IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor.	Case No. 1:16-cv-01534 (JEB) (consolidated with Cases No. 1:16-cv-01796 & 1:17-cv-00267)

UNITED STATES ARMY CORPS OF ENGINEERS' OPPOSITION TO DAKOTA ACCESS'S MOTION TO COMPEL COMPLETION OF ADMINISTRATIVE RECORD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

It is a basic tenet of administrative law that review of agency action is based on the agency's stated reasons for its decision and that, barring exceptional circumstances, it is beyond the power of courts to probe the mental processes of the agency. For that reason, the D.C. Circuit has: (1) held that an agency's compilation of its administrative record is entitled to a presumption of regularity; and (2) held that an agency's internal, deliberative, and predecisional documents are not required to be included in an administrative record. Dakota Access's motion to "complete" the certified administrative record with broad requests for deliberative materials, documents that were not considered by the decision maker, a privilege log, and depositions is therefore squarely in conflict with D.C. Circuit precedent.

First, by submitting its certification, the United States Army Corps of Engineers ("Corps") represented that its administrative record contained the documents that were relied upon either directly or indirectly by the decision maker in issuing the challenged easement. The Corps' certification of the record is entitled to a presumption of regularity. To overcome that presumption, Dakota Access would need to "put forth concrete evidence' and 'identify reasonable, non-speculative grounds for its belief that the [requested] documents were considered by the agency and not included in the record.'" *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008) (citation omitted). Citing no evidence, Dakota Access asks this Court to compel the Corps to "complete" the record with various broad categories of documents. As explained below, Dakota Access's description of these categories of documents makes clear that at least some of them were not before the decisionmaker. These documents, therefore, are not part of the record. Dakota Access has not and cannot show otherwise, therefore, it cannot defeat the presumption of regularity and its motion must be denied.

Second, to the extent that any of the requested categories of documents were before the decision maker, they too are not part of the record because they are deliberative. For seventy years, the D.C. Circuit has been unequivocal in holding that internal agency deliberations need not be included in the administrative record. *See Norris & Hirschberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947). Despite this precedent, Dakota Access seeks to compel inclusion of various deliberative government communications. Mem. of Law in Supp. of Mot. to Compel Completion of Admin. R. ("Dakota Access Mem.") at 3-4 (seeking emails of "[p]ersons at or near the highest levels of these various Executive Branch components [who] were in regular communication with each other") (ECF No. 216-1). A party seeking these types of deliberative materials can only overcome the well-settled exclusion of deliberative materials from the record if it demonstrates "well-nigh irrefragable proof" of bad faith. *China Trade Ctr., LLC v. Wash. Metro. Area Transit Auth.*, 34 F. Supp. 2d 67, 70–71 (D.D.C. 1999). Dakota Access does no such thing. Instead, it offers only speculation that the documents it seeks would allow it to prove "political interference" rather than providing the significant showing of bad faith required by the D.C. Circuit. That is insufficient.

Because each of the requested categories of documents are indisputably deliberative and because Dakota Access has not even attempted to show bad faith, it cannot show that the record should be "completed" with these documents. And for the same reasons that Dakota Access is not entitled to compel the inclusion of these deliberative documents in the record, Dakota Access also cannot compel the production of a privilege log with respect to these extra-record documents. *See Nat'l Ass'n. of Chain Drug Stores v. U.S. Dep't of Health & Human Servs*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009) ("[s]ince deliberative documents are not part of the

administrative record, an agency that withholds these privileged documents is not required to produce a privilege log to describe the documents that have been withheld.").

Simply put, internal predecisional deliberations are not part of the administrative record. Dakota Access's motion to compel broad discovery of such documents would therefore not "complete" the administrative record, as Dakota Access suggests. It would instead transform this case from one based upon the review of a discrete administrative record under the Administrative Procedure Act into one with typical civil discovery. Dakota Access's Motion to Compel should be denied because the Corps, rather than Dakota Access, must be accorded deference in determining what materials the Corps considered in making the challenged decision.

II. BACKGROUND

A. Challenges to Dakota Access Pipeline-related permitting

The facts surrounding the permitting and legal background for the Dakota Access Pipeline ("DAPL") are well known to this Court, and will not be restated in detail in this memorandum. *Standing Rock Sioux Tribe v. U. S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2017 U.S. Dist. LEXIS 31967 (D.D.C. Mar. 7, 2017).

Plaintiffs Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux Tribe, and Oglala Sioux Tribe filed Complaints challenging a number of actions taken by the Corps on or about July 25, 2016. Oglala has also challenged — and Standing Rock and Cheyenne River have moved to amend their Complaints to challenge — the Corps' granting of an easement to install a portion of the Dakota Access pipeline under Corps-managed lands at Lake Oahe, North Dakota on February 8, 2017. *See Standing Rock Sioux Tribe*, 2017 U.S. Dist. LEXIS 31967 at *3-*5. One of the July 25, 2016 decisions — the Corps' issuance of a Finding of No Significant

Impact and determination to grant permission to cross Corps-managed lands at Lake Oahe under Section 14 of the Rivers and Harbors Act, 33 U.S.C. § 408 — was made by Colonel John Henderson, the District Commander of the Corps Omaha District.

On September 9, 2016, this Court denied Plaintiff Standing Rock Sioux Tribe's motion for a preliminary injunction. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d 4. Immediately following that decision, the Department of the Army, the Department of the Interior, and the Department of Justice issued a statement that, among other things, announced that the Army would determine whether it needed to "reconsider any of its previous decisions regarding the Lake Oahe site." Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016) (USACE_ESMT001484) (Exhibit ("Ex.") 1). On October 10, 2016, the same agencies stated that the Army was continuing to "review issues raised by the Standing Rock Sioux Tribe and other Tribal nations and their members and hopes to conclude its ongoing review soon." Joint Statement from the Dept. of Justice, Dept. of the Army and Dept. of the Interior Regarding D.C. Circuit Court of Appeals Decision in Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Oct. 10, 2016) (USACE_ESMT001293) (Ex. 2). On November 14, 2016, the Department of the Army and Department of the Interior announced that the Army completed the review it began on September 9 and "determined that additional discussion and analysis are warranted in light of the history of the Great Sioux Nation's dispossessions of lands, the importance of Lake Oahe to the Tribe, our government-to-government relationship, and the statute governing easements through government property." Statement regarding the Dakota Access Pipeline (Nov. 14, 2016) (USACE_ESMT001002) (Ex. 3). On December 4, the Assistant Secretary of the Army (Civil Works) issued a memorandum stating that the Army

would not grant the Lake Oahe easement at that time. Mem. re: Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota (Dec. 4, 2016) (USACE_ESMT000604) (Ex. 4).

On January 24, 2017, the President issued a memorandum directing the Army to "review and approve in an expedited manner, to the extent permitted by law and as warranted," the Lake Oahe easement application and "consider, to the extent permitted by law and as warranted, whether to rescind or modify. . ." the December 4 Memorandum. Presidential Memorandum Regarding Construction of the Dakota Access Pipeline § 2(i), (ii), 2 of 4 (Jan. 24, 2017), ECF No. 89-1. The Army and the Corps completed the review directed by the Presidential Memorandum. Memorandum re: Dakota Access Pipeline; USACE Technical and Legal Review for the Department of the Army (Feb. 3, 2017) (USACE_ ESMT000224) (Ex.5). The Army provided Congress with notice of its intent to issue the easement on February 7, ECF No. 95-1, and the Corps issued the Lake Oahe easement on February 8, 2017. ECF No. 96-1. The Omaha District's Chief of Real Estate made the Corps' ultimate decision to grant the Lake Oahe easement — the only other final agency action relating to Lake Oahe that is being challenged by Plaintiffs. Easement for Fuel Carrying Pipeline Right-of-way Located on Lake Oahe Project Morton and Emmons Counties, North Dakota (Feb. 8, 2017) (USACE_ESMT000001-42) (Ex. 6); Memorandum re: Delegation of Authority to Acquire, Manage, and Dispose of Real Property (Oct. 28, 2015) (Delegating authority to sign easements pursuant to statutes such as the Mineral Leasing Act to District Chiefs of Real Estate) (USACE_ESMT002725) (Ex. 7).

B. Compilation of the administrative records for challenged decisions

On November 10, 2016, the Corps lodged an administrative record for its July 25, 2016 decisions. ECF No. 55. That record contained 5,298 documents and included certifications by nine Corps employees covering nine separate portions of the administrative record. *Id.*

On March 21, 2017, the Corps filed its Notice of Lodging the Administrative Record for the February 8, 2017 Lake Oahe easement decision. ECF No. 181. Colonel John Henderson, the District Commander of the Corps Omaha District, certified the administrative record of the Lake Oahe easement decision. Certification of Index to the Administrative Record for Department of the Army Easement for Fuel Carrying Pipeline Right-of-way Located on Lake Oahe Project Morton and Emmons Counties, North Dakota, ECF No. 181-1 (Mar. 13, 2017) (containing 259 documents).[1] Both Dakota Access and Plaintiff tribes subsequently requested that the Corps supplement its administrative record with several specific documents. The Corps reviewed those documents and re-reviewed its files in response to the Parties' requests. The Corps determined that it had considered one of the documents identified by Dakota Access and that an additional document from the Corps' records had inadvertently been excluded. On May 5, 2017, the Corps certified that it was adding a March 21, 2016 email and its attachments to its record of its July 25, 2016 decisions and a November 22, 2016 email and its attachments to its record of its

[1] Dakota Access suggests in its recitation of the background for its motion, Dakota Access Mem. at 18-19, that its "stated . . . understanding [at a February 13, 2017 hearing] that the government would be producing 'everything that post-dates July 25th up to the February 8th decision" and the government's alleged failure to "narrow the scope of the record relevant to Plaintiffs' claims" somehow determines the scope of the administrative record. To the contrary, the government has consistently maintained that it cannot compile an administrative record of a decision prior to making that decision. Tr. of Feb. 6, 2017 Hr'g at 18:7-18 ("THE COURT: So the question then would be the administrative record that relates to any grant of an easement this week or next week. How soon would you be able to file the administrative record for that? Which I imagine would not be terribly extensive.
MR. MARINELLI: Your Honor, I would like to respond by first noting that I have a general objection, it's the same objection that I raised to Dakota Access' efforts to get us to file an administrative record before making a decision. And that's that, we really can't compile an administrative record before we've made a decision.") (Ex. 8); Tr. of Feb. 13, 2017 Hr'g at 43:13-16 ("MR. MARINELLI: Your Honor, two issues. One, our compilation and finalization of administrative record depends on the decision challenged, and we don't have all of those before us.") (Ex. 9).

February 8, 2017 decision. Notice of Adding Documents to the Nov. 10, 2016 and Mar. 21, 2017 Administrative Records (ECF No. 221).

C. Dakota Access's efforts to obtain additional documents

On November 15, 2016, Dakota Access filed a motion to supplement the administrative record relating to the July 25, 2016 decisions and a cross-claim against the Corps. ECF Nos. 57-58. Dakota Access's November 15, 2016 cross-claim advanced a single count – seeking a declaratory judgment that the Corps had "granted Dakota Access a right-of-way" at Lake Oahe on July 25, 2016. ECF No. 57 at 64-66. And its November 15, 2016 motion sought to "supplement" the administrative record with eight broad categories of documents. ECF No. 58-1 at 6-9. That motion was "denied without prejudice TO BE RENEWED IN THE EVENT THAT [Dakota Access] believes additional records are required to respond to the Government's" opposition to Dakota Access's Motion for Summary Judgment on its cross-claim. Minute Order (Dec. 9, 2016).

On February 13, 2017, Dakota Access requested that the Court hold its cross-claim in abeyance. Tr. of Feb. 13, 2017 Hr'g at 25:6-12 (Ex. 9). And on February 28, 2017, Dakota Access agreed that because the Corps granted it the easement that was the focus of Dakota Access's cross-claim, its motion for summary judgment on that cross-claim could be denied without prejudice as moot. Tr. of Feb. 28, 2017 Hr'g at 60:16-61:21 (Ex. 10). The Court so denied Dakota Access' motion for summary judgment. Minute Order (Feb. 28, 2017).

Dakota Access filed its Motion to Compel Completion of the Administrative Record on April 21, 2017. ECF No. 216. Dakota Access asserts that, notwithstanding the voluminous record the agency produced that Dakota Access itself has argued is sufficient to support the Defendants' motions for summary judgment, the administrative record must be supplemented

through "production of records (including emails, telephone logs, and calendars) of the Departments of the Army, the Interior, and Justice, as well as those held, received or issued by the White House, that relate to the Dakota Access Pipeline project." *Id*. at 1-2. Essentially, Dakota Access seeks every communication relating to the Lake Oahe easement across the executive branch agencies from September 2016 through January 18, 2017. *Id*. Dakota Access bases its motion in large part on the legal theory set forth in its cross-claim — that actions taken by the government after July 25, 2016 are invalid because the Corps granted Dakota Access the Lake Oahe easement on July 25, 2016. Dakota Access Mem. at 2-3.

III. LEGAL STANDARD

A. The administrative record is entitled to a presumption of regularity.

In undertaking its review of a final agency action, the APA directs a court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. This requires the Court to review "the full administrative record that was before the [decisionmaker] at the time he made his decision." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). An agency's administrative record "is entitled to a strong presumption of regularity" whereby it is presumed to contain all the appropriate materials that were either directly or indirectly relied upon by the decision maker. *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008) (citation omitted). "Common sense dictates that the agency determines what constitutes the whole administrative record, because 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." *Pac. Shores Subdivision v. U. S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (citation and quotation marks omitted).

"A plaintiff may show that the record is '[i]nsufficien[t]' — i.e., incomplete — only if she is able to 'specif[y] . . . documents that ha[ve] been omitted.'" *Charleston Area Med. Ctr. v. Burwell*, No. 15-2031, 2016 U.S. Dist. LEXIS 146681, at *8 (D.D.C. Oct. 24, 2016) (quoting *NRDC v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975)). It is insufficient to "imply that the documents at issue were in the [agency's] possession. . . . Rather, plaintiff must prove that the documents were before the actual decisionmakers involved in the [challenged] determination." *Sara Lee*, 252 F.R.D. at 34. In other words, a "plaintiff must put forth concrete evidence" and "'identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record." *Id*. (citation omitted). "Then, if the Court finds that the record produced 'clearly do[es] not constitute the "whole record" compiled by the agency,' it will order the agency to complete the record." *Charleston Area Med. Ctr*., 2016 U.S. Dist. LEXIS 146681 at *8 (quoting *Overton Park*, 401 U.S. at 419).

B. Deliberative materials are not part of an administrative record.

Agency action should be judged on the basis of the agency's stated reasons for its decision. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). Under the APA's arbitrary and capricious standard, the role of federal courts is to judge the agency action "based on an agency's stated justification, not the predecisional process that led up to the final, articulated decision." *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002). It is "not the function of the court to probe the mental processes" of the agency. *Morgan v. United States*, 304 U.S. 1, 18 (1938). Accordingly, documents containing internal agency deliberations need not be included in the administrative record. *See Norris & Hirschberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947).

The D.C. Circuit has therefore consistently upheld the exclusion of documents reflecting intra- or inter-agency deliberations from an administrative record. *See PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001–02 (D.C. Cir. 1999); *New Mexico v. EPA*, 114 F.3d 290, 295 (D.C. Cir. 1997); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986). Moreover, the D.C. Circuit has recognized that including such extra-record deliberative materials would have a chilling effect on agency discussions, thereby harming the quality of agency decisionmaking. *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994); *Ad Hoc Metals*, 227 F. Supp. 2d at 143.

In order to overcome this well-established prohibition on extra-record evidence relating to the administrative decisionmaking process, a party must make "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420; *San Luis Obispo Mothers for Peace*, 789 F.2d at 44-45. A party challenging the presumption of regularity therefore "must present 'well-nigh irrefragable proof' of bad faith or bias on the part of government officials in order to overcome this presumption." *Id*. at 70-71.

IV. ARGUMENT

A. Dakota Access's motion to complete the administrative record should be denied because it fails to identify any exception to the general presumption of regularity, much less make a strong showing of any such exception.

1. The documents Dakota Access seeks are not part of the administrative record because they were not considered by the decisionmaker.

The parties agree that this case has been brought pursuant to the Administrative Procedure Act ("APA"), under which judicial review of the challenged agency decision is limited to the agency's administrative record. Plaintiffs' pending summary judgment motions challenge agency decisions made by Colonel John Henderson and the Omaha District Chief of Real Estate on July 25, 2016 and February 8, 2017, respectively. Dakota Access's motion to

"complete" the record for the February 8, 2017 decision with documents relating to pre-decisional internal governmental communications between September 9, 2016 and January 18, 2017, by individuals other than the final Corps decisionmakers must be rejected because the Corps has certified that its administrative records for the final decisions being challenged in this case are complete.[2] As discussed below, the Corps decisionmaker could not have seen, much less relied upon, documents sought by Dakota Access that were internal to other agencies. He instead based his decision regarding whether to issue the Lake Oahe easement on the documents in the administrative record. *See* Memorandum re: Dakota Access Pipeline; USACE Technical and Legal Review for the Department of the Army (Feb. 3, 2017)(USACE_ESMT0224) (Ex. 5).

Notably, despite their instant motion, Dakota Access recognized, "**NEPA is not a disclosure statute**. . . . The Corps had no obligation to give the Tribe every document that it received when carrying out its NEPA review." Dakota Access's Consol. (1) Resp. in Opp'n to Cheyenne River Sioux Tribe's Mot. for Summ. J. and (2) Cross-Mot. for Partial Summ. J. at 23 (Mar. 23, 2017) (ECF No. 185) (emphasis added). NEPA is similarly not a "disclosure statute" when Dakota Access seeks documents beyond the administrative record. Simply put, the Corps

[2] Dakota Access's brief conflates "decision" or "process" with final agency action. *See, e.g.*, Dakota Access Mem. at 21 ("Plaintiffs challenge decisions resulting from an administrative process, first announced in September"), 29 (seeking "all documents that pertain to the public statements and decisions regarding the Dakota Access Pipeline beginning with the lead-up to the September 9 Joint Statement"). Many decisions by the federal government are not reviewable under the APA. Only the smaller class of decisions that are "final agency actions" are so reviewable. *See Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012) (APA "only provides a right to judicial review of '*final* agency action . . . .'"); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-63 (2004) (judicial review under the APA limited to challenge to "agency actions" defined in Section 551(13) of the Act). Notably, neither Dakota Access nor Plaintiffs argue that anything other than the February 8, easement decision and July 25 permissions are the "final agency actions" challenged in this case.

has determined what it considered in making the Lake Oahe easement decision and that determination must be accorded deference. The Court's inquiry need proceed no further.

2. Dakota Access cannot defeat the presumption of regularity because it cannot show that the broad categories of documents it seeks were considered by the decisionmaker.

The Corps is entitled to a strong presumption of regularity that the administrative record of its Omaha District Real Estate Chief's February 8, 2017 decision to grant the Lake Oahe easement is complete. It is therefore presumed to contain all the appropriate materials that were either directly or indirectly relied upon by the decision maker. *Sara Lee*, 252 F.R.D. at 34. "[T]he argument that a plaintiff and the Court should be permitted to participate in an agency's record compilation as a matter of course contravenes 'the standard presumption that the agency properly designated the Administrative Record.'" *Nat'l Ass'n. of Chain Drug Stores*, 631 F. Supp. 2d at 28. Dakota Access has not overcome this presumption of regularity because, with the exception of the November 22, 2016 email identified in section II(B)., above, it has not identified any specific documents that the Corps considered but excluded from the administrative record for its February 8, 2017 decision. Dakota Access's failure to identify concrete evidence that the Corps considered documents beyond those in the record for the February 8, 2017 decision is fatal to its motion. *Charleston Area Med. Ctr.*, 2016 U.S. Dist. LEXIS 146681 at *8.

In support of its motion, Dakota Access repeatedly states that communications were ongoing between various executive branch components and personnel regarding the easement. It seeks these documents regardless of whether they were available to, much less considered by, the Corps. Indeed, Dakota Access explicitly seeks internal documents of three agencies and the White House that by Dakota Access's own description were not before the decisionmaker. *See* Dakota Access Mem. at 1-2, 11 (seeking documents "*internal* to . . . the Army or Interior"), 28

(seeking "everything responsive" to what amounts to civil discovery requests for production). Rather than supporting its motion to compel, Dakota Access's description of the documents it seeks therefore illustrates that its motion is untethered to the operative legal standard – whether the agency decisionmaker considered documents beyond those included in the administrative records.

References to these assumed communications offer no basis for overriding the presumption of regularity. Dakota Access simply cannot clear the first hurdle for supplementing, or "completing," the administrative record because it fails to identify specific documents that have been wrongly excluded from the certified record of the only relevant decision being challenged in this case – the February 8, 2017 easement decision. *Charleston Area Med. Ctr.*, 2016 U.S. Dist. LEXIS 146681, at *8 (D.D.C. Oct. 24, 2016). Nor does Dakota Access suggest how the decisionmaker could have considered the broad categories of documents it seeks. At most, it speculates that the documents were indirectly considered by the decisionmaker in making the February 8, 2017 decision to grant the Lake Oahe easement. Such speculation falls far short of Dakota Access's burden of "put[ting] forth concrete evidence and 'identify[ing] reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record'" necessary to overcome the strong presumption of regularity. *Sara Lee*, 252 F.R.D. at 34. To the extent that Dakota Access's motion to compel seeks to supplement the administrative record, it must be therefore be denied.[3]

Dakota Access identifies three "unusual circumstances" in which a litigant can rebut the general rule against supplementing the certified administrative record, but fails to explain how

[3] As discussed below, even if the decisionmaker was privy to some of the requested communications regarding inter-agency deliberations, those communications would not be part of the administrative record because they are deliberative.

any of those circumstances are present here. Indeed, Dakota Access's citation to the D.C. Circuit's decision in *City of Dania Beach v. FAA*, 628 F.3d 581 (D.C. Cir. 2010), Dakota Access Mem. at 20, highlights the absence of legal or factual support for its motion. *Dania Beach* provides "that the record can be supplemented in three instances: (1) if the agency 'deliberately or negligently excluded documents that may have been adverse to its decision,' (2) if background information was needed 'to determine whether the agency considered all the relevant factors,' or (3) if the 'agency failed to explain administrative action so as to frustrate judicial review.'" *Id*. at 590 (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.D.C. 2008)). Dakota Access's failure to identify which of these exceptions it invokes is immaterial, as it does not meet its burden to establish that *any* of the three unusual circumstances exists here.

Dakota Access's motion itself precludes reliance on the first *Dania Beach* exception. That exception applies only where the agency excluded documents that were adverse to the challenged final decision. Dakota Access speculates that the Corps has withheld documents that are supportive of, rather than adverse to, the decision Plaintiffs challenge – the Corps' decision to grant the Lake Oahe easement to Dakota Access.[4] *See* Dakota Access Mem. at 4 (speculating that withheld documents would support the issuance of the easement). Nor does Dakota Access establish that the documents it seeks are necessary to determine whether the agency considered all the relevant factors in making the challenged February 8, 2017 decision. To the contrary, Dakota Access contends that the Corps' administrative records demonstrate that the Corps considered all relevant factors and are sufficient to support summary judgment in favor of the Corps. ECF Nos. 185 and 203. Dakota Access's motions for summary judgment defending the

[4] Notably, Dakota Access has no motion pending challenging any decision.

Corps' decisions therefore defeat any suggestion that the Corps failed to explain its actions so as to frustrate judicial review. *Id*. Simply put, Dakota Access cannot credibly argue both (1) that summary judgment is appropriate and (2) that judicial review is impossible absent the additional documents it seeks. To the contrary, judicial review is possible and summary judgment should be granted in favor of the Corps.

Relatedly, Dakota Access is incorrect that its desire to bar Plaintiffs from "rely[ing] on *any* post-July 25, 2016 materials" by proving the invalidity of post-July 25 government "process" provides support for its motion. Dakota Access Mem. at 3. Dakota Access appears to contend that it is necessary to compel the inclusion of additional post-July 25 documents in the record in order to invalidate Plaintiffs' use of all post-July 25 documents. *Id*. This rationale is identical to the one advanced in Dakota Access's cross-claim - that all post-July 25, 2016 government actions were either unnecessary, unlawful, or both because the Corps granted Dakota Access all necessary permits on July 25, 2016. *Id*.[5] Dakota Access's use of this motion to reargue its cross-claim must be rejected for three reasons. First, as discussed above, Dakota Access identifies no basis for departing from the strong presumption of regularity accorded to the Corps' certification of its administrative record. Second, Dakota Access's contention that Plaintiffs (and presumably Defendants) are barred from using post-July 25, 2016 documents would lead to the unworkable result that the parties could not rely upon the February 8, 2017 easement (or any documents in the Corps' administrative record for that decision) in litigation

[5] The Corps has already explained that Dakota Access's cross-claim was without merit because it had not issued an easement to install a portion of the Dakota Access pipeline under Corps-managed lands at Lake Oahe, North Dakota. Corps' Mem. in Supp. of its Mot. to Dismiss and in Opp'n to Dakota Access, LLC's Mot. for Summ. J. (Jan. 6, 2017) (ECF No. 73-1). The Corps subsequently granted the Lake Oahe Easement and this Court denied Dakota Access's motion for summary judgment as moot.

about that easement. Third, Dakota Access fails to cite a single case where a Court "supplemented" an administrative record by requiring the agency to remove from the record documents that the agency certified were part of the record. Dakota Access simply offers no basis for departing from the strong presumption of regularity.

Instead of focusing on the Corps' February 8, 2017 decision to grant Dakota Access the Lake Oahe easement, Dakota Access seeks what amounts to broad discovery on all documents relating to the Dakota Access pipeline in the possession of three federal agencies and the White House. That is simply inappropriate in an APA case. *See Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487-88 (D.C. Cir. 2011) ("Discovery typically is not available in APA cases."). Because Dakota Access cannot show with concrete proof that the requested documents were before the decision maker, it cannot defeat the presumption of regularity and its motion must be denied.

B. Dakota Access's motion should be denied because the deliberative documents sought by Dakota Access are not part of the administrative record.

Dakota Access's effort to add internal deliberative documents to the administrative record fares no better. Under clear D.C. Circuit precedent, such deliberative materials are not part of the administrative record.

It is long settled that agency action should be judged on the basis of the agency's stated reasons for its decision. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action"); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962). "[I]n APA cases, 'the function of the district court is to determine whether or not . . . the evidence in the administrative

record permitted the agency to make the decision it did.'" *Resolute Forest Prods. v. U.S. Dep't of Agric.*, No. 14-2103, 2016 U.S. Dist. LEXIS 64439, at *11 (D.D.C. May 17, 2016) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)). Under the APA's arbitrary and capricious standard, the role of federal courts is to judge an agency action "based on an agency's stated justification, not the predecisional process that led up to the final, articulated decision." *Ad Hoc Metals*, 227 F. Supp. 2d at 143. It is "not the function of the court to probe the mental processes" of the agency. *Morgan*, 304 U.S. at 18. "[S]uch inquiry into the mental processes of administrative decisionmakers is usually to be avoided." *Overton Park*, 401 U.S. at 420.

It is therefore well-established that documents containing internal agency deliberations need not be included in the administrative record. *See Norris & Hirschberg*, 163 F.2d at 693 ("Internal memoranda made during the decisional process . . . are never included in a record."); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) (an agency may exclude from an administrative record "material that reflects internal deliberations"). The D.C. Circuit has consistently upheld the exclusion of documents reflecting intra- or inter-agency deliberations from an administrative record. *See PLMRS Narrowband Corp.*, 182 F.3d at 1001–02 (videotape of agency meeting not part of record); *New Mexico*, 114 F.3d at 295 (denying motion to supplement the record with documents summarizing pre-decisional policy discussions between EPA, Department of Energy, and OMB); *San Luis Obispo Mothers for Peace*, 789 F.2d at 44-45 ("Judicial examination of these transcripts [of a closed-door meeting] would represent an extraordinary intrusion into the realm of the agency"); *Kan. State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (striking transcript of agency deliberations from the record); *Nat'l Courier Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1242-43 (D.C. Cir. 1975) (denying motion to supplement the record with deliberative intra-agency memoranda).

In order to overcome this well-established prohibition on deliberative materials relating to the administrative decisionmaking process, a party must make "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420; *San Luis Obispo Mothers for Peace*, 789 F.2d at 44-45; *Styrene Info. & Research Ctr. v. Sebelius*, 851 F. Supp 2d 57, 62-63, 67 (D.D.C. 2012) (distinguishing between supplementation of record and extra-record evidence and providing that "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law—unless there is a showing of bad faith or improper behavior.") (internal citations omitted). This "policy of nondisclosure 'protect[s] the integrity of the decisionmaking process.'" *Ad Hoc Metals*, 227 F. Supp. 2d at 143 (citation omitted). "In addition, government officials are presumed to act in good faith." *China Trade Ctr., L.L.C. v. Wash. Metro. Area Transit Auth.*, 34 F. Supp. 2d 67, 70 (D.D.C. 1999). A party challenging the presumption of regularity therefore "must present 'well-nigh irrefragable proof' of bad faith or bias on the part of government officials in order to overcome this presumption." *Id*. at 70-71 (citation omitted).

The single case Dakota Access relies on to address deliberative process, Dakota Access Mem. at 26 (citing *Alexander v. F.B.I.*, 186 F.R.D. 170, 179 (D.D.C. 1999)), is inapposite. First, the plaintiff in *Alexander* alleged violations of the Privacy Act and a common law tort of invasion of privacy. *Alexander v. F.B.I.*, 917 F.Supp. 603, 605 (D.D.C. 1997). In other words, because *Alexander* was not brought under the APA, civil discovery was appropriate and the Court did not address the long line of D.C. Circuit precedent holding that deliberative materials are not part of the administrative record. Second, Alexander met her burden of proving misconduct. *Alexander*, 186 F.R.D. at 179 ("No one disputes that releasing Tripp's background security information qualifies as misconduct."). Dakota Access has demonstrated no such proof

that the government engaged in any misconduct by considering Dakota Access's easement application for longer than Dakota Access preferred.

Dakota Access does not address this clear D.C. Circuit precedent placing the deliberative materials it seeks outside of the administrative record, much less make the required strong showing of bad faith or improper behavior required to obtain such extra-record materials. Dakota Access's failure to meet its burden of proving bad faith or improper behavior is similarly fatal to Dakota Access's effort to obtain a privilege log and depositions.

1. Dakota Access seeks documents that are deliberative.

Dakota Access's description of the documents it seeks makes clear that it seeks unidentified records of intra- and inter-agency deliberations between September 2016 and January 18, 2017. *E.g.* Dakota Access Mem. at 28 (documents that relate to the preparation and substance of a September 9, 2016 Joint Statement . . . [and] documents pertaining to an October 10 Joint Statement by the same Departments, including the determination whether to reconsider any previous decisions). These agency records of the preparation and determination of joint statements are facially deliberative. The Corps intentionally did not include these deliberative materials in the administrative record.[6]

2. Dakota Access has not made the requisite strong showing of bad faith or improper behavior that might permit the examination of extra-record materials.

Rather than provide strong evidence of bad faith or improper behavior, Dakota Access claims that it needs the extra-record deliberative materials in order to establish "political interference." Dakota Access's repeated admissions that it cannot establish bad faith or improper behavior are fatal to its motion to compel the production of extra-record evidence.

[6] That the deliberations resulted in statements or memoranda other than the February 8, 2017 final agency action at issue does not change the deliberative nature of the underlying documents.

The D.C. Circuit squarely rejected a similar request for extra-record documents based upon speculation that the documents sought would establish bad faith or improper behavior.[7] In *San Luis Obispo Mothers for Peace*, the *en banc* D.C. Circuit declined to supplement a record with transcripts of a closed agency proceeding. It held that the petitioners could not base their efforts to supplement the record solely upon the documents that they sought to introduce, but rather had to provide "independent evidence of improper conduct by the Commission." 789 F.2d at 44-45 ("Petitioners must make the requisite showing *before* we will look at the transcripts. We will not examine the transcripts to determine if we may examine the transcripts."). Dakota Access similarly admits that it cannot make the required strong showing of bad faith by speculating that the documents it seeks will provide evidence of "political interference." Dakota Access Mem. at 4 ("Dakota Access needs these records to help show . . . that this substantial delay was unlawful"), 19 ("missing documents will show that the previous administration's process for revisiting the issues that the Final EA and the FONSI had already resolved was infected with improper political interference lacking a basis in law"), 24 ("Dakota Access needs these records to show that the three Departments and the White House worked outside of the lawful process"), 26 ("the documents that are missing from this record are needed to show that the government engaged in an unlawful process"). Dakota Access's grounding of its motion to compel the production of deliberative materials on speculation that those materials would provide evidence of "political interference" must be denied because it would turn the D.C. Circuit's standard on its head.

[7] Dakota Access identifies no standard for introducing extra-record evidence based upon "political interference." Defendant addresses the D.C. Circuit's "bad faith or improper behavior" standard due to the nature of Dakota Access's allegations.

Even if Dakota Access were correct that political factors played some role in any agency process, the D.C. Circuit has made clear that "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law" to APA review. *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998). Indeed, deliberative materials are protected from disclosure to ensure candid discussion among agency officials and to protect the integrity of the administrative process. A requirement that such materials be included in an administrative record "could hinder candid and creative exchanges regarding proposed decisions and alternatives, which might, because of the chilling effect on open discussions within agencies, lead to an overall decrease in the quality of decisions." *Ad Hoc Metals*, 227 F. Supp. 2d at 143. As the D.C. Circuit has stated:

> [A]gency deliberations, like judicial deliberations, are for similar reasons privileged from discovery. Subjecting judges to questioning about how they reached their decisions would be destructive of judicial responsibility. . . . Just as a Judge cannot be subjected to such [questioning about how she reached her decisions], so the integrity of the administrative process must be equally respected. In passing on final agency action, we therefore have refused to consider . . . documents recording the deliberative process leading to the agency's decision.

Checkosky, 23 F.3d at 489 (quotations omitted) (citing *Morgan*, 313 U.S. at 422), *superseded by rule on other grounds as stated in Marrie v. SEC*, 374 F.3d 1196 (D.C. Cir. 2004); *see also Ad Hoc Metals*, 227 F. Supp. 2d at 143 ("policy of non-disclosure 'protect[s] the integrity of the decision-making process'") (citation omitted). Dakota Access's admission that it cannot establish bad faith or improper behavior without obtaining the extra-record, deliberative documents it seeks is fatal to its efforts to obtain those documents. Dakota Access falls far short of meeting its burden to demonstrate that the Corps acted in bad faith. Its motion to compel "completion" of the administrative record through discovery should be denied.

3. Dakota Access is not entitled to a privilege log of documents that are not properly part of the administrative record.

Dakota Access's alternative request that the Corps "log any documents it withholds in a Vaughn index," Dakota Access Mem. at 26, should likewise be denied. "Since deliberative documents are not part of the administrative record, an agency that withholds these privileged documents is not required to produce a privilege log to describe the documents that have been withheld." *Nat'l Ass'n. of Chain Drug Stores*, 631 F. Supp. 2d at 27. *See also, Oceana, Inc. v. Locke*, 634 F. Supp. 2d 49, 52-53 (D.D.C. 2009) (collecting cases), *rev'd on other grounds*, 670 F.3d 1238 (D.C. Cir. 2011); *Stand Up for Cal.! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 123 (D.D.C. 2014) ("[P]rivileged and deliberative materials are not part of the administrative record as a matter of law."); *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 372 (D.D.C. 2007) (agencies need not file privilege logs of deliberative documents absent "clear command from the court of appeals"). Further, the presumption of regularity dictates that parties are not entitled to a privilege log for the purpose of testing such determinations in the agency's record compilation, which are "conclusive" absent a significant showing that the agency acted in bad faith. *Nat'l Ass'n. of Chain Drug Stores*, 631 F. Supp. 2d at 28. Dakota Access has made no such allegations, much less a "significant showing," here. As this Court recently held, "[t]he law is clear: predecisional and deliberative documents 'are not part of the administrative record to begin with,' so they 'do not need to be logged as withheld from the administrative record.'" *Oceana, Inc. v. Pritzker*, 2016 U.S. Dist. LEXIS 153210, *13 (D.D.C. Nov. 4, 2016).[8]

[8] While the absence of legal support for Dakota Access's request is a sufficient basis for rejecting it, the Corps notes that "requiring all predecisional and deliberative documents to be logged in a *Vaughn*-type index would place a significant burden on agencies whose decisions are challenged as arbitrary and capricious." *Id*. at *19.

Simply stated, the Corps has no duty to include all deliberative materials in its administrative records. Because those materials "are not part of the administrative record" as a matter of law, the Corps is "not required to produce a privilege log to describe" them. Dakota Access has offered no legal authority to the contrary and, accordingly, this Court should not defy the longstanding precedent of this Circuit in order to grant Dakota Access's motion. Dakota Access's motion should be denied.

4. Dakota Access's request to compel numerous depositions is without merit and should be denied.

Dakota Access concludes its memorandum with a paragraph seeking to compel the deposition of former personnel from three federal agencies and the White House based on its purported need to "explore where and to what extent the records" it seeks "can be located." Dakota Access Mem. at 28. Dakota Access provides no legal or factual support for this request. This paragraph of Dakota Access's memorandum is particularly deficient.

As discussed above, Dakota Access's efforts to "complete" the administrative record with broad categories of documents is without merit. Plaintiffs seeking such discovery bear an even higher burden than those seeking supplementation with specific materials. *Capital Eng'g & Mfg. Co. v. Weinberger*, 695 F. Supp. 36, 41 (D.D.C. 1988) ("[P]laintiffs have made out their *prima facie* case that supplementation of the present record is appropriate. This does not mean, of course, that plaintiffs are necessarily entitled to the seven depositions and potentially voluminous documentary materials they seek."). "Discovery typically is not available in APA cases." *Air Transp. Ass'n*, 663 F.3d at 487 (D.C. Cir. 2011). "Discovery is permitted only in two circumstances: (1) upon a strong showing of bad faith or improper motive; and (2) in the rare case in which the record is so bare as to frustrate effective judicial review." *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 271 (D.D.C. 2013) (internal

quotation marks and citations omitted). Neither internal agency disagreement nor a change in agency position provide the necessary evidentiary basis required to establish such bad faith or improper motive. *Id.* at 273-74 (quoting *Hinckley v. United States*, 140 F.3d 277, 286 (D.C. Cir. 1998) ("The fact that the Maritime Administration's initial position with respect to the Plaintiff's application differed from the ultimate decision reached after extensive consultation with the Credit Council 'does not suggest ... any improper motivations.'"); *Air Transp. Ass'n*, 663 F.3d at 487-88 ("letter – written by a dissenting member and saying only that the Board's behavior gave 'the impression' of prejudgment – falls short of the 'strong' evidence of 'unalterably closed minds' necessary to justify discovery."). Dakota Access's effort to compel depositions should be rejected for several reasons.

First, Dakota Access's motion to compel depositions highlights the extent to which its motion seeks the type of civil discovery that is inappropriate in APA litigation. Dakota Access argues that depositions are warranted because the government has not "produced everything responsive." Dakota Access Mem. at 28 (apparently asserting that the administrative record of the Corps' February 8, 2017 Lake Oahe easement decision should have included all documents responsive to the broad document requests set forth in Dakota Access's November 15, 2016 Motion to Supplement the Administrative Record). Dakota Access cites no case imposing its proposed "responsiveness" standard on an agency in a case brought under the APA. As Dakota Access recognizes elsewhere in its Memorandum, *id*. at 19, review under the APA is limited to the administrative record. *See* Section IV(B), above. Depositions taken after the February 8, 2017 decision at issue are manifestly not part of the administrative record of that decision. Dakota Access's motion to compel broad discovery should therefore be denied.

Second, as discussed above, Dakota Access has failed to set forth any evidentiary basis for overcoming the strong presumption of regularity. Dakota Access has not made the required strong showing of bad faith or improper motive. And its argument that summary judgment should be granted in its favor precludes any argument that the record is so bare as to frustrate judicial review. Simply put, neither the facts nor the law support Dakota Access's motion to compel depositions.

V. CONCLUSION

The Corps respectfully submits that Dakota Access's motion should be denied because the Corps has certified the administrative records of its challenged decisions. Dakota Access has not established the exceptional circumstances that would justify any supplementation of the administrative record or the inclusion of extra-record evidence, much less the broad civil discovery Dakota Access seeks in this APA case.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of May, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Matthew Marinelli
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