UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 20-9893 JGB (SHKx)**	Date	October 19, 2023
Title	***Immigrant Defenders Law Center, et al. v. Alejandro Mayorkas, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) GRANTING IN PART and DENYING IN PART Plaintiffs' Motion to Compel Completion of the Administrative Record and Privilege Log (Dkt. No. 277); and (2) VACATING the October 23, 2023 Hearing (IN CHAMBERS)**

Before the Court is Plaintiffs' motion to compel completion of the administrative record and privilege log. ("Motion," Dkt. No. 277.) The Court determines this matter appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court **GRANTS IN PART** and **DENIES IN PART** the Motion and **VACATES** the October 23, 2023 hearing.

I. PROCEDURAL POSTURE

The proceedings in this case are fully summarized in this Court's March 15, 2023 Order on Defendants' Motion to Dismiss and Plaintiffs' Motion for Class Certification. (See Dkt. No. 261.) Here, the Court provides an abbreviated summary of the proceedings relevant to the instant Motion.

On October 28, 2020, Plaintiffs Immigrant Defenders Law Center ("ImmDef"), Jewish Family Service of San Diego ("JFS") (together, "Organizational Plaintiffs"), and eight individuals filed a Complaint for Injunctive and Declaratory Relief against Defendants. ("Complaint," Dkt. No. 1.) Defendants included the Secretary of the Department of Homeland Security ("DHS"), the Chief of U.S. Border Patrol, U.S. Immigrations and Customs Enforcement ("ICE") and others. (Id.) As alleged in the Complaint, Organizational Plaintiffs are nonprofit organizations which exist to serve immigrant and refugee communities. (Id. ¶¶ 21, 22.) Individual Plaintiffs are

asylum seekers subject to the Migrant Protection Protocols ("MPP") and required to wait in Mexico while their asylum applications are adjudicated. (Id. ¶¶ 14-20.) Plaintiffs sought to enjoin Defendants from continuing to implement policies affecting asylum seekers waiting at the U.S.-Mexico border. (Id. ¶ 10.)

On August 13, 2021, Plaintiffs filed a First Amended Complaint ("FAC," Dkt. No. 143) , which Defendants moved to dismiss on December 1, 2021. (Dkt. No. 167.) On December 3, 2021, Defendants filed a notice of agency action related to the motion to dismiss, referencing a court-ordered reimplementation of the MPP program. (Dkt. No. 168.)

On December 22, 2021, Plaintiffs filed a Second Amended Complaint, thus mooting Defendants' motion to dismiss the FAC. ("SAC," Dkt. No. 175; see Dkt. No. 193.) In addition to the Organizational Plaintiffs, the SAC was filed on behalf of twelve individuals (collectively, "Individual Plaintiffs"). (SAC ¶¶ 13-25.) The SAC names DHS Secretary Alejandro Mayorkas, DHS, U.S. Customs and Border Protection ("CBP") Commissioner Chris Magnus, Executive Assistant Commissioner of CBP's Office of Field Operations ("OFO") William A. Ferrara, Border Patrol Chief Raul Ortiz, CBP, Acting Director of ICE Tae D. Johnson, and ICE as Defendants. (Id. ¶¶ 26-33.) The SAC alleges harms arising from the initial implementation of MPP by the Trump Administration and certain actions by the Biden Administration in ceasing its wind-down of the policy. (See id.) Plaintiffs assert the following claims for relief: (1) violation of the Administrative Procedure Act (APA) premised on the violation of the right to apply for asylum; (2) violation of the APA premised on access to counsel; (3) violation of the Fifth Amendment Due Process Clause right to a full and fair hearing; (4) violation of the APA premised on the unlawful cessation of the MPP wind-down; (5) violation of the First Amendment (on behalf of Individual Plaintiffs); and (6) violation of the First Amendment (on behalf of Organizational Plaintiffs.) (Id. ¶¶ 329–91.)

On January 26, 2022, Defendants moved to dismiss the SAC. (Dkt. No. 189.) On February 17, 2022, Plaintiffs filed a class certification motion. (Dkt. No. 205.) On Mach 15, 2023, the Court granted in part Defendants' motion to dismiss the SAC and granted Plaintiffs' motion for class certification. (Dkt. No. 261.) The Court permitted all but one of Plaintiffs' claims to proceed. (See id. at 43–44 (finding that Plaintiff's fourth cause of action was moot and dismissing same without leave to amend).)

On August 15, 2023, Defendants produced a Certified Administrative Record ("CAR"). (See "CAR Certification," Dkt. No. 274.) On September 7, 2023, Plaintiffs filed the instant motion to compel completion of the administrative record and privilege log. (Motion.) In support of their motion, Plaintiffs submitted the following:

- Declaration of Hannah R. Coleman ("Coleman Decl.," Dkt. No. 277-1);
- Exhibit A to the Coleman Decl., which is a true and correct copy of the Certified Administrative Record produced by Defendants in this action ("CAR," Dkt. Nos. 277-2, 277-3);

- Exhibit B to the Coleman Decl., which is correspondence between the parties dated July 18, 2023 ("Axe Email," Dkt. No. 277-4); and,
- Exhibit C to the Coleman Decl., which is correspondence between the parties dated July 21, 2023 ("Heartney Letter," Dkt. No. 277-5).

On September 23, 2023, the parties stipulated to continue the briefing schedule for the Motion such that Defendants' opposition would be due on September 26, 2023 and Plaintiffs' reply on October 3, 2023. (Dkt. No. 281.) The Court approved that stipulation. (Dkt. No. 285.) Defendants then filed their opposition to the Motion on September 16, 2023. ("Opposition," Dkt. No. 283.) Plaintiffs replied on October 2, 2023. ("Reply," Dkt. No. 284.)

II. LEGAL STANDARD

Under APA § 706, arbitrary and capricious review shall be based upon "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The whole record "includes everything that was before the agency pertaining to the merits of its decision." Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (internal quotation marks and citations omitted). Importantly, the whole administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." Thompson v. U.S. Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks omitted). As such, the record includes "documents that literally passed before the eyes of the final agency decision maker as well as those considered and relied upon by subordinates who provided recommendations." WildEarth Guardians v. Bernhardt, 507 F. Supp. 3d 1219, 1223 (C.D. Cal. 2020) (quoting Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 2017 WL 4642324, at *2 (N.D. Cal. Oct. 17, 2017)).

The whole administrative record is "ordinarily the record the agency presents"—in other words, "an agency's statement of what is in the record is subject to a presumption or regularity." Blue Mountains Biodiversity Project v. Jeffries, 72 F.4th 991, 997 (9th Cir. 2023) (internal quotation marks and citations omitted). However, this presumption of regularity may be overcome if there is clear evidence that the agency considered documents not included in the CAR. See In re United States, 875 F.3d 1200, 1206 (9th Cir. 2017), vacated on other grounds, 583 U.S. 29 (2017). A plaintiff need not show bad faith or improper motive to rebut the presumption of regularity; instead, a plaintiff must "identify the allegedly omitted materials with sufficient specificity and identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record." WildEarth Guardians, 507 F. Supp. 3d at 1223.

III. DISCUSSION

Plaintiffs identify six categories of documents they argue are missing from the CAR and assert that to the extent Defendants believe any of those documents are privileged, Defendants must produce a privilege log. (Motion.) The Court considers each argument in turn.

A. Documents Purportedly Missing from the Certified Administrative Record

1. Agreements with, and Communications from, the Government of Mexico

The first category of documents Plaintiffs allege are missing from the CAR are "agreements secured with, communications from, or records of meetings with the government of Mexico about the planning, design, and/or implementation of MPP 1.0." (Motion at 7.) Plaintiffs argue that "the core feature of MPP 1.0 was forcing asylum seekers to reside in Mexico while awaiting their U.S. hearings," and as such, agency decisionmakers relied (directly or indirectly) on agreements with and commitments from Mexico regarding its treatment of those subject to the program. (Id.) Defendants admit that the challenged decision did indeed "rely on an *agreement* and *official* communications with Mexico securing Mexico's cooperation," but contend that the CAR includes the only two such documents relied upon by the agency. (Opposition at 4 (emphasis in original).)

The first of these two documents is a December 20, 2018 memorandum from the United States Embassy to Mexico. (CAR Doc. No. 26 at AR00317.[1]) That memorandum purports to "transmit[] … a copy of the U.S. Statement of Protocols on Migrant Protection" which "become effective in the United States as of December 20, 2018" (the same day the memorandum is dated). (Id.) The second document is a letter from Mexico to the United States also dated December 20, 2018 which attaches the Mexican government's public statement responding to the United States Embassy's memorandum. (CAR Doc. Nos. 27–28.)

Plaintiffs acknowledge that those two documents fall under the category of documents they allege are missing from the CAR, see Motion at 7 n.5, but assert that they have reasonable, non-speculative grounds to believe Defendants failed to include additional agreements with and communications from the government of Mexico. In support of that position, Plaintiffs point to (1) public reports (including some produced in the CAR itself) which reference November 2018 negotiations between the United States and Mexico regarding potential policies concerning immigration at the border, and (2) certain documents in the CAR which reference assurances from Mexico about how it would treat MPP 1.0 enrollees. (Motion at 8–9; see CAR Doc. Nos. 6, 7, 26, 27.) In sum, Plaintiffs contend that the agency relied on a broader set of agreements and communications with Mexico than just the two documents produced in the CAR.

Importantly, Defendants do not argue that the pre-December negotiations Plaintiffs identify did not occur. Instead, Defendants draw a distinction between "mere" negotiations

[1] Plaintiffs submit the entire CAR as Exhibit A to the Coleman Declaration, Dkt. Nos. 277-2 and 277-3. The CAR Document Nos. cited in this Order are taken directly from Defendants' Certified Index to Administrative Record, Dkt. No. 277.

and preliminary communications on the one hand, and "official" agreements and "formal" communications on the other hand. According to Defendants, although the United States and Mexican governments engaged in discussions concerning MPP 1.0 prior to the exchange of the two documents produced in the CAR, "the decision to implement MPP 1.0 would not and could not have relied on mere 'negotiations.'" (Opposition at 4.)

The Court finds this distinction unavailing. First, Defendants fail to explain why the agency "would not and could not have relied on mere 'negotiations.'" (See id.) Defendants' only argument in support of this conclusion is that the January 25, 2019 memorandum concerning policy guidance for implementation of the Migrant Protection Protocol issued by then-DHS Secretary Kirstjen M. Nielsen (the "Nielsen Memorandum") block quotes the two documents produced in the CAR, and references no other communications or agreements between the governments. (Opposition at 4 (citing CAR Doc. No. 5 at AR00008).) Although the memorandum's citations to the two documents produced in the CAR indicate that the agency did in fact rely on those documents in connection with drafting that memorandum, it does not follow that the agency did not rely on any additional agreements or communications merely because those other documents are not referenced therein.

If Defendants' position were correct, the only communications and agreements with Mexico on which the agency relied in reaching its decision are (1) a document announcing the implementation of that decision, and (2) a document responding to that decision. That conclusion defies logic. The agency's initial decision to effectuate MPP 1.0 can't have been influenced by a document announcing, nor by a document responding to, that same decision. Plaintiffs have identified reasonable, non-speculative grounds for the belief that the agency relied on other communications and/or agreements with Mexico in making its initial decision to effectuate MPP 1.0.

To be clear, if Plaintiffs had no evidence of pre-December 20, 2018 negotiations or communications between the United States and Mexico, the presumption of completeness would be challenging to overcome. But that is not the case here. Numerous news articles refer to ongoing discussions between the United States and Mexican governments concerning a forthcoming immigration policy change, and all of these public reports precede the two documents cited by Defendants. (See, e.g., CAR Doc. No. 79 at AR00705, 709 (reporting in November 2018 that "[t]he White House is reportedly close to clinching a deal with Mexico's incoming government to send asylum-seekers back across the southern U.S. border while their cases wind through America's beleaguered immigration courts" and the incoming Mexican government is attempting to "persuade the Trump administration to secure about $20 billion in private investment . . . as part of the deal that would allow Central American asylum-seekers to wait in Mexico.").) And Plaintiffs even identify a specific agreement between the United States and Mexico which is obviously related to the challenged agency action and dated weeks before the announcement of MPP 1.0, yet excluded from the CAR. (See Motion at 7–8 (citing Arrangement Between the United States of America and the United Mexican States Regarding Implementation of Immigration and Nationality Act, (INA) Section 235(b)(2)(C), available at

https://www.documentcloud.org/documents/ 20459620-front-office-november-2020-release-of-2020-icli-00038#document/p84).)

Defendants do not dispute that these negotiations occurred, nor do they assert that the specific documents identified by Plaintiffs do not exist. Defendants only assert that the agency did not rely on them, and for the reasons identified above, the Court disagrees. "An administrative record must include all materials that might have influenced an agency's decision, are related to the subject matter under review, and were before the agency during the relevant time." WildEarth Guardians, 507 F. Supp. 3d at 1225. It defies credulity to conclude that the agency was not influenced by communications and agreements between the United States and Mexico which precede the December 18, 2020 memoranda included in the CAR.

Plaintiffs have provided reasonable, non-speculative grounds to believe that Defendants considered communications and agreements with the Mexican government but failed to include those documents in the CAR.

2. Communications from the White House, the Department of Justice, and the Department of State

The second category of documents Plaintiffs allege are missing from the CAR are "communications from, agreements with, or records of meetings with the White House, the Department of State, or DOJ, about the planning, design, and/or implementation of MPP 1.0." (Motion at 9.) Plaintiffs assert that all three entities "played a major part in the decision to implement MPP 1.0," as illustrated in the CAR. (Id.)

Plaintiffs rebut the presumption of regularity with respect to communications from, agreements with, or records of meetings with the White House. Plaintiffs identify in the CAR a single White House document concerning MPP 1.0: the January 2017 Executive Order issued by former President Trump directing the DHS Secretary to "take appropriate action . . . to ensure that [noncitizens] described in section 235(b)(2)(C) of the INA . . . are returned to the territory from which they came pending a formal removal proceeding." (See CAR Doc. No. 10 at AR00032.) Plaintiffs also identify two Tweets posted by former President Trump on November 24, 2018 which describe what would become MPP 1.0. (See Motion at 10 (citing Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 24, 2018, 6:49 PM), https://shorturl.at/gosJT ("Migrants at the Southern Border will not be allowed into the United States until their claims are individually approved in court. We only will allow those who come into our Country legally. Other than that our very strong policy is Catch and Detain. No "Releasing" into the U.S…[.]"); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 24, 2018, 6:56 PM), https://shorturl.at/kmpN5 (".... All will stay in Mexico. If for any reason it becomes necessary, we will CLOSE our Southern Border. There is no way that the United States will, after decades of abuse, put up with this costly and dangerous situation anymore!").)

Despite clear evidence of the White House's involvement in developing MPP 1.0, the CAR does not include any communications with the White House. It "strains credulity to suggest" that the agency did not rely on a single communication with the White House regarding the development or implementation of MPP 1.0. See Regents of the Univ. of California v. United States Dep't of Homeland Sec., 2017 WL 4642324, at *4 (N.D. Cal. Oct. 17, 2017).

Defendants do not deny the existence of such communications; instead, they respond that any such communications are protected by the deliberative process privilege and thus not properly subject to inclusion in an administrative record. (Opposition at 7.) In their Reply, Plaintiffs clarify that they do not seek White House communications to the extent such communications reflect "the mental processes of administrative decisionmakers." (Reply at 5.) Plaintiffs argue only that White House materials considered by DHS in its decision to implement MPP 1.0 are properly part of the administrative record, and DHS failed to include them in the CAR. The Court agrees with Plaintiffs. There is sufficient evidence to indicate that the White House communicated with DHS concerning the development and implementation of MPP 1.0 and that DHS relied on those communications. Those communications, including any agreements or records of meetings, must be included in the CAR.

Plaintiffs also rebut the presumption of regularity with respect to certain communications from, agreements with, or records of meetings with the DOJ. Plaintiffs note that a document included in the CAR indicates that DHS and the DOJ Executive Office for Immigration Review ("EOIR") "work[ed] closely" together to "streamline" MPP 1.0. (Motion at 11 (citing CAR Doc. No. 6 at AR00014).) The CAR also includes several documents containing DOJ statistics, which Plaintiffs contend "appear to be EOIR's response to specific data requests from DHS during the timeframe that DHS was designing and planning MPP 1.0." (Motion at 11 (citing CAR Doc. Nos. 71, 74).) Despite DOJ's demonstrated involvement in assisting DHS with designing and planning MPP 1.0, there are no communications, notes, or other records describing the entities' work to "streamline" MPP 1.0, nor add context surrounding the data shared between the entities.

Defendants again contend that any such communications implicate the deliberative process and assert that that the DOJ's efforts to "streamline" MPP 1.0 would not fall within the CAR because "interagency communications concerning how to implement and/or roll out MPP 1.0 after it was promulgated are post-decisional documents that the agency could not have considered and thus not properly included in the administrative record." (Opposition at 6.) Defendants also argue more generally that Plaintiffs do not demonstrate that DHS actually considered the communications they identify. (Opposition at 5.) Plaintiffs respond that "it is beyond reasonable dispute that DHS would have considered EOIR's input in making decisions about the implementation of MPP 1.0, since MPP 1.0 could not have been realized without the direct participation of EOIR," and cite to FOIA disclosures which reflect meetings with and communications from EOIR leading up to MPP 1.0's implementation. (Motion at 6.) Plaintiffs

also contend that communications from EOIR to DHS do not implicate the internal mental processes of DHS, which is the relevant decisionmaker in the matter at bar. (Reply at 5–6.)

Although a closer question than with respect to White House materials, the Court concludes that Plaintiffs have identified reasonable, non-speculative grounds to believe that the agency considered at least some communications with the EOIR in developing MPP 1.0. Plaintiffs supply evidence that DHS met with EOIR before the implementation of MPP 1.0 and are correct that EOIR's direct participation in the implementation of that policy was seemingly required given that MPP 1.0 enrollees' hearings occurred in EOIR immigration courts. As such, any communications from, or records of meetings with, EOIR before the implementation of MPP 1.0 and concerning the development or implementation of MPP 1.0 are properly part of the administrative record, to the extent DHS relied on those documents and they do not reveal the deliberative process of DHS. See Portland Audubon Soc'y, 984 F.2d at 1549 ("the internal deliberative processes of the agency [and] the mental processes of individual agency members" are not part of the administrative record).

The Court finds, however, that Plaintiffs do not have sufficient grounds to believe that DHS considered any "accompanying communications, meeting notes, or other records" concerning the EOIR data which appears in the CAR. As Defendants rightly point out, CAR Documents 71 and 74 consist of year-end EOIR data for Fiscal Year 2018 and were created in 2018. There is no evidence to support that DOJ prepared this data in response to a DHS request; any argument to the contrary is mere speculation. As such, Plaintiffs fail to rebut the presumption of regularity with respect to that set of documents.

Finally, Plaintiffs fail to rebut the presumption of regularity with respect to communications from, agreements with, or records of meetings with the Department of State ("DOS"). In support of their argument, Plaintiffs cite (1) a CAR document which states that "DHS will continue to work with the Mexican government and [DOS] to determine how best to implement" the January 2017 Executive Order issued by former President Trump, which forms the basis for MPP 1.0, see Motion at 11 (citing CAR Doc. No. 15 at AR00082), and (2) a news article which references the participation of the Secretary of State in negotiations with Mexico to reach agreement relating to MPP 1.0, see Reply at 6 n.3.

Defendants again assert that any such communications are deliberative and thus properly excluded from the administrative record, and also point out that the CAR document cited by Plaintiffs is dated March 1, 2017, and largely concerns a separate Executive Order regarding the construction of a southern border wall. (Opposition at 6–7.) Although there is some limited evidence that suggests DOS was involved in the development of MPP 1.0, Plaintiffs have not identified specific documents they believe should be included in the CAR. It is not enough that Plaintiffs have reason to believe DOS played some role in the development of the challenged agency action; they must provide reasonable, non-speculative grounds for their belief that the agency considered specific DOS materials and cannot overcome the presumption of regularity by "merely proffering broad categories of documents and data that

are likely to exist as a result of other documents that are included in the administrative record." See Gill v. Dep't of Just., 2015 WL 9258075, at *5 (N.D. Cal. Dec. 18, 2015) (internal quotations omitted).

3. Communications from Stakeholder Groups

The third category of documents Plaintiffs allege are missing from the CAR are "communications from, or records of meetings with, nongovernmental stakeholders regarding MPP 1.0." (Motion at 11.) Plaintiffs do not supply facts indicating that Defendants communicated or met with nongovernmental stakeholders about the implementation of MPP 1.0 beyond a passing citation to a report indicating that one stakeholder group met with Customs and Border Protection ("CBP") the day before MPP 1.0 became effective. (See Motion at 11–12.) As such, Plaintiffs only speculate that this category of documents exist. Although federal agencies "may have considered 'stakeholder' communications in reaching other decisions not at issue in this case," it appears based on the CAR and Defendants' Opposition that Defendants did not consider input from stakeholders regarding its implementation of MPP 1.0. (See Opposition at 7–8; Reply at 8 n.6.) Plaintiffs thus fail to overcome the presumption of regularity with respect to this category of documents.

4. DHS Records and Communications

The fourth category of documents Plaintiffs allege are missing from the CAR are "DHS records and communications, as well as facts and data DHS considered, in deciding to implement MPP 1.0." (Motion at 12.) Plaintiffs contend that such materials—which include "decision memoranda, internal approvals, notices, minutes, agendas, lists of attendees, notes, other memoranda, or other communications from meetings relating to the decision to implement MPP 1.0"—must have been produced during the time Defendants were considering whether and how to implement MPP 1.0, but are nonetheless excluded from the CAR. (See id. at 12–13.)

Plaintiffs first argue that the CAR must include all records in a separate, never-finalized rulemaking to implement Immigration and Nationality Act § 235(b)(2)(C) because the CAR includes one document which states on its face that it is a part of the administrative record for that separate rulemaking. (Id. at 12 (citing CAR Doc. No. 68).) According to Plaintiffs, it is implausible that the broader record of that rulemaking was not considered by the agency because, by Defendants' own admission, at least some portion of that record (one document) was so considered. (See Reply at 7.) The Court disagrees. It does not follow that the agency necessarily relied upon an entire administrative record for a separate rulemaking merely because the agency included one document from that record in the CAR.

Moreover, Plaintiffs' cited case, Center for Environmental Health v. Perdue, is not directly on point. 2019 WL 3852493, at *4 (N.D. Cal. May 6, 2019). There, the administrative record included the actual proposed rule itself but failed to include the thousands of public

comments submitted concerning that proposed rule. Id. at *1. Here, the only document from the separate rulemaking is one page and includes data obviously relevant to the implementation of MPP 1.0. The CAR does not include the proposed rule itself nor any other related document. Plaintiffs thus fail to overcome the presumption of regularity with respect to these documents.

Second, Plaintiffs argue that the CAR is missing facts or data underlying what they describe as key conclusions that Defendants reached in deciding to implement MPP 1.0. (Motion at 13.) Plaintiffs specifically allege that the CAR should, but does not, include facts or data supporting the following assertions which appear in the CAR:

- One hour of consultation with an attorney before a hearing was sufficient to ensure meaningful access to counsel (CAR Doc. No. 131);
- "[Noncitizens in MPP] will have access to immigration attorneys" (CAR Doc. No. 7);
- MPP 1.0 would "ensure[] that vulnerable populations receive the protections they need" (CAR Doc. No. 6); and,
- MPP 1.0 would "provide a safer and more orderly process" (id.).

(Motion at 13.) For the latter three assertions, Defendants respond in relevant part that documents within the CAR—including some of the very same documents Plaintiffs cite—contain the relevant facts Plaintiffs argue are missing from the record. (Opposition at 9–10.) The Court agrees. Plaintiffs may be dissatisfied with Defendants' grounds for making certain determinations, but their belief that those grounds were insufficient do not bear on whether the CAR is complete. Plaintiffs have not overcome the presumption of regularity with respect to these documents.

5. Documents Issued by DHS to MPP 1.0 Enrollees

The fifth category of documents Plaintiffs allege are missing from the CAR are documents Defendants created to issue to migrants enrolled in MPP 1.0. (Motion at 13.) For example, the CAR references "tear sheets" provided to each MPP 1.0 enrollee, but there are no such "tear sheets" in the CAR. (Id. at 13–14.) Plaintiffs also contend that documents confirming migrants' enrollment in the program, instructing migrants about how to present at a port of entry on the date of a court hearing, and lists of legal service providers should also be included in the CAR. (Id. at 14.)

Defendants argue that post-decisional documents like those identified by Plaintiffs are not properly included in the administrative record because the agency could not have considered such documents in deciding whether to implement MPP 1.0. (Opposition at 10.) But Plaintiffs argue persuasively that the tear sheet and list of legal services are not post-decisional, because both documents were developed by the time Defendants implemented MPP 1.0. To support that assertion, Plaintiffs point to the January 28, 2019 MPP Guiding

Principles Document included in the CAR, which references the tear sheet and list of legal services providers. As such, both the tear sheet and approved list of legal service providers must have been developed by the date that Defendants implemented MPP 1.0. (Motion at 8–9.) Plaintiffs also note that documents produced through FOIA indicate that a draft tear sheet had been developed as of December 27, 2017, which lends further credence to the conclusion that the tear sheets and list of legal service providers pre-date the challenged agency action. (Id. at 9.)

The Court therefore disagrees with Defendants' contention that the documents issued by DHS to MPP 1.0 enrollees all necessarily post-date the challenged agency action. Still, the question of whether the agency considered such documents in connection with its decision to implement MPP 1.0 is a close call. Plaintiffs argue that documents provided to MPP 1.0 enrollees are "inherently part of the agency's decision to implement MPP 1.0 in the manner in which it did," and thus are "part of the agency action challenged in this case and should be included in a complete administrative record." (Id.) Unsurprisingly, Defendants draw a contrary conclusion from the same facts. In the opinion of Defendants, "MPP 1.0-related documents given to MPP 1.0 enrollees would not be something the agency 'directly or indirectly' considered in deciding whether or not to implement MPP 1.0. Rather, they would be documents prepared to execute MPP after the decision was made to implement it." (Opposition at 10.)

The Court agrees with Plaintiffs. By the time Defendants began to formally implement MPP 1.0 on January 25, 2019, they must have developed the documents which would be issued to MPP 1.0 enrollees. In considering the need for, and structure, scope, and effects of, MPP 1.0, Defendants necessarily must have directly or indirectly considered the various documents with which MPP 1.0 enrollees would be supplied should the program be implemented. Plaintiffs have overcome the presumption of regularity with respect to these documents and Defendants must include them in the CAR.

6. Implementation Guidance

The sixth and final category of documents Plaintiffs allege are missing from the CAR are implementation guidance documents. (Motion at 13.) The CAR references seven such documents, including six which post-date the January 25, 2019 Nielsen Memorandum. (See Reply at 10 (citing CAR Doc. Nos. 1–4, 130–31).) Those documents are as follows:

- U.S. Customs and Border Protection, Guiding Principles/or Migrant Protection Protocols (January 28, 2019) (CAR Doc. No. 1);
- U.S. Customs and Border Protection, Memorandum from Kevin K. McAleenan, Commissioner, for Todd C. Owen, Executive Assistant Commissioner, Field Operations, and Carla L. Provost, Chief, U.S. Border Patrol, Implementation of the Migrant Protection Protocols (January 28, 2019) (CAR Doc. No. 2);

- U.S. Customs and Border Protection, Memorandum from Todd A. Hoffman, Executive Director, Admissibility and Passenger Programs, Office of Field Operations, for Director, Field Operations, Office of Field Operations and Director Field Operators Academy, Office of Training and Development, Guidance on Migrant Protection Protocols (January 28, 2019) (CAR Doc. No. 3);
- U.S. Immigration and Customs Enforcement, Memorandum from Ronald Vitiello, Deputy Director and Senior Official Performing the Duties of the Director, for Executive Associate Directors and Principal Legal Advisor, Implementation of the Migrant Protection Protocols (February 12, 2019) (CAR Doc. No. 4)[2];
- U.S. Citizenship & Immigration Services, PM-602-0169: Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols (January 28, 2019) (CAR Doc. No. 130); and,
- Memorandum from Nathalie R. Asher, Acting Executive Associate Director, Enforcement and Removal Operation, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement to Field Office Directors, Enforcement and Removal Operations (February 12, 2019) (CAR Doc. No. 131).

(CAR Certification.) Plaintiffs argue that "Defendants may not select certain implementation guidance documents for inclusion in the record but omit others—since all implementation guidance documents issued by DHS are necessarily part of the agency's decision to implement MPP 1.0." (Motion at 17.)

Defendants respond that any implementation guidance documents which post-date the Nielsen Memorandum could not have been considered by the agency, and thus are properly excluded from the CAR. (Opposition at 10–11.) But as Plaintiffs explain, the agency action they challenge is the *implementation of* MPP 1.0, including "the polices DHS created regarding enrollees' access to counsel and ability to apply for asylum." (See Reply at 10; SAC ¶¶ 2, 64.) Defendants' CAR Certification acknowledges as much:

> [The CAR] constitutes the true, correct, and complete copy of the administrative record that DHS directly or indirectly considered in connection with the agency policies challenged by Plaintiffs in the above-captioned case, which challenges,

[2] Plaintiffs correctly note that although Defendants' Certified Index to Administrative Record incorrectly states CAR Document No. 4 is the Vitiello memorandum, that memorandum does not appear in the CAR. CAR Document No. 4 is actually a printout from a public Immigration and Customs Enforcement ("ICE") webpage referencing two ICE implementation guidance documents, neither of which is itself included in the CAR. One of the documents referenced is the Vitiello memorandum, and the other is a document titled "ICE Policy 11088.1." (CAR Doc. No. 4. at AR00005.) The Court assumes these discrepancies result from an oversight on Defendants' part and directs Defendants to include in the CAR complete copies of the two aforementioned documents.

> among other things, DHS's policies regarding access to counsel for noncitizens who were processed into the Migrant Protection Protocols (MPP) and their ability to apply for asylum.

(CAR Certification.) Moreover, Defendants impliedly admit that they in fact did rely on at least some implementation guidance documents which post-date the Nielsen Memorandum by including those documents in the CAR. (See CAR Doc. Nos. 1–4, 130–31.)

Contrary to Defendants' characterization, "[f]inal agency action may result from a series of agency pronouncements rather than a single edict." Defs. of Wildlife v. Tuggle, 607 F. Supp. 2d 1095, 1110 (D. Ariz. 2009) (quoting Ciba–Geigy Corp. v. EPA, 801 F.2d 430, n. 7 (D.C. Cir. 1986)). The key question is whether the "series of agency pronouncements," taken together, "could crystallize an agency position into final agency action." See Barrick Goldstrike Mines Inc. v. Browner, 215 F.3d 45, 49 (D.C. Cir. 2000). Plaintiffs credibly claim that MPP 1.0 was implemented via a series of agency pronouncements, and Defendants' reliance on implementation guidance documents which post-date their proposed date of final agency action supports that conclusion. Faced with these facts, the Court cannot endorse Defendants' line-in-the sand approach to defining the agency action at issue here. The implementation of MPP 1.0 was not complete upon the issuance of the January 25, 2019 Nielsen Memorandum, and as such, Defendants' argument fails.

Having dispensed with Defendants' post-decisional documents argument, the Court now addresses whether Plaintiffs identify the implementation guidance documents they allege should have been included in the CAR with "with sufficient specificity and identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency." WildEarth Guardians, 507 F. Supp. 3d at 1223. Plaintiffs broadly define the "full set of guidance Defendants created to implement MPP 1.0" as "all documents and communications concerning implementation, including . . . internal guidance documents, policies, FAQs, training materials, and directives—including those distributed to enforcement agents or other employees." (Motion at 17; Reply at 10.) According to Plaintiffs, because Defendants admit to relying on at least a handful of implementation guidance documents, they must also have relied on the presumably extensive universe of related implementation guidance documents. Defendants offer no counter to Plaintiffs' reliance argument beyond their general contention that they could not have relied on any documents which post-date the Nielsen Memorandum (which is directly contradicted by their inclusion of some such documents in the CAR). The Court thus concludes that Plaintiffs have provided non-speculative grounds to believe that at least some additional implementation guidance documents were considered by the agency and improperly excluded from the CAR.

Even so, the Court is not persuaded that Defendants considered as broad a universe of implementation guidance documents as Plaintiffs contend. Because Defendants admit that they considered the implementation guidance documents included in the CAR, there is a strong inference that they also must have considered other similar implementation guidance

documents. But that inference only arises where the excluded documents are sufficiently similar or related to the implementation guidance documents which appear in the CAR. The more dissimilar the document from those included in the CAR, the weaker the inference that Defendants must also have considered it when making implementation decisions.

For example, Plaintiffs are correct that Defendants' inclusion of the CBP "Guiding Principles" document issued at the San Diego port of entry, see CAR Doc. No. 1, gives rise to the inference that the agency also considered the "Guiding Principles" documents issued for CBP personnel in the other MPP 1.0 jurisdictions. (See Motion at 15.) Defendants offer no credible explanation for why they would have considered only the San Diego version of the document and no others. These documents must be added to the CAR. By extension, the Standard Operating Procedures ("SOP") documents Plaintiffs identify in their Motion should also appear in the CAR because these documents outline jurisdiction-specific processes for implementing MPP 1.0 in accordance with that jurisdiction's Guiding Principles document. (See Motion at 17.)

The same is true for all implementing memoranda issued for ICE personnel. Defendants include in the CAR (or at least, would have included in the CAR if not for a seeming error) the February 12, 2019 Vitiello memorandum discussed above. (CAR Doc. No. 4.) Defendants cannot plausibly argue that they did not also consider the February 13, 2019 ICE "OPLA MPP Implementation Guidance" document Plaintiffs identify, as that document clearly relates to—indeed, interprets and implements—the Vitiello memorandum. (See Motion at 16.) The other ICE memoranda and SOPs identified by Plaintiffs are likewise similar enough to the 2019 Vitiello memorandum to justify the inference that Defendants also considered those implementation documents, and they were thus improperly excluded from the CAR.

The Court concludes, however, that the various "email guidance" documents Plaintiffs identify in their Motion are too dissimilar from the more formal, general implementation memoranda and guidelines which appear in the CAR to conclude that Defendants considered those more casual, ad-hoc communications. (See Motion at 16.) The same is true for MPP 1.0 checklists, training materials, and FAQs provided to DHS personnel. (See id. at 17.) According to the CAR, Defendants relied on high-level, top-down guidance which outlined the contours of MPP 1.0's implementation. It does not necessarily follow that Defendants considered materials bearing on the day-to-day effectuation of the program, and those documents need not appear in the CAR. Indeed, it is unclear that these documents could fairly be categorized as the "complete set of implementation guidance" Plaintiffs allege should be included in the CAR. (See id. at 14.)

B. Privilege Log

Plaintiffs request that the Court order Defendants to produce a privilege log identifying documents Defendants withheld from the CAR, including but not limited to those withheld based on the deliberative process privilege. (Motion at 17–18.) The Ninth Circuit recently held that documents withheld by an agency pursuant to the deliberative process privilege are not

part of the administrative record. Blue Mountains Biodiversity Project v. Jeffries, 72 F.4th 991, 996–97 (9th Cir. 2023). However, the Ninth Circuit expressly left open the question of whether "a showing of bad faith or improper behavior might justify production of a privilege log to allow the district court to determine whether excluded documents are actually deliberative." Id. As Plaintiffs correctly explain, Blue Mountains considers whether a court can order a privilege log in cases where plaintiffs failed to show that the administrative record is incomplete; the Ninth Circuit did not reach the question of whether "bad faith or improper behavior" can justify the production of a privilege log precisely because the administrative record was presumed to be correct, and plaintiffs made no specific allegations of bad faith or improper behavior. (See Reply at 10 (citing Blue Mountains, 72 F.4th at 998).)

Plaintiffs contend that because they rebutted the presumption of regularity afforded to the CAR, the Court is thus permitted to order the production of a privilege log to ensure that the Court can evaluate Defendants' "sweeping claim[s] that certain types of documents can be wholesale designated as deliberative." (Motion at 18; Reply at 11.) In Defendants' view, merely rebutting the presumption of regularity does not justify the production of a privilege log; instead, Plaintiffs must allege bad faith or improper behavior, which they failed to do. (Opposition at 11.)

Plaintiffs have the better argument. Blue Mountains explicitly adopts the reasoning of the D.C. Circuit in Oceana, Inc. v. Ross, 920 F.3d 855 (D.C. Cir. 2019). In Oceana, as in Blue Mountains, plaintiffs failed to make a "substantial showing" that the administrative record is incomplete, but the D.C. Circuit nonetheless made clear that were such a showing made, "further action or inquiry by the District Court" would be justified. See id. at 865. As explained above, Plaintiffs here have made a substantial showing that the administrative record is incomplete. Defendants have a broad view of what materials are protected by the deliberative process privilege, including "informal communications with the White House and other agencies," "accompanying communications, meeting notes, or other records describing . . . documents' relevance or provenance," "notes from stakeholder meetings," and "minutes, agendas, lists of attendees, notes, other memoranda, or other communications from meetings relating to the decision to implement MPP 1.0." (Opposition at 11–12 (citing Motion at 20–22).) Defendants' repeated invocation and broad understanding of the deliberative process privilege, taken together with the volume of documents improperly omitted from the CAR, leads the Court to conclude that a privilege log is necessary to ensure that the CAR is indeed "the whole record." See 5 U.S.C. § 706.

IV. CONCLUSION

For the reasons above, the court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion to Compel Completion of the Administrative Record and Privilege Log and **VACATES** the October 23, 2023 hearing.

The Court further **ORDERS**:

1. Defendants shall undertake a diligent search for the additional documents identified and described in this Order and shall produce a completed Certified Administrative Record ("CAR") by **December 1, 2023**.

2. To the extent that any documents are withheld from the CAR on the grounds of privilege, Defendants shall produce a privilege log identifying all such documents and the privilege(s) in question by **December 15, 2023**.

IT IS SO ORDERED.