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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 CONSERVATION CONGRESS and the
10 CITIZENS FOR BETTER FORESTRY,

11 Plaintiffs,

12 v.

13 UNITED STATES FOREST SERVICE,
14 and the UNITED STATES FISH
AND WILDLIFE SERVICE,

15 Defendants.

No. 2:13-cv-00934-JAM-DB

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO SUPPLEMENT THE
ADMINISTRATIVE RECORD**

16 In 2012, Conservation Congress and the Citizens for Better
17 Forestry sued the United States Forest Service and the United
18 States Fish and Wildlife Service. Compl., ECF No. 1. Plaintiffs
19 alleged that by approving the "Pettijohn Project," a fuel-
20 reduction project that would require cutting down trees in
21 Shasta-Trinity National Forest, the two agencies violated the
22 Endangered Species Act (ESA), the National Environmental Policy
23 Act (NEPA), the National Forest Management Act (NFMA), and the
24 Administrative Procedure Act (APA). See Compl. ¶¶ 2, 10.

25 The parties stipulated to stay the proceedings after the
26 Forest Service requested additional consultation with the Fish
27 and Wildlife Service on the project. Six years later, the Forest
28 Service issued a Supplemental Information Report ("2019 SIR").

1 First Am. Compl. (FAC) ¶ 60, ECF No. 32. The 2019 SIR considered
2 new information and modified the Pettijohn Project accordingly.
3 Id. In response, Plaintiffs filed an amended complaint, alleging
4 the project still violated the ESA, NEPA, NFMA, and APA. See
5 FAC, ECF No. 32. Plaintiffs also filed a motion to supplement
6 the administrative record. See Memo. ISO Mot. to Supp. Admin.
7 Record ("Mot."), ECF No. 39.¹

8 Plaintiffs seek to supplement the record with the following
9 documents:

- 10 1. Future of America's Forests and Rangelands - Update to
11 the Forest Service 2010 Resources Planning Act
12 Assessment, Chapter 6 "Forest Carbon" (USDA Sept. 2016),
13 cited in 2012 FEIS, USFS AR Record No. 34 at PAR-00054
14 (Exhibit A, Declaration of Sean Malone (Malone Decl.));
- 15 2. Brandt, Leslie; Shultz, Courtney (June 2016). Climate
16 Change Considerations in National Environmental Policy
17 Act Analysis. U.S. Department of Agriculture, Forest
18 Service, Climate Change Resource (Exhibit B, Malone
19 Decl.); and
- 20 3. Process Paper for the Interim Baseline Adjustment for
21 Northern Spotted Owl and its Critical Habitat: 2008
22 through 2018 Wildfires (USFWS Dec. 20, 2018) (Exhibit C,
23 Malone Decl.).

24 Mot. at 3.

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27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for April 21, 2020.

1 In Plaintiffs' opening brief, they requested to supplement
2 the administrative record on all three of their ESA claims
3 (Claims I, II, III) with all three exhibits. Mot. at 3. They
4 also sought to supplement the record on their two NEPA claims
5 (Claims VII, IX) with Exhibits A and B. Mot. at 10.
6 Ultimately, the parties agreed to supplement the administrative
7 record of Plaintiffs' failure-to-reinstate-consultation claim
8 and Plaintiffs' failure-to-supplement claim with Exhibit C. See
9 Opp'n at 1, ECF No. 43; Reply at 2, ECF No. 44. Moreover,
10 Plaintiffs withdrew their request to supplement the record of
11 their ESA claims with Exhibits A and B.² Bearing these
12 developments in mind, the Court is left to review the following:
13 (1) Plaintiffs' request to supplement the administrative record
14 of Claims I and II with Exhibit C, and (2) Plaintiffs' request
15 to supplement the administrative record of Claims VII and IX
16 with Exhibits A and B.

17 For the reasons set forth above, the Court grants in part
18 and denies in part plaintiffs' motion to supplement the
19 administrative record. The Court grants Plaintiffs' motion to
20 supplement the record of their NEPA failure-to-supplement claim
21 with Exhibits A and B. The Court also grants Plaintiffs' motion

22 ² Plaintiffs' reply brief states they "withdraw[] [their] request
23 to add Exhibits A and B to the administrative record in support
24 of [their] NEPA claims under the Ninth Circuit's ESA citizen suit
25 exception." Reply at 3 (emphasis added). The Court infers that
26 Plaintiffs intended to withdraw their request to add Exhibits A
27 and B to the administrative record of their ESA claims, not their
28 NEPA claims. Plaintiffs' opening brief argued that the ESA
citizen suit exception only applies to their ESA claims. Mot. at
3-9. Moreover, pages 4-6 of Plaintiffs' reply brief suggests
they still want to supplement the administrative record for their
NEPA claims with Exhibits A and B.

1 to supplement the administrative record of their ESA claims with
2 Exhibit C. The Court, however, denies Plaintiffs' motion to
3 supplement the record of their NEPA hard-look claim with Exhibit
4 A or B.

5 I. OPINION

6 The APA "provides a right to judicial review of all 'final
7 agency action for which there is no other adequate remedy in a
8 court.'" Bennett v. Spear, 520 U.S. 154, 175 (1997).
9 Generally, "courts reviewing an agency decision are limited to
10 the administrative record." Lands Council v. Powell, 395 F.3d
11 1019, 1029 (9th Cir. 2005) (citing Fla. Power & Light Co. v.
12 Lorion, 470 U.S. 729, 743-44 (1985)). A "records review" case
13 "typically focuses on the administrative record in existence at
14 the time of the [agency's] decision and does not encompass any
15 part of the record that is made initially in the reviewing
16 court." Id. at 1029-30 (quoting Southwest Ctr. For Biological
17 Diversity v. United States Forest Serv., 100 F.3d 1443, 1450
18 (9th Cir. 1996)). But this general rule is not without
19 exception. Id. at 1030.

20 A. NEPA Claims

21 It is well-established that "district courts are permitted
22 to admit extra-record evidence: (1) if admission is necessary to
23 determine 'whether the agency has considered all relevant
24 factors and has explained its decision,' (2) if 'the agency has
25 relied on documents not in the record,' (3) 'when supplementing
26 the record is necessary to explain technical terms or complex
27 subject matter,' or (4) 'when plaintiffs make a showing of
28 agency bad faith.'" Id. (quoting Southwest Ctr., 100 F.3d at

1 1450). The "Lands Council exceptions" are "widely accepted" but
2 "narrowly construed." Id. District courts only employ these
3 exceptions when necessary to "identify and plug holes in the
4 administrative record." Id.

5 Plaintiffs request the Court supplement the record of
6 Claims VII and IX with Exhibits A and B under Lands Council's
7 "all relevant factors" exception. Exhibit A is a September 2016
8 update to the Forest Service's Resource Planning Act Assessment
9 and Exhibit B, published in June 2016, is a Forest Service
10 resource that details how to account for climate change when
11 conducting a NEPA analysis. See Exs. A-B to Mot. As Defendants
12 argue, different administrative records apply to these claims
13 "because Plaintiffs' hard-look claim challenges final agency
14 action . . . while their failure-to-supplement claim seeks to
15 compel agency action unlawfully withheld or unreasonably delayed
16 under the APA." Opp'n at 12. Defendants contend it is improper
17 to supplement Plaintiffs' hard-look claim because Exhibits A and
18 B both post-date the 2012 agency action challenged. Id. at 13-
19 14. And supplementing Plaintiffs' failure-to-supplement claim
20 is improper, Defendants argue, because (1) the agencies did not
21 consider Exhibits A and B in issuing the SIR, and (2) both
22 exhibits are irrelevant to Plaintiffs' claims. Opp'n at 16.

23 1. Hard-look Claim (Claim VII)

24 The Court agrees that it is inappropriate to supplement the
25 record of Plaintiffs' hard-look claim with Exhibits A or B. In
26 support of their hard-look claim, Plaintiffs allege, "[t]he
27 Record of Decision for the Pettijohn Project violates NEPA
28 because it fails to adequately analyze and disclose the direct,

1 indirect, and cumulative effects of the Pettijohn Project.” FAC
2 ¶ 171. As both parties acknowledge, the Forest Service issued
3 the Record of Decision (“2013 ROD”) in March 2013. Mot. at 2;
4 Opp’n at 2. Both parties also agree that Exhibits A and B post-
5 date the 2013 ROD. Mot. 10-12; Opp’n at 13-14. Defendants
6 contend that this fact alone precludes judicial consideration of
7 the proffered documents—even under the Lands Council exceptions.
8 Opp’n at 13-14; see also Tri-Valley CAREs v. U.S. Dept. of
9 Energy, 671 F.3d 1113, 1130 (9th Cir. 2012) (finding the Lands
10 Council exceptions “only appl[y] to information available at the
11 time [of the decision], not post-decisional information.”).
12 Plaintiffs, on the other hand, seem to argue that the agencies’
13 2019 SIR was tantamount to an amended ROD. See Mot. at 10-11;
14 Reply at 5-6. Under this framework, the relevant timestamp is
15 not the 2013 ROD, but the 2019 SIR. The Court does not,
16 however, find any legal basis for Plaintiffs’ proposed timeline.

17 Plaintiffs cite Standing Rock Sioux Tribe v. U.S. Army
18 Corps of Engineers, 255 F. Supp. 3d 101, 124 (D.D.C. 2017) for
19 the undisputed proposition that when an agency’s extended
20 decision-making process results in successive decisions,
21 documents that post-date one decision may nonetheless be part of
22 a later decision’s administrative record. Mot. at 11. But
23 Standing Rock Sioux Tribe, 255 F. Supp. 3d at 124 does not
24 answer the question this motion poses. Rather, the issue is
25 whether this Court can properly interpret Plaintiffs’ hard-look
26 claim as a challenge to the 2019 SIR, instead of (or in addition
27 to) a challenge to the 2013 ROD. Phrased differently: is the
28 2019 SIR a “final agency action” challengeable under NEPA?

1 Plaintiffs do not identify any cases where a court has granted
2 an SIR this designation. Indeed, SIRs are intended to play a
3 "limited role within NEPA's procedural framework." Idaho
4 Sporting Congress Inc. v. Alexander, 222 F.3d 562, 566 (9th Cir.
5 2000). Agencies use these reports to assess the significance of
6 new information. Id. But agencies may not use SIRs "as a
7 substitute" for NEPA-mandated reports if they ultimately find
8 the new information significant. Id. Absent binding authority
9 to the contrary, the Court finds that equating the 2019 SIR with
10 an amended ROD would categorically push SIRs beyond their
11 intended limits. The Court views Plaintiffs' hard-look claim as
12 a challenge to the 2013 ROD and finds Exhibits A and B both
13 post-date the decision challenged. The Court therefore denies
14 Plaintiffs' motion to supplement the administrative record on
15 this claim.

16 2. Failure-to-Supplement Claim (Claim IX)

17 Unlike Plaintiffs' hard-look claim, Plaintiffs' failure-to-
18 supplement claim "is not a challenge to a final agency decision,
19 but rather an action . . . to 'compel agency action unlawfully
20 withheld or unreasonably delayed.'" Friends of the Clearwater
21 v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000). Consequently,
22 "review is not limited to the record as it existed at any point
23 in time, because there is no final agency action to demarcate
24 the limits of the record." Id. Under these circumstances,
25 courts may even consider extra-record evidence prepared after
26 the onset of litigation. See id. at 560-61. Notwithstanding
27 this temporal flexibility, the APA still bars extra-record
28 evidence unless it falls within one of the Lands Council

1 exceptions.

2 Plaintiffs invoke the “all relevant factors” exception.
3 Mot. at 9-10. This exception “only applies where supplementing
4 the record is necessary.” ForestKeeper v. LaPrice, 270 F. Supp.
5 3d 1182, 1128 (E.D. Cal. 2017), aff’d, 723 F. App’x 481 (9th
6 Cir. 2018). Supplementing the record is “necessary” when the
7 administrative record fails to “explain how the [agency used the
8 information before it] and why it reached its decision.” Id.
9 (quoting Ctr. For Biological Diversity v. Skalski, 61 F. Supp.
10 3d 945, 951 (E.D. Cal. 2014), aff’d, 613 Fed. App’x 571 (9th
11 Cir. 2015)) (modifications in original). For example, “[a]
12 court should supplement the record when the agency ‘fail[s] to
13 consider a general subject matter.” Id.

14 Plaintiffs maintain Exhibits A and B are necessary to
15 determine whether the Forest service adequately considered the
16 Pettijohn Project’s greenhouse gas impact when it decided not to
17 issue a supplemental FEIS. Mot. at 10. Defendants concede the
18 2019 SIR does not address greenhouse gas emissions. Opp’n at
19 15. They argue the Court should nonetheless exclude the
20 exhibits because Plaintiffs’ failure-to-supplement claim does
21 not challenge the agency’s consideration of greenhouse gas
22 emissions. Id. at 15-16. But as Plaintiffs refute, their
23 failure-to-supplement claim properly incorporates by reference
24 an earlier allegation. Reply at 6 (citing Fed. R. Civ. Proc.
25 10(c)). In Plaintiffs’ hard-look claim, they alleged that the
26 Forest service failed to consider “the effect and influence of
27 climate change on the [Pettijohn] Project, as well as the effect
28 and influence of the Project on the climate.” Compl. ¶ 194.

1 Paragraph 203 of the complaint then incorporates that allegation
2 into Plaintiffs' failure-to-supplement claim. Admittedly,
3 Plaintiffs could have more clearly set forth this theory of
4 liability within the relevant section of their complaint. But
5 their decision to incorporate the allegation by reference
6 certainly falls within the realm of permissible pleading
7 options. Fed. R. Civ. Proc. 10(c).

8 Defendants declined to consider the "general subject
9 matter" of greenhouse gas emissions in assessing whether to
10 issue a supplemental SEIS. Insofar as Plaintiffs' failure-to-
11 supplement claim challenges this decision, Plaintiffs may
12 proffer Exhibits A and B under the "all relevant factors"
13 exception.

14 B. ESA Claims

15 Far less established than the Lands Council exceptions is
16 what Plaintiffs identify as the "ESA citizen suit exception."
17 See Reply at 3. As the name suggests, this exception arguably
18 permits parties to present extra-record evidence to the
19 reviewing court in support of a claim arising out of the ESA's
20 citizen suit provision. See Western Watersheds Project v.
21 Kraayenbrink, 632 F.3d 462, 481-82 (9th Cir. 2011); Washington
22 Toxics Coalition v. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005),
23 abrogated on other grounds by Cottonwood Environ. Law Center v.
24 U.S. Forest Service, 789 F.3d 1075, 1089-91 (9th Cir. 2015). In
25 Kraayenbrink, the Ninth Circuit reasoned that the APA's scope-
26 of-review limitations did not apply to claims brought under the
27 ESA's citizen suit provision because "the APA applies only where
28 there is 'no other adequate remedy in a court.'" 632 F.3d at

1 497 (quoting 5 U.S.C. § 704). Finding the ESA's citizen suit
2 provision provides an adequate remedy in court, the Ninth
3 Circuit found the APA's limitation inapplicable and permitted
4 plaintiffs' submission of extra-record evidence. Id.

5 But district courts within the Ninth Circuit apply
6 Kraayenbrink inconsistently. See Northwest Envir. Advocates v.
7 United States Fish and Wildlife Services, No. 3:18-cv-01420-AC,
8 2019 WL 6977406, at *13 (D. Or. Dec. 20, 2019) (collecting
9 cases). Indeed, as Northwest Envir. Advocates helpfully
10 illustrates, Kraayenbrink gave rise to both inter- and intra-
11 district splits regarding the propriety of the ESA citizen suit
12 exception. Id. Adding to this uncertainty, at least two Ninth
13 Circuit opinions since Kraayenbrink have denounced extra-record
14 evidence in cases involving ESA citizen suit claims—neither,
15 however, expressly overruled or even discussed Kraayenbrink.
16 See Karuk Tribe of California v. U.S. Forest Service, 731 F.3d
17 1006, 1017 (9th Cir. 2012) (referring to a suit involving ESA
18 citizen suit claims as a “record review case” and limiting
19 review to the administrative record); San Luis & Delta-Mendota
20 Water Auth. v. Jewell, 747 F.3d 581, 602-04 (9th Cir. 2014)
21 (expressing “serious concerns” that the district court judge
22 considered extra-record evidence in a case involving ESA citizen
23 suit claims).

24 Although both parties present sound arguments, with respect
25 to the instant motion, this Court adopts Kraayenbrink's citizen
26 suit exception. The reasoning set forth by Judge Acosta in
27 Northwest Envir. Advocates, 2019 WL 6977406, at *12-14 is
28 particularly persuasive, and places this decision in line with

1 other rulings from the Eastern District. See Nat. Res. Def.
2 Council v. Zinke, 347 F.Supp.3d 465, 500-01 (E.D. Cal. 2018);
3 Conservation Congress v. U.S. Forest Service, No. 12-cv-02416-
4 WBS-KJN, 2013 WL 2457481, at *3 (E.D. Cal. June 6, 2013). This
5 Court declines to wade into the thicket of pronouncing when the
6 Ninth Circuit has abrogated a prior decision sub silentio.
7 Accepting Defendants' position would require that type of
8 endeavor.

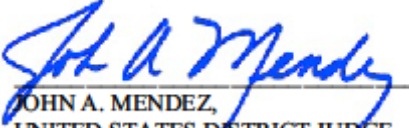
9 Plaintiffs seek to supplement their First and Second Claims
10 with Exhibit C to Malone's declaration. Both claims arise under
11 the ESA's citizen suit provision; they therefore fall within
12 Kraayenbrink's exception. The Court grants Plaintiffs' motion
13 to supplement the administrative record of these claims.

14 II. ORDER

15 For the reasons set forth above, the Court GRANTS IN PART
16 and DENIES IN PART Plaintiffs' motion to supplement the
17 administrative record. The Court GRANTS Plaintiffs' motion to
18 supplement the record of their NEPA failure-to-supplement claim
19 with Exhibits A and B. The Court also GRANTS Plaintiffs' motion
20 to supplement the administrative record of their ESA claims with
21 Exhibit C to their motion. The Court, however, DENIES
22 Plaintiffs' motion to supplement the record of their NEPA hard-
23 look claim with Exhibit A or B.

24 IT IS SO ORDERED.

25 Dated: May 27, 2020

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27 
28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE