Attachment F

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

January 8, 2020

MEMORANDUM FOR: Assistant Administrators
Deputy Assistant Administrators
Regional Administrators, NMFS
Director, NMFS Office of Protected Resources
Director, NMFS Office of Habitat Conservation
Director, NMFS Office of Sustainable Fisheries
Director, NMFS Office of Science & Technology
Director, NMFS Office of Law Enforcement
Director, NOS Office of National Marine Sanctuaries
Director, NOS Office of Response and Restoration
Director, NOS Office for Coastal Management

FROM: John Luce
General Counsel

SUBJECT: Treatment of Deliberative Materials When Compiling an Administrative Record of the National Oceanic and Atmospheric Administration (NOAA)

This memorandum addresses the use of the deliberative process privilege when compiling an administrative record in litigation for the defense of final agency action under the Administrative Procedure Act's (APA) "arbitrary and capricious" standard of review. *See* 5 U.S.C. § 706(2)(A). This guidance supplements and partially supersedes the December 21, 2012 NOAA General Counsel guidance, "National Oceanic and Atmospheric Administration Guidelines for Compiling an Administrative Record" (NOAA 2012 Guidance).

Courts have widely held that the administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). However, divergent lines of case law have established two different approaches regarding the treatment of predecisional, deliberative materials, a broader and a more focused approach.

Under the broader approach, predecisional materials pertaining to the challenged action are presumptively part of the administrative record. On this view, the agency may only withhold deliberative documents through an affirmative, item-by-item assertion of the deliberative process privilege. *See, e.g.*, *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996); *Gill v. Dep't of Justice*, No. 14-CV-03120-RS (KAW), 2015 WL 9258075, *6-7 (N.D. Cal. Dec. 18, 2015).

Other courts, in contrast, have endorsed the more focused approach, under which deliberative materials are presumed to be immaterial and not part of the administrative record at all—and are therefore excluded without any need to assert the privilege or to list such items on a privilege log. This view finds support in Supreme Court holdings that agency action is reviewed "on the basis articulated by the agency itself," *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), and that an "inquiry into the mental processes of administrative decisionmakers is usually to be avoided." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). For example, this approach governs in the D.C. Circuit. *See Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019).

The NOAA 2012 Guidance acknowledged the existence of both approaches, but can be read as reflecting a presumption in favor of the broader approach.[1] However, DOJ's Environment and Natural Resources Division has issued guidance to its client agencies, including NOAA, calling for a contrary presumption in favor of the more focused approach. According to DOJ's guidance, absent a "strong showing of bad faith," "inquiry into the agency's internal deliberations is immaterial," and "deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log." Mem. from Jeffrey H. Wood, Acting Assistant Attorney General, U.S. Department of Justice, Environment and Natural Resources Division, Oct. 20, 2017, at 2. Therefore, DOJ states that use of the broader approach should be reserved for "unusual circumstances," and recommends that agencies update their guidance for consistency with this position. *Id.*

This guidance accordingly establishes that the narrow approach should be the usual approach for NOAA administrative records, and supersedes any portions of the 2012 Guidance that may be read as stating a contrary presumption. That is, as a general matter, NOAA components should not include deliberative materials in the administrative record, or list them on a privilege log. In addition, those portions of the NOAA 2012 Guidance addressing the steps for asserting the deliberative process privilege are not applicable when following the more focused approach (such as its statements that deliberative materials should be included in the record and listed on a privilege log). *See* NOAA 2012 Guidance at 8. The remainder of the NOAA 2012 Guidance (i.e., all portions of that guidance not addressing the inclusion of deliberative documents and the use of the deliberative process privilege) remain in effect.[2]

The determination of the approach to preparing the administrative record requires careful consideration of factors including the governing law of the jurisdiction and the interests of other federal agencies involved in the litigation, and should be made in early and close coordination with such agencies and with DOJ. NOAA components should consult with NOAA GC about applying these approaches in practice. As appropriate, we will issue additional guidance to assist personnel assembling administrative records.

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[1] The NOAA 2012 Guidance acknowledged that it did not reflect "a set of mandatory obligations that must be adhered to in all cases," and that in some jurisdictions, "deliberative materials may be excluded from the Administrative Record as immaterial to the agency's stated reasoning." NOAA 2012 Guidance at 3 and n.3.

[2] It should be noted that this memorandum does not address or apply to how we apply the deliberative process privilege under the Freedom of Information Act, 5 U.S.C. § 552(b)(5).