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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Lower San Pedro Watershed Alliance, et al.,
Plaintiffs,
v.
Aaron Barta, et al.,
Defendants.

No. CV-19-00048-TUC-RCC
ORDER

This environmental case arises from Defendants United States Army Corps of Engineers (“ACOE”) and United States Fish and Wildlife Service’s (“FWS”) alleged failure to conduct a proper environmental analysis on the effects of a proposed development before granting the developer a permit. Plaintiffs assert that Defendants’ flawed analysis was the direct result of improper political interference in an agency’s decision-making process. Defendants deny any assertion of political interference, arguing that the alleged “political interference” was simply an interagency “legal” conversation regarding the scope of the environmental analysis to be conducted. Now, Plaintiffs have filed a Motion to Supplement the Administrative Record and for Extra-Record Evidence (“Motion to Supplement”) (Doc. 38) and a Motion to Bifurcate the Case and Set a Merits Briefing Schedule (“Motion to Bifurcate”) (Doc. 39). For the reasons set forth herein,

1 Plaintiffs’ Motions to Supplement (Doc. 38) and Bifurcate (Doc. 39) are **GRANTED**.

2 **Background**

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4 The San Pedro River (“River”) is “one of the most significant perennial undammed
5 desert rivers of the U.S.” ACOE-001014¹. The River supports habitats for the endangered
6 yellow-billed cuckoo and Mexican garter snake. ACOE-003973. The River is sustained by
7 a network of tributary streams that support the River’s ecological function and integrity.
8 ACOE-001014. The River rests near the City of Benson, Arizona. In Benson, Developer
9 El Dorado Benson, LLC, (“El Dorado”) intends to develop a master planned community
10 called the “The Villages at Vigneto” (“Villages”). ACOE-003652-3890. The Villages’
11 community plan proposes 28,000 homes on 12,167 acres. ACOE-003666.
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14 The site where El Dorado seeks to develop the Villages is partially composed of a
15 network of streams and washes that are tributary to the San Pedro River. ACOE-0010104.
16 El Dorado wishes to fill these washes in its development site with fill materials in
17 preparation for its master planned community. To fill these washes, El Dorado needs a
18 Clean Water Act 404 permit (“CWA permit”) from ACOE. 33 U.S.C. § 1344. The CWA
19 permit program was established “to regulate the discharge of dredged or fill material into
20 waters of the United States . . . including fill for development.” *Id.* While determining
21 whether to grant the CWA permit, the Endangered Species Act (“ESA”) requires analysis
22 of the effects of the proposed agency action on federally listed and endangered species in
23 the area. 16 U.S.C. § 1536(a)(2). If the proposed agency action does not affect federally
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¹ “ACOE-xxxxxx” refers to the Bates-numbering on ACOE’s administrative record.
“FWS-xxxxxx” refers to the Bates-numbering on FWS’ administrative record.

1 endangered species, then no further inquiry is necessary. 50 C.F.R. § 402.13(c); 50 C.F.R.
2 § 402.14(b). However, if the proposed agency action “may affect” federally endangered
3 species, interagency consultation with the United States Fish and Wildlife Service (“FWS”)
4 is required under the CWA and ESA. 50 C.F.R. § 402.13; 50 C.F.R. § 402.14; *see also* 66
5 Fed. Reg. 11,202-01, 11,208–17 (Feb. 22, 2001) (Memorandum of Agreement explaining
6 FWS and EPA consultation procedures.).
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9 Interagency consultation occurs in one of two ways, either informally or formally.
10 50 C.F.R. § 402.13; 50 C.F.R. § 402.14. Informal interagency consultation is a “process
11 that includes all discussions, correspondence, etc., between [FWS] and the Federal agency
12 or the designated non-Federal representative, designed to assist the Federal agency in
13 determining whether formal consultation or a conference is required.” 50 C.F.R. §
14 402.13(a). “During informal consultation, [FWS] may suggest modifications to the action
15 that the Federal agency and any applicant could implement to avoid the likelihood of
16 adverse effects to listed species or critical habitat.” 50 C.F.R. § 402.13(b). If the Federal
17 agency determines that the proposed action “may affect listed species or critical habitat . .
18 . formal consultation is required.” 50 C.F.R. § 402.14. In formal interagency consultation,
19 FWS conducts a more in-depth review of the agency’s action including a “review of all
20 relevant information provided by the [F]ederal agency or otherwise available” and prepares
21 its own biological assessment and opinion. § 402.14(g).
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26 As part of its ESA review, ACOE analyzed the plan for the Villages and made
27 environmental effects determinations of the CWA permit area for the development site and
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1 its offsite compensatory mitigation parcel.² ACOE-004369-004540; ACOE-002935-
2 003029. ACOE found that implementation of the CWA permit on the development site
3 would have “no effect” on any endangered species or critical habitat because there were no
4 endangered species or critical habitats found on the Villages’ site. *Id.* ACOE also found
5 that the Villages’ offsite mitigation plan may affect, but is not likely to adversely effect,
6 the endangered yellow-billed cuckoo and Mexican garter snake. *Id.* ACOE requested
7 informal interagency consultation with FWS on the potential effects of the mitigation plan
8 and asked for their concurrence on its “not likely to adversely affect” determination. *Id.*

11 For many years prior to ACOE’s request, FWS maintained a position that formal
12 consultation and an in-depth review of the Villages was necessary. ACOE-000429-36;
13 ACOE-001012-1024; ACOE-003973-76. FWS refused to concur with prior ACOE effects
14 determinations of the Villages site. *Id.* However, in 2017, FWS withdrew its position and
15 concurred with ACOE’s environmental effects determinations. FWS004841-51. During
16 consultation, a dispute arose between ACOE and FWS because FWS Director Steve
17 Spangle (“Director Spangle”) requested a more in-depth analysis of the Villages’ site and
18 its CWA permit area before FWS could concur with ACOE’s no effect determination.
19 Then, FWS changed its position and issued a Letter of Concurrence (“LOC”) in 2017,
20 agreeing with ACOE’s “no effect” determination. *Id.* El Dorado received its CWA permit
21 from the ACOE.

27 ² ACOE previously issued a CWA permit for a development on the same site as the
28 Villages. ACOE-004369. The previous developer and original CWA permit recipient was
Whetstone Partners, LLC, who received the permit in 2006 to develop Whetstone Ranch.
Id.

1 Plaintiffs filed suit alleging violations of the National Environmental Policy Act
2 (“NEPA”), the CWA (“Clean Water Act”)n , and the ESA. (Doc. 1). Defendants filed an
3 Answer (Doc. 19) and their respective administrative records. Plaintiffs now request that
4 ACOE and FWS include deliberative materials as part of their administrative records along
5 with other unspecified extra-record discovery. (Doc. 38).
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7 **Standard of Review**

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9 When reviewing an agency action under the Administrative Procedure Act
10 (“APA”), this Court must “hold unlawful and set aside agency action, findings, and
11 conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in
12 accordance with the law.” 5 U.S.C. § 706(2)(A). When reviewing agency action, courts
13 must refrain from substituting their judgment with those made by the agency. *Motor*
14 *Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
15 Generally, judicial review of an agency action is limited to the administrative record on
16 which the agency based the challenged decision.” *Fence Creek Cattle Co. v. U.S. Forest*
17 *Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). The administrative record encompasses “all
18 the evidence that was before the decision-making body.” *Pub. Power Council v. Johnson*,
19 674 F.2d 791, 794 (9th Cir. 1982).
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23 Courts allow supplementation of the record in four narrowly construed instances.
24 *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Courts supplement the
25 administrative record where: (1) supplementation is necessary to ensure that the agency
26 considered all factors; (2) the agency relied on documents not in the administrative record;
27 (3) explanations for technical terms were necessary; and (4) the issuing agency has shown
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1 bad faith. *Id.* The party attempting to admit extra-record evidence bears a heavy burden in
2 demonstrating extra-record evidence is necessary to effectively review the agency's
3 decision. *Fence Creek Cattle Co.*, 602 F.3d at 1131.

5 **Discussion**

6 I. Motion to Complete/Supplement the Administrative Record and for Extra- 7 Record Discovery (Doc. 38)

8 Plaintiffs request emails, draft documents, calendars and meeting notes that show
9 FWS' 2017 LOC was the result of political interference. (Doc. 38). Additionally, Plaintiffs
10 request extra-record discovery to uncover additional evidence of political interference. *Id.*
11 In support of these assertions, Plaintiffs cite to statements made by Director Spangle
12 indicating his disagreement with FWS' 2017 LOC. (Doc. 38); FWS-009910. Since making
13 those initial comments, Director Spangle made additional statements as to why FWS
14 changed its position in 2017 and concurred with the ACOE's no affect determination.
15 Specifically, Director Spangle indicated that FWS "did not ignore any science" and that
16 Director Spangle retracted FWS' request for an in-depth analysis of the Villages because
17 he was legally required to do so. (Doc. 45)

18 Plaintiffs request for deliberative materials and additional discovery is predicated
19 on Director Spangle's initial proclamations of disagreement with FWS' legal position.
20 (Doc. 38). Plaintiffs contend that Director Spangle's statements establish bad faith
21 sufficient to justify their requests. *Id.* The Court agrees.

22 It is generally "not the function of the court to probe the mental processes" of an
23 agency. *Morgan v. United States*, 304 U.S. 1, 18 (1938). However, this Court cannot ignore
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1 the gravity of Director Spangle’s statements indicating political interference. Director
2 Spangle plainly admitted that he was forced to concur on a decision that was his to make.
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4 Regardless of whether Director Spangle recanted those statements later, those statements
5 were made. Director Spangle was the Director of FWS for several years. As an executive
6 and final decision-maker at a federal agency, Director Spangle surely understood the
7 importance of his public proclamations of political interference when he made them, on
8 the record, to the media. Director Spangle’s statements call FWS’ entire decision-making
9 process into question. These statements, at the very least, support a showing of bad faith
10 sufficient to warrant deliberative materials and limited extra-record discovery.
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13 Defendants assertion of a categorical bar to the inclusion of deliberative materials
14 fails to satisfy this Court especially considering Director Spangle’s statements. This Court
15 adopts the view shared by many other district courts in this Circuit requiring “deliberative
16 materials (such as internal comments, draft reports, emails, and meeting notes) to be added
17 to the administrative record if they were considered in the agency's decision. *Sierra Club*
18 *v. Zinke*, No. 17-CV-07187-WHO, 2018 WL 3126401, at *3 (N.D. Cal. June 26, 2018);
19 *Inst. for Fisheries Res.*, 2017 WL 89003, at *1. “[T]he government is wrong to assert that
20 these types of materials, as a categorical matter, should be excluded from the universe of
21 materials directly or indirectly considered by agency decision-makers.” *Inst. for Fisheries*
22 *Res.*, 2017 WL 89003, at *1. Plaintiff’s Motion to Supplement (Doc. 38) is **GRANTED**.
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26 II. Motion to Bifurcate and Set Merits Briefing Schedule (Doc. 39)

27 Federal Rule of Civil Procedure 42(b) gives courts the ability to bifurcate “in
28 furtherance of convenience or to avoid prejudice, or when separate trials will be conducive

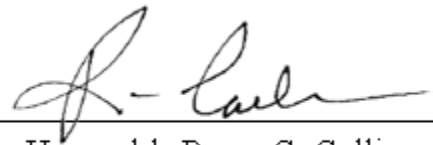
1 to expedition and economy . . . always preserving inviolate the right of trial by jury as
2 declared by the Seventh Amendment of the Constitution or as given by a statute of the
3 United States.” Fed. R. Civ. P. 42(b). Rule 42 bifurcation is discretionary. *Hirst v. Gertzen*,
4 676 F.2d 1252, 1261 (9th Cir. 1982).

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6 Here, Plaintiffs assert that bifurcation of its NEPA and CWA claims from its ESA
7 claim would promote expedience and undue delay by allowing them to proceed with the
8 NEPA and CWA claims, which will be determined on ACOE’s administrative record.
9 Meanwhile, Plaintiffs’ ESA claim, which is based on FWS’ administrative record, will be
10 delayed because of the additional discovery necessary to complete FWS’ administrative
11 record. The Court agrees. Further discovery is necessary for Plaintiffs ESA claim.
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13 Consequently, Plaintiffs Motion to Bifurcate (Doc. 39) is **GRANTED**.

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15 **Conclusion**

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17 For the reasons set forth herein, Plaintiffs Motions to Supplement (Doc. 38) and to
18 Bifurcate (Doc. 39) are **GRANTED**. Accordingly, **IT IS HEREBY ORDERED**
19 Defendants shall disclose all deliberative materials that were directly or indirectly
20 considered within thirty (30) days of the entry of this Order. **IT IS FURTHER**
21 **ORDERED** the Parties shall file a new proposed summary judgment briefing schedule
22 within thirty (30) days of this Order.

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24 Dated this 30th day of November, 2020.

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27 Honorable Raner C. Collins
28 Senior United States District Judge