

REFORMING THE EXTRA-RECORD EVIDENCE RULE IN  
 ARBITRARY AND CAPRICIOUS REVIEW OF INFORMAL AGENCY  
 ACTIONS: A NEW PROCEDURAL APPROACH

by

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*Following the Supreme Court’s decision in Overton Park, a core principle of the judicial review of informal agency action is that such review is limited to the “full administrative record that was before the [agency].” And yet, ever since Overton Park, courts have struggled to apply the “record review rule” to the vague and undefined boundaries of the administrative records produced by the informal rulemaking process. As a result, courts have often felt the need to go outside of the administrative record on a case-by-case basis in order to consider “extra-record evidence.” In the process, the federal circuits have developed a number of ad hoc “exceptions” to the record review rule. These federal common law exceptions are incoherent, vary significantly between and within the federal circuits, and in several instances facially contradict clear Supreme Court precedent. Moreover, the fact that these exceptions vary greatly between circuits has led to several circuit splits on important matters of substantive federal law. This chaotic and contradictory case law poses a significant problem for courts, agencies, and litigants who have little reliable guidance on when extra-record evidence may be considered in review of informal agency action. The first Part of this Article closely examines the case law regarding the various exceptions to the record review rule that have developed in the federal circuits and explains the problems created by this muddled case law. The second Part of the Article proposes a new approach to determining the scope of the administrative record for review that focuses on the procedural opportunities for public participation in the agency decisionmaking process. Applying this procedural approach will simplify the evaluation of extra-record evidence and bring the case law back in line with the main body of modern administrative law.*

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INTRODUCTION

Ever since the Supreme Court’s decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>1</sup> it has been a truism of administrative law that judicial review of informal agency actions should be limited to “the full administrative record that was before the [agency]” at the time that it made its decision, a requirement that has come to be known as the “record review rule.” As the Court has explained, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”<sup>2</sup> Without the

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<sup>1</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>2</sup> *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

record review rule, the court's limited review of the agency's decision under section 706 of the Administrative Procedure Act (APA),<sup>3</sup> would be transformed into a "*de novo* inquiry"<sup>4</sup> that will inevitably lead the reviewing court to "substitute its judgment for that of the agency."<sup>5</sup> Accordingly, it is standard practice for the lower courts to cite the record review rule as the starting point for all arbitrary and capricious review of informal agency action under the APA.<sup>6</sup>

Despite the apparent clarity of the record review rule, the bright-line certainty of the rule masks a deeper ambiguity. It is the nature of informal agency action that such action does not produce a formal administrative record, and neither the APA nor the Supreme Court have provided substantive guidance on what evidence should and should not be included in the administrative record.<sup>7</sup> Moreover, from the beginning, courts have been forced to confront the paradox presented by the *Overton Park* decision: it will often be difficult to determine whether the agency has considered "all relevant factors"—as required by *Overton Park*—unless the court "looks outside the record to determine what matters the agency should have considered but did not."<sup>8</sup> Indeed, at the same moment that the Court firmly established the record review rule as the baseline for judicial review of informal agency proceedings in *Overton Park*, it also began the ongoing process of defining exceptions to the record review rule that would allow for the admission of evidence from outside of the record compiled by the agency.<sup>9</sup>

Over the years these "exceptions" to the record review rule, which allow plaintiffs to introduce new evidence from outside of the administrative record to challenge agency decisions, have proliferated in the federal courts, leading some commentators to conclude that the doctrine of the record review rule "no longer exists in any coherent

<sup>3</sup> See 5 U.S.C. § 706 (2012) (listing standards for holding agency action, findings, and conclusions unlawful).

<sup>4</sup> *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry" but instead must rely on the "record the agency presents to the reviewing court.").

<sup>5</sup> *Overton Park*, 401 U.S. at 416.

<sup>6</sup> See RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 11.6, at 1048 (5th ed. 2010) ("[M]ost circuit court opinions simply recite and apply the record rule as the basis for holding that a reviewing court cannot go beyond the administrative record.").

<sup>7</sup> See Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 938 (1993) ("The APA provides no guidance as to what constitutes the record when an informal agency action is challenged in court. . . . For informal agency actions . . . the administrative record is often a chimera that must be reconstructed in retrospect and whose content is often subject to heated debate.").

<sup>8</sup> *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

<sup>9</sup> For discussion of these exceptions, see *infra* Part I.A.

form.”<sup>10</sup> Without further guidance from the Supreme Court on the limits of the record review rule, the federal courts have created a diverse and incoherent suite of case-by-case exceptions to the record review rule. Among other things, these exceptions allow the introduction of “extra-record evidence” where the agency has failed to consider relevant factors, where the court requires background information to understand complex and technical matters, or where there is evidence of “bad faith” on the part of the agency.<sup>11</sup>

The result of this organic and ad hoc experimentation in the federal courts has been the development of a hodge-podge of conflicting and contradictory standards that vary between and within the federal circuits. This ongoing confusion regarding the standards for admission of extra-record evidence in the district courts has been ignored by the Supreme Court, brushed aside by the circuit courts, and received little attention from commentators.<sup>12</sup> And yet, these contradictory rules create an ongoing problem for the day-to-day litigation of informal agency decisions in district courts across the country. As a district court recently explained,

[L]ower courts have failed to articulate coherently and consistently the exceptions which justify supplementation of the record. . . . [T]he failure to articulate consistently and comprehensively the exceptions contributes to confusion on the part of litigants and the District judges who are often uncertain how many exceptions exist and what exactly the exceptions are.<sup>13</sup>

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<sup>10</sup> See Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 335 (1984).

<sup>11</sup> See *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) (listing exceptions to the record review rule).

<sup>12</sup> LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING 3 (2013), <https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf> (“Scholarly research of important [issues related to the scope of the administrative record] has been limited in recent years and the pace of change has outstripped academic review.”). For general discussion of the exceptions to the record review rule, see Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review* “On the Record,” 10 ADMIN. L.J. AM. U. 179 (1996). For general discussion of the exception in the context of NEPA, see Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3 (2006); French, *supra* note 7, at 938; Jesse Garfinkle, *Scope of Reviewable Evidence in NEPA Predetermination Cases: Why Going Off the Record Puts Courts on Target*, 39 B.C. ENVTL. AFF. L. REV. 161 (2012); W. Riley Lochridge, Comment, *Allowing for Greater Admission of Evidence in NEPA Predetermination Suits*, 2011 U. CHI. LEGAL F. 375, 376; James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301 (2008).

<sup>13</sup> *Colo. Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1239–40 (D. Colo. 2010). For more complaints from district courts regarding the lack of clarity in the case law, see, for example, *Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Eng’rs*, No.

The result of these incoherent rules is frustration on the part of litigants and judges, as well as significant waste as plaintiffs, courts, and agencies attempt to determine on a case-by-case basis whether proffered evidence fits within an array of conflicting standards.

As it currently stands, the existing federal common law regarding the exceptions to the record review rule presents a number of significant problems for review of informal agency action. First, the exceptions vary from circuit to circuit, and are poorly defined within the circuits. This lack of uniformity means that there is a real possibility that challenges to an informal federal agency action in one circuit may result in a different outcome due solely to variations in the available exceptions to the extra-record evidence rules, as compared to an identical challenge in another circuit. Second, the current case law regarding extra-record evidence lacks any consistent terminology to describe what is and is not “extra-record evidence,” which frustrates the development of a coherent body of case law and leads to confusion between substantively distinct subsets of potentially admissible evidence. Third, many of the established “exceptions” to the record review rule facially conflict with standards for review of informal agency actions as articulated by the Supreme Court.

Finally, the existing exceptions regarding extra-record evidence do not take into account variations in the process of informal agency decisionmaking, most notably the distinction between informal agency proceedings that involve a public notice-and-comment process and those that do not. As a result, the existing rules are both over- and under-inclusive; they have the potential to allow for the admission of extra-record evidence in cases where it is legally irrelevant, and also to exclude extra-record evidence where it is necessary for effective arbitrary and capricious review of the agency’s decision.

This Article addresses these problems in the existing case law and seeks to provide a more coherent framework for determining when extra-record evidence should be admitted in review of informal agency decisions. To that end, Part I briefly discusses the history of the record review rule from *Overton Park* to the present, and then surveys the case law, showing in detail how the existing case law on extra-record evidence is in disarray. This Part explains how several circuit splits have developed concerning the scope of the administrative record, leading to significant differences between the circuits regarding important substantive features of federal laws such as the National Environmental Policy Act (NEPA).<sup>14</sup>

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3:13–CV–126, 2015 WL 1883522, at \*3 (S.D. Tex. Apr. 20, 2015) (lamenting “the mixing of terminology . . . that has infected the case law in this area”); *Cape Hatteras Access Pres. All. v. U.S. Dep’t of Interior*, 667 F. Supp. 2d 111, 113 (D.D.C. 2009) (noting “confusion is caused by the use of the word ‘supplement’ in [similar] types of cases”); *Pac. Shores Subdivision v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (noting confusion about “supplementing” the record).

<sup>14</sup> 42 U.S.C. §§ 4321–4347 (2012).

Part II of this Article provides a road map for reforming the current exceptions to the record review rule. This Part begins by discussing the confusion in the standards regarding the meaning of the term “administrative record” and then establishes a terminology to define the conceptually distinct forms of the “administrative record” currently encompassed within that general term. Next, the Article develops a taxonomy of the general types of “extra-record evidence” that have been identified by courts.

Having developed a standardized terminology to define the discrete forms of extra-record evidence that come before the courts, this Article proposes two important changes to the case law that would alleviate a significant amount of the confusion regarding the rule. First, the Article argues that the federal circuits should adopt the recent innovations developed in the D.C. Circuit recognizing that evidence considered by the agency during the decisionmaking process, but not included in the agency’s certified administrative record, is *not* extra-record evidence but rather omitted *record* evidence. Over the past decade, the D.C. district courts have increasingly found that such evidence should be admissible under a much less stringent standard than that which applies to true “extra-record evidence,” and the district courts have developed a practical test for determining when that evidence should be admissible. As this Article explains, the approach taken by the D.C. district courts is consistent with *Overton Park* and the record review rule, and should be adopted by the D.C. Circuit and the other federal circuits.

Second, this Article discusses how the case law in the D.C. Circuit regarding the exceptions to the record review rule has fallen increasingly out of step with important developments in the Supreme Court and the D.C. Circuit regarding the related concept of administrative rulemaking issue exhaustion. It is now considered “black letter law” within the D.C. Circuit that issues not raised by the petitioner or other parties during the agency’s decisionmaking process cannot be raised in the first instance before the courts.<sup>15</sup> The development of the doctrine of rulemaking issue exhaustion calls into question the continuing vitality of the existing exceptions to the record review rule, many of which are in direct contradiction of the doctrine of issue exhaustion.

Drawing on that doctrine, this Article proposes a new procedural approach to the admission of extra-record evidence to review agency decisions under the arbitrary and capricious standard. The federal courts

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<sup>15</sup> For discussion and criticism of the development of the doctrine of issue exhaustion in informal agency rulemaking, see generally William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1 (2000); Gabriel H. Markoff, Note, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 TEX. L. REV. 1065 (2012); Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, ADMIN. CONFERENCE OF THE U.S. (May 5, 2015), [https://www.acus.gov/sites/default/files/documents/Final%20Issue%20Exhaustion%20Report%2005052014\\_1.pdf](https://www.acus.gov/sites/default/files/documents/Final%20Issue%20Exhaustion%20Report%2005052014_1.pdf).

should abandon the current exceptions, which focus on discrete qualitative evidentiary questions, and instead determine the admissibility of extra-record evidence by reference to the availability of a procedural opportunity for public participation in the administrative process leading to the informal agency decision.

In situations where the administrative process provides ample opportunity for the public to submit arguments and analysis through a notice and comment process or similar procedure, there should be a strong presumption that extra-record evidence is not admissible in court to challenge the agency's decision, no matter what form that evidence takes or how facially "useful" the evidence might be for judicial review. However, where the informal agency process offers no opportunity for public participation, there should be a presumption in favor of admitting limited extra-record evidence where the plaintiff is able to demonstrate that the evidence would have been relevant to the agency's decision and was potentially available to the agency at the time of its decisionmaking. Using the underlying informal agency procedure as an initial filter for the admissibility of extra-record evidence is consonant with the doctrine of administrative issue exhaustion developed by the Supreme Court and the D.C. Circuit in *Vermont Yankee* and other cases, which requires potential plaintiffs to develop their substantive arguments during the notice and comment process or risk waiving the arguments in court.<sup>16</sup>

Applying a procedural filter to the question of extra-record evidence will not entirely solve the problem presented by the record review rule, and courts will continue to resolve motions to admit extra-record evidence on a case-by-case basis. However, by providing a taxonomy of extra-record evidence, and broadly explaining in which circumstances that evidence should be admissible, the procedural approach outlined in this Article will reduce confusion in the courts and pre-empt unnecessary litigation regarding the exceptions to the record review rule.

## I. A BRIEF HISTORY OF THE RECORD REVIEW RULE FROM *OVERTON PARK* TO THE PRESENT

### A. *Overton Park and the Creation of the Record Review Rule*

Passed in 1946, the APA provides both a set of procedures for federal agencies to follow and also a set of standards for judicial review of agency actions.<sup>17</sup> Under the APA, agencies can undertake two different types of

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<sup>16</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

<sup>17</sup> Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); see 5 U.S.C. § 553 (2012); Young, *supra* note 12, at 204.

actions: adjudications<sup>18</sup> and rulemakings.<sup>19</sup> For the process of agency rulemaking, the APA contemplates two levels of formality: so-called “formal” and “informal” agency rulemakings.<sup>20</sup>

For formal agency rulemaking, the APA specifies an elaborate procedure of gathering evidence that resembles the process of factfinding in a trial court: the agency holds a formal public evidentiary hearing, with the presentation of evidence and rebuttal evidence, as well as the cross-examination of witnesses.<sup>21</sup> On review of a formal agency action, the court evaluates the administrative record created by the formal hearing, which includes “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding,”<sup>22</sup> as well as the legal arguments made by the parties in the same manner that an appellate court reviews the decision of a trial court.<sup>23</sup>

While the APA provided a very precise description of the procedures required to develop a record for formal agency rulemaking, it offers little guidance about the composition of the record for informal agency actions.<sup>24</sup> Under section 706 of the APA, a court reviewing an informal agency action must determine whether the agency’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and in doing so the court must “review the whole record or those parts of it cited by a party.”<sup>25</sup> However, the APA does not define “the whole record” or establish a procedure for determining what material should or should not be included in that record.<sup>26</sup>

As Professor Young has argued, this lack of specificity in the APA regarding informal agency actions may be due to the conception at the time of the passage of the APA that informal rulemakings constituted a type of “legislative” action in which “the agency was seen as an appropriate sole representative of the public interest . . . .”<sup>27</sup> Accordingly, citizens would rarely have standing to challenge informal agency actions

<sup>18</sup> See 5 U.S.C. § 551(6), (7) (defining an adjudication as an “agency process for the formation of an order,” which is further defined as a “final disposition . . . of an agency in a matter other than rule making”).

<sup>19</sup> See *id.* § 551(4), (5) (defining a rulemaking as an “agency process for formulating, amending, or repealing a rule,” which is further defined as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . .”).

<sup>20</sup> See *id.* §§ 556–557 (describing procedural requirements for formal agency actions).

<sup>21</sup> *Id.* § 556(d).

<sup>22</sup> *Id.* § 556(e).

<sup>23</sup> Young, *supra* note 12, at 195. Much like appellate review of a trial court’s decision, formal agency rulemakings are subject to a “substantial evidence” standard of review. See 5 U.S.C. § 706(2)(E).

<sup>24</sup> See Stark & Wald, *supra* note 10, at 338.

<sup>25</sup> 5 U.S.C. § 706.

<sup>26</sup> See Saul, *supra* note 12, at 1305.

<sup>27</sup> Young, *supra* note 12, at 203.



in court. However, with the rise of new regulations, such as environmental regulations, that had the potential to affect groups of citizens significantly, “courts began to recognize public interest groups and even individual standing.”<sup>28</sup>

As it became easier for individual citizens to challenge informal agency actions in court, the question of what constituted the “whole record” for purposes of review presented more and more problems. The Supreme Court’s answer to this question came in the form of *Overton Park*, where the Court imposed a level of scrutiny on informal rulemakings that resembled the review of formal agency rulemakings.<sup>29</sup>

In *Overton Park*, the Court stated that review of an informal agency action must be “based on the full administrative record that was before the Secretary at the time he made his decision.”<sup>30</sup> While that record is undefined by the APA, the Court found that it constitutes all of the material that was before agency at the time of its decision, rather than any litigation materials prepared afterwards for judicial review.<sup>31</sup> Moreover, courts must review the record of the agency’s informal decision in order to determine whether the agency’s conclusion are supported by the record: “[T]he generally applicable standards of [section] 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary’s decision is entitled to a presumption of regularity. . . . But that presumption is not to shield his action from a thorough, probing, in-depth review.”<sup>32</sup> In making such a determination, “the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>33</sup> Thus, on the one hand the Court imposed a requirement that the agency develop a full administrative record in order to facilitate judicial review—a requirement that does not derive from the APA—and on the other hand granted agency factfinding a relatively deferential standard of review rather than the *de novo* review advocated by the plaintiffs.<sup>34</sup>

However, as courts have repeatedly found since *Overton Park*, the conceptual challenge presented by the record review rule is that it is often difficult to determine whether the agency has considered “all relevant factors” unless the court “looks outside the record to determine what matters the agency should have considered but did not.”<sup>35</sup> And indeed, even the Court in *Overton Park* immediately identified two possible exceptions to the record review rule. First, the Court suggested

<sup>28</sup> *Id.* at 213.

<sup>29</sup> *See id.* at 209.

<sup>30</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>31</sup> *Id.* at 419–20.

<sup>32</sup> *Id.* at 415.

<sup>33</sup> *Id.* at 416.

<sup>34</sup> *See id.* at 414–15.

<sup>35</sup> *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (1980).

that in regard to agency adjudications, “*de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate.”<sup>36</sup> Second, the Court stated in regard to enforcement actions that “there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action.”<sup>37</sup> Finally, the Court suggested in dicta that where the administrative record does not “disclose the factors that were considered or the Secretary’s construction of the evidence . . . [t]he court may require the administrative officials who participated in the decision to give testimony explaining their action.”<sup>38</sup> The lower courts have made little use of the exceptions to the record review rule created by the Court in *Overton Park*.<sup>39</sup> However, as this Article will discuss further in Section I.B. below, the lower courts have taken *Overton Park* as an invitation to develop further exceptions to the record review rule.

In the meantime, the Supreme Court doubled down on the centrality of the administrative record in review of informal agency actions. Thus, in *Camp v. Pitts*, the Court reiterated that review of informal agency actions is limited to determining whether the action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>40</sup> In making this determination, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”<sup>41</sup> Thus, where a reviewing court finds that the administrative record fails to explain the agency’s decision, it may not conduct a *de novo* trial on the merits of the agency’s decision, but instead should “obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.”<sup>42</sup> And in *Camp*, the Court made clear that in those cases where the record provides a rationale for the agency’s decision, but the decision cannot be sustained under that rationale, the proper remedy is to vacate the decision and then remand it to the agency for further review.<sup>43</sup>

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<sup>36</sup> *Overton Park*, 401 U.S. at 415. This exception derives from section 706(2) (F) of the APA, which states that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” 5 U.S.C. § 706(2) (F) (2012).

<sup>37</sup> *Overton Park*, 401 U.S. at 415.

<sup>38</sup> *Id.* at 420.

<sup>39</sup> See Young, *supra* note 12, at 214 (“There are almost no federal cases in which courts used either of the ‘exceptions’ recognized in *Overton Park* to justify a reviewing agency action on an evidentiary record made or augmented in a judicial proceeding.”). For further discussion of the *Overton Park* exceptions, see *id.* at 211–19.

<sup>40</sup> *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (citing 5 U.S.C. § 706(2) (A)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 143.

<sup>43</sup> *Id.*

Finally, in *Florida Power & Light Co. v. Lorion*, the Court emphasized that the administrative record created by the agency in an informal agency action should generally be sufficient for judicial review under the arbitrary and capricious standard: “[A] formal hearing before the agency is in no way necessary to the compilation of an agency record. . . . The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action . . . .”<sup>44</sup> Thus, because the agency’s own factfinding procedure—as evidenced in the administrative record—is presumed adequate in informal agency actions, “[t]he factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking.”<sup>45</sup>

*Florida Power* completed the process of the “formalization” of informal agency decisionmaking described by Professor Young: It required agencies issuing informal administrative decisions to provide a factual record capable of supporting their decisions, and required that record to explain the agency’s decision “adequately.”<sup>46</sup> In return, agencies would receive deference to their informal decisionmaking and protection from *de novo* review by the courts.

*B. From Esch to Axiom: The Proliferation of Exceptions to the Record Review Rule After Overton Park*

In the decade following *Overton Park*, the lower courts struggled to square the strict scope of the record review rule with the informal and unstructured nature of the administrative record actually developed in informal agency actions.<sup>47</sup> In the process, the lower courts found it necessary at times to consider evidence outside of the bounds of the administrative record submitted to the reviewing court by the agency. As Steven Stark and Sarah Wald wrote in their influential 1984 article, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, “[C]ourts supported a narrow concept of the record, and yet admitted evidence from challenging parties which the agency claimed was not part of the record.”<sup>48</sup>

In their article, Stark and Wald identified eight “exceptions” to the record review rule that they believed had developed in the case law:

- (1) when agency action is not adequately explained in the record before the court;
- (2) when the agency failed to consider factors which are relevant to its final decision;
- (3) when an agency considered evidence which it failed to include in the record;
- (4) when a case is so complex that a court needs more evidence to

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<sup>44</sup> Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

<sup>45</sup> *Id.*

<sup>46</sup> See Young, *supra* note 12, at 209–10.

<sup>47</sup> For further discussion of the scope of the administrative record in informal agency action, see *infra* Part II.A.

<sup>48</sup> Stark & Wald, *supra* note 10, at 343.

enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.<sup>49</sup>

As this Article will discuss further below, these exceptions were only dubiously supported in the case law at the time;<sup>50</sup> however, they were given canonical status by the D.C. Circuit in the influential case of *Esch v. Yeutter*.<sup>51</sup> In that case, the court stated that “when the substantive soundness of the agency’s decision is under scrutiny . . . it may sometimes be appropriate to resort to extra-record information to enable judicial review to become effective.”<sup>52</sup> As the court explained, in response to this problem, “the courts have developed a number of exceptions countenancing use of extra-record evidence,” at which point the court cited the eight exceptions from the Stark and Wald article, noting that “[t]he caselaw supports these applications.”<sup>53</sup> In the decades since *Esch*, the case has been cited repeatedly in multiple circuits as a convenient compendium of the available exceptions to the record review rule.<sup>54</sup>

Alongside the *Esch* exceptions in the D.C. Circuit, the other federal circuits have developed their own exceptions to the record review rule, some of which mirror the *Esch* exceptions, and some of which delineate new exceptions to the record review rule. Apart from the D.C. Circuit, the most influential statement of the exceptions has been the Ninth Circuit’s, which recognizes exceptions to the record review rule in “four narrowly construed circumstances,” where “(1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency.”<sup>55</sup>

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<sup>49</sup> *Id.* at 344.

<sup>50</sup> See Young, *supra* note 12, at 221–28 for a thorough discussion of the doctrinal failings of most of the Stark and Wald exceptions.

<sup>51</sup> *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 991 n.166.

<sup>54</sup> See, e.g., *Partners in Forestry Coop. v. U.S. Forest Serv.*, 45 F. Supp. 3d 677, 682 (W.D. Mich. 2014), *aff’d* 638 Fed. App’x 456 (6th Cir. 2015); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197–98 (D.D.C. 2005); *Miccosukee Tribe of Indians v. United States*, 396 F. Supp. 2d 1327, 1330–31 (S.D. Fla. 2005); *Airport Cmty. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1212 n.2 (W.D. Wash. 2003); *Sierra Club v. U.S. Dep’t of Energy*, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998).

<sup>55</sup> *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

The Eleventh Circuit has followed the Ninth Circuit,<sup>56</sup> but the Tenth Circuit considers five exceptions, including four that resemble those in the Ninth Circuit, and a fifth exception where “evidence coming into existence after the agency acted demonstrates that the actions were right or wrong.”<sup>57</sup> The Second Circuit recognizes a narrower exception in the case of a “strong showing in support of a claim of bad faith or improper behavior . . . or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency’s choice.”<sup>58</sup> However, the Second Circuit has also long recognized a broad exception for extra-record evidence in cases involving NEPA.<sup>59</sup> As a final example, the Sixth Circuit potentially recognizes a broad suite of exceptions to the record review rule deriving from *Esch*, but only permits plaintiffs to invoke those exceptions where the plaintiff has made a “strong showing of bad faith”—a nearly impossible standard.<sup>60</sup>

In recent years, the *Esch* exceptions have faced increasing criticism in the appellate courts. Most notably, in the influential *Axiom Resource Management, Inc. v. United States*, the Federal Circuit directly challenged the validity of the *Esch* exceptions to the record review rule.<sup>61</sup> In that case, which involved a bid protest regarding the award of a services contract

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<sup>56</sup> See, e.g., *Miccossukee Tribe of Indians*, 396 F. Supp. 2d at 1330 (stating that the Eleventh Circuit recognizes exceptions where “(1) an agency’s failure to explain its action effectively frustrates judicial review; (2) it appears that the agency relied on materials not included in the record; (3) technical terms or complex subjects need to be explained; or (4) there is a strong showing of agency bad faith or improper behavior” and citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436–37 (9th Cir. 1988)). But see *Ga. Aquarium, Inc. v. Pritzker*, 134 F. Supp. 3d 1374, 1378 (N.D. Ga. 2014) (“While the Eleventh Circuit has yet to specify what circumstances may justify going beyond the record, it has noted exceptions recognized by other circuits.”) (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997) for the D.C. Circuit exceptions).

<sup>57</sup> See *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985) (citing *Stark & Wald*, *supra* note 10, at 343–44); see also *Custer Cty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) (citing *Am. Mining Cong.*, 772 F.2d at 626).

<sup>58</sup> See, e.g., *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997).

<sup>59</sup> See *id.* at 15 (citing *Cty. of Suffolk v. Sec. of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977)). The Tenth Circuit also recognizes a NEPA exception. See *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007). The Fourth Circuit at times recognizes a specific exception to the record review rule for NEPA cases. See *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009) (“[I]n the NEPA context, ‘courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary.’” (citation omitted)).

<sup>60</sup> See *Partners in Forestry Coop. v. U.S. Forest Serv.*, 45 F. Supp. 3d 677, 682 (W.D. Mich. 2014), *aff’d* 638 Fed. App’x 456 (6th Cir. 2015).

<sup>61</sup> *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009). For further discussion of the *Axiom* decision and the application of the *Esch* exceptions in the Federal Circuit, see Robert A. Caplen, *Turning Esch to Dust? The State of Supplementation of the Administrative Record in Bid Protests Before the Court of Federal Claims*, 32 WHITTIER L. REV. 197 (2011).

with the United States Army, the trial court allowed for liberal supplementation of the administrative record, stating in a telephone conference with the parties that it was the court's practice to allow both parties to "[put] whatever they want . . . into the record in trial and even in an administrative record to supplement."<sup>62</sup> In making its decision, the trial court cited to *Esch*; however, the Federal Circuit noted that "[r]elying on *Esch* in this fashion [was] problematic" for several reasons.<sup>63</sup> First, because the *Esch* exceptions themselves were of dubious provenance, since they originated in the Stark and Wald article, which predated the Supreme Court's decision in *Florida Power*, and which "described itself as 'a guide for lawyers challenging informal administrative action when they are attempting to submit evidence not in the formal record.'"<sup>64</sup> Second, the Federal Circuit found that the "vitality" of *Esch* in the D.C. Circuit had come into question.<sup>65</sup> Thus, the Federal Circuit found that

*Esch* not only is "heavily in tension" with existing precedent . . . but some of its exceptions "are so broadly-worded as to risk being incompatible with the limited nature of arbitrary and capricious review, particularly if construed to allow the introduction of new evidence or theories not presented to the deciding agency." . . . For these reasons, insofar as *Esch* departs from fundamental principles of administrative law as articulated by the Supreme Court in *Pitts* and *Florida Power & Light*, it is not the law of this circuit.<sup>66</sup>

Ultimately, the *Axiom* court returned to the basic principle that "[t]he focus of judicial review of agency action remains the administrative record" and that the record "should be supplemented only if the existing record is insufficient to permit meaningful review consistent with the APA."<sup>67</sup>

As the Federal Circuit noted, there are reasons to doubt that *Esch* and its full list of exceptions to the record review rule continue to carry much weight in the D.C. Circuit. In *IMS, P.C. v. Alvarez*, the D.C. Circuit seemed to recognize only four "accepted exceptions" to the record review rule, without citing to *Esch*.<sup>68</sup> And following the *Axiom* decision, several district courts within the D.C. Circuit have recognized that "the *Esch* exceptions are not as widely accepted" as they might seem.<sup>69</sup> These

<sup>62</sup> *Axiom*, 564 F.3d at 1379.

<sup>63</sup> *Id.* at 1380.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1380–81 (citations omitted).

<sup>67</sup> *Id.* at 1381.

<sup>68</sup> *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); see also *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 218 n.17 (D.D.C. 2005) (describing the *Esch* exceptions as "dicta").

<sup>69</sup> *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 115 (D.D.C. 2009); see also *Butte Cty. v. Chaudhuri*, 197 F. Supp. 3d 82, 91 (D.D.C. 2016); *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C.

district courts have read the D.C. Circuit's decision in *IMS, P.C.* to have "narrowed these exceptions to four: (1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior."<sup>70</sup> However, the D.C. Circuit itself continues to cite *Esch* for the general proposition that the admission of extra-record evidence "may sometimes be appropriate," and has not addressed either the Federal Circuit's decision in *Axiom* or the numerous D.C. district court decisions that have addressed *Axiom* and the scope of the exceptions to the record review rule.<sup>71</sup>

*C. The Problems Created by the Current Incoherent Federal Common Law Regarding the Exceptions to the Record Review Rule*

As the discussion above indicates, the federal case law regarding the exceptions to the record review rule is chaotic and contradictory, with little agreement among the courts on when extra-record evidence should and should not be admitted. For every circuit that finds a general exception for one kind of extra-record evidence, there is another that rejects that kind of evidence out of hand. Taking a broad view of the landscape of extra-record evidence law, several significant practical and doctrinal problems are apparent.

*1. The Exceptions to the Record Review Rule Vary from Circuit to Circuit and Are Poorly Defined Within the Circuits*

The welter of conflicting exceptions to the record review rule serves no purpose, and threatens to create situations where challenges to an informal federal agency action in one circuit may result in a different outcome from an identical challenge in another circuit due solely to variations in the available exceptions to the record review rule in the various circuits. There is nothing in *Overton Park* or any of the subsequent cases regarding the administrative record in the Supreme Court that suggests that differing standards regarding record evidence would be beneficial or useful. On the contrary, the APA was designed in part to regularize the development and judicial review of agency rulemakings.<sup>72</sup> The discordant exceptions to the record review rule developed in the federal courts frustrate that purpose by creating arbitrary divisions in the review of nationwide federal standards.

It is likely that these conflicting evidentiary standards lead to different substantive outcomes in federal cases. For example, a circuit

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2012) (citing *Cape Hatteras* in "noting the Circuit's narrowing of the *Esch* exceptions").

<sup>70</sup> *Styrene*, 851 F. Supp. 2d at 63.

<sup>71</sup> See *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010).

<sup>72</sup> See *Young*, *supra* note 12 at 204; see also 5 U.S.C. § 553 (2012).

split has developed over the past decade regarding the scope of the reviewable administrative record in cases involving NEPA.<sup>73</sup> The Fourth Circuit has found that in NEPA predetermination cases, in which the plaintiff alleges that the agency has irreversibly committed to an outcome before undertaking an Environmental Impact Statement (EIS), the court should confine its review to EIS itself rather than consider any extrinsic evidence: “[T]he evidence we look to in determining whether [predetermination] has taken place consists of the environmental analysis itself.”<sup>74</sup> The Seventh Circuit has similarly found that review should be confined to the environmental assessment generated by the agency.<sup>75</sup>

The Tenth Circuit, on the other hand, has directly rejected the Fourth Circuit’s narrow approach to the record in NEPA cases. Thus, in *Forest Guardians v. U.S. Fish and Wildlife Service*, the court upheld the district court’s inquiry into the record, which went well beyond the environmental assessment prepared by the agency by looking at evidence of intra-agency comments on the draft rule, e-mail correspondence, and notes of meetings between the agency and interested parties.<sup>76</sup> The Tenth Circuit found that “the Fourth Circuit’s restrictive approach does not permit the predetermination inquiry to be conducted with sufficient analytic rigor. . . . [Limiting review to the EIS] could fail to detect predetermination in cases where the agency has irreversibly and irretrievably committed itself to a course of action, but where the bias is not obvious from the face of the environmental analysis itself.”<sup>77</sup>

Here the circuit split is over the scope of the record on review, rather than the substance of the NEPA predetermination standard itself. And even though both the Fourth and the Tenth Circuit ultimately found no predetermination in either of the two cases, it is clear that the substantive

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<sup>73</sup> See generally Garfinkle, *supra* note 12 (advocating for the adoption of the Tenth Circuit’s approach over the Fourth Circuit’s approach to extra-record evidence); Lochridge, *supra* note 12 (establishing “a framework for deciding what evidence courts may consider” due to the circuit split that “has recently emerged on the question of what evidence courts may consider when assessing whether an agency has predetermined its environmental assessment and thus violated its obligations under NEPA”).

<sup>74</sup> *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 199 (4th Cir. 2005) (finding evidence of predetermination “does not include, as plaintiffs suggest, the alleged subjective intent of agency personnel divined through selective quotations from email trails”).

<sup>75</sup> *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 443–44 (7th Cir. 1990) (finding no need for further evidence because “the agency embodied its decision and reasons in a substantial document”).

<sup>76</sup> *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716, 719 (10th Cir. 2010). The Ninth Circuit also allows for a broad review similar to the Tenth Circuit. See *Metcalf v. Daley*, 214 F.3d 1135, 1143–45 (9th Cir. 2000); Garfinkle, *supra* note 12, at 176–77.

<sup>77</sup> *Forest Guardians*, 611 F.3d at 717.



outcome of the cases could have been determined based on the admission of a broader administrative record.<sup>78</sup>

A similar split has developed regarding the ability of plaintiffs to “complete” or “supplement” the administrative record with material that the agency either directly or indirectly considered during the rulemaking process but did not include in the administrative record submitted to the court.<sup>79</sup> In recent years, courts in the D.C. Circuit have begun to recognize that the standard for admission of such evidence should be less stringent than the standard for introduction of entirely new evidence the agency did not consider either directly or indirectly. For example, in *Styrene Information and Research Center, Inc. v. Sebelius*, the plaintiffs sought to supplement the administrative record submitted by the Department of Health and Human Services with draft reports that were “considered by the full [agency] panel and incorporated into the final version of the report” but not included in the administrative record.<sup>80</sup> The defendants argued, relying on older case law, that such evidence should not be considered by the court absent a “strong showing of bad faith or improper behavior” on the part of the agency.<sup>81</sup> The court disagreed, finding that the draft reports “are not extra-record evidence” because they were “an integral part of the Expert Panel’s peer review process and influenced the Expert Panel’s recommendation.”<sup>82</sup> Thus, the request for admission should be “reviewed under the less stringent standard for supplementation of the administrative record,” which requires only that the plaintiff “present[] concrete evidence that the missing [documents] were actually before the decisionmakers.”<sup>83</sup>

A district court in the Sixth Circuit reached the opposite conclusion in *Partners in Forestry Cooperative v. U.S. Forest Service*.<sup>84</sup> In that case, the plaintiffs sought to supplement the administrative record with an appraisal document that they argued was relevant to the validity of an agency NEPA determination.<sup>85</sup> As the court noted, the evidence had certainly been directly or indirectly considered by the agency: “There [was] no dispute that the Appraisal was . . . reviewed by individuals within the Forest Service as part of the decisionmaking process” and was “referenced in the Revised Environmental Assessment prepared by [the]

<sup>78</sup> See, e.g., *Metcalfe*, 214 F.3d at 1144–45 (finding predetermination based on evidence outside of the environmental assessment).

<sup>79</sup> For further discussion of this type of “extra-record evidence,” see *infra* Part II.B.

<sup>80</sup> *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 64 (D.D.C. 2012).

<sup>81</sup> *Id.* (quoting *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (internal quotations omitted).

<sup>84</sup> *Partners in Forestry Coop. v. U.S. Forest Serv.*, 45 F. Supp. 3d 677 (W.D. Mich. 2014), *aff’d* 638 Fed. App’x. 456 (6th Cir. 2015).

<sup>85</sup> *Id.* at 681–82.

Defendant.”<sup>86</sup> However, the court denied the motion to supplement the record because it found that “before invoking an exception [to the record review rule], a plaintiff is generally required to make a ‘strong showing of bad faith’” and that the plaintiffs had not “demonstrated that the Appraisal is necessary for adequate judicial review or that Defendant acted in bad faith in excluding it.”<sup>87</sup> The evidence in *Partners in Forestry* would have been admissible under the D.C. Circuit’s standard from *Styrene Information*, which only requires a showing of concrete evidence that the documents were before the decisionmakers, a fact that was undisputed regarding the document in *Partners in Forestry*.<sup>88</sup>

Such confusion *between* the federal circuits is not surprising when there is significant disagreement regarding the exceptions to the record review rule *within* individual circuits. For example, a district court in the Tenth Circuit recently called on the appellate courts to “grasp the nettle and provide a clear articulation of the exceptions allowing District Courts in this circuit to supplement the Administrative Record with extra-record evidence.”<sup>89</sup> The district court noted that the Tenth Circuit had been inconsistent in its holdings regarding exceptions to the record review rule: it noted that in one case from 2001 “the 10th Circuit recognized five possible exceptions [to the record review rule],” while in another case from 2004, “it listed only two exceptions.”<sup>90</sup> As the court explained, “the failure to articulate consistently and comprehensively the exceptions contributes to confusion on the part of litigants and the District judges who are often uncertain how many exceptions exist and what exactly the exceptions are.”<sup>91</sup>

At times, the incoherence within a circuit regarding the exceptions to the record review rule can produce jarring and irreconcilable conflicts where the appellate courts seem unaware of their own precedent within the circuit. For example, as discussed above, in a 2005 decision the Fourth Circuit found that in NEPA cases, review of the decision should be confined solely to the final environmental analysis produced by the agency in the form of an EIS or environmental assessment (EA).<sup>92</sup> And yet, four years later in the 2009 decision, *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, the Fourth Circuit endorsed a broad exception to the record review rule for all NEPA cases: “[I]n the NEPA context, ‘courts generally have been willing to look outside the record

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 682–83 (citation omitted).

<sup>88</sup> *Id.* at 681.

<sup>89</sup> *Colo. Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1240 (D. Colo. 2010).

<sup>90</sup> *Id.* at 1239 (citing *Custer Cty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1028 n.1 (10th Cir. 2001) and *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004), respectively).

<sup>91</sup> *Id.* at 1240.

<sup>92</sup> *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 199 (4th Cir. 2005) (stating that “the evidence we look to in determining whether [improper predetermination] has taken place consists of the environmental analysis itself”).

when assessing the adequacy of an EIS or a determination that no EIS is necessary.”<sup>93</sup> It is possible that the *Ohio Valley* court was distinguishing between extra-record evidence submitted to show predetermination and extra-record evidence submitted to show inadequacy of the EIS, but the court makes no mention of the Fourth Circuit’s earlier decision in *National Audubon Society*, which makes it impossible to tell whether the court was developing a distinction or simply ignoring earlier precedent. Regardless, a plaintiff in the Fourth Circuit might reasonably be confused about whether or not extra-record evidence could be considered in NEPA cases.

Significant confusion regarding the actual application and scope of the exceptions to the record review rule can also exist in circuits where the available exceptions are relatively stable in the case law. For example, in the Ninth Circuit, the courts have outlined four exceptions to the record review rule, including an exception for cases where “supplementation is needed to explain technical terms or complex subjects.”<sup>94</sup> However, the Ninth Circuit’s recent decision in *San Luis & Delta-Mendota Water Authority v. Jewell* calls into question the existence of that exception without actually finding it invalid.<sup>95</sup> In *San Luis & Delta-Mendota Water Authority*, the district court permitted the plaintiffs to submit declarations from scientific experts to challenge the reasonableness of the scientific analyses in a decision of the Fish and Wildlife Service, and the district court then relied on those expert declarations to a large degree in its decision to invalidate the agency’s decision.<sup>96</sup> The Ninth Circuit reversed, finding that the district court had “overstepped its bounds” by admitting extra-record evidence.<sup>97</sup> However, the court never explained why the evidence was inadmissible under the long-standing exception for extra-record evidence explaining “technical terms or complex subjects.”<sup>98</sup>

The Ninth Circuit’s failure to explain its decision that the evidence was inadmissible to “explain technical terms or complex subjects” was particularly confusing because the court conceded that the agency’s scientific analysis was a “big bit of a mess,” and that it was “unrefined,” “out of logical order,” and “largely unintelligible.”<sup>99</sup> The court further found that the biological opinion (BiOp) was so scientifically complex that the district court reasonably had “need for a scientific interpreter.”<sup>100</sup>

<sup>93</sup> *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009) (quoting *Webb v. Gorsuch*, 699 F.2d 157, 159 n.2 (4th Cir. 1983)).

<sup>94</sup> *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

<sup>95</sup> *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014).

<sup>96</sup> *Id.* at 603–04 (“The district court relied extensively on the declarations of the parties’ experts-as-advocates as the basis for rejecting the BiOp.”).

<sup>97</sup> *Id.* at 604.

<sup>98</sup> *Id.* at 603.

<sup>99</sup> *Id.* at 604–05.

<sup>100</sup> *Id.* at 603.

Given the court's acknowledgment that the BiOp was so unclear that it was difficult to tell whether it had addressed all relevant issues, and given that the document was so highly complex and technical that it required a scientific interpreter, the Ninth Circuit's unsupported finding that it was an abuse of discretion on the part of the district court to admit extra-record evidence under those recognized exceptions would suggest to a litigant or district court that such evidence submitted under that exception would never be admissible.<sup>101</sup>

Ultimately, such confusion between and within the circuits regarding the standards for the exceptions to the record review rule "has significant consequences for courts and litigants"<sup>102</sup> who are left in the dark regarding the standards for the admissibility and consideration of evidence that may be determinative of important substantive issues.

## 2. *Courts Use Inconsistent Terminology to Refer to Evidentiary Matters Regarding Extra-Record Evidence*

Such confusion is exacerbated by the fact that courts use inconsistent and contradictory terminology to refer to different types of "extra-record" evidence and the "exceptions" to the record review rule.

Most notably, there is currently a significant difference between the D.C. Circuit—the most important circuit for administrative law review<sup>103</sup>—and the rest of the circuits regarding what is and is not "extra-record evidence." As discussed above, in recent years, district courts within the D.C. Circuit have found that evidence that was considered by the agency, but was not included in the administrative record submitted to the court by the agency, should be admissible under a less stringent standard than the traditional standard for extra-record evidence.<sup>104</sup> As one court has explained, evidence that was deliberately or negligently omitted from the submitted administrative record is "not extra-record evidence, subject to the more exacting standards [for extra-record evidence.]"<sup>105</sup> Instead, such evidence is part of the whole administrative record, and is necessary to complete the record submitted to the court. The D.C. Circuit district courts have not, as yet, developed a distinct term to distinguish this kind of omitted record evidence.

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<sup>101</sup> For further discussion of the *San Luis* case, see Travis O. Brandon, *Fearful Asymmetry: How the Absence of Public Participation in Section 7 of the ESA Can Make the "Best Available Science" Unavailable for Judicial Review*, 39 HARV. ENVTL. L. REV. 311, 359–62 (2015).

<sup>102</sup> *Colo. Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1238 (D. Colo. 2010).

<sup>103</sup> See Lubbers, *supra* note 15, at 13–14 (noting the D.C. Circuit hears most challenges to administrative rulemaking).

<sup>104</sup> See, e.g., *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 64 (D.D.C. 2012); *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009) ("If for some reason, materials that were actually a part of the agency's record were not properly included, whether by design or accident, they should be included in the record for the Court's review.").

<sup>105</sup> *Styrene*, 851 F. Supp. 2d at 64.

However, the other circuits consider that same evidence to be “extra-record” evidence, admissible only as one of the exceptions to the record review rule. For example, courts in the Ninth Circuit could consider admitting such evidence under the exception that allows “extra-record evidence” “when the agency has relied on documents not in the record.”<sup>106</sup> Courts within the Ninth Circuit have relied on precedent from the D.C. Circuit to admit such evidence, but even in those cases, the Ninth Circuit considers these documents “extra-record evidence” whereas the D.C. Circuit considers them to be merely omitted parts of the whole administrative record.<sup>107</sup> Such confusion in the terminology becomes especially salient in jurisdictions such as the Sixth Circuit, which requires a strong showing of agency bad faith before a plaintiff may invoke exceptions for any type of “extra-record evidence.”<sup>108</sup>

Adding to the confusion is the fact that courts employ overlapping terminology to describe different kinds of motions to add to the administrative record. For example, a district court in the D.C. Circuit observed in the case before the court there was “some confusion between the parties as to what standards of review are appropriate in this case” in regard to omitted record evidence as opposed to extra-record evidence, and went on to observe that “this is not the first time that such confusion has occurred.”<sup>109</sup> As the court explained, “[u]ndoubtedly some of that confusion is caused by the use of the word ‘supplement’ in both types of cases.”<sup>110</sup> The district court concluded that “it is ultimately the province of the Court of Appeals to clarify these issues;” however, in the absence of such appellate guidance, the court suggested that a distinction could be drawn between “supplementing” the record with material considered by the agency and “going beyond” the administrative record to consider extra-record evidence.<sup>111</sup> In the intervening years, the D.C. Circuit has not addressed the evidentiary question raised by *Cape Hatteras* and by numerous other district courts within the Circuit.

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<sup>106</sup> *Tri-Valley Cares v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (listing exceptions); *see also Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1236 (E.D. Cal. 2013) (stating that requests for admission of evidence to complete the “whole record” and requests for admission of evidence “when the agency has relied upon documents . . . not included in the record . . . invoke essentially the same standards”).

<sup>107</sup> *See Pinnacle Armor*, 923 F. Supp. 2d at 1239 (citing *Sara Lee Corp. v. Am. Bakers Ass’n*, 252 F.R.D. 31, 34 (D.D.C. 2008)).

<sup>108</sup> *See Partners in Forestry Coop. v. U.S. Forest Serv.*, 45 F. Supp. 3d 677, 682 (W.D. Mich. 2014), *aff’d* 638 Fed. App’x 456 (6th Cir. 2015).

<sup>109</sup> *Cape Hatteras*, 667 F. Supp. 2d at 113.

<sup>110</sup> *Id.* (citing to cases showing the use of the term “supplementing the record” to describe both motions to add omitted material to the record and to introduce extra-record evidence that was never considered by the agency).

<sup>111</sup> *Id.* at 113–15; *see also Grunewald v. Jarvis*, 924 F. Supp. 2d 355, 358 (D.D.C. 2013) (“There is a difference between ‘supplementing the Record’ and ‘going beyond the Record.’”).

In the absence of such guidance regarding terminology from the appellate courts, district courts are left trying to parse the meaning of appellate court decisions that often seem unaware of the existing case law within the circuit. For example, in a recent district court case in Texas, the court lamented “the mixing of terminology . . . that has infected the case law in this area” as courts “use different terminology—such as extra-record evidence, supplementing the record, completing the record, or going beyond the record” to describe the same things.<sup>112</sup> In that case, the confusion regarding the meaning of the term “supplement” made it unclear whether a recent Fifth Circuit decision had overruled the use of the “NEPA exception” in the circuit or whether that exception was outside of the scope of the Fifth Circuit’s recent decision.<sup>113</sup> Ultimately, the district court concluded that despite the lack of clarity from the appellate court there was little difference between an earlier Fifth Circuit decision listing eight exceptions to the record review rule and the recent *Medina* decision that provided only three: “Most, and perhaps all, of the eight *Davis Mountains* exceptions fit within the three broader categories in *Medina*.”<sup>114</sup>

Such confusion in the Fifth Circuit and other circuits could be avoided if appellate courts would make a practice of citing and explaining their own circuit’s decisions regarding extra-record evidence rather than pulling in decisions from other circuits without explanatory comment. For example, in discussing the exceptions to the record review rule, the Fifth Circuit court in *Medina* cited precedent from the D.C. Circuit, but it made no attempt to explain how lower courts within the Fifth Circuit should interpret the D.C. Circuit’s standard in light of other recent Fifth Circuit precedent that seemed to contradict the D.C. Circuit’s standard.<sup>115</sup> District courts should not be left guessing as to the evidentiary standards by which they are bound.

In many of these cases, one is left with the sense that the courts such as the Fifth Circuit court in this case are simply unaware of the precedent within their own circuit. This is not surprising: “the mixing of terminology” regarding extra-record evidence creates a self-fulfilling feedback loop because where the applicable terminology is unstable and poorly defined, it is difficult for both district and appellate courts to search for relevant case law. As a result, courts often appear to grab the first case law they can find, and rarely engage with the question of the true scope of the record review rule within the circuit.

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<sup>112</sup> Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Eng’rs, No. 3:13-CV-126, 2015 WL 1883522, at \*1 n.1, \*3 (S.D. Tex. Apr. 20, 2015).

<sup>113</sup> See *id.* at \*3 (discussing *Medina Cty. Envtl. Action Ass’n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010)).

<sup>114</sup> *Id.* at \*3 (referring to *Davis Mountains Trans-Pecos Heritage Ass’n v. FAA*, 116 Fed. App’x 3, 16 (5th Cir. 2004)).

<sup>115</sup> *Medina*, 602 F.3d at 706 (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) for the standard for admission of extra-record evidence with no further explanation of Fifth Circuit precedent).

3. *Several of the Commonly Recognized “Exceptions” to the Record Review Rule Facially Conflict with Basic Principles of Administrative Law*

An additional problem with the standard exceptions to the record review articulated in the courts is that several of them run counter to basic principles of administrative law as articulated by the Supreme Court. Most notably, both the Tenth and the Fifth Circuits state an exception for cases where “evidence coming into existence after the agency acted demonstrates the actions were right or wrong.”<sup>116</sup> Indeed, several courts have admitted such post-decisional evidence in a challenge to the validity of the agency decision.<sup>117</sup>

However, the Supreme Court has explained that the scope of the administrative record “is a limited one, limited both by the time at which the decision was made and by the statute mandating review.”<sup>118</sup> And both *Overton Park* and *Camp* emphasize that review of informal agency action is to be based on the record that was before the agency “at the time [the agency] made [its] decision”<sup>119</sup> rather than “some new record made initially in the reviewing court.”<sup>120</sup> Accordingly, the Ninth Circuit has recognized that “post-decision information may not be advanced as a new rationalization either for sustaining or attacking an agency’s decision because it inevitably leads the reviewing court to substitute its judgment for that of the agency.”<sup>121</sup> As Professor Young observed, the “exception” for post-decisional evidence demonstrating whether the agency was right or wrong “is so flatly at odds with *Overton Park* that, if it exists, it renders the On the Record Rule meaningless.”<sup>122</sup>

Similarly, several circuits provide an exception to the record review rule where the “agency failed to explain administrative action so as to

<sup>116</sup> *Custer Cty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) (citing *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985)); see also *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797, 810 (N.D. Tex. 2003), *vacated on other grounds*, 116 Fed. App’x 3 (5th Cir. 2004).

<sup>117</sup> See, e.g., *S. Utah Wilderness All. v. Norton*, 277 F. Supp. 2d 1169, 1175–76 (D. Utah 2003), *appeal dismissed*, 116 Fed. App’x 200 (10th Cir. 2004) (admitting post-decisional photographs that “demonstrate[ ] the [agency’s] actions were right or wrong”); see also *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811 (9th Cir. 1980) (“To a limited extent, therefore, the post-decision studies can be deemed a clarification or an explanation of the original information before the Agency, and for this purpose it is proper for us to consider them.”).

<sup>118</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978).

<sup>119</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>120</sup> *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

<sup>121</sup> *Tri-Valley Cares v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1130–31 (9th Cir. 2012) (internal quotations omitted).

<sup>122</sup> Young, *supra* note 12, at 228; see also *id.* at 237 (“Relaxing the On the Record Rule to permit consideration of new matter on judicial review would make every agency proceeding a potential nullity from the beginning, even though an agency has considered all of the materials the APA requires it to consider and even though the agency has reasoned impeccably from those materials to its decision.”).

frustrate judicial review.”<sup>123</sup> Here, the exception derives directly from the Supreme Court’s opinion in *Camp*, where the Court found that where “there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.”<sup>124</sup> However, the modern exception seems to invite the submission of post-decisional affidavits from the agency explaining its decision, which are barred by the Court’s holding in *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Auto Insurance Co.*<sup>125</sup> In that case the Court found that “the courts may not accept appellate counsel’s *post hoc* rationalizations for agency action. . . . It is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”<sup>126</sup> Indeed, in the *Camp* case itself, the Court held that where the agency’s decisionmaking process had generated a sufficient administrative record such that “[t]he validity of the Comptroller’s action must, therefore, stand or fall on the propriety of that finding . . . If that finding is not sustainable on the administrative record made, then the Comptroller’s decision must be vacated. . . .”<sup>127</sup>

Thus this recognized “exception” to the record review rule, like the exception for post-decisional evidence of whether the agency’s decision was right or wrong, seems to exist primarily as an invitation to litigants to submit and lower courts to accept evidence that is barred by clear Supreme Court precedent.<sup>128</sup> It is difficult to understand why the appellate courts maintain exceptions to the record review rule that invite needless litigation and would be unlikely to hold up to Supreme Court review.

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<sup>123</sup> *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010); *see also* *Custer Cty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) (allowing exception where “the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials”); *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (allowing exception where “supplementation is necessary to determine if the agency has . . . explained its decision”).

<sup>124</sup> *Camp*, 411 U.S. at 142–43.

<sup>125</sup> *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

<sup>126</sup> *Id.*

<sup>127</sup> *Camp*, 411 U.S. at 143.

<sup>128</sup> For examples of this kind of error, *see* *Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 707 F.3d 462, 468–69 (4th Cir. 2013) (reversing district court decision to admit declaration under this exception from a NMFS scientist that “expanded the agency’s record by providing justifications, explanations, and facts not relied on by the Fisheries Service in its BiOp”); *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1245 (9th Cir. 2001) (refusing to consider new evidence submitted by the agency because to “allow the consulting agency to produce far reaching and unsupported Biological Opinions knowing that it could search for evidentiary support if the opinion was later challenged”).



4. *The Current Exceptions Do Not Take into Account Variations in Informal Agency Proceedings*

The currently existing “exceptions” to the record review rule are largely insensitive to variations in the underlying informal agency procedure. Instead, they offer a suite of “exceptions” that might potentially apply to any informal agency action regardless of the form of the record below. As explained above, this approach invites error: the *Camp* exception for situations where “there was such failure to explain administrative action as to frustrate effective judicial review” was expressly intended by the Supreme Court to apply only to cases like the one in *Overton Park*, where the administrative record was significantly underdeveloped.<sup>129</sup> And yet, appellate courts routinely list the exception as simply one of many on the menu of available exceptions for arbitrary and capricious review of standard notice-and-comment rulemakings, a rulemaking procedure that inevitably produces a record sufficiently detailed to obviate the *Camp* exception.<sup>130</sup> Thus, the current precedent regarding exceptions to the record review rule is often *over-inclusive* because it risks allowing for the admission of evidence that would generally be considered irrelevant or improper for normal arbitrary and capricious review of informal agency rulemakings.

However, these same exceptions are occasionally *under-inclusive* when it comes to admitting “extra-record” evidence in challenges to informal agency actions that do *not* include a notice-and-comment rulemaking. As this Article will discuss further below, the record-review rule, and the arbitrary and capricious review under the APA generally, assume the presence of a notice-and-comment period preceding agency rulemaking. Under the record-review rule, extra-record evidence is inadmissible in part because it should have been submitted to the agency as part of the rulemaking process, before the agency made its final decision.<sup>131</sup> Generally speaking, the failure of parties to “structure their participation” in the administrative process so as to guarantee that their factual and analytical concerns are addressed in the administrative record constitutes a waiver of those challenges in court.<sup>132</sup> Accordingly,

<sup>129</sup> *Camp*, 411 U.S. at 142–43.

<sup>130</sup> See, e.g., *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997).

<sup>131</sup> See, e.g., *CTS Corp. v. EPA*, 759 F.3d 52, 65 (D.C. Cir. 2014) (denying motion to introduce new scientific evidence and stating that “the dialogue between administrative agencies and the public is a two-way street, and just as the opportunity to comment is meaningless unless the agency responds to significant points raised by the public, so too is the agency’s opportunity to *respond* to those comments meaningless unless the interested party clearly states its position” (quoting *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1520 (D.C. Cir. 1988) (internal quotations and brackets omitted)). Accordingly, the court stated, “We cannot provide such administrative consideration of [plaintiff’s] arguments and evidence in the first instance.” *Id.*

<sup>132</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978); see also *Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996). For further discussion of administrative issue exhaustion, see *infra* Part II.B.

interested parties take care to fill the administrative record with scientific studies and data, expert affidavits, and critical analyses of the agency's draft findings.<sup>133</sup> The rule against extra-record evidence applies because a diligent challenger should not *need* to introduce new evidence into the record.<sup>134</sup>

The rule breaks down, however, during judicial review of an informal agency procedure that does not include an opportunity for public notice and comment. In these cases, the agency may be able to produce a substantial administrative record containing the agency's summary of the data and analysis it considered in making its decision. But interested parties, who would normally introduce contradictory evidence or challenge the agency's analyses in the administrative record during a notice-and-comment period, have no opportunity to build an evidentiary record contrary to the agency except in litigation, in front of the district court. Without that contrary record, it will be difficult for the court to determine whether the agency has truly considered all "relevant factors" as required by *Overton Park*.<sup>135</sup>

However, under the currently existing jurisprudence regarding exceptions to the record review rule, it is very difficult for plaintiffs to introduce such evidence in front of the district court. In order to raise a substantive challenge to the reasonableness of the agency's analysis in these cases, a plaintiff will first have to obtain admission of the evidence under one of the exceptions to the record review rule that governs in the circuit. Second, the plaintiff will have to overcome precedent holding that extra-record evidence cannot provide a new, post hoc rationalization for challenging the agency's decision<sup>136</sup>—even though the challenger

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<sup>133</sup> See PIERCE, *supra* note 6, § 11.6 ("[A]ny individual or organization that wants to ensure that an agency performs [its] task thoroughly has the opportunity to bring to the agency's attention problems and studies that identify issues of which the agency may be unaware or the magnitude of which it may not fully appreciate"); see also, e.g., *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 98 n.11 (1983) ("The record includes more than 1,100 pages of prepared direct testimony, two rounds of questions by participants and several hundred pages of responses, 1,200 pages of oral hearings, participants' rebuttal testimony, concluding statements, the 137-page report of the hearing board, further written statements from participants, and oral argument before the Commission.").

<sup>134</sup> See French, *supra* note 7, at 988 ("Where the agency provides procedures that facilitate an interchange of ideas and encourage in-depth participation by outside groups, the argument for allowing extra-record evidence is less compelling.").

<sup>135</sup> See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("As interpreted by recent decisions of this court, these procedural [notice and comment] requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule. . . . To this end there must be an *exchange* of views, information, and criticism between interested persons and the agency. . . . A response [to comments] is also mandated by *Overton Park*, which requires a reviewing court to assure itself that all relevant factors have been considered by the agency.").

<sup>136</sup> *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) ("Just as we will not allow the agency to supply post-hoc rationalizations for its actions, so 'post-decision information . . . may not be advanced as a new

never actually had the opportunity to present its “rationalization” ex ante during the administrative process. In these cases, the misapplication of the record review rule by the courts improperly shields the agency from the probing arbitrary and capricious review mandated by *Overton Park* and the APA.

## II. REFORMING THE EXCEPTIONS TO THE RECORD REVIEW RULE: A NEW PROCEDURAL APPROACH

For the reasons discussed above, the current state of the case law regarding the exceptions to the record review rule needs fixing. The approaches to extra-record evidence taken by the various circuits are incoherent, contradictory, and dubious under clear Supreme Court precedent. This situation, which has evolved chaotically and organically over decades, is not surprising given the lack of clarity regarding the scope of the administrative record as described in both *Overton Park* and the APA, as well as the general neglect of the subject by the appellate courts. However, the product of this incoherent doctrine is confusion and uncertainty on the part of litigants, agencies, and lower courts, which receive little guidance on what evidence can and cannot be considered in adjudication of informal agency actions.

In this Part, this Article proposes three steps for reforming the exceptions to the record review rule to make them easier to administer and understand for all parties, and also to make them fit better within the current structure of administrative law. First, it develops a new taxonomy of the administrative record and “extra-record” evidence in order to alleviate “the mixing of terminology . . . that has infected the case law” in regards to extra-record evidence.<sup>137</sup> Second, this Article argues that evidence that was directly or indirectly before the agency decisionmaker during the decisionmaking process is *not* “extra-record evidence,” and should be readily admissible under a much less stringent standard. Such evidence is clearly part of the “whole record” contemplated by the APA and *Overton Park*, and there is no good reason for excluding it.<sup>138</sup> Several district courts in the D.C. Circuit have developed a well-reasoned and practical approach to considering such evidence. The D.C. Circuit should endorse that case law and other circuits should follow the D.C. Circuit’s lead.

Finally, this Part explains why the courts should abandon the current untenable system of exceptions to the record review rule and focus instead on the administrative process underlying the informal agency action. Where interested parties had an opportunity to engage in agency

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rationalization either for sustaining or attacking an agency’s decision.” (citing *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)).

<sup>137</sup> *Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Eng’rs*, No. 3:13-CV-126, 2015 WL 1883522, at \*3 (S.D. Tex. Apr. 20, 2015).

<sup>138</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

factfinding through a notice-and-comment process, the admission of extra-record evidence should generally be barred, regardless of the form it takes. However, where the administrative process does *not* provide an opportunity for public participation, courts should be more willing to consider extra-record evidence to determine whether the agency's decision met the basic standards of rationality under arbitrary and capricious review. Applying a procedural filter, rather than a system of poorly defined exceptions, will greatly clarify and streamline the process of evaluating extra-record evidence in the courts.

A. *A Brief Taxonomy of the Administrative Record and Extra-Record Evidence*

The root of the incoherence in the existing case law regarding the exceptions to the record review rule is the lack of clarity regarding the scope of the "administrative record" and the meaning of the term "extra-record evidence." This Section will present new terminology for the different meanings of these terms in an attempt to clarify their usage in the case law.

1. *The "Administrative Record" Includes Both the "Whole Administrative Record" Considered by the Agency and the "Certified Administrative Record" Submitted to the Court*

As a recent report to the Administrative Conference of the United States explained, "[t]he APA provides little guidance on the creation and compilation of the 'whole record' or 'administrative record' as it has come to be known."<sup>139</sup> In *Overton Park*, the Court defined the "whole record" as the "full administrative record that was before the Secretary at the time he made his decision."<sup>140</sup> Following *Overton Park*, the courts have found that "[t]he complete administrative record consists of all documents and materials directly or indirectly considered by the agency."<sup>141</sup> This record should include all material "referred to, considered by, or used by [the agency] before it issued its final rule."<sup>142</sup> Accordingly, the administrative record should include not only the evidence that supported the agency's decision, but also the evidence opposed to the agency's position.<sup>143</sup>

However, despite these generalizations from the courts there is little statutory guidance for agencies when it comes to compiling an

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<sup>139</sup> BECK, *supra* note 12, at 2.

<sup>140</sup> *Overton Park*, 401 U.S. at 420.

<sup>141</sup> *See, e.g.,* Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993); *Cty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 71 (D.D.C. 2008).

<sup>142</sup> *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 139 (D.D.C. 2002).

<sup>143</sup> *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) ("The agency may not skew the record in its favor by excluding pertinent but unfavorable information.").

administrative record to submit to the court.<sup>144</sup> Several statutes set forth administrative record requirements for decisions made under those statutes, and a few federal agencies have developed regulatory guidance for what should be included in their own administrative records.<sup>145</sup> The lack of guidance regarding the materials that should be included in the administrative record “increases the chances that agency officials will inadvertently omit pertinent materials from a record.”<sup>146</sup>

Ultimately, having compiled its administrative record for judicial review, the agency will submit the certified record to the court along with an index and an affidavit by an official attesting to the record’s completeness and correctness.<sup>147</sup> However, the record that is submitted to the court will always be a “subset” of the full record considered by the agency, and will generally consist “of only a modest fraction of the complete record amassed by the agency.”<sup>148</sup> Even in the most thoroughly compiled certified administrative record there will be omissions of material that could at least potentially be considered part of “whole record” actually considered by the agency.

Thus, when courts speak of the “administrative record” in a case reviewing informal agency actions, they often use the same term to refer to two conceptually distinct concepts. First, courts use the term “administrative record” to refer to the complete universe of documents and materials that an agency considered directly or indirectly as part of its rulemaking process. This is the sense meant by the Supreme Court’s holding in *Overton Park* that judicial review “is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision.”<sup>149</sup> However, courts also use the same term to refer to a subset of the whole record that has actually been physically provided to the court by the agency: “The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.”<sup>150</sup>

<sup>144</sup> See French, *supra* note 7, at 938 (“The APA provides no guidance as to what constitutes the record when an informal agency action is challenged in court. . . . For informal agency actions . . . the administrative record is often a chimera that must be reconstructed in retrospect and whose content is often subject to heated debate.”).

<sup>145</sup> See Daniel J. Rohlf, *Avoiding the ‘Bare Record’: Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575, 598–99 (2009); see also, Saul, *supra* note 12, at 1317–19 (describing in detail the administrative record policies of the Fish and Wildlife Service and NOAA Fisheries).

<sup>146</sup> Rohlf, *supra* note 145, at 608.

<sup>147</sup> See BECK, *supra* note 12, at 58–61 (describing the process of submitting a certified administrative record to the court).

<sup>148</sup> PIERCE, *supra* note 6, § 11.6; BECK, *supra* note 12, at 10 (“The materials contained in the certified administrative record are typically a subset of the rulemaking record.”).

<sup>149</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>150</sup> *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); see also *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision

Due to this confusion in terminology, it is often difficult to determine *which* “administrative record” a court is referring to when it says, for example, “[i]n cases brought under the APA, the Court’s review is confined to the administrative record.”<sup>151</sup> Is the court’s review confined to the *whole record* considered by the agency? Or to the documents *presented* to the court by the agency?

The clear doctrinal answer under *Overton Park* is that the court should consider the “full administrative record that was before the [agency] at the time [it] made [its] decision.”<sup>152</sup> And yet the use of the term is sufficiently confusing that many courts still consider evidence that was “directly or indirectly” considered by the agency, but not included in the administrative record submitted to the court, to be “extra-record evidence” even though it is clearly part of the “full administrative record” contemplated by *Overton Park*.<sup>153</sup>

In order to avoid this confusion, this Article proposes the full “administrative record” referred to by *Overton Park*—which includes all documents “directly or indirectly” considered by the agency whether they appear in the administrative record submitted to the court or not—should be termed the “whole administrative record,” drawing upon the APA’s requirement that judicial review be based upon the “whole record.”<sup>154</sup> The “whole administrative record” represents a platonic concept that incorporates all possible relevant materials considered by the agency, even though such a record would be nearly impossible to compile for a court.

In regard to the “administrative record” actually submitted to the court by the agency—which will always necessarily be a subset of the whole administrative record—this Article uses the term “certified administrative record” to represent the fact that this record consists of the documents that the agency has initially determined to be relevant to review of the rulemaking. The use of the term “certified administrative

based on the [administrative] record the agency presents to the reviewing court”); Young, *supra* note 12, at 222 n.174 (“In these cases, the court seems to be using the word ‘record’ in a secondary non-*Overton Park* sense to mean what the agency provides to the court.”).

<sup>151</sup> See, e.g., *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 136 (D.D.C. 2002).

<sup>152</sup> *Overton Park*, 401 U.S. at 420; see Young, *supra* note 12, at 221 (“[N]othing that was considered by an agency can be considered outside of the ‘record’ in an *Overton Park* sense. It may be true that what the agency *presents* as the record is not actually comprehensive.”).

<sup>153</sup> See, e.g., *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) (listing exceptions to the record review rule).

<sup>154</sup> This Article does not use *Overton Park*’s term “full administrative record” simply because *Overton Park* has been cited and misapplied so many times that the case law risks confusing the use of the term. Similarly, it does not use the apt term “rulemaking record” proposed in a similar taxonomy because it is too far afield of current usage and because it risks confusion in cases where the court is not reviewing a standard informal agency rulemaking. See BECK, *supra* note 12, at 10.

record” makes clear that this form of the “administrative record” is not final, but may be added to as the court becomes aware of documents from the whole administrative record that were not included in the agency’s submission.

## 2. *Three Kinds of “Extra-Record Evidence”*

Having established the two conceptually distinct forms of the “administrative record” that exist in the case law, it is worth considering what exactly constitutes “extra-record evidence” in the case law. Looking at the case law as a whole, the material that has traditionally been described as “extra-record evidence” can be usefully divided into three categories:

*Omitted Record Evidence.* This is evidence that was “directly or indirectly considered” by the agency during its decisionmaking process, but which the agency either deliberately or negligently failed to include in the submitted administrative record. Looking at the traditional *Esch* exceptions to the record review rule, such evidence fits squarely into the exception for situations where “the agency considered evidence which it failed to include in the record,” but could also include evidence submitted “when agency action is not adequately explained in the record before the court.”<sup>155</sup>

*Contemporaneous Extra-Record Evidence.* This is evidence that was potentially available to the agency before it made its decision but was not directly or indirectly considered by the agency. Such evidence would include material or data of any sort that was already in existence during the period when the agency was conducting its decisionmaking process, but was neither reviewed by the agency nor brought to its attention through public comment. This kind of extra-record evidence could potentially be admitted under the traditional *Esch* exceptions for “when agency action is not adequately explained in the record before the court,” “when the agency failed to consider factors which are relevant to its final decision,” “when a case is so complex that a court needs more evidence to enable it to understand the issues clearly,” and cases arising under NEPA.<sup>156</sup>

*Post-Decisional Extra-Record Evidence.* This is evidence that was not available to the agency before it made its decision because it had not come into existence at the time of the agency’s final decision. Such evidence would include any facts or analysis coming into being after the agency’s decision, including any subsequent expert analysis of the agency’s decision. This evidence potentially fits into the traditional *Esch* exceptions that apply “when agency action is not adequately explained in

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<sup>155</sup> See *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). These are exceptions (1) and (3). *Id.*

<sup>156</sup> *Id.* These are the *Esch* exceptions (1), (2), (4) and (7). *Id.* Such evidence also potentially falls under the Ninth Circuit’s exception for evidence explaining “technical terms or complex subject matter.” *Lands Council*, 395 F.3d at 1030.

the record before the court,” “when the agency failed to consider factors which are relevant to its final decision,” “when a case is so complex that a court needs more evidence to enable it to understand the issues clearly,” “where evidence arising after the agency action shows whether the decision was correct or not,” and cases arising under NEPA.<sup>157</sup>

As this Article will discuss further below, the distinctions between these different types of evidence are substantively significant for purposes of the record review rule, and yet the current case law blends them together, heightening confusion in the lower courts regarding what evidence is admissible under the exceptions to the record review rule and what is not.

### *B. Omitted Record Evidence and the Agency’s Submitted Administrative Record*

It is an uncontroversial statement regarding the review of informal agency action that the judicial review should be based on the “full administrative record that was before the [agency] at the time [it] made [its] decision.”<sup>158</sup> As the D.C. Circuit has found, “If a court is to review an agency’s action fairly, it should have before it neither more nor less information than did the agency when it made its decision. . . . To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case.”<sup>159</sup> Similarly, the Ninth Circuit has found that “[a]n incomplete record must be viewed as a ‘fictional account of the actual decisionmaking process’” and that “[w]hen it appears the agency has relied on documents or materials not included in the record, supplementation is appropriate.”<sup>160</sup>

And yet, in their case law regarding the record review rule, all of the circuit courts classify record evidence that has been omitted from the certified administrative record as “extra-record evidence.” For example, in the influential Ninth Circuit decision in *Lands Council v. Powell*, the Ninth Circuit restated the rule in the circuit: “In limited circumstances, district courts are permitted to admit extra-record evidence . . . if the agency *has relied on documents not in the record.*”<sup>161</sup> The court went on to admonish the lower courts:

The scope of these exceptions permitted by our precedent is constrained, so that the exception does not undermine the general rule. Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that

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<sup>157</sup> *Esch*, 876 F.2d at 991. These are the *Esch* exceptions (1), (2), (4), (5) and (7).  
*Id.*

<sup>158</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>159</sup> *Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

<sup>160</sup> *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977)).

<sup>161</sup> *Lands Council*, 395 F.3d at 1030 (emphasis added) (listing exceptions to the record review rule).



the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making.<sup>162</sup>

The evidence at issue in *Lands Council* appears to have been true contemporaneous extra-record evidence in the form of scientific evidence that was not submitted to the agency during the rulemaking process.<sup>163</sup> However, the standard cited by the court lumps omitted record documents in with the other forms of “extra-record evidence.”<sup>164</sup> The court’s arguments for why this exception should be “narrowly construed” and “constrained” do not add up: completing the record with evidence that the “agency has relied on” is not “admit[ting] new evidence” into the record nor does it lead courts into the temptation of “de novo review.”<sup>165</sup> Instead, it provides courts with the opportunity to review the *whole administrative record* actually considered by the agency as required by *Overton Park*.

Labeling omitted record evidence as “extra-record evidence” and warning that such evidence should only be admitted in “exceptional circumstances” confuses the proper standard and encourages district courts to exclude evidence that should rightly be before the court. For example, in the Sixth Circuit district court *Partners in Forestry* case mentioned above, the plaintiffs sought to supplement the administrative record with an appraisal that they argued was relevant to the validity of an agency NEPA determination.<sup>166</sup> Indeed, the only reason the plaintiffs had not requested the appraisal be included in the original certified administrative record submitted to the court was because “they did not realize that the Appraisal was not in the 5,000+ page Administrative Record until they attempted to cite to it.”<sup>167</sup> Therefore, the plaintiffs argued that “the Appraisal [was] part of the ‘whole record’” and that they were “not seeking to supplement the Administrative Record, but rather to complete the record to include materials that should have been there from the start.”<sup>168</sup>

But the court treated the evidence as “extra-record evidence” and denied the motion to supplement the record because it found that

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> The court also cites to *Florida Power & Light* for the erroneous statement that “The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on *the record the agency presents to the reviewing court.*” *Id.* (emphasis added) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 72, 743–44 (1985)); Young, *supra* note 12, 222 n.174 (stating in regard to *Florida Power & Light* that “In that case, however, there is no indication that the Court had in mind a situation in which such a record did not reflect the full record.”).

<sup>165</sup> *Lands Council*, 395 F.3d at 1030 (emphasis added).

<sup>166</sup> *Partners in Forestry Coop. v. U.S. Forest Serv.*, 45 F. Supp. 3d 677, 681–82 (W.D. Mich. 2014), *aff’d* 638 Fed. App’x 456 (6th Cir. 2015).

<sup>167</sup> *Id.* at 681.

<sup>168</sup> *Id.* at 681–82.

“before invoking an exception [to the record review rule], a plaintiff is generally required to make a ‘strong showing of bad faith’” and that the plaintiffs had not “demonstrated that the Appraisal is necessary for adequate judicial review or that Defendant acted in bad faith in excluding it.”<sup>169</sup> Thus, even though “[t]here [was] no dispute that the Appraisal . . . was reviewed by individuals within the Forest Service as part of the decision-making process” and was “referenced in the Revised Environmental Assessment prepared by Defendant” the document was excluded from the certified administrative record.<sup>170</sup> It is hard to understand the purpose of excluding this kind of evidence, which was not only directly considered and referenced by the agency decisionmaker, but was also easily available to the court and would not require discovery or delay.<sup>171</sup>

Moreover, these kinds of prescriptions against admitting omitted record evidence are often legally incoherent. In affirming the *Partners in Forestry* district court, the Sixth Circuit noted that one of the exceptions that justifies “supplementation” of the submitted administrative record is that such evidence may be admissible when an agency “deliberately or negligently excludes certain documents,” and yet also stated that supplementation is only justified based on a “strong showing of bad faith.”<sup>172</sup> It goes without saying that as a legal matter a merely *negligent* exclusion of record documents will not produce the evidence of intention necessary to make a “strong showing of bad faith.” Applying such a contradictory and inscrutable standard encourages the lower courts to exclude evidence that should be admitted under *Overton Park* to allow review of the “full administrative record.”

A better approach to omitted record evidence has been developed by the district courts of the D.C. Circuit over the past decade. These courts recognize that “supplementing” the record with omitted record evidence is an entirely separate action from supplementing the record with true extra-record evidence:

[A]n administrative record may be “supplemented” in one of two ways—either by (1) including evidence that should have been properly a part of the administrative evidence but was excluded by the agency, or (2) adding extra-judicial evidence that was not

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<sup>169</sup> *Id.* at 682–83 (citation omitted).

<sup>170</sup> *Id.* at 681–82. The court added that “[a]lthough the Appraisal could arguably have been included in the Administrative Record, Plaintiffs have not demonstrated that the Appraisal is necessary for adequate judicial review or that Defendant acted in bad faith in excluding it.” *Id.* at 683.

<sup>171</sup> For a more reasonable approach within the Sixth Circuit, see *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997) (upholding district court’s determination that admitting omitted record evidence documents “cause[s] no harm and may be helpful to the Court. Defendants will incur no additional cost or delay, because the items have already been provided by Plaintiffs”).

<sup>172</sup> *Partners in Forestry Coop. v. U.S. Forest Serv.*, 638 Fed. App’x 456, 468–69 (6th Cir. 2015) (quoting *Slater*, 120 F.3d at 638).

initially before the agency but the party believes should nonetheless be included in the administrative record. . . .<sup>173</sup>

Requests to add omitted record evidence that was “excluded by the agency” are subject to a “less stringent standard” because such evidence is “not extra-record evidence.”<sup>174</sup> The D.C. Circuit district court approach continues to grant the agency the traditional “presumption” that it “properly designated the administrative record;” however, in order to rebut that presumption, the plaintiff need only “put forth concrete evidence that the documents it seeks to ‘add’ to the record were actually before the decisionmakers” rather than make the traditional showing of “bad faith.”<sup>175</sup>

This is still an exacting standard: in order to prevail, the plaintiff may not merely show that the documents were “relevant” and “possessed by the entire agency at or before the time the agency action was taken” but rather must “offer ‘reasonable, non-speculative’ grounds for its belief that the documents were directly or indirectly *considered* by the Secretary.”<sup>176</sup> However, the D.C. Circuit approach properly clears the way for a plaintiff to supplement the agency’s certified record with evidence that was clearly before the agency decisionmaker so long as the plaintiff provides reasonable proof that the agency considered the evidence.

This is a practical and workable approach to completing the whole administrative record without placing an undue burden on the agency or allowing unnecessary discovery.<sup>177</sup> Moreover, this sensible approach has been adopted by district courts in a number of other circuits. However, to date, neither the D.C. Circuit nor any other circuit has recognized a substantive distinction between omitted record evidence and true “extra-

<sup>173</sup> See, e.g., *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 5 n.4 (D.D.C. 2009); *City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 288 (D.D.C. 2013); *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63–64 (D.D.C. 2012).

<sup>174</sup> *Styrene*, 851 F. Supp. 2d at 63–64 (“A separate standard governs extra-record evidence, which consists of evidence outside of or in addition to the administrative record that was not necessarily considered by the agency.”).

<sup>175</sup> *Id.* at 62–64.

<sup>176</sup> *City of Duluth*, 968 F. Supp. 2d at 289. In order to show that the document was “considered” by the agency, the document must be *cited* by the agency rather than merely *mentioned*. See *WildEarth Guardians*, 670 F. Supp. 2d at 6 (“This distinction is significant. Although citation to a document may . . . indicate consideration of the contents of the document, the fact that a document is merely mentioned does not lead to the same conclusion.”). The distinction is between a “mention” of the existence of a document within an agency record as opposed to direct “citation” or “discussion” of content within the document, which implies direct or indirect consideration by the decisionmaker. *Id.* at 6–7.

<sup>177</sup> These courts regularly deny requests for discovery of omitted record documents where there is no concrete evidence that the particular document was before the decisionmaker. See *City of Duluth*, 968 F. Supp. 2d at 291 (denying request for “a variety of unspecified documents and records of communications that may or may not exist”); *Franks v. Salazar*, 751 F. Supp. 2d 62, 73–74 (D.D.C. 2010) (“Plaintiffs have not offered non-speculative grounds for their belief that the requested documents exist, much less that the Service considered them.”).

record evidence.” Thus, the district courts are arguably acting contrary to circuit precedent in these cases. The D.C. Circuit should take the ready opportunity to resolve this matter of administrative evidence clearly and definitively to set an example for the other circuits.<sup>178</sup>

Doing so would go a long way towards clarifying the case law on the “exceptions” to the record review rule, and would also eliminate or limit the need for other exceptions that have been recognized in the courts. For example, many of the documents admitted under the so-called “NEPA exception” are actually documents considered by the agency during the preparation of the EIS, but not included in the final EIS.<sup>179</sup> As discussed above, both the Fourth Circuit and the Seventh Circuit have found that review of the substantive validity of an EIS should be confined to the EIS itself. However, there is always material that the agency “directly or indirectly” considers in the course of preparing an EA or an EIS that does not go into the final document.<sup>180</sup> This material is properly considered part of the whole administrative record and would be admissible under the D.C. district court’s approach so long as the plaintiff could “offer ‘reasonable, non-speculative’ grounds for its belief that the documents were directly or indirectly considered by the Secretary.”<sup>181</sup>

A recognition that all materials “directly or indirectly” considered by the agency are properly part of the whole administrative record, and should not be classified as “extra-record evidence,” would also largely eliminate the need for an exception where the agency has acted in “bad faith.” In essence, a claim that the agency has acted in “bad faith” in compiling the record is a claim that the certified record is pretextual, and that the agency in fact relied directly or indirectly on evidence that it has not disclosed. Where there are reasonable, non-speculative grounds to believe that such evidence exists, it should be readily admissible as omitted record evidence.

Thus, in *Portland Audubon Society v. Endangered Species Committee*, the Ninth Circuit found that supplementation of the record was warranted

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<sup>178</sup> In doing so, the D.C. Circuit should respond to the request of the district courts and consider adopting new language to distinguish between motions to supplement the administrative record with the two distinct types of evidence. The *Colorado Wild* court has aptly suggested that a motion to add omitted record evidence should be styled as a “Motion to Complete the Administrative Record” while a motion to add extra-record evidence should be styled as a “Motion to Supplement the Administrative Record.” See *Colo. Wild*, 713 F. Supp. 2d at 138 n.4.

<sup>179</sup> For a thorough discussion of the NEPA exception, see generally French, *supra* note 7.

<sup>180</sup> See *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Pac. Shores Subdivision v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (“This Court has interpreted the ‘whole record’ to include ‘all documents and materials that the agency ‘directly or indirectly considered’ . . . [and nothing] more nor less.” (citations omitted) (edits in original)).

<sup>181</sup> *City of Duluth*, 968 F. Supp. 2d at 289 (emphasis omitted) (citations omitted).

where there was evidence of improper *ex parte* communications during the agency process.<sup>182</sup> The court found that this kind of evidence was not new information that “was *never* presented to the agency” but rather “material that allegedly *was* before the agency.”<sup>183</sup> As the court found, if such *ex parte* communications occurred, then they were properly part of the administrative record, and it “must be supplemented to include those contacts so that proper judicial review may be conducted.”<sup>184</sup>

### C. *Extra-Record Evidence and Administrative Rulemaking Issue Exhaustion*

While the current restrictions on admitting *omitted record evidence* are currently too stringent, and should be loosened, the current exceptions to the record review rule for true *extra-record evidence*—which is to say evidence that the agency never had before it during the decisionmaking process and therefore did not consider directly or indirectly—are currently too lenient, and have the potential to allow for the admission of evidence that is irrelevant or improper for judicial review of informal agency rulemakings under the *Overton Park* standard. Most notably, the case law regarding extra-record evidence has failed to keep up with the simultaneous development of the case law of administrative issue exhaustion, which precludes parties from challenging agency rulemakings based on issues that they did not raise during the notice-and-comment process preceding the rulemaking. This case law, which has been increasingly applied to informal agency rulemakings over the past decade, effectively forecloses most use of extra-record evidence where there has been public participation in the rulemaking process.

However, as this Article will discuss further below, it is also true that the case law regarding the record review rule has failed to account for the recognition elsewhere in the case law that the application of the issue exhaustion rule is improper where there has been no opportunity for the public to participate in the rulemaking. In those cases, plaintiffs may raise new issues not considered by the agency.

The doctrine of issue exhaustion provides a new approach to extra-record evidence. Instead of focusing on a list of defined exceptions to the record review rule, courts should consider whether the plaintiff and similarly situated parties had an opportunity to participate in the rulemaking process through notice-and-comment or a similar procedure. Where that opportunity was fully available, extra-record evidence should generally not be admissible whatever form it takes, because it will inevitably raise new issues that are precluded under the doctrine of issue exhaustion. However, where plaintiffs and similar parties did not have an opportunity to raise their arguments during a rulemaking process, they

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<sup>182</sup> *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

<sup>183</sup> *Id.* (emphasis in original).

<sup>184</sup> *Id.* at 1549.

should be able to do so in court and to provide extra-record evidence to support those arguments.

1. *Rulemaking Issue Exhaustion in the Courts*

The record review rule responds to a very similar concern that is addressed by the doctrine of issue exhaustion: that the court should not consider *de novo* a matter that the agency has not had an opportunity to consider on the record. Courts have long recognized that admitting extra-record evidence poses a threat to the *Overton Park* approach to reviewing agency decisionmaking because factfinding outside of the record will raise new issues or matters not considered by the agency. As the Supreme Court observed in *Camp*, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”<sup>185</sup> Similarly, in its seminal *Asarco* decision, the Ninth Circuit explained that “[w]hen a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency.”<sup>186</sup> As the Ninth Circuit observed, once the court considers evidence that was not actually before the agency, the court is no longer simply *reviewing* the validity of the agency’s decision, but is conducting its own *factual inquiry* into the policy matter before the agency.<sup>187</sup>

When an issue that was not raised before the agency is introduced in court, it poses a similar problem: the court is not able to evaluate the reasonableness of the agency’s *response* to the issue because the agency has not addressed the matter in the administrative record. Many courts, especially those in the D.C. Circuit,<sup>188</sup> have responded to this problem by finding that issues not raised initially before the agency are waived. For example, in the early case of *Gage v. AEC*, the D.C. Circuit noted that failure to raise a particular issue during the rulemaking process “will probably preclude the compilation of a record adequate for judicial review of the specific claims [the plaintiff] has reserved.”<sup>189</sup> In recent years, this doctrine has become well-established in the D.C. Circuit, which has stated that “[i]t is black-letter administrative law that ‘[a]bsent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue.’”<sup>190</sup>

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<sup>185</sup> *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.”).

<sup>186</sup> *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

<sup>187</sup> *Id.*

<sup>188</sup> *See generally* Lubbers, *supra* note 15 (evaluating issue exhaustion in the D.C. Circuit).

<sup>189</sup> *Gage v. U.S. Atomic Energy Comm’n*, 479 F.2d 1214, 1219 (D.C. Cir. 1973).

<sup>190</sup> *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (citation omitted); *see also Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) (“It is well established that issues not raised in comments before the agency are waived and this Court will not consider them.”).

As the D.C. Circuit has explained, the reason for the issue exhaustion requirement is twofold:

First, the courts are not authorized to second-guess agency rulemaking decisions; rather, the role of the court is to determine whether the agency's decision is arbitrary and capricious for want of reasoned decisionmaking. . . . Therefore, it is unsurprising that parties rarely are allowed to seek "review" of a substantive claim that has never even been presented to the agency for its consideration. Second, as noted above, "[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body . . . has erred against objection made at the time appropriate under its practice."<sup>191</sup>

In the same way that the *Asarco* court warned that a court considering new extra-record evidence would "substitute its judgment for that of the agency[.]"<sup>192</sup> the D.C. Circuit court found that a court considering new arguments against the rulemaking will inevitably "second-guess" the agency rulemaking rather than properly judge whether the original decision was rational. Moreover, as a matter of fairness and efficiency, the failure to present the challenge to the agency at the proper time deprives the agency of "an opportunity to discover and correct its own errors before judicial review occurs."<sup>193</sup>

Raising an issue before the agency requires the party not only to mention its concerns somewhere within the comments, but to do so with sufficient specificity so as to give clear notice to the agency of the nature of the problem: "The question in determining whether an issue was preserved, however, is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity and emphasis to give the agency a fair opportunity to address it."<sup>194</sup> This rule recognizes the complexity of modern rulemaking, where the agency is often compelled to process thousands of pages of comments, and cannot be expected to detect every latent criticism of its rulemaking.<sup>195</sup>

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<sup>191</sup> *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005) (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

<sup>192</sup> *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

<sup>193</sup> *Ohio v. EPA*, 997 F.2d 1520, 1528 (D.C. Cir. 1993); *see also* *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1290 (D.C. Cir. 2004) ("To preserve a legal or factual argument, we require its proponent to have given the agency a 'fair opportunity' to entertain it in the administrative forum before raising it in the judicial one.").

<sup>194</sup> *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015).

<sup>195</sup> *Id.* ("[The agency did not have the opportunity to] decipher the claims arguably latent in only a few sentences. . . . Interior received 280,189 comments . . . some of them dense and lengthy"); *see also* *Nat. Res. Def. Council v. EPA*, 559 F.3d 561, 564 (D.C. Cir. 2009) ("If a comment lacking even that low level of specificity sufficed, the agency would be subjected to verbal traps. Whenever the agency failed to detect an obscure criticism of one aspect of its proposal, the petitioner could

2. *Issue Exhaustion and Extra-Record Evidence Where the Public Has Had an Opportunity to Participate in the Rulemaking Through Notice-and-Comment or a Similar Procedure*

The record review rule and the rule of issue exhaustion are prudential administrative law doctrines that run in parallel.<sup>196</sup> And yet, while the doctrine of issue exhaustion in administrative rulemaking has developed significantly over the years, the case law around the exceptions to the record review rule has remained largely stagnant since the *Esch* decision in 1989. At the time that *Esch* was decided, issue exhaustion was a doctrine largely confined to administrative adjudications and was rarely applied in rulemaking cases.<sup>197</sup> However, in the decades since *Esch*, the doctrine of issue preclusion in informal administrative actions has become “black letter law” in the D.C. Circuit and several other circuits.<sup>198</sup> Neither the D.C. Circuit nor any other court has addressed the growing discord between the two doctrines.

For example, in its modern formulation post-*Axiom*, the D.C. Circuit recognizes four exceptions to the record review rule: “(1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior.”<sup>199</sup> The most important and most frequently cited of these exceptions is the first one: “when the agency has failed to consider all relevant factors.”

It is hard to imagine how a plaintiff could introduce evidence under this exception if the D.C. Circuit applied its “black letter law” of issue exhaustion. If the agency failed to consider all “relevant factors” and the plaintiff or another party failed to inform the agency of that relevant factor during the rulemaking process, then the plaintiff should be barred by issue preclusion from raising that relevant factor for the first time in court as a factual matter. For example, in *National Association of Manufacturers v. United States Department of the Interior*, the plaintiffs argued that the agency’s models were arbitrary and capricious because they had failed to consider a relevant factor: “they do not evaluate restoration alternatives in terms of the effect such action may (or may not) have on

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claim . . . that the agency acted arbitrarily because it never responded to the comment.”).

<sup>196</sup> See Lubbers, *supra* note 15, at 44; see also *Selected Risks Ins. Co. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983) (“[Issue exhaustion] is a rule of discretion rather than jurisdiction.”).

<sup>197</sup> For a discussion of the history of issue exhaustion in the administrative adjudication context, see Lubbers, *supra* note 15, at 1–3.

<sup>198</sup> See, e.g., *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001); *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2009); *Cent. N.Y. Fair Bus. Ass’n v. Jewell*, No. 6:08–cv–0660, 2015 WL 1400384, at \*10 (N.D.N.Y. Mar. 26, 2015); *Wyo. St. Snowmobile Ass’n v. U.S. Fish & Wildlife Serv.*, 741 F. Supp. 2d 1245, 1259 (D.Wyo. 2010).

<sup>199</sup> *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012).



natural resource ‘services.’”<sup>200</sup> The court found that the plaintiffs had waived their argument because they had not raised the issue before the agency during the rulemaking process.<sup>201</sup> Thus, any *evidence* that would support such a claim—evidence that the agency had failed to consider a relevant factor—should be barred as irrelevant, even though the D.C. Circuit’s exceptions to the record review rule would seem to permit admission of that evidence.

If, on the other hand, the plaintiffs or another party *had*, in fact, raised the issue during the rulemaking process, extra-record evidence should not be required to prove that the agency’s analysis was arbitrary and capricious. The agency’s failure to consider the matter fully based on the material in the administrative record should be visible in the administrative record itself, providing potential grounds for the court to find the agency’s decision arbitrary and capricious.<sup>202</sup> And if the plaintiff asserts that the proffered extra-record evidence is necessary to show *why* the agency’s failure to fully consider the matter was arbitrary and capricious, then the plaintiff’s failure to present that explanatory evidence to the agency in the first instance during the rulemaking process raises significant questions of whether the plaintiff actually raised the issue in front of the agency with “sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it.”<sup>203</sup> As the *National Association of Manufacturers* court found, a mere mention in the comments of “the resources services concept and its relation to compensable values” was not sufficient to provide the agency with adequate notice of the importance of the issue.<sup>204</sup>

A similar analysis applies in regard to the Ninth Circuit’s exception to the record review rule allowing extra-record evidence when it is “necessary to explain technical terms or complex subject matter.”<sup>205</sup> The Ninth Circuit has been careful to specify that this kind of extra-record evidence can only be considered by the court “[t]o a limited extent . . . [as] a clarification or an explanation of the original information before the Agency. . . .”<sup>206</sup> Applying an implicit theory of issue exhaustion, the Ninth Circuit emphasizes that the use of such evidence can only be used

<sup>200</sup> *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998).

<sup>201</sup> *Id.* (“[W]e decline to find that scattered references to the services concept in a voluminous record addressing myriad complex technical and policy matters suffices to provide an agency like DOI with a ‘fair opportunity’ to pass on the issue.”).

<sup>202</sup> *See Young, supra* note 12, at 238 (“An agency’s failure to consider the factors raised by the record may be a justification for overturning the decision as arbitrary and capricious, on the grounds that the relevant factors were not explored adequately.”).

<sup>203</sup> *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015).

<sup>204</sup> *Nat’l Ass’n of Mfrs.*, 134 F.3d at 1111.

<sup>205</sup> *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) (citation omitted).

<sup>206</sup> *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811 (9th Cir. 1980).

for explanatory purposes and that it is inappropriate to use such evidence “as a new rationalization either for sustaining or attacking the Agency’s decision.”<sup>207</sup>

Here, even with the Ninth Circuit’s caveat, the relevance of such explanatory scientific evidence to the court is unclear. To the extent that the extra-record evidence supports the agency’s decision, it is “legally irrelevant,” because the agency’s decision would otherwise have been supported by the administrative record that led to the decisionmaking.<sup>208</sup> And if the scientific evidence is “necessary” to understand why the agency’s “complex and technical decision” was arbitrary and capricious, then that explanatory evidence should have been provided to the agency in the first instance during the rulemaking process in order to preserve the claim.<sup>209</sup> Indeed, issue preclusion is particularly warranted in cases involving “complex subject matter” because the parties affected by the rulemaking are often in possession of specific data and analysis that would assist the agency in the rulemaking.<sup>210</sup> If the parties withhold that evidence during the rulemaking process, they should not be able to raise them as a new issue before the court.

Applying the lens of issue exhaustion to extra-record evidence helps to clarify why true extra-record evidence should rarely if ever be admitted in judicial review of agency rulemaking, even in those circuits that do not impose issue exhaustion requirements as strictly as the D.C. Circuit. Ultimately, agency rulemaking as conceived by the APA and the Supreme Court in cases like *Vermont Yankee* is one bounded by time and the practical limits of agency review: “Time and resources are simply too limited to hold that an [agency’s decision] fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the [decision was

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<sup>207</sup> *Id.* at 811–12.

<sup>208</sup> See Young, *supra* note 12, at 243.

<sup>209</sup> See *CTS Corp. v. EPA*, 759 F.3d 52, 65 (D.C. Cir. 2014) (“[Plaintiff] argues in its reply brief that its newly commissioned consultant’s report and never-before-voiced specific criticisms of the EPA’s isotope analysis are not, in fact, new arguments. . . . [T]he mere fact that the general topic of isotope analysis had been broached by the EPA as part of its own investigation does not relieve [plaintiff] of its obligation to clearly state its position regarding the analysis the EPA performed . . . to that agency in the first instance.” (internal quotations omitted)).

<sup>210</sup> Moreover, in many cases involving technical and scientific matter the scientific expertise of commenters may be greater than that of agency scientists. Therefore, it is essential not only for commenters to provide analysis, but also sufficient explanation of scientific data to inform the agency. See Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act’s Best Available Science Mandate*, 34 ENVTL. L. 397, 416 (2004) (“Field-level agency scientists may have academic training only to the bachelor’s or master’s degree level, as opposed to the doctoral training typical of research scientists. Moreover, they may not have enough time in their jobs to systematically keep up with the latest developments in the field by, for example, regularly reading the key journals.”).

made].”<sup>211</sup> To find that the agency’s decision was arbitrary or capricious because it failed to consider evidence that was never presented to the agency during the rulemaking process would be to require the agency to consider the full scope of every conceivable relevant issue, even those not presented to the agency by a commenter.<sup>212</sup>

A good example of this kind of approach is the D.C. Circuit’s recent decision in *CTS Corp. v. EPA*, where the plaintiff sought to introduce as extra-record evidence the report of a scientific expert critiquing an analysis performed by the EPA.<sup>213</sup> Rather than delve deeply into the “exceptions” to the record, the court simply found that the plaintiff’s “entire argument is procedurally foreclosed” because the plaintiff “made no effort at all to present this argument or the expert analysis on which it relies to the agency.”<sup>214</sup> The court explained the numerous procedural opportunities that the plaintiff had to raise its concerns before the administrative agency and concluded that “[w]e cannot provide such administrative consideration of [the plaintiff’s] arguments and evidence in the first instance.”<sup>215</sup>

Applying the procedural lens of issue exhaustion also provides a much more helpful guide to where the admission of true extra-record evidence might be appropriate compared with the current list of “exceptions.” For example, courts have found that applying issue exhaustion is inappropriate where the final decision of the agency is not a “logical outgrowth” of the proposed rule “such that commenters should have fairly anticipated that an agency might go there.”<sup>216</sup> Courts have found that where an agency raises a new issue *sua sponte* after the comment period, the court should not expect plaintiffs to have raised their objections to that new issue during the comment period.<sup>217</sup>

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<sup>211</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978).

<sup>212</sup> *See Young*, *supra* note 12, at 237 (“Relaxing the On the Record Rule to permit consideration of new matter on judicial review would make every agency proceeding a potential nullity from the beginning, even though an agency has considered all of the materials the APA requires it to consider and even though the agency has reasoned impeccably from those materials to its decision. . . . [R]elaxing the On the Record Rule undoes Vermont Yankee by requiring an agency to do more than the APA requires if it wants to avoid having its decision overturned.”).

<sup>213</sup> *CTS*, 759 F.3d at 63.

<sup>214</sup> *Id.* at 64.

<sup>215</sup> *Id.* at 65.

<sup>216</sup> *Lubbers*, *supra* note 15, at 33 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)).

<sup>217</sup> *See City of Seabrook v. EPA*, 659 F.2d 1349, 1361 (5th Cir. 1981) (refusing to impose issue exhaustion because doing so would require a potential plaintiff to be “a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated”); *see also Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 343 (D.C. Cir. 2013) (finding, in an adjudication, that the plaintiff had not waived an argument when the Board had raised the issue *sua sponte* “without first providing [the plaintiff] an opportunity to address the issue”).

Similarly, it may be appropriate to allow plaintiffs to introduce new extra-record *evidence* where they did not have an opportunity to respond to the agency's newly raised issues in the administrative record. Additionally, extra-record evidence might be admissible in those rare cases where the agency's failure to analyze relevant issues "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."<sup>218</sup> In those cases, it may be appropriate to allow plaintiffs to provide evidence to show that these issues were sufficiently "obvious" that the agency acted arbitrarily by ignoring them.<sup>219</sup>

3. *Issue Exhaustion and Extra-Record Evidence Where the Public Has Not Had an Opportunity to Participate in the Rulemaking*

Applying the lens of issue exhaustion to the question of extra-record evidence also suggests that courts should be more willing to consider extra-record evidence in those unusual cases reviewed under the APA where the plaintiff did not have an opportunity to take part in the rulemaking through notice-and-comment or a similar procedure. From the perspective of issue exhaustion, the plaintiff in those cases cannot reasonably be held to have "waived" an argument before the agency, because they did not have an opportunity to raise the issue before the agency in the first instance. Similarly, where parties did not have an opportunity to raise evidence supporting their arguments, they should not be barred from introducing that relevant evidence, even if it is not included in the agency's administrative record. In the absence of a notice-and-comment process, such evidence becomes more necessary to perform review under the *Overton Park* standard to determine whether the agency has "considered all relevant factors."

The Supreme Court reached a similar conclusion in its 2000 issue exhaustion decision, *Sims v. Apfel*, where the Court decided not to apply issue exhaustion where a plaintiff had failed to raise an issue before the Social Security Appeals Council because the Court found that exhaustion was not appropriate given the underlying agency procedure.<sup>220</sup> As the Court noted, the doctrine of issue exhaustion in administrative procedure derives from "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts."<sup>221</sup> In that context, the parties are expected to develop arguments and evidence in an adversarial process in front of the district court.<sup>222</sup> However, as the Court found, issue exhaustion becomes less appropriate where no such analogous adversarial process is available to the claimant: "[T]he

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<sup>218</sup> Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 765 (2004).

<sup>219</sup> The Ninth Circuit has interpreted this standard as applying in NEPA cases where the agency has "independent knowledge of the issues that concern[] [p]laintiffs." *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006).

<sup>220</sup> *Sims v. Apfel*, 530 U.S. 103, 105 (2000).

<sup>221</sup> *Id.* at 108–09.

<sup>222</sup> *Id.* at 109.

desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.”<sup>223</sup> The Court found that issue exhaustion was not appropriate in Social Security proceedings because they are “inquisitorial rather than adversarial” on account of the fact that “[t]he Council, not the claimant, has primary responsibility for identifying and developing the issues.”<sup>224</sup>

The degree to which *Sims* applies to the doctrine of issue exhaustion of informal agency rulemakings is unclear in the case law. In *Advocates for Highway Safety*, the D.C. Circuit agreed with the petitioner that “[r]ulemakings are classic examples of non-adversarial administrative proceedings . . . because there appears to be no statute or regulation compelling exhaustion in advance of judicial review, and no argument has been made analogizing the agency’s rulemaking to adjudication” and that therefore *Sims* suggests that issue exhaustion is not warranted.<sup>225</sup> However, the court found that while in the D.C. Circuit, “a party’s presentation of issues during a rulemaking proceeding is not a *jurisdictional* prerequisite to judicial review,” courts still apply the issue exhaustion in arbitrary and capricious review as a prudential matter of fairness and to avoid second-guessing the agency’s analysis.<sup>226</sup>

The D.C. Circuit’s rejection of the plaintiff’s argument in *Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Administration*, where there was a public notice-and-comment procedure in which the plaintiff had participated, leaves open the possibility that a court might find issue exhaustion unwarranted in a case involving an informal agency action where the underlying administrative procedure was more “inquisitorial rather than adversarial.”

One notable example of an important agency proceeding that does not include an opportunity for public comment is the issuance of a BiOp under section 7 of the Endangered Species Act (ESA).<sup>227</sup> Under section 7, federal agencies are required to consult with one of the federal wildlife agencies<sup>228</sup> to analyze how a proposed federal project will affect the habitat, population, and recovery of an endangered species.<sup>229</sup> The agency’s analysis results in a scientific determination, referred to as a

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 111–12.

<sup>225</sup> *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1149 (D.C. Cir. 2005).

<sup>226</sup> *Id.* at 1148.

<sup>227</sup> 16 U.S.C. § 1536(a)(2) (2012).

<sup>228</sup> The federal wildlife agencies are the U.S. Fish and Wildlife Service (FWS), located in the Department of Interior, and the National Marine Fisheries Service (NMFS), located in the Department of Commerce. NMFS has jurisdiction over most marine and anadromous species, while the FWS has jurisdiction over all terrestrial, all freshwater, and certain other specified species. *See* 50 C.F.R. § 402.01(b) (2003).

<sup>229</sup> 16 U.S.C. § 1536(a)(2).

BiOp, as to whether the project will “jeopardize the continued existence” of the species.<sup>230</sup>

Challenges to a BiOp are reviewed as a challenge to an informal agency action under the APA, and yet there is no formal opportunity for public participation in the development of a biological opinion.<sup>231</sup> Courts typically apply the record review rule in these cases, and yet the justification for such a limitation is unclear where the plaintiffs have had no opportunity to raise their issues and evidence before the agency in the first instance during the decisionmaking process. In these cases, like *Sims*, the agency’s analysis is the result of a process that is more “inquisitorial” than “adversarial”: the agency makes all decisions about the scientific information it will consider and include in the administrative record without any “adversarial” input from stakeholders who might oppose or disagree with the approach taken by the agency. In these kinds of cases, to forbid the admission of extra-record evidence to challenge the completeness of the administrative record assembled solely by the agency is to cede most judicial review of an important agency scientific decision.

Faced with this evidentiary problem in section 7 cases, a number of district courts have responded by allowing parties to submit extra-record evidence to challenge the wildlife agency’s scientific determinations in spite of the restrictions of the record review rule. For example, in *Oceana, Inc. v. Evans*, an environmental group challenged NMFS’s use of a statistical model to set a numerical limit on the number of endangered loggerhead sea turtles that could be taken as bycatch in a scallop fishery.<sup>232</sup> *Oceana* argued that the use of the model was arbitrary and capricious because the model was based on outdated data that required NMFS to make unfounded assumptions regarding the existing loggerhead turtle population.<sup>233</sup> In support of its argument, *Oceana* submitted evidence in the form of a letter from Dr. Selina Heppell, one of the chief scientists who had designed the model.<sup>234</sup> The letter explained in depth the reasons why such models are “inappropriate tools for such quantitative decision making.”<sup>235</sup>

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<sup>230</sup> *Id.*

<sup>231</sup> See Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 326 (1993) (noting that opportunity for public notice and comment is provided for in “every other step of the [ESA] process” and “for nearly all federal decisions affecting the general public” except section 7 decisions).

<sup>232</sup> *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 213–14 (D.D.C. 2005). For a detailed discussion of the *Oceana* decision, see Katherine Renshaw, *Leaving the Fox to Guard the Henhouse: Bringing Accountability to Consultation Under the Endangered Species Act*, 32 COLUM. J. ENVTL. L. 161, 192–203 (2007).

<sup>233</sup> *Oceana*, 384 F. Supp. 2d at 211, 221–24.

<sup>234</sup> Renshaw, *supra* note 232, at 198 (citing Letter from Dr. Selina S. Heppell to Dr. Michael Sisenwine, Chief Science Advisor, NOAA Fisheries (Mar. 13, 2005)).

<sup>235</sup> *Id.*

NMFS objected that the letter constituted improper extra-record evidence and should not be considered by the court because the letter was not submitted to NMFS during the consultation and NMFS had not had an opportunity to address Dr. Heppell's criticisms on the record.<sup>236</sup> The district court rejected the agency's argument and admitted the evidence, finding that the letter shed light on the question of whether NMFS had "considered factors which are relevant to its final decision" and that it helped the court to understand the complex technical material in the BiOp.<sup>237</sup> The court further observed that admission of the evidence was procedurally appropriate because Dr. Heppell did not actually have an opportunity to submit her letter until "after the close of the administrative record":

While Dr. Heppell submitted her comments only after the agency had issued the December 2004 [BiOp], the delay is understandable, since *there was no public comment period for the [BiOp] and she only recently became aware of the [BiOp's] use of the model.*<sup>238</sup>

As the district court recognized, Dr. Heppell's letter was necessary for proper judicial review of the agency's decision. NMFS's objection that the plaintiffs had not submitted the evidence during the consultation period would place an impossible structural barrier in the way of challenging the agency's scientific decision because neither Oceana nor Dr. Heppell had a formal opportunity to submit any evidence to the agency during the consultation period, and indeed may not have been aware of the use of the model until the final publication of the BiOp itself.<sup>239</sup>

The *Oceana* case exemplifies the potential importance of extra-record evidence in cases where the underlying agency procedure does not provide an opportunity for public comment. If the agency in *Oceana* had made identical use of the model for a rulemaking that *allowed* for notice and comment, the plaintiffs easily could have submitted the letter from Dr. Heppell during the public comment period, which would have required a formal agency response on the record. If the agency was not able to rebut rationally the argument regarding the inappropriateness of the use of the statistical model in the administrative record, the court would find the agency's use of the model to be arbitrary and capricious. However, in a section 7 case, with no opportunity for public comment, a court might uphold an agency's identically arbitrary use of a statistical model simply because the plaintiffs were not able to introduce the extra-record evidence. Thus, as a number of district courts have recognized,

<sup>236</sup> *Oceana*, 384 F. Supp. 2d at 217 n.17.

<sup>237</sup> *See id.* at 218 (internal quotations omitted).

<sup>238</sup> *Id.* at 217 n.17 (emphasis added).

<sup>239</sup> *See Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (stating that extra-record evidence is particularly inappropriate where it "allow[s] the introduction of new evidence or theories *not presented to the deciding agency*" (emphasis added) (citation omitted)).

the admission of extra-record scientific evidence is potentially appropriate in section 7 cases where that evidence is necessary to challenge an agency's scientific decisions that would otherwise be effectively unreviewable because of the absence of public comment.<sup>240</sup>

Such extra-record evidence should be admitted sparingly in these cases, solely as evidence of whether as a procedural matter the agency has considered all relevant evidence, as required by *Overton Park*. As discussed above, overturning an agency decision based on new evidence increases the risk that the court will "substitute its judgment for that of the agency."<sup>241</sup> However, in these cases where there is less procedural guarantee that the agency will be presented with "all relevant evidence" through the public comment process, the benefits of considering such evidence outweigh the risks.

Moreover, there is evidence in the case law that district courts are capable of assessing the significance of such evidence while maintaining proper deference to the agency. For example, in section 7 cases a significant number of district courts, including the court in the *Oceana* case discussed above, have admitted extra-record evidence, carefully reviewed it, and subsequently upheld the rationality of the agency's decision.<sup>242</sup> In most of these kinds of cases courts should be competent to evaluate the significance of extra-record evidence to determine whether it would be sufficiently important as to require serious reconsideration of the agency's decision.

## CONCLUSION

The existing case law regarding the exceptions to the record review rule is a mess. The failure of the appellate courts to articulate coherently and consistently the situations in which district courts may add to the certified administrative record submitted by an administrative agency has left courts, agencies, and litigants confused and uncertain about the appropriate standards to apply. This confusion, in turn, destabilizes the

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<sup>240</sup> See, e.g., *Kandra v. United States*, 145 F. Supp. 2d 1192, 1208–10 (D. Or. 2001) (discussing extra-record declarations); *Envtl. Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv.*, No. C 04-04647 CRB, 2005 WL 3021939, at \*15 (N.D. Cal. Nov. 10, 2005) (discussing extra-record declaration); *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 344–47 (E.D. Cal. 2007) (admitting extra-record evidence); *Nat. Res. Def. Council v. Pritzker*, 62 F. Supp. 3d 969, 1026 (N.D. Cal. 2014) (admitting extra-record evidence).

<sup>241</sup> *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (1980)).

<sup>242</sup> See *Oceana*, 384 F. Supp. 2d at 217 n.17; *Kandra*, 145 F. Supp. 2d at 1210 (D. Or. 2001) (discussing extra-record declarations and concluding that "[t]he opposing views and supporting evidence of the parties demonstrate that plaintiffs simply disagree with the scientific conclusions reached by FWS and NMFS"); *Envtl. Prot. Info. Ctr.*, 2005 WL 3021939, at \*15 (discussing extra-record declaration and finding that "the Court must defer to the Service"); *Nat. Res. Def. Council*, 62 F. Supp. 3d at 1022 (rejecting ESA claim after considering extra-record evidence).



review of informal agency actions more generally, because it raises the risk that substantive questions of federal administrative law will be decided differently based on the arbitrary application of this incoherent doctrine.

Fixing the problem in the case law will require the federal courts to abandon the exceptions originally canonized in the D.C. Circuit's *Esch* decision and to recognize that much has changed in administrative law since 1989 when *Esch* was decided. First, the federal appellate courts should formally ratify the recognition in the scholarship and the district courts that *omitted record evidence*—evidence that was directly or indirectly before the agency during its decisionmaking process but deliberately or negligently omitted from the certified administrative record submitted to the court—is not “extra record evidence” and should be admissible under a less stringent standard. As this Article discusses above, the district courts of the D.C. Circuit have already developed a practical approach to deciding when such evidence should be admissible, but they are working in the shadow of appellate case law that treats such evidence as “extra-record evidence” admissible only in the most unusual circumstances. The D.C. Circuit should adopt the case law developed in the district courts, and the other federal circuits should follow their lead.

Second, the appellate courts should recognize that the admissibility of true extra-record evidence should not be assessed by reference to *qualitative* factors, as with the current set of exceptions, but should instead focus on the *procedural* opportunities that the petitioner and other parties had to participate in the administrative decisionmaking process. Thus, in situations where the administrative process provides ample opportunity for the public to submit arguments and analysis through public comment, there should be a strong presumption that extra-record evidence is not admissible in court to challenge the agency's decision, no matter what qualitative form that evidence takes. However, where the informal agency process offers no opportunity for public participation, there should be a presumption in favor of admitting limited extra-record evidence where the plaintiff is able to demonstrate that the evidence would have been relevant to the agency's decision and was potentially available to the agency at the time of its decisionmaking.

Applying this procedural filter will bring the case law on the exceptions to the record review rule into conformity with the modern doctrine of administrative issue exhaustion in agency rulemakings. In addition, it will reduce confusion for courts, agencies, and litigants, while also providing for the “thorough, probing, in-depth review” required by *Overton Park*.