UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SIERRA CLUB, ET AL.	CIVIL ACTION
VERSUS	NUMBER: 19-13966
SCOTT ANGELLE, ET AL.	SECTION: "M"(5)

ORDER AND REASONS

Before the Court is the Plaintiffs' Motion to Compel Completion of the Administrative Record and Permit Discovery. (Rec. doc. 115). The Federal Defendants filed an opposition memorandum (rec. doc. 118) and the Plaintiffs filed a reply memorandum. (Rec. doc. 123).

After thorough consideration of the pleadings and exhibits, the law, and the arguments of the parties, the Court grants the motion for the following reasons.

I. A BRIEF PROCEDURAL HISTORY

Plaintiffs describe this case as centering on the question of "whether the Bureau of Safety and Environmental Enforcement (BSEE) arbitrarily and unlawfully disregarded its own science-based findings on drilling safety to repeal critical offshore safety regulations, putting workers and local communities at risk of harm." (Rec. doc. 115-2). Most of Plaintiffs' claims in this case arise under the Administrative Procedures Act ("APA"), which provides for judicial review of final agency action. 5 U.S.C. §§ 701–706. Review of a challenge to a final agency action under the APA is based on the "whole record." *Id.* § 706.

The Federal Defendants in this case produced what they assert is the "whole record" on March 30, 2020. The current dispute concerns the completeness of that record.

The Plaintiffs claim that certain materials that should have been included in the record have been left out by the Federal Defendants. Many of these materials were identified

in a Wall Street Journal article published in February of 2020. (Rec. doc. 115-4). In their memorandum in support of the pending motion, Plaintiffs describe the import of that article and how it relates (or gives rise to) the present dispute:

> The [Wall Street Journal] article describes and quotes from "emails and memos reviewed by The Wall Street Journal" that show how BSEE Director Scott Angelle overrode the safety guidance from BSEE engineers and ordered staff to delete safety concerns from rulemaking documents. Specifically, the article references seven "decision memos" in which BSEE engineers objected to "industry recommendation" to make changes in the Repeal and describes how those objections were "deleted from the memos after Mr. Angelle's intervention." The article quotes emails among staff describing how the engineers' safety recommendations were disregarded: "'The team really wasn't consulted,' Mr. Malstrom wrote. 'The director did not want a recommendation from the team and asked us to remove our recommendation from that memo.'" And the emails describe how, when Director Angelle was asked "to put his order in writing for the administrative record, 'he just said that that was not important and he is giving us the verbal approval to do it on that phone call.'" Plaintiffs asked BSEE to include the referenced materials in the administrative record. BSEE never responded [before producing the administrative record].
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> (Rec. doc. 115-2)(citations omitted).

When the Federal Defendants produced the administrative record, many or all of the documents described above were (admittedly) left out by them. They take the position that the materials described are properly excluded from the record because they are "deliberative materials." (Rec. doc. 118).

II. LAW AND ANALYSIS

Review of a challenge to a final agency action under the APA is based on the "whole record." 5 U.S.C. § 706. The APA directs courts to engage in a "thorough, probing, in-depth review" of agency action, which must be based "on the full administrative record that was

before the [decision-maker] at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 420 (1971), *superseded by statute on other grounds* Pub. L. No. 94-574, 90 Stat. 2721 (1976) *as recognized in Califano v. Sanders*, 430 U.S. 99 (1977). While it is true that there exists a "general presumption that review is limited to the record compiled by the agency,"[1] it is also true that "the 'whole record' is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record," but rather "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 32–33 (N.D. Tex. 1981) (Higginbotham, J.); *see also City of Dallas, Tex. v. Hall*, Nos. 07-CV-0060 & 07-CV-0213, 2007 WL 3257188 at *4 (N.D. Tex. Oct. 29, 2007) ("An agency may not unilaterally determine what constitutes the administrative record."); *Williams v. Roche*, No. 00-CV-1288, 2002 WL 31819158 (E.D. La. Dec. 12, 2002).

The "whole" record must be available for review so that the reviewing court may determine whether the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "[T]o require less [than the full record] denies effective judicial review, and leaves the agency unaccountable, contrary to congressional purpose." *Exxon Corp.*, 91 F.R.D. at 39. Requiring the entire "whole record," including both favorable and unfavorable information, prevents

[1] *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

the court from reviewing a "fictional account of the actual decisionmaking process." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

A key question in this case is whether "deliberative materials" should be included in the "whole" administrative record in the first place, even if they might be considered privileged. The Federal Defendants in this case have excluded such materials from the record, citing the "general rule against inquiring into the mental processes of administrative decisionmakers." (Rec. doc. 115-12 (citing *Dept. of Commerce v. New York*, 139 S.Ct. 2551, 2573 (2019)). Plaintiffs on the other hand cite a number of district court decisions from within the Fifth Circuit to argue that such materials must be included in the administrative record, even if the agency subsequently seeks to protect those materials as privileged. (Rec. doc. 115-2 (citing *Exxon Mobil Corp. v. Mnuchin*, No. 17-CV-1930, 2018 WL 4103724 at *2–3 (N.D. Tex. Aug. 29, 2018); *Williams*, 2002 WL 31819158 at *3)).

The question before the Court at this stage is not whether certain materials not already included in the administrative record should be shielded as privileged but whether they should have been included in the record in the first place. The Court finds that the administrative record lodged in this case is incomplete, because the materials referenced in the Wall Street Journal article and vaguely described by the Federal Defendants as "deliberative" should have been included in the record in order for it to be considered "whole."

There is clear authority emanating from this Circuit to support this conclusion. *See, e.g.*, *Exxon Mobil Corp. v. Mnuchin*, No. 17-CV-1930, 2018 WL 4103724 at *2-3 (N.D. Tex. Aug. 29, 2018); *Williams*, 2002 WL 31819158 at *3. Judge Wilkinson stated the concept clearly in *Williams*:

> [T]he court and the parties may look outside the administrative record specified by the agency under limited circumstances. Limited discovery may be permitted, for example, when it appears that the agency relied on substantial materials not included in the record or when the procedures used and factors considered by the decisionmaker require further explanation for effective review.
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> *Williams*, 2002 WL 31819158 at 3.[2]

In correspondence leading up to the filing of this motion, the Federal Defendants explained to Plaintiffs that "The United States disagrees with [the *Exxon Mobil*] decision and will ask the Court to follow the 'general rule against inquiring into the mental processes of administrative decisionmakers,'" citing the *Dept. of Commerce v. New York* case. (Rec. doc. 115-12 at p. 3, citing 139 S.Ct. 2551, 2573 (2019)).

The Court declines that invitation for the following reasons. First, there is the aforementioned persuasive authority in this Circuit and District holding that "[t]o be complete, an [administrative record] must include or otherwise account for 'all documents ... considered by [the] agency,' not just the non-privileged ones." *Exxon Mobil*, 2018 WL 4103724 at *2. Second, a closer look at one Supreme Court case relied upon heavily by Defendants reveals that it not at all helpful to their position.

The Federal Defendants quote[3] the recent *Dept. of Commerce* case for the proposition that "'it should be' 'rare to review a record as extensive as the one before us,' which contains numerous 'internal deliberative materials.'" (Rec. doc. 118 at p. 2). First, of all, "rare" doesn't

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[2] Citing *Camp v. Pitts,* 411 U.S. 138, 142-43 (1973); *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 437 n. 18 (5th Cir. 1985); *Public Power Council v. Johnson,* 674 F.2d 791, 794 (9th Cir. 1982); *Sokaogon Chippewa Community v. Babbitt,* 929 F.Supp. 1165, 1172 (W.D. Wis. 1996); *Preserve Endangered Areas of Cobb's History, Inc. ("P.E.A.C.H.") v. United States Army Corps of Eng'rs,* 915 F.Supp. 378, 383 (N.D. Ga. 1995).

[3] It is a strange quote, and it took the Court a few minutes to piece it all together. While the quoted words are all found in the opinion, they are found in a different order than they were quoted.

mean "never" and the use of that term doesn't imply a rule against including deliberative materials in an administrative record. One way we know this is that the Supreme Court found, in that very case, that: (1) supplementation of the administrative record was proper and (2) some extra-record discovery was also proper. *Dept. of Commerce*, 139 S.Ct. at 2573. Notably, the Department of Commerce's objection before the Supreme Court was not to the District Court's order supplementing the record, which is the question before this Court. In that case "the parties stipulated to the [supplemental] inclusion of more than 12,000 pages of internal deliberative materials as part of the administrative record, materials that the court later held were sufficient on their own to demonstrate pretext." *Id.* at 2574 (emphasis added).

So the Federal Defendants here have relied upon a case in which the parties stipulated to the supplemental inclusion of thousands of pages of deliberative materials in an administrative record as support for their argument that there is a rule against the inclusion of such materials. This is a strange argument indeed.

It is also worth mentioning that what the Supreme Court was actually analyzing in that case was the propriety of the District Court's order for extra-record discovery, including a deposition of the Secretary of Commerce. *Id.* In any event, while the Supreme Court found the extra-record discovery order premature, it nonetheless held that it was justified by the 12,000-page supplement to the original administrative record. *Id.*

Parties challenging the completeness of an administrative record must "provide the court with reasonable, non-speculative grounds to believe that materials considered in the decision-making process are not included in the record ..." *City of Dallas, Tex.*, 2007 WL

3257188 at *14. The Plaintiffs have done that in this case and the Court will order the Federal Defendants to supplement the administrative record accordingly.

Plaintiffs have also requested discovery from Defendants. "Limited discovery may be permitted, for example, when it appears that the agency relied on substantial materials not included in the record or when the procedures used and factors considered by the decisionmaker require further explanation for effective review." *Williams*, 2002 WL 31819158 at *3 (citing *Citizen Advocates for Responsible Expansion*, 770 F.2d at 437 n. 18; *Public Power Council*, 674 F.2d at 794; *Sokaogon Chippewa Community*, 929 F.Supp. at 1172; *Preserve Endangered Areas of Cobb's History, Inc. ("P.E.A.C.H."),* 915 F.Supp. at 383). "Plaintiff may be permitted some limited discovery to explore whether the agency considered other evidence, either directly or indirectly, in reaching its decision and to determine whether the administrative record is actually complete." *Id.*

Plaintiffs have demonstrated their entitlement to limited discovery in this matter to explore whether certain information identified in their motion was omitted from the record, including the 2016 Well Control Rule record, documents related to the Wall Street Journal article, whether agency staff and leadership used text and chat messaging to communicate about relevant matters, communications with senior Department of Interior officials, and meetings records. Plaintiffs have demonstrated entitlement to discovery into these matters largely because the Federal Defendants have refused repeated requests by them to confirm or attest that such materials either were or were not considered. Defendants' caginess leaves the Court with little choice but to order limited discovery into these matters.

It is hereby ordered, then, that the Federal Defendants supplement the administrative record to include any and all materials denominated by them as "deliberative" if those

materials were indirectly or directly considered by the agency. These materials include, but are not limited to, the decision memos and emails referenced in the Wall Street Journal, the administrative record of the 2016 Well Control Rule, and file attachments to emails in the administrative record that were not included in that record.

As for discovery, the parties shall meet and confer to develop a limited discovery plan consistent with the above-stated direction. The Court will schedule a discovery status conference in the coming weeks to discuss the status of the plan's development and to discuss any disagreements.

New Orleans, Louisiana, this 3rd day of March, 2021.

MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE