actions, explains that, in making its determinations, a reviewing court “shall review the whole record or those parts of it cited by a party.”²¹ But the statute gives no further guidance on what comprises the record, or how to determine if the record is complete.

It is important at this juncture to contrast the record compiled as part of a formal agency proceeding (be it adjudication or rulemaking) from the record on review of an informal agency rulemaking--the latter of which is the subject of this Comment. In formal proceedings, for which hearings are required,²² the agency compiles an evidentiary record not unlike those created by trial courts. Thus, a court's review of an agency decision is similar to an appellate court's review of a trial court's decision.²³ The court examines the evidence presented to the agency and the legal arguments made by the parties as included in the record below.²⁴ This review of the record in formal agency proceedings is wholly consistent with our system of adversary jurisprudence; without it, the entire fact-finding process could be made a nullity, frustrating effective judicial review.²⁵

The APA offers a much less precise definition of the record required for an informal rulemaking.²⁶ This is possibly because at the time of the APA's enactment in 1946, it was widely accepted that decisions falling outside of the “formal” realm addressed mere “generalized public interest[s]” of which the agency was the “sole protector,” and to which a private citizen would not likely have standing to address in a court.²⁷ Thus, there was rarely a need for judicial review of informal agency actions. (While the APA does grant a “right of review” to certain parties,²⁸ the existence of such a right does not ensure that judicial review will be available in all instances.)²⁹ However, over time, standing doctrine evolved so that private citizens were permitted to challenge informal agency rulemakings;³⁰ the Supreme Court's *1306 decision in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*³¹ made clear that a person whose alleged injury arguably falls within the zone of interests protected by the statute at issue would have standing to sue the agency.³²

What, then, is the source and function of the record rule as applied to informal agency actions? It comes not from the text of the APA, but rather from a line of Supreme Court cases, beginning with the seminal and enigmatic *Overton Park*.³³ In that case, the Court drew upon the APA's requirements for formal proceedings to require that judicial review of an informal adjudication be based solely upon an administrative record.³⁴ The Court stated that judicial review of the Secretary of Transportation's decision to fund the construction of a highway through a public park must be “based on the full administrative record that was before the Secretary at the time he made his decision.”³⁵ The Court rejected the plaintiffs' contention that de novo review of the Secretary's actions was appropriate, instead choosing to adopt a more limited basis for review.³⁶ The Court went on to state its perplexing position on the standard of review: “[T]he generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption

is not to shield his action from a thorough, probing, in-depth review.”³⁷ Implicitly, at least, the Court recognized that without an administrative record, there would be no basis upon which to measure the legality of the Secretary's decision, no subject upon which the court could turn its “probing, in-depth review.” Indeed, as the Court explains its understanding of arbitrary and capricious review under section 706(2)(A)-- “[t]o make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a *1307 clear error of judgment”³⁸--it is hard to imagine such review without at least a complete administrative record, and perhaps additional evidence not contained in the record.³⁹

The Court in *Overton Park* explicitly recognized--but did not apply--two possible exceptions to the record rule. The first exception applies only for adjudications: “de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate.”⁴⁰ This exception is found in section 706(2)(F) of the APA,⁴¹ but the APA gives no further clarification as to when a “trial de novo” might be applicable. The second exception is not grounded in the text of the APA, and applies in an enforcement action: “there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.”⁴² Furthermore, the Court recognized that in some instances it might be necessary to go even further beyond the record, as when the record does not “disclose the factors that were considered or the [agency's] construction of the evidence.”⁴³ In such presumably rare instances, “[t]he court may require the administrative officials who participated in the decision to give testimony explaining their action. . . . And where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made.”⁴⁴

In *Camp v. Pitts*,⁴⁵ the Court again rejected the theory that arbitrary and capricious review involved any sort of de novo judicial review of the agency's decision.⁴⁶ Instead, the Court explained, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”⁴⁷ Therefore, if a reviewing court finds the administrative record incomplete or insufficient for effective judicial review, “the remedy [is] not to hold a de novo hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.”⁴⁸

Any doubts as to the role of the administrative record in review of informal agency actions were laid to rest by *Florida Power & Light Co. v. Lorion*.⁴⁹ There, the Supreme Court emphatically stated that judicial review of informal agency *1308 actions was to be based upon an administrative record, regardless of whether there had been a hearing before the agency.⁵⁰ As the Court explained, “a formal hearing before the agency is in no way necessary to the compilation of an agency record. . . . [A]gencies typically compile records in the course of informal agency action. The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred.”⁵¹

C. Recognized Exceptions to the Record Rule

Despite the general rule that judicial review of informal agency actions is to be based solely on the basis of the administrative record that was before the decision maker at the time the decision was made, lower courts have created several exceptions that allow the introduction of extrarecord information.⁵² While there is disagreement over the basis for several of these exceptions,⁵³ they have been accepted by a number of circuits and certainly have considerable effect today.⁵⁴

1. Bad Faith on the Part of the Agency

The first exception to the record rule may apply where there is a showing of bad faith on the part of the agency. It comes directly from the language of *Overton Park* itself, where the Supreme Court explained that a reviewing court “may require the administrative officials who participated in the decision to give testimony explaining their action,” but that “there must be a strong showing of bad faith or improper behavior before such inquiry may be made.”⁵⁵ This exception is logical because once there is a showing of bad faith by the agency, the reviewing court has lost its reason to trust the agency. There is no reason, then, to presume that the record is complete, and justice is served only by going beyond the record to ascertain the true range of information before the agency.

Although the “strong showing of bad faith or improper behavior” standard is often difficult to meet,⁵⁶ this exception has nonetheless been recognized by every ***1309** circuit,⁵⁷ at least in circumstances where the plaintiffs have sought to use discovery to shed light on the mental processes of the agency decision maker.⁵⁸ As the Ninth Circuit Court of Appeals has explained, “where the so-called ‘record’ looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.”⁵⁹ Based upon such a showing of bad faith, the court may allow extrarecord evidence to be presented.

2. A “Bare” Record that Frustrates Effective Judicial Review

The second major exception to the record rule also has its basis in the language of *Overton Park*. There, the Supreme Court remanded the case to the district court for “plenary review” of the Transportation Secretary’s decision to fund the Memphis highway, based upon the administrative record.⁶⁰ However, the Court recognized that since the agency’s “bare record may not disclose the factors that were considered or the Secretary’s construction of the evidence[,]” it might be necessary for the district court to request further explanation on the part of the agency.⁶¹ The Court did not explain exactly how the district court was to go about this additional inquiry, instead leaving it to the lower court to determine exactly what information was still needed, and how it would be best entered into the record.⁶²

The “bare record” exception applies most frequently in two related circumstances. First, it applies when additional information may be necessary to determine whether the agency considered all of the relevant factors. As one scholar has recognized, this determination raises a clear contradiction with the record rule, for how can a reviewing court determine if the agency failed to consider any “relevant factors” by examining a record that shows only those factors that were considered?⁶³ The Supreme Court has mandated that such an examination be made, for its very definition of an arbitrary or capricious agency action is one that was not ***1310** “based on a consideration of the relevant factors.”⁶⁴ The Ninth Circuit recognized this difficulty in *Asarco v. United States Environmental Protection Agency*,⁶⁵ where it explained that a district court engaged in review of an agency action may properly allow expert testimony in some limited circumstances:

It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a “substantial inquiry” if it is required to take the agency’s word that it considered all relevant matters.⁶⁶

The second, yet related, subcategory of the “bare record” exception to the record rule applies where the administrative record is lacking sufficient or adequate information necessary to facilitate effective judicial review. As the Supreme Court explained in *Camp v. Pitts*, there may be instances where there is “such failure to explain administrative action as to frustrate judicial review.”⁶⁷ In such cases, the court may turn to extrarecord information. This second exception to the record rule, which would allow extrarecord information if necessary to fully explain the agency’s decision, has been recognized by many circuits.⁶⁸

3. Agency Considered Materials that it Failed to Include in the Record

The third exception to the record rule states that where the agency has considered or relied on documents, yet has failed to include such documents in its administrative record, the court should nonetheless consider those documents during judicial review.⁶⁹ This exception often arises in instances where the agency contends that it did not “rely upon” certain documents in making its ultimate decision. For instance, in *Ad Hoc Metals Coalition v. Whitman*,⁷⁰ the district court permitted the addition of certain documents to the record where those documents were clearly available to the agency when it made its decision, even though the agency claimed it did not rely on those documents.⁷¹ The agency admitted that it had reviewed the documents in question and had even addressed the concerns raised by the documents internally; the court, however, rejected the agency’s attempt to distinguish between the phrases “relied upon” and “considered,” noting that the prevalent case law had applied the two phrases interchangeably.⁷²

***1311** This exception is also consistent with *Overton Park*, because of the Supreme Court's admonition that judicial review is to be based upon the full record that was before the decision maker when the decision was made.⁷³ Courts have consistently rejected attempts by agencies to look only to that record compiled and submitted by the agency, to the exclusion of other documents that were clearly considered. As the D.C. Circuit Court of Appeals has explained, “[t]o review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of ‘the whole record.’”⁷⁴ This important exception has been widely accepted in most circuits.⁷⁵

4. Additional Information Is Necessary to Explain Complex Issues

The fourth exception to the record rule permits a court to consider documents not in the administrative record if those documents are necessary for the court to understand complex or technical issues raised in the litigation.⁷⁶ For instance, in *Ass'n of Pacific Fisheries v. United States Environmental Protection Agency*,⁷⁷ the Ninth Circuit Court of Appeals considered several postdecisional studies offered by the petitioners in reviewing an informal agency rulemaking, considering them to be “a clarification or an explanation of the original information before the Agency.”⁷⁸ This fourth exception to the record rule has been recognized in at least two circuits.⁷⁹

III. Compiling an Administrative Record: The Legal Framework

A. The Agency's Presumption of Regularity

It is widely recognized that agencies, in preparing and submitting administrative records that form the basis for judicial review, enjoy a presumption of regularity.⁸⁰ Like similar presumptions of regularity in other contexts of ***1312** administrative activity, the presumption serves important policy objectives. Not only does it respect traditional notions of separation of powers by limiting unnecessary or inappropriate judicial interference with agency decision making, it also comports with the degree of judicial deference granted to agencies in other contexts in which they operate within their spheres of expertise.⁸¹ The presumption of regularity exists for another, more practical reason as well: No party can better identify the universe of relevant documents considered by an agency in a given decision than the agency itself.⁸²

The presumption is rebuttable, however. While courts are willing to extend deference to agencies initially, once there has been a showing of irregularity in the agency's record as submitted, the reviewing court has no reason to take the agency's word that the record is complete, or that the agency will necessarily complete the record on its own accord.⁸³ There are a variety of reasons for which a court might conclude that the presumption has been lost.⁸⁴ For instance, a showing by a party that the agency excluded documents that were certainly considered by the agency would suffice in most cases, especially if those documents are adverse to the agency's ultimate decision.⁸⁵ Additionally, an agency's piecemeal compilation of the record ***1313** (i.e., submission of an initial record followed by a series of “supplemental” records) strongly suggests that the record is incomplete and that the presumption of regularity should be foregone.⁸⁶ Because it is essential that a reviewing court have the full and complete record before it, a minimal showing of irregularity is all that should be required before the presumption of regularity is rebutted.

B. What Constitutes the “Whole Record”?

The scope of the administrative record is often a highly disputed issue in environmental litigation. Despite *Overton Park*'s directive that review be based upon the “whole record,” which includes all the material “considered” by the agency decision maker,⁸⁷ the Supreme Court has never precisely defined what that phrase means. Lower courts have attempted to define some criteria, and a few trends can be discerned from the case law. Most importantly, courts recognize that, given the complexities of the modern regulatory structure, the idea of a sole decision maker acting on the basis of a factual record laid out before her on the desk is clearly a myth.⁸⁸ Some of the common formulations of the “whole record” are discussed below.

Most courts recognize that documents considered either directly or indirectly by the agency are part of the record.⁸⁹ Clearly documents considered directly by the agency belong in the record; they form the central core of documents that underlie the

final decision. Documents considered indirectly, however, remain a more elusive category. The administrative record should not only demonstrate the basis for the final decision; most courts agree that it should also include relevant documents which run counter to the agency's final decision if they were before the agency when the decision was made.⁹⁰

Some courts have concluded that documents available to the agency decisionmaker are properly included in the record.⁹¹ This category is even broader than the class of documents indirectly considered by the agency, because the decision maker need not have actually examined or considered the documents at all. The courts that would include this class of documents in the record seem to recognize that many decisions in modern agencies are made collectively, even though a single administrator or secretary might sign the ultimate decision memorandum.⁹² By including those documents available to (but, by implication, not actually considered by) the decision maker, the court may actually be suggesting that the agency should nonetheless have considered those documents because they were relevant to his decision.

IV. Administrative Records in Modern Agency Practice: Use and Abuse

In several startling ways, environmental agencies are taking advantage of the confusing legal standards for the compilation of an administrative record in order to restrict the scope of the record on review and prevent public access to information. First, agencies frequently muddle the difference between “completing” and “supplementing” the record submitted by the agency.⁹³ This impacts both the burden on the plaintiffs, who must demonstrate why any additional information is necessary, and the willingness of the reviewing court to allow that additional information to be admitted. Second, certain environmental agencies have taken an overly restrictive view on the scope of the record, seeking to unilaterally shield allegedly deliberative documents from judicial review in a manner that is inconsistent with the “deliberative process privilege” and prevailing case law.⁹⁴ I begin this section by setting the stage with an analysis of various agencies' internal guidance on compiling an administrative record; I then discuss each of the two abuses of the record rule in turn, offering solutions that strike an appropriate balance between agency autonomy and the public's interest in access to information and effective judicial review of agency decisions.

A. Agency Guidance on Administrative Records

Employees of federal agencies typically use informal guidance documents issued by the agency as a framework for compiling an administrative record. In this section, I will examine the guidelines used by three agencies: the United States Department of Justice (DOJ), Environment and Natural Resources Division; National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries); and the United States Fish and Wildlife Service (FWS). Each of these guidance documents are informal statements of policy, and are unlikely binding in and of themselves.⁹⁵

1. DOJ Guidelines

As the legal office which must defend the decisions of FWS and NOAA Fisheries (at least as related to environment and natural resource protection) in court,⁹⁶ the position of the Department of Justice's Environment and Natural Resources Division (ENRD) on the proper contents of an administrative record would seem likely to have particular relevance to those agencies. It is therefore a logical place to begin our review of agency guidelines on administrative records. In 1999, ENRD issued a guidance document for the purpose of instructing federal agencies on the scope of administrative records as needed to prepare for judicial review of agency actions (ENRD Guidance).⁹⁷

Recognizing that ENRD lawyers are often placed in the position of defending an agency that has failed to compile a complete administrative record, the ENRD Guidance initially counsels that it is “critical for the agency to take great care in compiling a complete administrative record. If the agency fails to compile the whole administrative record, it may significantly impact our ability to defend and the court's ability to review a challenged agency decision.”⁹⁸ This warning is, of course, entirely consistent with the Supreme Court's statements in *Overton Park*.

Next, the ENRD Guidance properly recognizes that a complete administrative record is one that is focused upon the process of rulemaking, not just on the final decision settled upon by the agency.⁹⁹ This is critical, as a reviewing court must ultimately determine not just that the end decision can be rationally supported by some evidence put forth by the agency, but also that the

agency's decision as a whole is not arbitrary or capricious.¹⁰⁰ To this end, the ENRD Guidance suggests that the following classes of documents should be placed in the administrative record:

- Include documents and materials whether they support or do not support the final agency decision.
- Include documents and materials which were before or available to the decision-making office at the time the decision was made.
- Include documents and materials that were considered by or relied upon by the agency.
- Include documents and materials that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final agency decision-maker.
- Include privileged and non-privileged documents and materials.¹⁰¹

These types of documents, as ENRD recognizes, will give the reviewing court the ability to assess the agency's decision-making process fully.

***1316** The ENRD Guidance also discusses the kinds of information that should be included in the administrative record:

- Include all documents and materials prepared, reviewed, or received by agency personnel and used or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials.
- Include policies, guidelines, directives, and manuals.
- Include communications the agency received from other agencies and from the public.
- Include documents and materials that contain information that support or oppose the challenged agency decision.
- Include draft documents that were circulated for comment either outside the agency or outside the author's immediate office, if changes in these documents reflect significant input into the decision-making process.

- Include minutes from meetings and memorializations of telephone conversations.¹⁰²

As the guidance makes clear, such information may be contained not only in written form, but also in “other means of communication or ways of storing or presenting information, including e-mail, . . . graphs, charts and handwritten notes.”¹⁰³

The ENRD Guidance indicates that only two types of documents should be routinely excluded from the administrative record, even if they may be pertinent to the final decision. First, the guidance states that “personal notes” are not properly part of the administrative record.¹⁰⁴ The ENRD explains that personal notes are notes taken by an individual at a meeting, or journal entries made by an individual.¹⁰⁵ Such personal notes are part of the administrative record, however, if they are included in an agency file.¹⁰⁶ Second, the ENRD Guidance explains that “working drafts of documents” are generally not part of the administrative record.¹⁰⁷ The guidance goes on to explain that draft documents that were either circulated among other agencies, or circulated outside the author's office, are not working drafts subject to exclusion if the changes made to those drafts reflect “significant input into the decision-making process.”¹⁰⁸ Perhaps recognizing the vagueness of this standard, ENRD suggests that such drafts be flagged for further advice from the DOJ attorney assigned to the case.¹⁰⁹

Finally, the ENRD Guidance gives specific advice on dealing with privileged documents. It asserts that, generally, “the administrative record includes privileged documents and materials and documents and materials that contain protected *1317 information.”¹¹⁰ It further explains that such privileged materials will be redacted or removed only after the record is compiled.¹¹¹ As to those documents for which a privilege is asserted, the ENRD Guidance explains that the index of the administrative record must identify all such documents, reflect their status as withheld documents, and state the basis upon which they are withheld.¹¹²

2. Fish and Wildlife Service Guidelines

FWS issued its own informal guidance statement on compiling an administrative record in 2000 (FWS Guidance).¹¹³ The original FWS Guidance made explicit reference to the ENRD Guidance, incorporating it by reference;¹¹⁴ there are, however, some interesting differences between the two. First, the FWS Guidance states that the record should include “[d]ocuments that relate to both the substance and procedure of making the decision.”¹¹⁵ This serves to emphasize that documents reflecting the internal process by which the agency reached its ultimate decision are part of the record; such documents may include, for instance, the form of debates among agency scientists, as well as the movement of information and recommendations up the chain of command. Second, the FWS Guidance expands somewhat on the ENRD Guidance's statement that documents that do not support the final decision are part of the record. The FWS Guidance states that the record must include “[a]ll pertinent documents regardless of whether they favor the decision that was finally made, favor alternatives other than the final decision, or express criticism of the final decision.”¹¹⁶ Third, the FWS Guidance explains that drafts “where hand-written notes or changes from one version to the next reflect the evolving process” belong in the record.¹¹⁷ This is perhaps a more lenient standard than that used by ENRD, which requires that a draft “reflect significant input into the decision-making process,”¹¹⁸ because the evolution of the decision-making process may be slight from one draft to the next. Overall, the FWS Guidance Document is consistent with, and perhaps more inclusive than, the ENRD Guidance Document.

3. NOAA Fisheries Guidelines

In 2005, NOAA Fisheries issued its own guidance document pertaining to the compilation of administrative record (NOAA Fisheries Guidance).¹¹⁹ It is far longer *1318 and more detailed than either the ENRD or the FWS Guidance documents, weighing in at almost sixteen pages. The NOAA Fisheries Guidance was also based upon the DOJ Guidance, as well as judicial decisions relating to the content of administrative records.¹²⁰

The NOAA Fisheries Guidance is strikingly different from that of ENRD or FWS in several respects, and represents a troubling departure from what ENRD advises, and what APA jurisprudence requires. The NOAA Fisheries Guidance begins by describing two “threshold principles” which it says should be used in the evaluation of agency documents for possible inclusion in an administrative record.¹²¹ This first principle is “relevance,” in that only those documents that are logically connected to the agency decision at issue should be part of the administrative record.¹²² The second principle is “significance,” or those documents which “bear directly on the substantive issues examined by the agency while undertaking its decision-making process relating to the final action.”¹²³ While the relevance principle makes perfect sense, the significance principle is quite disturbing; it is clearly designed to serve as a means to whittle down the administrative record on grounds that are, at best, legally dubious. For instance, the NOAA Fisheries Guidance explains that “[i]f a document contains information and deliberations relied on by the decision-maker (or incorporated by reference in documents relied on by the decision-maker), then the document is significant.”¹²⁴ This is clearly inconsistent with the ENRD Guidance, which states that documents belong in the administrative record “even though the final decision-maker did not actually review or know about the documents and materials,”¹²⁵ and “even if they were not specifically considered by the final agency decision-maker.”¹²⁶

As part of its discussion about the significance principle, the NOAA Fisheries Guidance takes a much more restrictive stance on e-mail correspondence than does the ENRD Guidance. NOAA explains that informal e-mails, such as “one employee making a comment to other employees about some aspect of a pending decision[,]” should be excluded from the administrative record because they are “rarely, if ever, transmitted to the decision-maker.”¹²⁷ By contrast, the ENRD Guidance explicitly recognizes that documents to be included in the administrative record are not limited to paper documents, but “should include other means of communication . . . including e-mail.”¹²⁸ Again, the NOAA Fisheries Guidance seems designed to limit the release of, or access to, documents which clearly pertain to the decision-making process, especially in an electronic age where e-mail use is a common mode of communication at the workplace.¹²⁹

*1319 Next, the NOAA Fisheries Guidance takes a more restrictive position on “working drafts” than does the ENRD Guidance. While the ENRD Guidance states that draft documents which were circulated outside the author's office and which reflect “significant input into the decision-making process” should be included in the administrative record,¹³⁰ the NOAA Fisheries Guidance would exclude all drafts circulated within the agency (presumably inside or outside the author's office).¹³¹ NOAA Fisheries further explains that any unique information contained in a working draft should be summarized in the final decision memorandum and placed in the administrative record “in lieu of the working drafts themselves.”¹³² Thus, the ENRD Guidance would include those working drafts that expose the evolution of the decision, whereas the NOAA Fisheries Guidance seeks to restrict inclusion of drafts containing unique information, or showing changes from one draft to the next.¹³³

Finally, the NOAA Fisheries Guidance would automatically exclude documents that reflect the agency's “mental processes - the healthy internal discussions reflecting staff viewpoints.”¹³⁴ The guidance contends that such information is irrelevant to a court's analysis in determining the legality of the agency's decision.¹³⁵ While it is true that federal agencies in some circumstances benefit from a “deliberative process privilege,”¹³⁶ shielding certain internal documents from release to the public, the ENRD Guidance explains that the administrative record should actually include such privileged documents, which may be removed or redacted after the record is compiled and indexed.¹³⁷

Thus, a comparison between the informal guidance documents used by the three agencies indicates that the FWS Guidance closely mirrors the guidelines issued by ENRD, and in fact may even be more inclusive overall. The NOAA Fisheries Guidance, however, is flatly inconsistent with the ENRD guidelines in a number of important respects, most notably those provisions dealing with documents available to but not relied upon by the decision maker: e-mails, working drafts, and deliberative documents.¹³⁸

B. “Supplementing” vs. “Completing” the Administrative Record

Given the dynamic between the record rule and the exceptions to it, there is an important distinction to be made between “supplementation” and “completion” of the *1320 administrative record, though it is one that is seldom recognized by courts or by agencies. Supplementation of the administrative record implies either: 1) the addition of newly created evidence, such as

through the collection of direct testimony from agency decision makers, or 2) the addition of documents or other information that was clearly not before the agency when the decision was made, such as postdecisional studies or public comments.¹³⁹ Completion of the record, by contrast, implies the addition of only those relevant documents that were actually available to the agency decision maker at the time the decision was made--and are therefore properly part of the record--but which were excluded from the version of the record presented to the court for review.¹⁴⁰ This distinction is critical for several reasons.

First, there are different burdens involved. While the agency enjoys a presumption of regularity when submitting a record to the court,¹⁴¹ once that presumption is rebutted the burden shifts to the agency to demonstrate to the reviewing court that the record on review is complete.¹⁴² By contrast, the burden is on the party challenging the agency action to demonstrate that the record is in need of supplementation, through the collection of new evidence or otherwise.¹⁴³ This stems from a principle previously discussed: that review of agency actions should be based on "the whole record,"¹⁴⁴ meaning the full record that was before the agency decision maker at the time the decision was made,¹⁴⁵ nothing more and nothing less.¹⁴⁶ A party challenging an agency's administrative record must still overcome the presumption of regularity in the administrative record,¹⁴⁷ but once it becomes evident that the court does not have before it the "whole record," the court is likely to order that the record be completed by the agency.

A second, but related, reason is that courts require a showing that one of the exceptions to the record rule applies before allowing supplementation of the record with additional evidence or information.¹⁴⁸ For instance, a party seeking to obtain discovery from an agency will likely have to make a substantial showing that the agency has acted in bad faith.¹⁴⁹ Thus, parties seeking to delve beyond the complete record through supplementation must not only overcome the presumption of regularity, but must also demonstrate that one of the recognized exceptions to the record rule applies. No such showing is typically required when plaintiffs merely seek to complete the record with documents erroneously omitted by the agency.¹⁵⁰ Courts themselves, to engage in appropriate review, should make all necessary efforts to ensure that they have a full and complete record.¹⁵¹ Anything less runs the risk of unfairly prejudicing the plaintiff challenging the agency action, who typically faces an uphill battle in gaining access to information withheld by the agency.¹⁵²

Thus, the second exception to the record rule, which allows the consideration of documents upon which the agency relied yet were excluded from the administrative record presented to the court,¹⁵³ actually refers not to supplementation of the record, but to completion of the record. As one commentator has noted, it is contradictory to call this an "exception" to the record rule, because when a court "allows augmentation of the record submitted by an agency to include material actually considered, but not initially presented, to the reviewing court by the agency, it is attempting to ensure review of the record in the Overton Park sense."¹⁵⁴ Thus the distinction between completion and supplementation becomes critical. To take into account the need for the reviewing court to examine the full record, as well as the agency's interest in protecting its inner workings from public scrutiny, a balance should be struck precisely at a "complete" record.¹⁵⁵

If there is anything less than a complete record, then the plaintiff should be able to seek completion from the agency with a minimal showing that relevant documents may be missing. Plaintiffs seeking to truly "supplement" the record with additional information, however, should still be required to make a substantial showing that such additional information is needed for effective judicial review. By ***1322** framing efforts by plaintiffs to secure a "complete" administrative record as inappropriate attempts to "supplement" the record, environmental agencies may take advantage of the confusion between the two in order to place a higher burden than necessary on the plaintiffs and limit the selection of documents actually reviewed by a court.

A handful of courts have correctly recognized the difference between completion and supplementation. For instance, in *Miami Nation of Indians of Indiana v. Babbitt*,¹⁵⁶ the plaintiffs sought both the completion of the record (with those documents considered by the agency, but withheld from the record) and the supplementation of the record (through a limited evidentiary hearing and the inclusion of additional extrarecord documents needed for adequate judicial review).¹⁵⁷ The court recognized this difference. First, the court granted the plaintiffs' motion to complete the administrative record, recognizing that, as to those documents considered but excluded by the agency, "[the plaintiffs] do not seek supplementation of the administrative record, but rather they seek to complete the current record to include materials that should have been there from the start."¹⁵⁸ The court then noted that "the [plaintiffs also] seek to supplement the record because 'even the complete administrative record will

not be sufficient to allow appropriate review” of the agency decision.¹⁵⁹ Ultimately the court denied the plaintiffs' motion to supplement the record without prejudice, pending resolution of the court's order directing the agency to complete the record.¹⁶⁰

The court in another recent case, *Pacific Shores Subdivision California Water District v. United States Army Corps of Engineers (Pacific Shores)*,¹⁶¹ went even further, taking great effort to explain the difference between “adding to the volume of the administrative record with documents the agency considered” and “viewing evidence outside of or in addition to the administrative record that was not necessarily considered by the agency.”¹⁶² As to the former--what I call “completing” the record--the court would require that the plaintiff rebut the presumption of regularity and make some showing that the documents were before the agency decision maker when the decision was made.¹⁶³ And as to the latter--what I call “supplementing” the record--the court would also require the additional showing that one of the exceptions to the record rule applied under the circumstances,¹⁶⁴ thus raising the hurdle placed before the plaintiffs significantly. While the court in *Pacific Shores* found that the plaintiffs had failed to rebut the presumption of regularity,¹⁶⁵ it did take the important step of recognizing and *1323 explaining the difference between the two actions. A variety of other recent district court decisions also discuss the difference between completion and supplementation, indicating that courts are beginning to recognize the difference and thus to apply the appropriate standard.¹⁶⁶

C. Deliberative Documents in the Record

In addition to a broad failure to recognize or comprehend the difference between “completion” and “supplementation” of the record (be it purposeful or accidental), environmental agencies have also taken great pains recently to attempt to unilaterally withhold allegedly deliberative documents from their records. Specifically, agencies are increasingly withholding such documents from the record entirely, without affirmatively asserting a privilege, even though such documents were almost certainly before the agency decision maker when the decision was made. As discussed below, this practice distorts the scope of the admittedly valid deliberative process privilege, and is inconsistent with agency guidance and prevailing case law. Recently, however, a few courts have taken a firm stance against such abuse and, in doing so, provide other courts and plaintiffs with a suitable model for seeking an appropriate balance between the disclosure of relevant information and the protection of sensitive material.

1. The Deliberative Process Privilege

The deliberative process privilege is an important tool that allows Executive Branch agencies to withhold from disclosure those documents that might unduly expose the deliberative interactions of agency officials, the goal being “to protect free discussion of prospective operations and policy.”¹⁶⁷ The privilege has evolved *1324 significantly in the context of Exemption 5 under the Freedom of Information Act (FOIA),¹⁶⁸ which provides federal agencies grounds to withhold from release those “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”¹⁶⁹ The privilege, however, pre-dates both the APA and FOIA¹⁷⁰ and has been claimed as an essential component of efficient administrative function.¹⁷¹

Courts over the years have very clearly defined how the deliberative process privilege functions. It is clear that the agency must conform to certain procedural requirements in its assertion of the privilege;¹⁷² the privilege is not automatic.¹⁷³ Generally, three steps are required. First, an agency official must affirmatively assert and justify the privilege over a set of documents, typically accompanied by a privilege log that clearly identifies each document withheld.¹⁷⁴ The agency has the burden of establishing that the privilege applies in any given circumstance,¹⁷⁵ and it can meet this burden by offering “oral testimony or affidavits that are ‘detailed enough for the district court to make a de novo assessment of the government's claim of exemption.’”¹⁷⁶ It is logical to place this initial burden on the government because plaintiffs are at a “distinct disadvantage” when it comes to defending claims of privilege,¹⁷⁷ especially when they have no initial access to the withheld documents.

Second, the assertion of privilege is treated like any claim or defense raised by a party in litigation, and it must be subjected to competing arguments from both *1325 sides.¹⁷⁸ Most importantly, the party seeking admission of the documents must be given opportunity to challenge the agency's claim of privilege.¹⁷⁹

Third, the reviewing court must determine, based on the arguments put forth by the agency as well as the party seeking disclosure, whether the privilege applies and, if it does apply, whether it should nonetheless be overcome.¹⁸⁰ Whether the privilege applies in the first instance is a de novo judicial determination, and courts will operate under the presumption that the privilege “should be applied as narrowly as consistent with efficient government operations.”¹⁸¹ Courts have applied varying tests to determine if a document is in fact deliberative; several circuits, for instance, use a functional test. Instead of looking to whether the document is purely factual or whether it is policy oriented, those courts will “focus on whether the document in question is a part of the deliberative process.”¹⁸² One thing is clear: the standard is a legal one, to be asserted by the government and possibly challenged by the plaintiff, but ultimately decided upon by the reviewing court. Even if the documents at issue are found to be deliberative in nature, the privilege can be overcome if the need for the documents outweighs the need for nondisclosure.¹⁸³ In balancing those competing interests the reviewing court will likely consider: “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.”¹⁸⁴ Additionally, the privilege can be waived in certain circumstances, such as when an agency expressly adopts portions of an otherwise-deliberative document in a final decision,¹⁸⁵ or when the agency fails to object to the introduction of allegedly deliberative documents by the other party.¹⁸⁶ And lastly, the privilege may not even be available in certain types of litigation aimed at reviewing the agency's subjective intent, as opposed to the substance of the final ***1326** decision.¹⁸⁷ These procedural steps ensure faithfulness to our adversarial system, and are essential for ensuring that courts strike the proper balance between open government and efficient administrative function.

2. Agency Misuse of the Deliberative Process Privilege

Increasingly, federal agencies are misusing the deliberative process privilege by failing to properly assert and justify the privilege. Whether this is a symptom of an Administration that has grown progressively more secretive, or whether it is a result of Justice Department attorneys struggling to defend questionable agency decisions, is a subject for later debate. Environmental plaintiffs involved in litigation against the government must frequently resort to “Motions to Compel Completion of the Administrative Record” when it becomes apparent that the defendant agency has withheld documents from the record. By failing to properly assert the privilege, agencies put plaintiffs at a distinct disadvantage because plaintiffs can rarely identify with accuracy the “universe” of documents that was before the agency decision maker yet absent from the record. Such misuse of the privilege also serves to frustrate judicial review by shielding relevant records from the reviewing court, and can needlessly protract already time-consuming litigation.

As previously discussed, the policy guidelines used by several agencies clearly indicate that deliberative documents are to be placed in the administrative record, with the agency retaining the right to assert a claim of privilege either contemporaneously with or subsequent to the submission of the record to the court.¹⁸⁸ In several recent environmental cases, however, federal agencies failed to affirmatively assert a claim of privilege, instead choosing to simply claim that deliberative documents do not belong in the record to begin with.

In *Washington Toxics Coalition v. United States Department of Interior*,¹⁸⁹ the plaintiffs claimed that the Department failed to include in the record internal agency deliberations, communications with other agencies, and past criticisms of relevant prior decisions.¹⁹⁰ Although the federal defendants failed to assert any claim of privilege, they argued that the record as submitted was complete because it contained “a detailed statement of the [agencies'] decision, the basis for that decision, and the agencies' findings.”¹⁹¹ In granting the plaintiffs' motion to compel completion of the administrative record, the court held that all documents that were relevant to the final agency decision should be produced and included in the record, including the internal deliberations and communications.¹⁹²

In *National Wildlife Federation v. National Marine Fisheries Service*,¹⁹³ the plaintiffs asserted that statements by the National Marine Fisheries Service's Regional ***1327** Administrator that “internal drafts of memoranda . . . and communications among my staff and with other federal employees . . . [are not considered] to properly be part of the Administrative Record”¹⁹⁴ left plaintiffs and the court “to guess at what documents and materials have been withheld.”¹⁹⁵ The federal defendant had made no effort to claim a privilege, arguing instead that it had the right to designate the record and that plaintiffs had failed to demonstrate the need to introduce extrarecord evidence.¹⁹⁶ The court found that the statements made by the Regional Administrator were

sufficient to rebut the presumption of regularity, and ordered those documents that fell within the types of documents excluded by the agency to be added to the record.¹⁹⁷

In an older case, *Miami Nation of Indians of Indianav. Babbitt*,¹⁹⁸ the federal defendants did not assert a privilege over allegedly deliberative documents; rather, they simply excluded various documents such as preliminary drafts and internal communications. Because the agencies had failed to assert or justify any claim of privilege, the court recognized that it was not “able to determine which, if any, of these [withheld] materials may be covered by the deliberative process privilege.”¹⁹⁹ The court then reiterated the procedural steps required to assert the privilege, including: 1) a formal claim of privilege by an agency official, 2) specific description of those documents alleged to be privileged, and 3) the articulation of “precise and certain reasons for preserving the confidentiality of the requested information.”²⁰⁰ With these procedural requirements “in mind,” the court ordered the agency to complete the administrative record with those documents previously withheld.²⁰¹

Courts are increasingly taking issue with federal agencies' attempts to unilaterally withhold allegedly deliberative documents without asserting a claim of privilege. Even in those cases where certain documents were ultimately found to be privileged, courts have required agencies to abide by the procedural requirements already soundly established in the FOIA context addressing claims of privilege.²⁰² Importantly, courts are beginning to recognize that claims of privilege in the administrative record context should be accompanied by a privilege log (or other written explanation) so that the plaintiffs, and the reviewing court, have the opportunity to assess or challenge the agency's claims.²⁰³

***1328** Additionally, courts have recognized that the final determination as to the application of the privilege is in the hands of the court, and not the agency itself.²⁰⁴ Some courts have begun to rely on in camera review of allegedly deliberative documents withheld from the record in order to determine if the privilege has been properly invoked.²⁰⁵ In other instances, where the documents are already available to the court (such as allegedly deliberative documents submitted by the plaintiffs), courts are able to make the determination on a document-by-document basis, relying on affidavits or declarations from the parties.²⁰⁶ And in still other instances, where courts recognize that an agency has simply failed to include documents of a certain type (such as draft documents or correspondence), they have rejected agency attempts to unilaterally exclude all such documents, instead requiring completion of the record.²⁰⁷

Even more surprising is that federal agencies have typically recognized that the deliberative process privilege must be asserted and justified, and have acted accordingly in litigation to seek the privilege by providing a list of documents up front.²⁰⁸ Not only is such an approach consistent with the jurisprudence governing the deliberative process privilege, it comports with both DOJ and FWS guidance on the interplay between the privilege and the scope of the administrative record.

***1329** Environmental agencies should follow the lead of these recent district court decisions defining the overlap between the deliberative process privilege and the compilation of an administrative record. Courts have long recognized that any assertion of the privilege in the FOIA context must comply with basic procedural requirements; it should be the same for administrative records. Unilateral exclusion of allegedly deliberative documents prevents the reviewing court from examining the whole record, and leaves plaintiffs with the near-impossible task of identifying themselves any withheld documents that were before the agency decision maker. Because of the presumption of regularity and the ordinary deference accorded to agency actions, federal agencies already have the tools they need to avoid intrusive or inappropriate judicial review.

V. Conclusion

The record rule, as initially established by the Supreme Court in *Overton Park*, plays an important role in administrative law; it ensures that reviewing courts do not overreach by engaging in broad, unconstrained de novo review of agency decisions, thereby respecting agency expertise and autonomy. But courts also play an important oversight function over federal agencies, and they have an obligation to review the full and complete administrative record in order to make their review as effective as possible. Agency abuse of the record rule, as demonstrated in the blurring of the line between completion and supplementation as well as the sweeping exclusion of allegedly deliberative documents, frustrates judicial review and prejudices plaintiffs who seek to challenge agency actions.

Modern courts should first recognize the crucial difference between supplementation and completion of the administrative record. While it is appropriate to grant agencies a presumption of regularity in the submission of an administrative record, and also to require a substantial showing from those plaintiffs seeking to supplement a record with additional, extrarecord evidence, plaintiffs should face a much lower burden when they seek merely to complete an incomplete record. No showing of bad faith should be required; rather, a minimal demonstration that the record as presented is lacking materials that were arguably before the agency when the decision was made should suffice. Such a standard would prevent a court from engaging in essentially de novo review, by keeping newly created evidence out of the record in most instances, and would also honor the Supreme Court's requirement that review be based upon the whole record.

Additionally, federal agencies and reviewing courts should recognize that deliberative documents are properly part of the administrative record, if they were otherwise before the decision maker when the decision was made. Recent attempts by agencies to unilaterally withhold allegedly deliberative documents ignore the important procedures governing the deliberative process privilege, prevent plaintiffs seeking to challenge the application of the privilege from forming a basis for their arguments, and are flatly inconsistent with DOJ and FWS policy. Additionally, such attempts prevent reviewing courts from determining if the privilege is applicable in the first instance, or whether the public interest dictates that the documents be included in the record despite their privileged status.

***1330** For judicial review to be an effective and worthwhile exercise, courts must be able to put themselves in the position of the agency decision maker to determine if he or she acted arbitrarily or capriciously. Absence of a full and complete record makes that task impossible.

Footnotes

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¹  401 U.S. 402 (1971).

² See generally John D. Podesta, [Shadow Creep: Government Secrecy Since 9/11](#), 2002 U. Ill. J.L. Tech. & Pol'y 361 (2002) (discussing the trend towards increasing government secrecy in the name of national security).

³ See discussion *infra* Part IV.B.










⁴ See discussion *infra* Part IV.B.






⁵ Administrative Procedure Act,  5 U.S.C. §706 (2006);  *Overton Park*, 401 U.S. at 420.

⁶ See discussion *infra* Part IV.C.

⁷  5 U.S.C. §552 (2006).



⁸ See discussion *infra* Part IV.C (discussing the Freedom of Information Act in relation to the deliberative process privilege).

- 9  5 U.S.C. §§551-559,  701- 706, 1305,  3105, 3344, 4301, 5335, 5362,  7521 (2006).
- 10 The term “agency” is defined by the APA to mean “each authority of the Government of the United States.”  *Id.* §551(1).
- 11 An adjudication is defined by the APA to mean an “agency process for the formation of an order[.]” an order being a “final disposition ... of an agency in a matter other than rule making but including licensing.” *Id.* §551(6)-(7).
- 12 A rulemaking is an “agency process for formulating, amending, or repealing a rule[.]” a rule being “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” *Id.* §551(4)-(5).
- 13 Generally speaking, formal agency actions are those that must follow the procedures of sections 556 and 557 of the APA, whereas informal agency actions do not. Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 652-57 (5th ed. 2002).
- 14 *Id.* at 652-53. The surest way to determine whether an agency must use formal or informal procedures is to determine whether the organic statute at issue requires the agency to take action on the basis of a “record” after opportunity for a “hearing.” *Id.* at 652. As will be discussed further below, the “record” used in a formal agency action is actually quite different from the “record” involved in judicial review of an informal rulemaking. See discussion *infra* Part II.B.
- 15 See Craig N. Johnston et al., *Legal Protection of the Environment* 79 (2nd ed. 2007) (discussing common rulemaking procedures in environmental law).
- 16 The APA directs that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”  5 U.S.C. §706(2) (2006).
- 17 See James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 *Temp. L. Rev.* 503, 540-43 (2000).
- 18 E.g.,  *Gonzales v. Thomas*, 547 U.S. 183, 186-87 (2006) (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” (citations omitted)); see also Charles H. Koch, Jr., *Administrative Law and Practice* §8.31[1] (2d ed. 1997).
- 19 Koch, *supra* note 18, at §8.27[1].
- 20 See, e.g., Richard J. Pierce, Jr., *II Administrative Law Treatise* §11.6 (4th ed. 2002).
- 21  5 U.S.C. §706 (2006).
- 22 Formal agency actions are generally those requiring the agency to act on the record after the opportunity for a hearing. In such cases, the procedural requirements of sections 556 and 557 will apply. These provisions provide for a trial-like proceeding, with the presentation of evidence and the like. See Breyer et al., *supra* note 13, at 654-55.


- 23 Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review* "On the Record," 10 Admin. L.J. Am.U. 179, 195 (1996).
- 24 Id. The APA provides that, in formal proceedings, the record consists of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding."  5 U.S.C. §556(e) (2006).
- 25 Breyer et al., *supra* note 13, at 742.
- 26 Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Admin. L. Rev. 333, 338 (1984).
- 27 Young, *supra* note 23, at 201-02.
- 28 "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." 5 U.S.C. §702 (2006). For a discussion of the legislative history of the "legal wrong" language in section 702, see Cass Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1441 n.37 (1988).
- 29 Sunstein states "there was no clear indication, in the text or history of the APA, whether and when the beneficiaries of regulation might have standing to vindicate legal requirements." Sunstein, *supra* note 28, at 1441.
- 30 Young, *supra* note 23, at 201 n.81.
- 31  397 U.S. 150 (1970).
- 32  Id. at 153. The Court's more lenient position on standing in cases seeking judicial review of administrative actions was influenced by several evolving theories of administrative law: first, that agency resistance to particular statutory schemes could frustrate congressional purpose just as surely as overzealous regulation; second, that agencies often become "captured" by the very entities they are intended to regulate, with political recourse less of a surefix than had been supposed; third, that those seeking the protection of a regulatory scheme deserve access to a legal forum just as much as those regulated by it; and fourth, a growing understanding that certain interests other than traditional property interests, such as an interest in environmental protection, could form valid bases for legal action. Sunstein, *supra* note 28, at 1445; Young, *supra* note 23, at 201 n.81.
- 33  401 U.S. 402 (1971).
- 34  Id. at 420.
- 35 Id. As Professor Young noted, portions of the Overton Park opinion "brim with contradictions." Young, *supra* note 23, at 190. The Court recognized that the informal adjudication which formed the basis of the Secretary's decision "is not designed to produce a record that is to be the basis of agency action,"  *Overton Park*, 401 U.S. at 415, and yet "the Court required that judicial review of informal proceedings be confined to a scrutiny of [a] record [provided to the reviewing

court]--precisely the requirement that the APA explicitly imposes on judicial review of agency formal proceedings.” Young, *supra* note 23, at 190.


36 See Stark & Wald, *supra* note 26, at 341 (noting in *Overton Park*, the lower court should only look at what the agency claimed the record showed to be its rationale).


37  *Overton Park*, 401 U.S. at 415 (citations omitted). The Court goes on to explain, again in a contradictory manner, that “[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”  *Id.* at 416.

38  *Id.* at 416.

39 See Young, *supra* note 23, at 191 (“Based on a plausible definition of ‘relevant factors,’ how can a court determine what was not considered by an agency solely by looking to a record of what was?” (quoting  *Overton Park*, 401 U.S. at 416)).

40  *Overton Park*, 401 U.S. at 415.

41 “The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be...unwarranted by the facts to the extent that the facts are subject totrial de novo by the reviewing court.” Administrative Procedure Act,  5 U.S.C. §706(2)(F) (2006).

42  *Overton Park*, 401 U.S. at 415. For greater discussion of these two exceptions to the record rule, see Young, *supra* note 23, at 215-19.

43  *Overton Park*, 401 U.S. at 420.

44 *Id.* For a discussion of the modern, recognized exceptions to the record rule, see *infra* Part II.C.

45  411 U.S. 138 (1973).

46  *Id.* at 141-42.

47  *Id.* at 142.

48  *Id.* at 143.

49  470 U.S. 729 (1985).

50  *Id.* at 744.

51 *Id.* The Court described the record on review as “the record the agency presents to the reviewing court.” *Id.* It is clear from *Overton Park* and later Supreme Court decisions, however, that the record on review is the entirety of the record before the agency when the decision was made, whether or not all of it was presented to the reviewing court. See Young, *supra* note 23, at 208 n.115.









52 Richard McMillan, Jr. & Todd Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 Duke L.J. 333, 334 (1982); Stark & Wald, *supra* note 26, at 343.


53 See Young, *supra* note 23, at 219-29.

54 See Stark & Wald, *supra* note 26, at 343-54. Stark and Wald identify eight different exceptions to the record rule, claiming that these exceptions have swallowed the record rule almost entirely. *Id.* at 358. Their claim has been forcefully rebutted by Professor Young and others. See, e.g., Young, *supra* note 23, at 220. For purposes of this Comment I will only address the four most widely accepted and commonly applied exceptions to the record rule.


55  *Overton Park*, 401 U.S. 402, 420 (1971); see also Pierce, *supra* note 20, at 824.

56 Pierce, *supra* note 20, at 824.

57 See, e.g.,  *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1458-59 (1st Cir. 1992);  *Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 332 (2d Cir. 1977); *Greene/Guilford Env'tl. Ass'n v. Wykle*, 94 F. App'x 876, 878 (3d Cir. 2004);  *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 212 (4th Cir. 1991);  *In re Fed. Deposit Ins. Corp.*, 58 F.3d 1055, 1062 (5th Cir. 1995); *Mount Clemens v. U.S. Env'tl. Prot. Agency*, 917 F.2d 908, 918 (6th Cir. 1990); *Des Plaines v. Metro. Sanitary Dist.*, 552 F.2d 736, 739-40 (7th Cir. 1977);  *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998);  *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993); *CF&I Steel Corp. v. Econ. Dev. Admin.*, 624 F.2d 136, 141 (10th Cir. 1980);  *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001);  *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998).

58 See, e.g.,  *United States v. Morgan*, 313 U.S. 409, 422 (1941) (holding that, while it is emphatically not the role of the courts to “probe the mental processes” of the agency decision maker, courts have allowed such extrarecord examination precisely because of the clear language in *Overton Park*); McMillan & Peterson, *supra* note 52, at 370-71.

59  *Portland Audubon Soc'y*, 984 F.2d at 1548.

60  *Overton Park*, 401 U.S. at 420; see also Stark & Wald, *supra* note 26, at 344-46 (explaining the “bare record” exception to the record rule).

61 *Overton Park*, 401 U.S. at 420.

62 Id.




63 Young, *supra* note 23, at 191.

64  Overton Park, 401 U.S. at 416.

65  616 F.2d 1153 (9th Cir. 1980).

66  Id. at 1160; see also  Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (limiting extrarecord evidence to four circumstances).

67  Camp v. Pitts, 411 U.S. 138, 142-43 (1973).

68  Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 997 (9th Cir. 1993); Sierra Club v. Marsh, 976 F.2d 763, 772-73 (1st Cir. 1992); Armstead v. U.S. Dep't of Hous. & Urban Dev., 815 F.2d 278, 281 (3d Cir. 1987);  Arkla Exploration Co. v. Tex. Oil & Gas Corp., 734 F.2d 347, 357 (8th Cir. 1984);  Env'tl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981).


69 Stark & Wald, *supra* note 26, at 347.

70  227 F. Supp. 2d 134 (D.D.C. 2002).

71  Id. at 139-40.





72  Id. at 139.












73  Overton Park, 401 U.S. 402, 420 (1971).

74 Walter O. Boswell Mem'l Hosp. v. Heckler (Boswell), 749 F.2d 788, 792 (D.C. Cir. 1984); see also  Tenneco Oil Co. v. U.S. Dep't of Energy, 475 F.Supp. 299, 317 (D. Del. 1979)

It strains the Court's imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives, and manuals DOE may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry.

Id.

75 See, e.g.,  Lee v. U.S. Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004);  Sierra Club v. Slater, 120 F.3d 623, 638 (6th Cir. 1997);  Thompson v. U.S. Dep't of Labor, 885 F.2d 551, 555-56 (9th Cir. 1989);  Esch v. Yeutter, 876 F.2d 976, 991-92 (D.C. Cir. 1989).

- 76 Stark & Wald, *supra* note 26, at 348.
- 77  615 F.2d 794 (9th Cir. 1980).
- 78  *Id.* at 811. The court was careful to point out, however, that the postdecisional studies were not to be used as additional bases for challenging or supporting the agency's decision.  *Id.* at 811-12. See Young, *supra* note 23, at 192-93 for further discussion of this decision.
- 79 See, e.g., *Davis Mountains Trans-Pecos Heritage Ass'n v. Fed. Aviation Admin.*, Nos. 03-10506, 03-10528, 02-60288, 2004 WL 2295986, at *12 (5th Cir. Oct. 12, 2004);  *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993).
- 80  *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (“[T]he designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.”). The presumption of agency regularity pre-dated the APA and the modern administrative state. See, e.g.,  *United States v. Chemical Found. Inc.*, 272 U.S. 1, 14-15 (1926) (“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).
- 81 Thus, for instance, courts will typically defer to agency interpretations of ambiguous statutes for which they have been delegated authority to administer. See, e.g.,  *United States v. Mead Corp.*, 533 U.S. 218, 236-37 (2001);  *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1983). Courts will be more cautious in reversing agency decisions pertaining to scientific or highly technical matters that clearly implicate agency expertise.  *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (“[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”). Indeed, the APA standard of review itself seems to embody a presumption of regularity, instructing courts to reverse agency decisions if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Administrative Procedure Act,  5 U.S.C. §706 (2006); see also *infra* Part II.B.
- 82 See, e.g.,  *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (2003) (“It is the agency that did the ‘considering,’ and that therefore is in a position to indicate initially which of the materials were ‘before’ it—namely, were ‘directly or indirectly considered.’” (quoting  *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993))).
- 83 See, e.g.,  *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (“[W]here the so-called ‘record’ looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.” (citing *Buschmann v. Schweiker*, 676 F.2d 358, 358 (9th Cir. 1982)));  *Natural Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291-92 (D.C. Cir. 1975) (declining to conclude that the record was complete after the agency supplemented the record with a document that was initially considered, instead finding the record was likely not complete and allowing limited discovery).

- 84 See, e.g., *California ex rel. Lockyer v. U.S. Dep't of Agric. (California)*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at *2 (N.D. Cal. Mar.16, 2006) (“Plaintiffs rebutted the presumption with a strong showing that [certain documents] were at a minimum indirectly considered by the Forest Service in its decision-making process”).
- 85 See, e.g., *Int'l Longshoreman's Ass'n v. Nat'l Mediation Bd.*, No. 04-824, 2006 WL 197461, at *3 (D.D.C. Jan. 25, 2006) (holding that “a party can establish that the administrative record is incomplete ... if, inter alia, ‘the agency may have deliberately or negligently excluded documents that may have been adverse to its decision.’” (quoting *Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 11 (D.D.C. 2001))).
- 86 See, e.g., *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 21 n.10 (D.D.C. 2002) (noting in dicta that the agency's supplementation of the initially-submitted record with twelve emails “raises further doubts that it has provided the complete Administrative Record”), vacated in part, 89 F. App'x 273 (D.C. Cir. 2004).
- 87 *Overton Park*, 401 U.S. 402, 419 (1971).
- 88 Sunstein, *supra* note 28, at 1433.
- 89 See, e.g., *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979).
- 90 See, e.g., *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Int'l Longshoreman's Ass'n*, 2006 WL 197461, at *3.
- 91 See, e.g., *Bar MK Ranches*, 994 F.2d at 729.
- 92 See *Tenneco Oil Co.*, 475 F. Supp. at 317.
- 93 See, e.g., *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, No. 05-1876-HA, 2008 WL 111054, at *3 (D. Or. Jan. 7, 2008).
- 94 See *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).
- 95 See *Pierce* *supra*note 20, at §6.3 (discussing the differences between a general statement of policy and a legislative rule).
- 96 See U.S. Dep't of Justice, Env't and Natural Res. Div., [http:// www.usdoj.gov/enrd/About_ENRD.html](http://www.usdoj.gov/enrd/About_ENRD.html) (last visited Nov. 16, 2008) (describing the role and responsibilities of the Department of Justice's Environment and Natural Resources Division).
- 97 Env't and Natural Res. Div., U.S. Dep't of Justice, *Guidance to Federal Agencies on Compiling the Administrative Record 1* (1999), available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf [hereinafter ENRD Guidance].

98 Id. (emphasis added).

99 Id. at 1-2 (“The administrative record consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency's decision. It includes documents and materials relevant to the process of making the agency's decision.” (emphasis added)).

100 Id. at 1.

101 Id. at 2 (emphasis added).

102 Id. at 3-4 (emphasis added).

103 Id. at 3.

104 Id.

105 Id.

106 Id.

107 Id. at 4.

108 Id.

109 Id.

110 Id.

111 Id. The ENRD Guidance recognizes several possible bases for asserting a privilege, including “attorney-client, attorney work product, Privacy Act, deliberative or mental processes, executive, and confidential business information.” Id.

112 Id.














113 Memorandum from Pete Raynor, Assistant Solicitor, Fish, Wildlife, and Env'tl. Prot. Branch, U.S. Dep't of the Interior to Dir., U.S. Fish and Wildlife Serv. (Jan. 7, 2000), available at [http:// www.nmfs.noaa.gov/pr/pdfs/recovery/appendix_f-j.pdf](http://www.nmfs.noaa.gov/pr/pdfs/recovery/appendix_f-j.pdf) [hereinafter FWS Guidance].


114 Id.at 1.

115 Id.

116 Id.

- 117 Id. at 2.
- 118 ENRD Guidance, *supra* note 97, at 4.
- 119 Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce, Guidelines for Agency Administrative Records (2005) (on file with author) [hereinafter NOAA Fisheries Guidance].
- 120 Id. at 2.
- 121 Id. at 3.
- 122 Id. at 4.
- 123 Id.
- 124 Id. (emphasis added).
- 125 ENRD Guidance, *supra* note 97, at 3 (emphasis added).
- 126 Id. at 2 (emphasis added).
- 127 NOAA Fisheries Guidance, *supra* note 119, at 4.
- 128 ENRD Guidance, *supra* note 97, at 3.
- 129 A Bureau of Labor Statistics report published in 2005 indicates that 56% of all public sector employees nationwide use the internet at work. Bureau of Labor Statistics, U.S. Dep't of Labor, Computer and Internet Use at Work in 2003 3 (2005), available at <http://www.bls.gov/news.release/pdf/ciuaw.pdf>.
- 130 ENRD Guidance, *supra* note 97, at 4.
- 131 NOAA Fisheries Guidance, *supra* note 119, at 6.
- 132 Id. at 7.
- 133 See *id.* at 6-7; ENRD Guidance, *supra* note 97, at 4.
- 134 NOAA Fisheries Guidance, *supra* note 119, at 7.
- 135 See *id.*
- 136 See discussion *infra* Part IV.C.


- 137 See supra notes 110-12 and accompanying text.
- 138 Apparently recognizing that its policy is inconsistent with prevailing legal standards on compiling an administrative record, the NOAA Fisheries Guidance was “rescinded in [February 2007] pending an update of the procedure.” Nat’l Marine Fisheries Serv., Policy Directive 30-123 (2005), available at <http://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/policies/30-123.pdf>.
- 139 See, e.g.,  *Pub. Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982) (citing  *Camp v. Pitts*, 411 U.S. 138, 143 (1973)) (discussing supplementation through affidavits or testimony when needed to effectuate judicial review);  *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp 771, 779 (N.D. Ind. 1996) (seeking to supplement the record by taking testimony from agency staff).
- 140 See, e.g., *California*, No. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006) (“To be complete, the administrative record must contain materials that are directly or indirectly related to the agency’s decision, not just those materials that the agency relied on.” (emphasis added));  *Amfac Resorts v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (“First and most basically, a complete administrative record should include all materials that ‘might have influenced the agency’s decision,’ and not merely those on which the agency relied in its final decision.” (emphasis added) (quoting  *Bethlehem Steel Corp. v. U.S. Env’t Prot. Agency*, 638 F.2d 994, 1000 (7th Cir. 1980))).
- 141 See supra Part III.A.
- 142 See, e.g.,  *Boswell*, 749 F.2d 788, 792 (D.C. Cir. 1984).
- 143  *Amfac Resorts, L.L.C. v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).
- 144 Administrative Procedure Act,  5 U.S.C. §706 (2006).
- 145  *Overton Park*, 401 U.S. 402, 419, 421 (1971).
- 146  *Boswell*, 749 F.2d at 792 (“If a 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.”).
- 147 See supra Part III.A.
- 148  *Amfac Resorts*, 143 F. Supp. 2d at 12.
- 149 See supra Part II.C.1;  *Amfac Resorts*, 143 F. Supp. 2d at 12 (“[A] party must make a significant showing--variously described as a ‘strong,’ ‘substantial,’ or ‘prima facie’ showing--that it will find material in the agency’s possession indicative of bad faith or an incomplete record.” (quoting  *Overton Park*, 401 U.S. at 420)). But see  *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 140 n.5 (D.D.C. 2002) (“Contrary to defendants’ contention, a showing of bad faith or improper behavior is not required for a court to supplement the record.... [Such] showing applies only to


instances where the method of supplementation involves testimony inquiring into the mental processes of administrative decisionmakers.” (citing  [Overton Park](#), 401 U.S. at 420)).

- 150  [Pub. Power Council v. Johnson](#), 674 F.2d 791, 794 (9th Cir. 1982).
- 151 See  [Boswell](#), 749 F.2d at 792;  [Int'l Longshoreman's Ass'n](#), No. 04-824, 2006 WL 197461 at *3 (D.D.C. Jan. 25, 2006) (“It is therefore improper for a district court to review only a ‘partial and truncated [administrative] record.’” (quoting [Natural Res. Def. Council, Inc. v. Train](#), 519 F.3d 287, 291 (D.C. Cir. 1975))).
- 152  [Maricopa Audubon Soc'y v. U.S. Forest Serv.](#), 108 F.3d 1089, 1092 (9th Cir. 1997); [Ollestad v. Kelley](#), 573 F.2d 1109, 1110 (9th Cir. 1978).
- 153 See *supra* Part II.C.3 (discussing the third “exception” to the record rule).
- 154 [Young](#), *supra* note 23, at 221-22; [Pub. Power Council](#), 674 F.2d at 794 (recognizing that this so-called “exception” is really just a “qualification to or explication of the rule that judicial review is based upon the full administrative record” (emphasis added)).
- 155 See  [Boswell](#), 749 F.2d at 792 (“To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case,” whereas “[t]o review more than the information before the [agency] at the time [of its] decision risks our requiring administrators be prescient or allowing them to take advantage of post hoc rationalizations.”).
- 156  979 F. Supp. 771 (N.D. Ind. 1996).
- 157  *Id.* at 775.
- 158  *Id.* at 777.
- 159  *Id.* at 779.
- 160  *Id.* at 781.
- 161  448 F. Supp. 2d 1 (D.D.C. 2006).
- 162  *Id.* at 5. However, that court uses different terminology than that used in this Comment. What I call “completing” the record the court calls “supplementing” the record, and what I call “supplementing” the court calls “reviewing extra-record evidence.” *Id.* That may, in part, be due to the fact that the plaintiffs described their motion as a “Motion to Supplement the Administrative Record.” *Id.* at 2.
- 163 *Id.* at 6.

164 Id.





165 Id.

166 See, e.g., *Ohio Valley Env'tl. Coal. v. Whitman*, No. 3:02-0059, 2003 U.S. Dist. Lexis 148, at *10 (S.D. W. Va. Jan. 6, 2003) (Mem. Op. and Order) (“The plaintiffs do not seek to supplement the administrative record in the sense of adding documents to the record that were neither before the agency nor considered in the decision-making process.... Instead, the plaintiffs contend that the EPA has not submitted to the court all of the materials that properly constitute the complete administrative record.”); *California*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at *2-4 (N.D. Cal. Mar. 16, 2006). For an example of a court that failed to recognize the important difference, see  *Fund for Animals*, 245 F. Supp. 2d 49, 58 (D.D.C. 2003) (“[T]he plaintiffs here expressly disavow any intent to supplement the record, saying instead that they ‘seek[] only to ensure that all of the “evidence” that was before the agency, and therefore [is] part of the record, is actually disclosed to the Court.’ But that statement ignores the fact that the record is presumed properly designated. If, once the agency has designated the record, the plaintiffs believe that the defendants have excluded documents in bad faith, they should petition the court to supplement the record, identifying the applicable exception.” (citations omitted)).


167  *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958) (Kaiser Aluminum). The policy reasons underlying the privilege have been further explained:














The privilege ... serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.









 *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

168  5 U.S.C. §552 (2006). See U.S.  *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 86 (1973) (“[T]he legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that ‘confidential intra-agency advisory opinions ... are privileged from inspection.’” (quoting  *Kaiser Aluminum*, 157 F. Supp. at 946));  *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975). Many of the cases cited herein relating to the scope of the deliberative process privilege arise in the FOIA context, not the administrative record context. Most courts, however, analogize freely between the two, and the analysis is functionally the same. See, e.g., *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, No. 04-8244 (RBW), 2006 U.S. Dist. LEXIS 4080, at *13 (D.D.C. Jan. 25, 2006) (“[I]t is clear that privileges under the APA are considered to be ‘co-extensive with Exemption 5 of [FOIA].’ Thus, to properly defend against a challenge to the exclusion of information from an administrative record, a defendant should necessarily provide the same information it would submit when defending against a challenge for withholding such information in a [FOIA] action.” (quoting *Seabulk Transmarine I, Inc. v. Dole*, 645 F. Supp. 196, 201 n.3 (D.D.C. 1986))).

169  5 U.S.C. §552(b)(5)(2005).

170 See, e.g.,  *Morgan v. United States*, 304 U.S. 1, 18 (1938) (reviewing a pre-APA administrative procedure akin to adjudication, and explaining that “it [is] not the function of the court to probe the mental processes of the Secretary in reaching his conclusions”).

- 171 See  *Sears, Roebuck & Co.*, 421 U.S. at 151.
- 172 See, e.g., *Mobil Oil Corp. v. Dep't of Energy*, 520 F. Supp. 414, 416 (N.D.N.Y. 1981).
- 173 See  *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1116 (9th Cir. 1988);  *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997).
- 174 In cases arising under FOIA, such an index is ordinarily called a Vaughn Index, named for  *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In that case, the court required the agency to “specify in detail which portions of the document are disclosable and which are allegedly exempt ... [by using] a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document.”  *Id.* at 827.
- 175 *Maricopa Audubon Soc'y*, 108 F.3d at 1092.
- 176 *Id.* (quoting  *Doyle v. FBI*, 722 F.2d 554, 555-56 (9th Cir. 1983)).
- 177 *Ollestad v. Kelley*, 573 F.2d 1109, 1110 (9th Cir. 1978).
- 178 See *Mobil Oil Corp.*, 520 F. Supp. 414, 417 (N.D.N.Y. 1981).
- 179 See  *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).
- 180  *Fed. TradeComm'n v. Warner Commc'n Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-cv-00453 OWW DLB, 2007 U.S. Dist. LEXIS 21949, at *18-19 (E.D. Cal. Mar. 9, 2007) (describing the “two-step process” that the court must engage in “when evaluating an assertion of privilege based on deliberative process”), motion granted, 2007 U.S. Dist. LEXIS 25954 (E.D. Cal. Mar. 21 2007).
- 181 *Ctr. for Biological Diversity v. Norton*, No. Civ. 01-409 TUC ACM, 2002 U.S. Dist. LEXIS 27617, at *8-9 (D. Ariz. July 24, 2002).
- 182  *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988); see also  *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1046-48 (D.C. Cir. 1982);  *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 560 (1st Cir. 1992).
- 183  *Warner Commc'n Inc.*, 742 F.2d at 1161;  *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658-59 (6th Cir. 1976).
- 184  *Warner Commc'n Inc.*, 742 F.2d at 1161.

- 185  [Sears, Roebuck & Co.](#), 421 U.S. 132, 161 (1974);  [Nat'l Council of La Raza v. Dep't of Justice](#), 411 F.3d 350, 356-57 (2nd Cir. 2005);  [Coastal States Gas Corp. v. Dep't of Energy](#), 617 F.2d 854, 866 (D.C. Cir. 1980) (“[E]ven if the document is [privileged] at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”).
- 186 See  [Miami Nation of Indians of Ind. v. Babbitt](#), 979 F. Supp. 771, 778 (N.D. Ind. 1996) (“The government's lack of specific objection could be construed as a waiver of its claim of privilege.”).
- 187  [In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency](#), 156 F.3d 1279, 1280 (D.C. Cir. 1998).
- 188 See *supra* Part IV.A.
- 189  [457 F. Supp. 2d 1158](#) (D. Wash. 2006).
- 190 The court granted plaintiffs' motion to compel completion of the administrative record. [Wash. Toxics Coal. v. U.S. Dep't of Interior](#), No. C04-1998C, 2005 U.S. Dist. LEXIS 45566, at*3-4 (D. Wash. June 14, 2005).
- 191 *Id.* at *4.
- 192 *Id.* at *7.
- 193 No. CV-640-RE, 2005 U.S. Dist. LEXIS 16655 (D. Or. Mar. 3, 2005).
- 194 *Id.* at *6-7.
- 195 *Id.* at *7.
- 196 *Id.* at *8.
- 197 *Id.* at *10.
- 198  [979 F. Supp. 771](#) (N.D. Ind. 1996).
- 199  *Id.* at 776, 778.
- 200 *Id.*
- 201 *Id.*





- 202 See, e.g., *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, No. 04-824(RBW), 2006 U.S. Dist. Lexis 4080, at *11-14 (D.D.C. Jan. 25, 2006) (explaining that the agency made “no effort to support [its] assertion [of privilege] with anything, such as an affidavit or declaration,” and taking issue with the agency's refusal “to provide [the] Court with all the documents and information that were before the agency at the time it made its decision, or ... provide the Court with a legal basis for withholding the information from the administrative record”). The court gave leave to the agency to resubmit its motion to dismiss, as long as it was “accompanied by the necessary support for its arguments that certain documents that appear relevant are properly excluded.” *Id.* at *14.
- 203 See, e.g., *Trout Unlimited v. Lohn*, No. C05-1128C, 2006 U.S. Dist. Lexis 28679, at *8-14 (W.D. Wash. May 4, 2006) (requiring federal defendants to “produce an unredacted version and a proposed redacted version of the [allegedly privileged] documents ... [that] indicate “precise and certain” reasons for preserving the confidentiality of the ... information.” (quoting  *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 544 (W.D. Wash. 2000))); *Coastal Conservation Ass'n*, No. H-05-1214, 2006 U.S. Dist. Lexis 96704, at *9 (S.D. Tex. Feb. 17, 2006) (granting plaintiffs' motion to compel completion of the administrative record and requiring the federal defendants to “compile a privilege log covering the documents and materials that have been withheld on the basis of privilege ... [which] shall be served upon Plaintiffs, who may then challenge any such privilege assertions”); *California*, No. C05-03508 EDL, C05-04038 EDL, 2006 WL 708914, at *4 (N.D. Cal. Mar. 16, 2006) (ordering completion of the record with internal and external communications, drafts, and other correspondence, but allowing defendants to withhold documents on the basis of privilege as long as they provide a privilege log).
- 204  *Kaiser Aluminum*, 157 F. Supp. 939, 947 (Ct. Cl. 1958); *Jade Trading v. United States*, 65 Fed. Cl. 487, 496 n.22 (Fed. Cl. 2005). But see  *Marriott Int'l Resorts v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (“[A] trial court enjoys little oversight of the Government's invocation of a privilege involving military and state secrets.”).
- 205 See, e.g., *Ariz. Rehabilitation Hosp. v. Shalala*, 185 F.R.D. 263, 269 (D. Ariz. 1998); *Trout Unlimited*, 2006 U.S. Dist. Lexis 28679, at *14 (involving in camera review of several documents withheld from the administrative record on the basis of the administrative process privilege).
- 206 See, e.g.,  *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198-99 (D.D.C. 2005) (stating that certain documents, publicly available and submitted by the plaintiffs as exhibits, were improperly excluded from the record).
- 207 See, e.g., *California*, 2006 WL 708914, at *4 (concluding that the record was incomplete because it lacked correspondence, email messages, and draft analyses). The court in *California* ordered the completion of the record with all relevant internal and external communications, but gave the agency the opportunity to assert a privilege, making clear that the agency must make a “specific showing establishing the application of a privilege for each document that it contends that it may withhold based on privilege.” *Id.* at *14.
- 208 See, e.g., *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-cv-00453 (OWW DLB), 2007 U.S. Dist. Lexis 21949, at *4 (E.D. Cal. Mar. 9, 2007) (“NMFS removed or redacted in part certain documents from the [administrative record], asserting the deliberative process privilege and/or the attorney-client privilege.”); *Ctr. for Biological Diversity v. Norton*, No. CIV 01-409 (TUC ACM), 2002 U.S. Dist. Lexis 27617, at *2 (D. Ariz. July 23, 2002) (“The Secretary [of the Interior] withheld 11 documents pursuant to attorney/client privilege, and 37 documents pursuant to the deliberative process privilege as documented in its filing entitled ‘Administrative Record/Privilege Log.’”).

EXHIBIT C

Angela (1:26:40): I did have a another point for clarification. So, I see this list of things that were included on the slide--and as you know I was not at the October meeting--and I was wondering in particular about communication among and in between staff and the regulated entity as being part of the administrative record. And, I think I heard you mention that so I just want to get some clarification on that.

Greg (1:27:13): Sorry. Yeah--I mean to have it all on one slide is kind of tough--It's a pretty long list. So, yeah this is not an attempt to define the full universe of all the documents that are in the administrative record and that would be one that would be. It doesn't show here but is part of the record. In other words, don't rely on this is the definition of what's in the administrative record. It's in the regs.

Angela (1:27:34): all right I wanted to--I just wanted to make sure that we were all clear on that because it's such an important piece of information and this is one of the-- Depending upon how these things unfold I would be certainly happy to have a full administrative record including these kinds of communications and the like available when the permit is issued. I also just want to acknowledge that it's my experience from the CEQA process is that collecting up all of these communications particularly on decisions that expand a number of years it can be very it can be very complicated and be very and take some time so we might want to just think about that when we're thinking about what is available upon permit decision and also when we're thinking about the timing, right, because one of the things that can happen is one may identify information in communication that raises issues that you didn't know before that you wanted to raise and so in thinking about how the timing goes for briefing and how new issues can be raised that are identified from information that wasn't available to the public when the decisions were made.

Greg (1:28:59): Corin, can you advance the slide? I think I part of the issue here is that there's two slides that cover this because it's such a long list so there—

Angela (1:29:09): --Correspondence--

Greg: --that's the missing piece there that you were looking for. Yeah, but that's a really excellent point. Thank you for that.

(1:29.16)

EXHIBIT D



Hazardous Waste Permit Appeals Process November 14, 2022

Taller sobre el Proceso de Apelación de
Permisos de Residuos Peligrosos
14 de Noviembre de 2022



Introduction

- August Workshop in Sacramento
- September Workshop in Berkeley
- October Workshop on Zoom
- Opportunities to comment for those who were unable to attend
- BES Comments Page - <https://bes.dtsc.ca.gov/comments/>

Presentación

- Taller de agosto en Sacramento
- Taller de septiembre en Berkeley
- Taller de octubre por Zoom
- Oportunidades para hacer comentarios para las personas que no pudieron asistir
- Página de comentarios de la BES - <https://bes.dtsc.ca.gov/comments/>

Overview

- Timing of Appeal
- Standing to Appeal
- Grounds/Basis for Appeal
- Standard of Review

Descripción general

- Tiempo para Apelación
- Legitimación para la Apelación
- Fundamentos/Bases para la Apelación
- Estándar de Revisión

Overview

- Notice of Permit Decision
- Participation in the Appeal Process
- Administrative Record
- Alternative Dispute Resolution

Descripción general

- Aviso de la decisión sobre el permiso
- Participación en el proceso de apelación
- Registro administrativo
- Resolución alternativa de disputas

What is a timely appeal?

- Interested parties currently have 30 days to file appeal
 - 30 days starts from service of written notice
 - Written notice provides directions on how to file appeal
 - Website provides additional instructions/FAQ

¿Qué es una apelación a tiempo?

- Las partes interesadas actualmente tienen 30 días para presentar la apelación.
 - Los 30 días son a partir de la entrega del aviso por escrito.
 - El aviso por escrito da indicaciones sobre cómo presentar una apelación.
 - El sitio web ofrece instrucciones adicionales y preguntas frecuentes.

Who may appeal? (Standing)

- Participation Requirement
- New Permit, Renewal, Class 3 Modification:
 - Full public review period;
Limited standing

¿Quién puede apelar? (Legitimidad)

- Requisito de Participación
- Nuevo Permiso, Renovación, Modificación de Clase 3:
 - Período de revisión del público mas expansivo;
Legitimidad limitada

Who may appeal? (Standing)

- Class 2 Permit Modification or Temporary Authorization:
 - Limited public review
 - No standing requirement
- Facility owner/operator
- Director review

¿Quién puede apelar? (Legitimidad)

- Modificación de Clase 2 al Permiso o Autorización Temporal:
 - Revisión pública limitado
 - Sin requisitos de legitimidad
- Dueño/operador de la instalación
- Revisión del director

What is the basis for an appeal?

- Permit Conditions
- Based upon:
 - Finding of fact
 - Conclusion of law
 - Exercise of discretion or
 - Important policy consideration

¿Cuál es la base de una apelación?

- Condiciones del Permiso
- Basado en:
 - Conclusiones de hecho
 - Conclusiones de derecho
 - Ejercicio de la discrecionalidad o
 - Importante determinación política

Standard of Review

- Clear error (“clearly erroneous”)
 - Deferential
 - Technical-factual conclusions
- Abuse of Discretion
 - Deferential
 - Legal-policy conclusions

Estándar de Revisión

- Error claro (“claramente erróneo”)
 - Deferente
 - Conclusiones técnicas o de hecho
- Abuso de la Discrecionalidad
 - Deferente
 - Conclusiones legales o políticas

Notice of a Permit Decision

- DTSC provides notice of a final permit decision to
 - The applicant
 - Each person who submitted comments on the draft permit
 - Each person who requested notice of the final permit

Aviso de una decisión sobre el permiso

- El DTSC notifica la decisión final sobre el permiso a
 - La persona solicitante
 - Cada una de las personas que presentaron comentarios sobre el borrador de permiso
 - Cada una de las personas que solicitaron el aviso del permiso final

Parties to the Appeal

- Applicant
- Petitioner
- DTSC

Partes de la apelación

- Persona solicitante
- Demandante
- DTSC

Administrative Record

- Permit Application
- Technical Memoranda
- DTSC Compliance History
- Orders and Agreements
- CEQA Analysis Documents
- Violations from other environmental agencies
- Statement of Basis of Fact Sheet with attachments

Registro Administrativo

- Solicitud de permisos
- Memorias técnicas
- Historial de cumplimiento del DTSC
- Órdenes y acuerdos
- Documentos de análisis de la CEQA
- Infracciones de otros organismos ambientales
- Declaración de la base de la hoja informativa con anexos

Administrative Record

- Public Participation Materials
- Correspondence
- Draft Permit
- Comments Received
- Responses to Comments
- Materials submitted at hearings
- Final Permit
- Index

Registro Administrativo

- Materiales para la participación del público
- Correspondencia
- Borrador de permiso
- Comentarios recibidos
- Respuestas a los comentarios
- Material presentado en las audiencias
- Permiso final
- Índice

Alternative Dispute Resolution

- Parties are encouraged to resolve their differences
- Currently there is no requirement for a settlement conference

Resolución Alternativa de Disputas

- Se anima a las partes a resolver sus diferencias
- En la actualidad no se exige la celebración de una conferencia de conciliación

Public Engagement

Comments can relate to any aspect of our permit appeal task.

Participación pública

Los comentarios pueden relacionarse con cualquier aspecto de nuestra tarea de apelación de permisos.



Send Comments

besinfo@bes.dtsc.ca.gov

BES Website Portal

Enviar comentarios a

besinfo@bes.dtsc.ca.gov

Portal web de la BES

Workshop Adjourn

Thank you for joining today!

Stay informed about the work of the Board of Environmental Safety:

- Join the listserv: Subscribe at www.dtsc.ca.gov/dtsc-e-lists
- Visit the Board's website: <https://bes.dtsc.ca.gov/>



EXHIBIT E

From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Tuesday, May 2, 2023 2:31 PM
To: Swati.Sharma@bes.dtsc.ca.gov; Forest, Gregory@DTSC
Cc: Byron Chan; Erica Martinez; Lisa Fuhrmann; Lupe Ruelas
Subject: Request for permit record--Quemetco July 2022 Temporary Authorization
Attachments: 2023-05-02 Request for final permit record.pdf

Ms. Sharma and Mr. Forest:

Please see the attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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May 2, 2023

Swati Sharma, Executive Officer
Greg Forest, Attorney Advisor
Board of Environmental Safety
Department of Toxic Substances Control

Dear Ms. Sharma and Mr. Forest:

On behalf of the Clean Air Coalition of North Whittier and Avocado Heights (CAC), we write to request the final permit record for the pending appeal of the July 22, 2022, approval of a Temporary Authorization Request for Quemetco, Inc.

The Board of Environmental Safety's newly adopted appeals rule requires resubmission of appeals filed before May 1, 2023, "on or before May 31, 2023."¹ Further, the Board's Standing Order 23-02 establishes that "all evidence presented to the Board at the hearing" shall be limited to items "in the final permit record."² As a result, we request that the Board provide the final permit record immediately to allow preparation of CAC's appeal.

Sincerely,



Angela Johnson Meszaros
Managing Attorney

¹ 66271(f).

² Standing Order 23-02(2).

EXHIBIT F

From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Wednesday, May 3, 2023 8:59 AM
To: Angela Johnson Meszaros
Cc: Byron Chan; Erica Martinez; Lisa Fuhrmann; Sharma, Swati; Lupe Ruelas; Ocampo, Linda@DTSC
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization
Attachments: 2023-5-3 BES Response to Earth Justice Appeal 23-02 (Portfolio).pdf

External Sender



Ms. Meszaros,

Please find attached pdf portfolio containing the documents that are responsive to your request.

As explained in the response, we need DTSC to confirm that no other documents should be included in the final permit record for this matter. I will be in touch as soon as we get that confirmation.

Regards,



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Tuesday, May 2, 2023 2:31 PM
To: Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>
Subject: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Sharma and Mr. Forest:

Please see the attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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Yana Garcia
Secretary for
Environmental Protection



P.O. Box 806 • 1001 "I" Street, Sacramento, California 95812-0806



Gavin Newsom
Governor

Jeanne Rizzo
Board Chair

Alexis Strauss-Hacker
Vice Chair

Sushma Bhatia
Member

Georgette Gomez
Member

Lizette Ruiz
Member

Via Email

May 3, 2023

Angela Johnson Meszaros
Earth Justice
707 Wilshire Blvd., Suite 4300
Los Angeles, CA 90017
ameszaros@earthjustice.org

Re: Board of Environmental Safety Appeal No. 23-02

This letter responds to your request for the final permit record in the matter of the July 22, 2022 approval of a Temporary Authorization Request for Quemetco, Inc.

Enclosed with this letter, please find the following documents responsive to your request:

1. Quemetco, Inc., Temporary Authorization Request, dated June 9, 2022
2. DTSC Approval of Temporary Authorization Request, dated July 22, 2022
3. DTSC Public Notices of Approval of Temporary Authorization Request – English, Spanish and Mandarin, dated July 2022

The Board has requested confirmation from DTSC that the above-referenced documents comprise the entirety of the final permit record for this matter. If DTSC identifies additional documents that are responsive to your request, we will provide those to you as soon as possible.

Pending confirmation from DTSC that the above-referenced documents constitute the entirety of the final permit record for this matter, the enclosed documents constitute all records in the possession of the Board that are responsive to your request.

Sincerely,

Greg Forest
Board Counsel

Enclosures

EXHIBIT G

From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Wednesday, May 3, 2023 11:43 AM
To: Forest, Gregory@DTSC
Cc: Byron Chan; Erica Martinez; Lisa Fuhrmann; Sharma, Swati; Lupe Ruelas; Ocampo, Linda@DTSC
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization
Attachments: 2023-05-03 response regarding request for final permit record.pdf

Mr. Forest,

Thank you for your prompt response. Please see our attached reply.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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Sent: Wednesday, May 3, 2023 8:59 AM
To: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Meszaros,

Please find attached pdf portfolio containing the documents that are responsive to your request.

As explained in the response, we need DTSC to confirm that no other documents should be included in the final permit record for this matter. I will be in touch as soon as we get that confirmation.

Regards,



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>
Subject: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Sharma and Mr. Forest:

Please see the attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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May 3, 2023

Swati Sharma, Executive Officer
Greg Forest, Attorney Advisor
Board of Environmental Safety
Department of Toxic Substances Control


Dear Ms. Sharma and Mr. Forest:

On May 3, 2023, Mr. Forest responded to our request for the final permit record for the matter related to the Department of Toxic Substances Control's (DTSC) July 22, 2022, approval of a Temporary Authorizations for Quemetco, Inc. That response listed three documents: Quemetco's June 2022 Temporary Authorization Request, DTSC's July 2022 Approval, and Public Notices of DTSC's approval.

As outlined in Quemetco's June 9, 2022, Temporary Authorization Request, the July 22, 2022, approval came after a long series of events that stretches back to its proceeding February 11, 2021, Temporary Authorization Request, a subsequent Class 2 Permit Modification Request and appeals of each those decisions. In addition, on August 4, 2022, CAC appealed DTSC Permitting's July 22, 2022, approval of Quemetco's June 9, 2022, Temporary Authorization Request. All of the documents related to this series of events must also be included in the record for this appeal.

Mr. Forest's May 3, 2023, letter also indicates that the three named documents "constitute all records in the possession of the Board that are responsive to your request." To the extent that CAC's request for the final permit record is a public records act request, it is clear that these three records are not "all records in the possession of the Board that are responsive to" our request since, at the very least, CAC's August 2022 appeal was submitted to the BES and there were subsequent exchanges between the BES and parties to the appeal. Further, the assertion that "pending confirmation from DTSC that the above-referenced documents constitute the entirety of the final record for this matter" is improper. Finalization of the record for this matter is a prerequisite for development of CAC's appeal.

As you are well aware, the Board has established a very, very short time frame for CAC to file its appeal. It is imperative that all the documents that are "part of the supporting file for the permit"¹ be provided immediately.

Sincerely,

Angela Johnson Meszaros
Managing Attorney

¹ 22 CCR § 66271.8(5) and 22 CCR § 66271.17(5).

EXHIBIT H

From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Wednesday, May 3, 2023 1:32 PM
To: Angela Johnson Meszaros
Cc: Byron Chan; Erica Martinez; Lisa Fuhrmann; Sharma, Swati; Lupe Ruelas; Ocampo, Linda@DTSC; Mayer, Alexander@DTSC; Choi, Sangwon Ryan@DTSC; White, Leah@DTSC; MWilliamson@manatt.com
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization
Attachments: 2023-05-03 response regarding request for final permit record.pdf; Appeal 23-02 BES Further Response Earth Justice.pdf

External Sender



Ms. Meszaros,

Please see attached.



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Mr. Forest,

Thank you for your prompt response. Please see our attached reply.

Angela Johnson Meszaros

Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Meszaros,

Please find attached pdf portfolio containing the documents that are responsive to your request.

As explained in the response, we need DTSC to confirm that no other documents should be included in the final permit record for this matter. I will be in touch as soon as we get that confirmation.

Regards,



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Tuesday, May 2, 2023 2:31 PM
To: Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>

Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>

Subject: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Sharma and Mr. Forest:

Please see the attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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Yana Garcia
Secretary for
Environmental Protection



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Governor

Jeanne Rizzo
Board Chair

Alexis Strauss-Hacker
Vice Chair

Sushma Bhatia
Member

Georgette Gomez
Member

Lizette Ruiz
Member

Via Email

May 3, 2023

Angela Johnson Meszaros
Earth Justice
707 Wilshire Blvd., Suite 4300
Los Angeles, CA 90017
ameszaros@earthjustice.org

Re: Board of Environmental Safety Appeal No. 23-02

Dear Ms. Meszaros,

As you acknowledged in your letter, the Board has established a deadline of May 31, 2023 to refile existing appeals under the appeal procedures recently enacted by the Board, at Section 66271.72 of Title 22, California Code of Regulations. Specifically, subsection (f) of Section 66271.72 requires previously-filed appeals to be refiled no later than May 31, 2023.

I have attached your response to my response to your request for records, and I have copied counsel for the Permitting Division and the facility operator so that all parties are included in these communications. Please include these parties in all further communications.

Sincerely,

Greg Forest
Board Counsel

cc: Alex Mayer, DTSC (Alexander.Mayer@dtsc.ca.gov)
Leah White, DTSC (Leah.White@dtsc.ca.gov)
Sangwon Ryan Choi, DTSC (SangwonRyan.Choi@dtsc.ca.gov)
Matt Williamson, Manatt (MWilliamson@manatt.com)

Enclosures

EXHIBIT I

From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Wednesday, May 3, 2023 1:13 PM
To: Mayer, Alexander@DTSC
Cc: Angela Johnson Meszaros; MWilliamson@manatt.com
Subject: Request for Records - Earth Justice Appeal
Attachments: Request for Records BES Appeal 23-02 Portfolio.pdf

External Sender



Dear Mr. Mayer,

Please find attached request for records concerning DTSC's approval of a Temporary Authorization for Quemetco on July 22, 2022.

Thanks,
Greg



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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Yana Garcia
Secretary for
Environmental Protection



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Board Chair

Alexis Strauss-Hacker
Vice Chair

Sushma Bhatia
Member

Georgette Gomez
Member

Lizette Ruiz
Member

Via Email

May 3, 2023

Alex Mayer
Department of Toxic Substances Control
1001 I Street, P.O. Box 806
Sacramento, CA 95812-0806
Alex.Mayer@dtsc.ca.gov

Re: Board of Environmental Safety Appeal No. 23-02

Dear Mr. Mayer,

The Board of Environmental Safety received the attached request for the "final permit record" in the matter of DTSC's July 22, 2022 approval of the Temporary Authorization for Quemetco. Please see attached documents provided in response to that request.

The Board hereby requests that the Permitting Division provide any additional records necessary to complete the administrative record for this matter as soon as possible.

Sincerely,

Greg Forest
Board Counsel

cc: Angela Johnsno Meszaros (AMeszaros@earthjustice.org)
Matt Williamson, Manatt (MWilliamson@manatt.com)

Enclosures

EXHIBIT J

From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Wednesday, May 10, 2023 9:39 AM
To: Mayer, Alexander@DTSC; Forest, Gregory@DTSC
Cc: Byron Chan; Erica Martinez; Lisa Fuhrmann; Sharma, Swati; Lupe Ruelas; Ocampo, Linda@DTSC; Choi, Sangwon Ryan@DTSC; White, Leah@DTSC; MWilliamson@manatt.com; Coe, Sam@DTSC; Heung, William; Khosraviani, Parisa@DTSC
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization
Attachments: 2023-05-10 follow up on record.pdf

Ms. Sharma and Mr. Forest:

Please see our attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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From: Angela Johnson Meszaros
Sent: Thursday, May 4, 2023 10:53 AM
To: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>; Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Please see our attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program

Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
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Sent: Wednesday, May 3, 2023 1:49 PM
To: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>; Angela Johnson Meszaros <ameszaros@earthjustice.org>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Mr. Forest,

On future correspondence regarding this matter, please include the following individuals from DTSC Permitting: Parisa Khosraviani, Sam Coe, and William Heung. I have copied them on this email.

Sincerely,

Alex Mayer (he/him/his)

Senior Staff Counsel
Office of Legal Counsel
(279) 895-5082
(916) 662-2199 (cell)
Alexander.Mayer@dtsc.ca.gov
Department of Toxic Substances Control
1001 "I" Street, P.O. Box 806, Sacramento, California 95812-0806
California Environmental Protection Agency



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Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Meszaros,

Please see attached.

#



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Mr. Forest,

Thank you for your prompt response. Please see our attached reply.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
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Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Meszaros,

Please find attached pdf portfolio containing the documents that are responsive to your request.

As explained in the response, we need DTSC to confirm that no other documents should be included in the final permit record for this matter. I will be in touch as soon as we get that confirmation.

Regards,



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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To: Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>
Subject: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Sharma and Mr. Forest:

Please see the attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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May 10, 2023

Swati Sharma, Executive Officer
Greg Forest, Attorney Advisor
Board of Environmental Safety
Department of Toxic Substances Control

Dear Ms. Sharma and Mr. Forest:

On May 2, 2023, through May 4, 2023, we engaged in a series of exchanges related to preparation of a timely and legally adequate record for appeal of DTSC's July 22, 2022, approval of a Temporary Authorization Request for Quemetco, Inc.

We request an update regarding the status of DTSC's record preparation effort as well as an estimate of when the record will be provided.

Sincerely,

Angela Johnson Meszaros
Managing Attorney

EXHIBIT K

From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Friday, May 12, 2023 4:27 PM
To: Mayer, Alexander@DTSC
Cc: Benedict, Annakathryn@DTSC; Coe, Sam@DTSC; Khosraviani, Parisa@DTSC; Heung, William; Angela Johnson Meszaros; MWilliamson@manatt.com; Sharma, Swati; Ocampo, Linda@DTSC; Choi, Sangwon Ryan@DTSC; Byron Chan; Erica Martinez; Lisa Fuhrmann; Lupe Ruelas; White, Leah@DTSC
Subject: BES Appeal 2302 Quemetco July 2022 TA Permit Record
Attachments: Appeal 23-02 BES Request Permitting 5-12-23.pdf

External Sender



Dear Mr. Mayer,

Please see attached correspondence.

A response is requested by close of business Monday.



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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Yana Garcia
Secretary for
Environmental Protection

BOARD OF
**Environmental
Safety**

P.O. Box 806 • 1001 "I" Street, Sacramento, California 95812-0806



Gavin Newsom
Governor

Jeanne Rizzo
Board Chair

Alexis Strauss-Hacker
Vice Chair

Sushma Bhatia
Member

Georgette Gomez
Member

Lizette Ruiz
Member

Via Email

May 12, 2023

Alex Mayer
Department of Toxic Substances Control
1001 I Street, P.O. Box 806
Sacramento, CA 95812-0806
Alex.Mayer@dtsc.ca.gov

Re: Board of Environmental Safety Appeal No. 23-02

Dear Mr. Mayer,

On May 2, 2023, the Board of Environmental Safety ("Board") received a request for the "final permit record" supporting DTSC's July 22, 2022 decision ("Decision") to grant a Temporary Authorization for Quemetco. On May 3, 2023, the Board provided the following documents in response to that request:

1. Quemetco, Inc., Temporary Authorization Request, dated June 9, 2022
2. DTSC Approval of Temporary Authorization Request, dated July 22, 2022
3. DTSC Public Notices of Approval of Temporary Authorization Request – English, Spanish and Mandarin, dated July 2022

On May 3, 2023, the Board requested the Permitting Division to provide additional records necessary to fulfill the request, if any, as soon as possible. To date, no additional records have been produced, and no response to the Board's request has been provided.

If there are any other public records which the Permitting Division relied upon in making its Decision in this matter, please either provide electronic copies or inform the parties where those records may be located by no later than the close of business on May 15, 2023.

Sincerely,

Greg Forest
Board Counsel

cc: Parisa Khosraviani (Parisa.Khosraviani@dtsc.ca.gov)
Sam Coe (Sam.Coe@dtsc.ca.gov)
William Heung (William.Heung@dtsc.ca.gov)
Angela Johnson Meszaros (AMeszaros@earthjustice.org)
Matt Williamson, Manatt (MWilliamson@manatt.com)

EXHIBIT L

From: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>
Sent: Monday, May 15, 2023 4:22 PM
To: Forest, Gregory@DTSC
Cc: Benedict, Annakathryn@DTSC; Coe, Sam@DTSC; Khosraviani, Parisa@DTSC; Heung, William; Angela Johnson Meszaros; MWilliamson@manatt.com; Sharma, Swati; Ocampo, Linda@DTSC; Choi, Sangwon Ryan@DTSC; Byron Chan; Erica Martinez; Lisa Fuhrmann; Lupe Ruelas; White, Leah@DTSC; Lorentzen, Wayne@DTSC; Koch, Lori@DTSC
Subject: RE: BES Appeal 2302 Quemetco July 2022 TA Permit Record
Attachments: 2023-5-12 Board of Environmental Safety Appeal No. 23-02 Response.pdf

External Sender



Mr. Forest:

I apologize, but I attached the incorrect letter to my email below. Attached is the correct letter.

Alex Mayer *(he/him/his)*

Senior Staff Counsel
Office of Legal Counsel
(279) 895-5082
(916) 662-2199 (cell)
Alexander.Mayer@dtsc.ca.gov
Department of Toxic Substances Control
1001 "I" Street, P.O. Box 806, Sacramento, California 95812-0806
California Environmental Protection Agency



From: Mayer, Alexander@DTSC
Sent: Monday, May 15, 2023 3:34 PM
To: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Cc: Benedict, Annakathryn@DTSC <Annakathryn.Benedict@dtsc.ca.gov>; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Angela Johnson Meszaros <ameszaros@earthjustice.org>; MWilliamson@manatt.com; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; Lorentzen, Wayne@DTSC <Wayne.Lorentzen@dtsc.ca.gov>; Koch, Lori@DTSC <Lori.Koch@dtsc.ca.gov>
Subject: RE: BES Appeal 2302 Quemetco July 2022 TA Permit Record

Mr. Forest:

The Permitting Division has received your letter dated May 12, 2023. At approximately the same time, the DTSC Permitting Division sent a letter dated May 12, 2023, addressed to you and Swati Sharma. It appears our two letters inadvertently crossed; for your convenience I have reattached a copy of the DTSC letter. The Permitting Division believes the information provided in its letter to you and Mrs. Sharma addresses the issues raised in your letter.

Please let the Permitting Division know if the Board of Environmental Safety needs anything further at this time.

Sincerely,

Alex Mayer (he/him/his)

Senior Staff Counsel

Office of Legal Counsel

(279) 895-5082

(916) 662-2199 (cell)

Alexander.Mayer@dtsc.ca.gov

Department of Toxic Substances Control

1001 "I" Street, P.O. Box 806, Sacramento, California 95812-0806

California Environmental Protection Agency



From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>

Sent: Friday, May 12, 2023 4:27 PM

To: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>

Cc: Benedict, Annakathryn@DTSC <Annakathryn.Benedict@dtsc.ca.gov>; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Angela Johnson Meszaros <ameszaros@earthjustice.org>; MWilliamson@manatt.com; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>

Subject: BES Appeal 2302 Quemetco July 2022 TA Permit Record

Dear Mr. Mayer,

Please see attached correspondence.

A response is requested by close of business Monday.



Greg Forest

Attorney Advisor

Board of Environmental Safety

279-895-5154

Gregory.Forest@dtsc.ca.gov

Department of Toxic Substances Control

1001 I Street, Sacramento, CA 95814

California Environmental Protection Agency

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Yana Garcia
Secretary for
Environmental Protection



Department of Toxic Substances Control

Meredith Williams, Ph.D.
Director
8800 Cal Center Drive
Sacramento, California 95826-3200



Gavin Newsom
Governor

May 12, 2023

Swati Sharma, Executive Officer
Greg Forest, Board Counsel
Board of Environmental Safety
Department of Toxic Substances Control
1001 I Street, P.O. Box 806
Sacramento, CA 95812-0806

Dear Mr. Forest and Mrs. Sharma:


The Department of Toxic Substances Control (DTSC) received your letter addressed to Alex Mayer dated May 3, 2023. In your letter, you requested the Permitting Division provide any additional records necessary to complete the administrative record related to DTSC's July 22, 2022 approval of the Temporary Authorization for Quemetco, Inc., now known as Ecobat Resources California, Inc. (Ecobat). The letter includes enclosures consisting of documents associated with the temporary authorization request and approval, a May 2, 2023 letter from Earthjustice to the Board of Environmental Safety (Board), and a May 3, 2023 response letter from the Board to Earthjustice. Earthjustice's letter included a request that the Board provide the "...final permit record for the pending appeal of the July 22, 2022, approval of a Temporary Authorization Request for Quemetco, Inc." The Board's response letter to Earthjustice included documents associated with the temporary authorization and a statement that the Board has requested confirmation from DTSC that the documents comprise the entirety of the final permit record for the matter.

DTSC can confirm that there are additional documents that comprise the final permit record. Per your request, DTSC will continue to assemble the complete administrative record for its decision to approve the Temporary Authorization and will provide it when completed. We are anticipating delivering the record by May 31, 2023. We would like to note that the effect of the authorization subject to appeal has no further application for Ecobat regardless of any Board decision on the status of the current stay. The term of DTSC's authorization has expired. In pertinent part, the July 22, 2022 Temporary Authorization states, "This temporary authorization will expire 180 days from the date of this letter."

DTSC would also like to note that the public comment period is currently underway for a permit modification that encompasses all of the activities covered by the July 22, 2022 Temporary Authorization. The public comment period closes on June 12, 2023.

If you have any further questions, please contact Parisa Khosraviani at Parisa.Khosraviani@dtsc.ca.gov.

Sincerely,



Wayne Lorentzen
Permitting Division
Department of Toxic Substances Control

Cc:

Matt Williamson, Manatt, Phelps and Phillips (MWilliamson@manatt.com)
Carl Raycroft, Ecobat Resources California, Inc. (Carl.Raycroft@ecobat.com)
Angela Johnson Meszaros, Earthjustice (Ameszaros@earthjustice.org)
Katie Butler, DTSC (Katherine.Butler@dtsc.ca.gov)
Lori Koch, DTSC (Lori.Koch@dtsc.ca.gov)
William Heung, DTSC (William.Heung@dtsc.ca.gov)
Sam Coe, DTSC (Sam.Coe@dtsc.ca.gov)
Alex Mayer, DTSC (Alexander.Mayer@dtsc.ca.gov)
Leah White, DTSC (Leah.White@dtsc.ca.gov)
Sangwon Ryan Choi, DTSC (SangwonRyan.Choi@dtsc.ca.gov)

EXHIBIT M

From: Byron Chan <bchan@earthjustice.org>
Sent: Wednesday, May 17, 2023 3:18 PM
To: Angela Johnson Meszaros; Mayer, Alexander@DTSC; Forest, Gregory@DTSC
Cc: Erica Martinez; Lisa Fuhrmann; Sharma, Swati; Lupe Ruelas; Ocampo, Linda@DTSC; Choi, Sangwon Ryan@DTSC; White, Leah@DTSC; MWilliamson@manatt.com; Coe, Sam@DTSC; Heung, William; Khosraviani, Parisa@DTSC
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization
Attachments: 2023-05-17_Ltr_RE_Final AR.pdf

Ms. Sharma and Mr. Forest:

Please see our attached letter.

Best,
Byron

From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Wednesday, May 10, 2023 9:39 AM
To: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>; Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Sharma and Mr. Forest:

Please see our attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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From: Angela Johnson Meszaros
Sent: Thursday, May 4, 2023 10:53 AM
To: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>; Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Please see our attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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From: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>
Sent: Wednesday, May 3, 2023 1:49 PM
To: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>; Angela Johnson Meszaros <ameszaros@earthjustice.org>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>
Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Mr. Forest,

On future correspondence regarding this matter, please include the following individuals from DTSC Permitting: Parisa Khosraviani, Sam Coe, and William Heung. I have copied them on this email.

Sincerely,

Alex Mayer (he/him/his)

Senior Staff Counsel

Office of Legal Counsel

(279) 895-5082

(916) 662-2199 (cell)

Alexander.Mayer@dtsc.ca.gov

Department of Toxic Substances Control

1001 "I" Street, P.O. Box 806, Sacramento, California 95812-0806

California Environmental Protection Agency



From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>

Sent: Wednesday, May 3, 2023 1:32 PM

To: Angela Johnson Meszaros <ameszaros@earthjustice.org>

Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com

Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Meszaros,

Please see attached.



Greg Forest

Attorney Advisor

Board of Environmental Safety

279-895-5154

Gregory.Forest@dtsc.ca.gov

Department of Toxic Substances Control

1001 I Street, Sacramento, CA 95814

California Environmental Protection Agency

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From: Angela Johnson Meszaros <ameszaros@earthjustice.org>

Sent: Wednesday, May 3, 2023 11:43 AM

To: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>

Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas

<lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>

Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Mr. Forest,

Thank you for your prompt response. Please see our attached reply.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>

Sent: Wednesday, May 3, 2023 8:59 AM

To: Angela Johnson Meszaros <ameszaros@earthjustice.org>

Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Lupe Ruelas <lruelas@earthjustice.org>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>

Subject: RE: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Meszaros,

Please find attached pdf portfolio containing the documents that are responsive to your request.

As explained in the response, we need DTSC to confirm that no other documents should be included in the final permit record for this matter. I will be in touch as soon as we get that confirmation.

Regards,



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Tuesday, May 2, 2023 2:31 PM
To: Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Cc: Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>
Subject: Request for permit record--Quemetco July 2022 Temporary Authorization

Ms. Sharma and Mr. Forest:

Please see the attached letter.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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May 17, 2023

VIA ELECTRONIC MAIL

Swati Sharma, Executive Officer
Greg Forest, Board Counsel
Board of Environmental Safety
Department of Toxic Substances Control
1001 I Street, P.O. Box 806
Sacramento, CA 95812-0806

RE: Final Administrative Record for CAC's Appeal of Quemetco's July 2022 Temporary Authorization

Dear Ms. Sharma and Mr. Forest:

In a letter dated May 12, 2023, the Department of Toxic Substances Control (DTSC) confirmed that it has not provided the entire final permit record for the Temporary Authorization for Quemetco, now known as Ecobat. DTSC anticipates delivering additional documents that comprise the final record by May 31, 2023.

The Board's regulations require the Clean Air Coalition of North Whittier and Avocado Heights (CAC) to resubmit its appeal of DTSC's July 2022 approval of the Temporary Authorization for Quemetco by May 31, 2023. Requiring CAC to resubmit its appeal without adequate time—indeed, any time—to review the final permit record is improper. Accordingly, CAC requests an extension of time to resubmit its appeal. That extension should run 30 days from the date that DTSC provides the entire final permit record for review.

Sincerely,

Byron Chan, Senior Attorney
Community Partnerships Program
Earthjustice

EXHIBIT N



May 17, 2023

VIA ELECTRONIC MAIL

DTSC's Legal Office
HQ PRA Coordinator
1001 I Street, MS 23A
Sacramento, CA 95814
Daniel.Knight@dtsc.ca.gov

RE: Public Records Act Request – Quemetco's 2021 and 2022 Temporary Authorizations for Centrifuge and Auger

Dear Mr. Knight:

On February 11, 2021, Quemetco (also known as Ecobat Resources California Inc., EPA ID CAD066233966) requested a temporary authorization for a compression auger and centrifuge at its facility (2021 Temporary Authorization). On April 19, 2021, DTSC approved Quemetco's request. On January 26, 2022, DTSC's Permit Appeals Officer vacated the temporary authorization.

On June 9, 2022, Quemetco again requested a temporary authorization for a compression auger and centrifuge at its facility (2022 Temporary Authorization). On July 22, 2022, DTSC approved Quemetco's request.

We submit this Public Records Act request to obtain access to the following records¹:

1. All internal DTSC records regarding the 2021 and 2022 Temporary Authorizations;
2. All records sent to or from DTSC regarding the 2021 and 2022 Temporary Authorizations;
3. All records between DTSC and Quemetco/Ecobat regarding the 2021 and 2022 Temporary Authorizations; and

¹ For the purposes of this request, the term "records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

May 17, 2023

Page 2 of 2

4. All records between DTSC and those acting at Quemetco/Ecobat's direction or on its behalf regarding the 2021 and 2022 Temporary Authorizations.

This request is made pursuant to the Public Records Act. (Gov. Code §§ 6250, *et seq.*) It is also made pursuant to Article I, section 3(b) of the California Constitution, which provides a Constitutional right of access to information concerning the conduct of government. Article I, section 3(b) provides that any statutory right to information shall be broadly construed to provide the greatest access to government information and further requires that any statute that limits the right of access to information shall be narrowly construed.

We respectfully request that DTSC provide relevant records in electronic format. (Gov. Code § 6253.9.) We also request a fee waiver in connection with this request. Earthjustice is a public interest, non-profit organization that works to protect the right of all people to a healthy environment and to uphold the laws of the State of California. A fee waiver is consistent with the letter and spirit of the Public Records Act. Should DTSC decline to grant a fee waiver, we ask that DTSC notify us prior to any duplication of records that would incur costs.

We look forward to your response within 10 days of receipt of this request, as provided by Gov. Code § 6253(c). If all the requested records are not located within that time, we request that you provide all requested records or portions of records which are available and provide other records on a rolling basis as they are located. If you have any questions about this request, please do not hesitate to contact me at (213) 766-1064 or bchan@earthjustice.org. We appreciate your cooperation and would be happy to clarify the request or otherwise simplify your efforts to comply.

Sincerely,

A handwritten signature in cursive script that reads "Byron Chan".

Byron Chan
Attorney
Earthjustice

EXHIBIT O

May 18, 2023

Client-Matter: 45122-032

VIA E-MAIL

Swati Sharma, Executive Officer
Greg Forest, Board Counsel
Board of Environmental Safety
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95612
Swati.Sharma@dtsc.ca.gov
Gregory.Forest@dtsc.ca.gov

Re: Earthjustice's May 17, 2023 Request for an Extension to Refile the Temporary Authorization Appeal

Dear Ms. Sharma and Mr. Forest:

I am writing on behalf of Ecobat Resources California, Inc. (formerly Quemetco, Inc.) ("Ecobat") to briefly respond to Earthjustice's May 17, 2023 request for an extension of time to refile its appeal of DTSC's July 22, 2022 approval of Temporary Authorization. Earthjustice asserts that it should not be required to file its appeal by the May 31, 2023 deadline because DTSC will be producing the final permit record on that same date. For the reasons outlined below, we urge the Board to deny Earthjustice's request for this unnecessary extension, which will serve only to further delay Ecobat's implementation of an environmental improvement project—which DTSC approved nearly one year ago.

As you are both aware, following months of extensive public engagement, the Board established an expedited appeal process for temporary authorization appeals, noting that temporary authorizations are essential to allowing permitted facilities to timely implement changes that are beneficial for health and human safety. There is no language in the rules specifying that extensions of this expedited process are authorized, and, in fact, other actions taken by the Board show that lack of access to the final permit record was not envisioned as a proper basis upon which to base an extension request (as Earthjustice does here).

Specifically, the Board's Rules for Administration of Appeals (Standing Order 23-01) sets a 30-day limit for DTSC to provide a copy of the administrative record. Had the Board intended to require the production of the permitting record prior to the submittal of a temporary authorization appeal statement (also with a 30-day window), this deadline would have been set earlier. We also note that DTSC has committed to providing the final permit record within 30

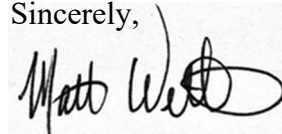
days of the request, in compliance with the Standing Order. DTSC's production of the final permit record in compliance with the Board's Standing Order cannot be sufficient basis for the granting of an extension, as sought here.

In any event, Earthjustice's claimed inability to cite the administrative record is immaterial, because the Rules require only that Earthjustice submit "a brief statement explaining why the appellant's appeal should be granted."¹ In other words, the Rules do not require Earthjustice to support their arguments with "citations to the final permit record" (as is required for all other permit appeals).² Earthjustice's request for an extension therefore should be rejected. DTSC is providing the record within the timeframe contemplated by the Rules, and regardless, a final administrative record is unnecessary for purposes of this expedited appeals process.³

Earthjustice's extension request also fails to acknowledge the extensive appeal history related to Ecobat's dewatering project, and the fact that as part of those prior appeals, DTSC has produced extensive documents constituting the administrative record supporting those prior decisions on two separate occasions. Because the temporary authorization request at issue here is, in large part, based on the exact same information DTSC relied upon in reaching those prior decisions, Earthjustice largely has already been provided with the final permit record, and certainly has sufficient information about the dewatering project upon which to submit its brief statement supporting an appeal of the temporary authorization approval. Indeed, Earthjustice previously submitted extensive briefing on the temporary authorization.

Finally, and as we know you are aware, DTSC granted Temporary Authorization of this environmental improvement project on July 22, 2022—nearly ten months ago—but the authorization was stayed pending Earthjustice's appeal. It is time for this appeal to proceed to the merits. Thank you for your time and attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Williamson", is written over a light gray rectangular background.

Matthew Williamson

¹ See 22 CCR § 66271.72(a)(2).

² See 22 CCR § 66271.72(a)(2), exempting TA appeals from multiple requirements, including the requirement in 66271.72(a)(4) that petitions "shall be supported by citations to the final permit record".

³ We similarly note that DTSC is meeting the timing requirements specified in the Standing Order.

cc (via email):

Carl Raycroft (Carl.Raycroft@ecobat.com)
Sam Coe (Sam.Coe@dtsc.ca.gov)
William Heung (William.Heung@dtsc.ca.gov)
Parisa Khosraviani (Parisa.Khosraviani@dtsc.ca.gov)
Alexander Mayer (Alexander.Mayer@dtsc.ca.gov)
Leah White (Leah.White@dtsc.ca.gov)
Sangwon Ryan Choi (SangwonRyan.Choi@dtsc.ca.gov)
Byron Chan (BChan@earthjustice.org)
Angela Johnson Meszaros (AMeszaros@earthjustice.org)
Linda Ocampo (Linda.Ocampo@dtsc.ca.gov)
Erica Martinez (EMartinez@earthjustice.org)
Lisa Fuhrmann (LFuhrmann@earthjustice.org)
Lupe Ruelas (LRuelas@earthjustice.org)

EXHIBIT P

From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Friday, May 19, 2023 9:50 AM
To: Byron Chan; Mayer, Alexander@DTSC
Cc: Ocampo, Linda@DTSC; Khosraviani, Parisa@DTSC; Coe, Sam@DTSC; Heung, William; White, Leah@DTSC; Choi, Sangwon Ryan@DTSC; Angela Johnson Meszaros; Erica Martinez; MWilliamson@manatt.com; McGrath, David
Subject: Earth Justice Request for Extension of Time to File Appeal (Ecobat Temporary Authorization July 22, 2022)
Attachments: Appeal 23-02 BES Response Earth Justice and Permitting Division 5-19-2023 SS.pdf

External Sender



Dear Counsel,

Please see attached.

Regards,



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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Yana Garcia
Secretary for
Environmental Protection



P.O. Box 806 • 1001 "I" Street, Sacramento, California 95812-0806



Gavin Newsom
Governor

Jeanne Rizzo
Board Chair

Alexis Strauss-Hacker
Vice Chair

Sushma Bhatia
Member

Georgette Gomez
Member

Lizette Ruiz
Member

Via Email

May 19, 2023

Alex Mayer
Department of Toxic Substances Control
1001 I Street, P.O. Box 806
Sacramento, CA 95812-0806
Alex.Mayer@dtsc.ca.gov

Byron Chan
Earth Justice
707 Wilshire Blvd., Suite 400
Los Angeles, CA 90017
BChan@earthjustice.org

Re: Request from Earth Justice for Extension of Time to Refile Appeal of July 22, 2022 Temporary Authorization Decision (Ecobat/Quemetco)

Dear Messrs. Mayer and Chan,

This letter addresses the concerns that have been raised regarding the refiling of the appeal of DTSC's Permitting Division's decision, on July 22, 2022, to approve a Temporary Authorization for Quemetco, Inc. ("Decision"). As explained more fully below, while we are dismayed by the delays anticipated by the Permitting Division in the assembly of the administrative record in this matter, to ensure that those delays do not in any way undermine fairness in the appeal process, the request for an extension of time to refile the appeal is **granted**.

On May 2, 2023, the Board of Environmental Safety ("Board") provided Earth Justice with certain documents relevant to the Decision, which included the application for the Temporary Authorization and the analysis of the Permitting Division in support of its Decision. While this appeared to include the records most relevant to the Decision, the Permitting Division was unable to confirm that these documents constituted the entire administrative record. Lacking such confirmation, Earth Justice asserted that it would be prevented from refiling its appeal of the Decision within the applicable timeframe. On May 3, 2023, the Board requested the Permitting Division to provide, "as soon as possible," such additional records as necessary to complete the administrative record in support of its Decision.

On May 12, 2023, the Permitting Division responded by confirming that additional documents exist, which are necessary to complete the administrative record for the Decision. The Permitting Division estimated that these records would be provided by May 31, 2023. Counsel for permittee Ecobat has urged the Board to deny the request, because the procedures applicable to an appeal of a temporary authorization decision do not contemplate that the full administrative record will be available in advance of the deadline to file such an appeal.

Under the standard appeal process established by the emergency rulemaking recently completed by the Board, appeals of most permit decisions must be filed before the administrative record has been compiled and indexed. However, Section 66271.17 of Title 22, California Code of Regulations, requires the Permitting Division to complete the "Final Permit

Record” on the day that the final permit decision is issued. As a general premise, the Board expects that interested parties will have unfettered access to the Final Permit Record when notice of the final permit decision is provided under Sections 66271.9 and 66271.14, so that they are not prevented from engaging effectively in the appeal process.

Even though the Decision at issue here is much narrower in scope than a full permit renewal, and is not subject to Section 66271.17, DTSC’s Permitting Division remains subject to the same obligation to provide timely access to the records relied upon for the Decision. Ensuring open access to permit records is a crucial element of the appeal process. The experience of this matter thus far suggests that the Permitting Division may need to revisit its record management practices so that interested parties and members of the public are more reliably provided timely access to relevant information, particularly concerning high-profile permit matters such as this. When appeals of such matters can be anticipated, the Permitting Division should redouble its efforts to diligently assemble the administrative record so that interested parties are not prevented from engaging effectively in the Board’s appeals process.

Considering the narrow scope of the Decision, which was issued nearly 10 months ago, the need for additional time to assemble the administrative record in this matter is very difficult to understand. As the Board assumes its role to hear and decide appeals of hazardous waste facility permit decisions generally, the apparent inability of the Permitting Division to timely assemble the records necessary to support the Decision in this matter is cause for genuine concern.

The Permitting Division is directed to provide all records necessary to complete the administrative record of the Decision by no later than **May 31, 2023**.

Earth Justice is granted an extension of thirty (30) days to refile its appeal in this matter, which must be filed with the Board of Environmental Safety using Form BES 2302 by no later than **June 30, 2023**.

Sincerely,

Swati Sharma
Swati Sharma
Executive Officer

Greg Forest
Greg Forest
Board Counsel

cc: Parisa Khosraviani, DTSC (Parisa.Khosraviani@dtsc.ca.gov)
Sam Coe, DTSC (Sam.Coe@dtsc.ca.gov)
William Heung, DTSC (William.Heung@dtsc.ca.gov)
Leah White, DTSC (Leah.White@dtsc.ca.gov)
Sangwon Ryan Choi, DTSC (SangwonRyan.Choi@dtsc.ca.gov)
Angela Johnson Meszaros, Earth Justice (AMeszaros@earthjustice.org)
Erica Martinez, Earth Justice (EMartinez@earthjustice.org)
Matt Williamson, Manatt (MWilliamson@manatt.com)
David McGrath, Manatt (DLMcGrath@manatt.com)

EXHIBIT Q

From: [Forest, Gregory@DTSC](mailto:Forest.Gregory@DTSC)
To: [Byron Chan](mailto:Byron.Chan); mwilliamson@manatt.com; [Erica Martinez](mailto:Erica.Martinez); [Lupe Ruelas](mailto:Lupe.Ruelas); [White, Leah@DTSC](mailto:White,Leah@DTSC); [Mayer, Alexander@DTSC](mailto:Mayer,Alexander@DTSC); lgarcete@manatt.com; dmcgrath@manatt.com; [Choi, Sangwon Ryan@DTSC](mailto:Choi,Sangwon.Ryan@DTSC)
Subject: Ecobat Temporary Authorization Administrative Record
Date: Wednesday, May 31, 2023 1:29:14 PM

External Sender



Dear Counsel

Please use this link to access the administrative record supporting the July 22, 2022 decision to approve a temporary authorization for Ecobat as compiled by the Permitting Division staff of DTSC.

Here's a OneDrive link to Administrative Record: https://cadtscomy.sharepoint.com/:f:/g/personal/gregory_forest_dtsc_ca_gov/EtRJDvaYrB9KoKF-E3hS7wkBAogC9V5che6b68x_3VA8Ww



Greg Forest
Attorney Advisor
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279-895-5154
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California Environmental Protection
Agency

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EXHIBIT R

From: [Kane, Christopher@DTSC](mailto:Kane.Christopher@DTSC)
To: [Mayer, Alexander@DTSC](mailto:Mayer,Alexander@DTSC); [Palmer, Karl@DTSC](mailto:Palmer,Karl@DTSC)
Cc: [Hendricks, Colin@DTSC](mailto:Hendricks,Colin@DTSC); [White, Leah@DTSC](mailto:White,Leah@DTSC); [Choi, Sangwon Ryan@DTSC](mailto:Choi,Sangwon.Ryan@DTSC); [Byron Chan](#); [Lupe Ruelas](#)
Subject: RE: Earthjustice Public Records Request
Date: Wednesday, June 7, 2023 2:35:38 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image005.png](#)

External Sender



Good afternoon Byron,

I believe Karl already left you a voicemail, but please let this email confirm that the Appeals Officer and the related staff from the 2021 temporary authorization appeal received your PRA request, will comply, and are in the process of gathering and reviewing documents.

I understand that DTSC has already sent a 10 day response letter to your PRA request, and in conversation with you, set a schedule for rolling production starting on September 1, 2023. The Appeals Officer believes that it can produce its documents on or before September 1, 2023. If you require a separate 10 day letter from the appeals officer, please let me know, however we believe the original letter suffices for DTSC.

Thank you, and please direct any questions you may have about this to me.

Christopher Kane
Assistant Chief Counsel
Department of Toxic Substances Control
Work Cell: (916)-508-2783
Christopher.kane@dtsc.ca.gov

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From: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>
Sent: Friday, June 2, 2023 3:54 PM
To: Palmer, Karl@DTSC <Karl.Palmer@dtsc.ca.gov>
Cc: Kane, Christopher@DTSC <Christopher.Kane@dtsc.ca.gov>; Hendricks, Colin@DTSC

<Colin.Hendricks@dtsc.ca.gov>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; Byron Chan <bchan@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>

Subject: Earthjustice Public Records Request

Mr. Palmer,

Attached, please see a Public Records Act (PR8-051723-02) that DTSC received from Earthjustice on May 17, 2023. DTSC Permitting originally interpreted the request to exclude records in the possession of the former DTSC Appeals Office (Appeals Office). However, at a meeting yesterday, Earthjustice clarified that it is seeking responsive records in the possession of the Appeals Office.

Earthjustice does not want to submit a separate PRA request to the Appeals Office. Because DTSC Permitting is not authorized to search emails of the Appeals Office, DTSC Permitting indicated it would forward the request to you.

At your earliest convenience, could you please reach out to Earthjustice to confirm that you will be handling the portion of PRA request seeking Board records or that you are requesting a separate PRA request?

Thank you,

Alex Mayer (he/him/his)

Senior Staff Counsel

Office of Legal Counsel

(279) 895-5082

(916) 662-2199 (cell)

Alexander.Mayer@dtsc.ca.gov

Department of Toxic Substances Control

1001 "I" Street, P.O. Box 806, Sacramento, California 95812-0806

California Environmental Protection Agency



EXHIBIT S

From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Thursday, June 22, 2023 5:03 PM
To: Forest, Gregory@DTSC; Swati.Sharma@bes.dtsc.ca.gov
Cc: Benedict, Annakathryn@DTSC; Mayer, Alexander@DTSC; Coe, Sam@DTSC; Khosraviani, Parisa@DTSC; Heung, William; Ocampo, Linda@DTSC; Choi, Sangwon Ryan@DTSC; Byron Chan; Lisa Fuhrmann; Lupe Ruelas; White, Leah@DTSC; MWilliamson@manatt.com; McGrath, David
Subject: Re: BES Appeal 2302 Quemetco July 2022 TA Permit Record
Attachments: 2023-06-21_Request to Argument the Record.pdf

Ms. Sharma and Mr. Forest:

Please see the attached letter regarding the administrative record.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
707 Wilshire Blvd, Suite 4300
Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Friday, May 12, 2023 4:26 PM
To: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>
Cc: Benedict, Annakathryn@DTSC <Annakathryn.Benedict@dtsc.ca.gov>; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Angela Johnson Meszaros <ameszaros@earthjustice.org>; MWilliamson@manatt.com <MWilliamson@manatt.com>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>
Subject: BES Appeal 2302 Quemetco July 2022 TA Permit Record

Dear Mr. Mayer,

Please see attached correspondence.

A response is requested by close of business Monday.



Greg Forest

Attorney Advisor

Board of Environmental Safety

279-895-5154

Gregory.Forest@dtsc.ca.gov

Department of Toxic Substances Control

1001 I Street, Sacramento, CA 95814

California Environmental Protection Agency

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June 22, 2023

VIA EMAIL

Swati Sharma, Executive Officer
Greg Forest, Attorney Advisor
Board of Environmental Safety
Department of Toxic Substances Control

Ms. Sharma and Mr. Forest:

Access to a complete “Final Permit Record” is central to effective engagement in an appeals process. To acknowledge this principle, the Board of Environmental Safety (BES) granted the Clean Air Coalition of North Whittier and Avocado Heights’ request for an extension to refile an appeal in of the Department of Toxic Substances Control’s July 22, 2022, Temporary Authorization Decision for Quemetco, Inc. As a result, the BES set June 30, 2023, as the deadline for CAC’s appeal.

After reviewing the materials submitted by DTSC’s Permitting Division, we have determined that the “Final Permit Record” is incomplete. In our May 3, 2023, letter seeking a complete record for CAC’s appeal, we wrote:

As outlined in Quemetco’s June 9, 2022, Temporary Authorization Request, the July 22, 2022, approval came after a long series of events that stretches back to its proceeding February 11, 2021, Temporary Authorization Request, a subsequent Class 2 Permit Modification Request and appeals of each those decisions. In addition, on August 4, 2022, CAC appealed DTSC Permitting’s July 22, 2022, approval of Quemetco’s June 9, 2022, Temporary Authorization Request. All of the documents related to this series of events must also be included in the record for this appeal.

Without explanation, DTSC’s Permitting Division provided a collection of documents it describes as “the complete administrative record for its decision” for the permit at issue here. The administrative record, however, is not “complete” because it fails to include 37 documents relied upon in the prior proceedings related to installation of the equipment at issue here. Also, the administrative record does not provide an unexplored number of documents that are “contained in the supporting file” for the permit, including communications between and among the parties during and after the appeal period for each of the prior permitting efforts.

Despite these failures—and without waiving the ability to dispute the appropriate contents of an administrative record in the future—we seek to move the appeals process forward in accordance with the timeline that the BES has established. To this end, we request that the BES agree to augment the record with the ten documents detailed in the attached list. Every document listed is relevant to this appeal; was created by DTSC permitting, Quemetco, Manatt, or CAC; and all the parties have seen each document. The documents can be found [here](#).

In the alternative, we request leave to file a motion to augment the record to ensure the record is complete.

Sincerely,



Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program

ATTACHMENT: DOCUMENTS TO AUGMENT THE RECORD

- CAC, Appeal of Approval of Temporary Authorization Request for Quemetco (May 27, 2021)
- Quemetco Inc., No. PAT-FY21/22-001, Petitioner's Opening Brief in Support of Appeal of Quemetco Inc's Temporary Permit Authorization (DTSC Permit Appeals Oct. 14, 2021)
- Quemetco, Additional Information for Pending Class 2 Permit Modification Request (Sept. 8, 2021)
- DTSC, Notice of Class 2 Permit Modification Approval (Feb. 23, 2022)
- CAC, Appeal of Feb. 23, 2022, Auger Centrifuge Permit Mod. Request for Quemetco (Mar. 28, 2022)
- Letter from M. Williamson, Manatt, to J. Rizzo, BES (June 29, 2022)
- Quemetco, Temporary Authorization Request (June 9, 2022)
- CAC, Appeal of July 22, 2022, Approval of Temporary Authorization Request for Quemetco (Aug. 4, 2022)
- Permit Modifications for Hazardous Waste Management Facilities, 52 Fed. Reg. 35,838-01 (proposed Sept. 23, 1987)
- Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37,912-01 (Sept. 28, 1988)

EXHIBIT T

From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Tuesday, June 27, 2023 4:36 PM
To: Angela Johnson Meszaros; Mayer, Alexander@DTSC
Cc: Benedict, Annakathryn@DTSC; Coe, Sam@DTSC; Khosraviani, Parisa@DTSC; Heung, William; Ocampo, Linda@DTSC; Choi, Sangwon Ryan@DTSC; Byron Chan; Lisa Fuhrmann; Lupe Ruelas; White, Leah@DTSC; MWilliamson@manatt.com; McGrath, David
Subject: RE: BES Appeal 2302 Quemetco July 2022 TA Permit Record
Attachments: Appeal 23-02 BES Response AR Earthjustice and Permitting GF SS.pdf

External Sender



Good afternoon Ms. Meszaros and Mr. Mayer,

Please see attached.



Greg Forest
Attorney Advisor
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Gregory.Forest@dtsc.ca.gov
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California Environmental Protection Agency

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From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Tuesday, June 27, 2023 9:20 AM
To: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>
Cc: Benedict, Annakathryn@DTSC <Annakathryn.Benedict@dtsc.ca.gov>; Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; Byron Chan <bchan@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com; McGrath, David <DLMcGrath@manatt.com>
Subject: Re: BES Appeal 2302 Quemetco July 2022 TA Permit Record

Good morning Ms. Sharma and Mr. Forest:

We would appreciate some visibility into when we will receive a response to this query.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
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earthjustice.org



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From: Angela Johnson Meszaros <ameszaros@earthjustice.org>
Sent: Thursday, June 22, 2023 8:03 PM
To: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>; swati.sharma@bes.dtsc.ca.gov
<Swati.Sharma@bes.dtsc.ca.gov>
Cc: Benedict, Annakathryn@DTSC <Annakathryn.Benedict@dtsc.ca.gov>; Mayer, Alexander@DTSC
<Alexander.Mayer@dtsc.ca.gov>; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Khosraviani, Parisa@DTSC
<Parisa.Khosraviani@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Ocampo, Linda@DTSC
<Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; Byron Chan
<bchan@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>;
White, Leah@DTSC <Leah.White@dtsc.ca.gov>; MWilliamson@manatt.com <MWilliamson@manatt.com>; McGrath,
David <DLMcGrath@manatt.com>
Subject: Re: BES Appeal 2302 Quemetco July 2022 TA Permit Record

Ms. Sharma and Mr. Forest:

Please see the attached letter regarding the administrative record.

Angela Johnson Meszaros
Managing Attorney
Community Partnerships Program
Los Angeles Office
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Los Angeles, California 90017
T: 213.766.1062
earthjustice.org



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From: Forest, Gregory@DTSC <Gregory.Forest@dtsc.ca.gov>
Sent: Friday, May 12, 2023 4:26 PM
To: Mayer, Alexander@DTSC <Alexander.Mayer@dtsc.ca.gov>
Cc: Benedict, Annakathryn@DTSC <Annakathryn.Benedict@dtsc.ca.gov>; Coe, Sam@DTSC <Sam.Coe@dtsc.ca.gov>; Khosraviani, Parisa@DTSC <Parisa.Khosraviani@dtsc.ca.gov>; Heung, William <William.Heung@dtsc.ca.gov>; Angela Johnson Meszaros <ameszaros@earthjustice.org>; MWilliamson@manatt.com <MWilliamson@manatt.com>; Sharma, Swati <Swati.Sharma@bes.dtsc.ca.gov>; Ocampo, Linda@DTSC <Linda.Ocampo@dtsc.ca.gov>; Choi, Sangwon Ryan@DTSC <SangwonRyan.Choi@dtsc.ca.gov>; Byron Chan <bchan@earthjustice.org>; Erica Martinez <emartinez@earthjustice.org>; Lisa Fuhrmann <lfuhrmann@earthjustice.org>; Lupe Ruelas <lruelas@earthjustice.org>; White, Leah@DTSC <Leah.White@dtsc.ca.gov>
Subject: BES Appeal 2302 Quemetco July 2022 TA Permit Record

Dear Mr. Mayer,

Please see attached correspondence.

A response is requested by close of business Monday.



Greg Forest
Attorney Advisor
Board of Environmental Safety
279-895-5154
Gregory.Forest@dtsc.ca.gov
Department of Toxic Substances Control
1001 I Street, Sacramento, CA 95814
California Environmental Protection Agency

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Yana Garcia
Secretary for
Environmental Protection



P.O. Box 806 • 1001 "I" Street, Sacramento, California 95812-0806



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Georgette Gomez
Member

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Member

Via Email

June 27, 2023

Angela Johnson Meszaros
Earthjustice
707 Wilshire Blvd., Suite 400
Los Angeles, CA 90017
AMeszaros@earthjustice.org

Alex Mayer
Department of Toxic Substances Control
1001 I Street, P.O. Box 806
Sacramento, CA 95812-0806
Alex.Mayer@dtsc.ca.gov

Re: Earthjustice Appeal of July 22, 2022 Temporary Authorization Decision (Ecobat/Quemetco)

Dear Ms. Meszaros and Mr. Mayer,

On June 22, 2023, Earthjustice requested the addition of ten (10) records into the administrative record for the above-referenced matter. That request is hereby **denied**.

Pursuant to Standing Order BES-2301, Earthjustice may request changes to the contents of the administrative record only by noticed motion. As an alternative to its informal request, Earthjustice requested leave to file a motion to augment the record.

Earthjustice's request for leave to file a motion is **granted**. The last day to file such a motion in this matter is July 28, 2023. The last day for the Permitting Division to file its opposition to such a motion is August 25, 2023.

As communicated to the parties in our letter dated May 19, 2023, the last day for Earthjustice to refile notice of its appeal in this matter is June 30, 2023. The last day for the Permitting Division to file its opposition to the appeal is July 28, 2023.

Sincerely,

Swati Sharma
Swati Sharma
Executive Officer

Greg Forest
Greg Forest
Board Counsel

cc: Byron Chan, Earthjustice (BChan@earthjustice.org)
Parisa Khosraviani, DTSC (Parisa.Khosraviani@dtsc.ca.gov)
Sam Coe, DTSC (Sam.Coe@dtsc.ca.gov)
William Heung, DTSC (William.Heung@dtsc.ca.gov)
Leah White, DTSC (Leah.White@dtsc.ca.gov)
Matt Williamson, Manatt (MWilliamson@manatt.com)
David McGrath, Manatt (DLMcGrath@manatt.com)

1 **PROOF OF SERVICE**

2 I, Lupe Ruelas, declare:

3 I am a resident of the State of California, and I am over the age of 18 years
4 and not a party to the within entitled action. My business address is 707 Wilshire
5 Boulevard, Suite 4300, Los Angeles, CA 90017.

6 On July 28, 2023, I served the following document(s):

7 **(1) MOTION TO COMPLETE THE PERMIT RECORD; AND (2) MEMORANDUM**
8 **OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

9 **(X) VIA E-MAIL.** I caused the document(s) to be sent to the person(s) at the
10 e-mail address(es) listed below.

11 Parisa Khosraviani, DTSC
12 Parisa.Khosraviani@dtsc.ca.gov

Sam Coe, DTSC
Sam.Coe@dtsc.ca.gov

13 William Heung, DTSC
14 William.Heung@dtsc.ca.gov

Alex Mayer, DTSC
alexander.mayer@dtsc.ca.gov

15 Leah White, DTSC
16 Leah.White@dtsc.ca.gov

Sangwon Ryan Choi, DTSC
SangwonRyan.Choi@dtsc.ca.gov

17 Matt Williamson, Manatt
18 MWilliamson@manatt.com

David McGrath, Manatt
DLMcGrath@manatt.com

19
20 I declare under penalty of perjury under the laws of the State of California
21 that the foregoing is true and correct.

22 Executed on July 28, 2023, in Los Angeles, California.

23
24 
25 Lupe Ruelas