

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 NORTHWEST ENVIRONMENTAL  
10 ADVOCATES,

11 Plaintiff,

12 v.

13 THE U.S. DEPARTMENT OF  
14 COMMERCE, *et al.*,

15 Defendants.

CASE NO. C16-1866-JCC

ORDER

16 This matter comes before the Court on Plaintiff's motion for leave to take discovery (Dkt.  
17 No. 129). Having thoroughly considered the parties' briefing and the relevant record, the Court  
18 hereby GRANTS the motion for the reasons explained herein.

19 The facts of this case have been outlined in prior orders by this Court and will not be  
20 repeated here. (*See* Dkt. Nos. 39, 56, 58, 79, 84, 112, 119.) The Court previously granted  
21 summary judgment for Defendants on Plaintiff's second and third claims because Plaintiff had  
22 failed to establish that it had standing to bring two claims. (Dkt. No. 112.) Now, Plaintiff moves  
23 for leave to take discovery into the issue of standing for its fourth and fifth claims. (Dkt. No.  
24 129.) Plaintiff argues that (1) discovery is appropriate in record review cases where discovery is  
25 only for the purpose of establishing Article III standing; (2) discovery should be allowed because  
26 Defendants contest Plaintiff's standing on claims four and five; and (3) information in the record

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1 suggests that discovery would reveal additional evidence of Plaintiff’s standing to bring claims  
2 four and five. (*See* Dkt. No. 129.) Defendants oppose the motion, arguing that (1) record review  
3 cases are normally limited to the record before the agency and inquiries into standing are not a  
4 recognized exception to this general rule; (2) Plaintiff must use affidavits to establish standing,  
5 rather than discovery regarding speculative matters; and (3) discovery is not warranted because it  
6 is purely speculative, because it likely would not lead to facts sufficient to prove standing, and  
7 because there is already evidence in the record going to standing. (*See* Dkt. No. 138).

8 In administrative record review cases, “courts reviewing an agency decision are limited  
9 to the administrative record.” *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005).  
10 “Judicial review of an agency decision typically focuses on the administrative record in existence  
11 at the time of the decision and does not encompass any part of the record that is made initially in  
12 the reviewing court.” *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450  
13 (9th Cir. 1996). This is because the district court’s role is to review an agency’s action, which  
14 would require the court to use the evidence that the agency had before it. *See id.* But because  
15 Article III’s standing requirement does not apply to agency proceedings, there is often no reason  
16 for a party to include facts sufficient to establish standing as part of the administrative record.  
17 *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997).  
18 Therefore, extra-record evidence may be appropriate to establish a party’s standing to bring a  
19 lawsuit in federal court in record review cases. *See id.*

20 Defendants argue that *Northwest Environmental Defense Center* merely stands for the  
21 proposition that Plaintiff-proffered affidavits may be used to supplement an administrative  
22 record to prove standing, not broader discovery. (Dkt. No. 138 at 3–7.) The Court is not  
23 convinced by this narrow reading. *See Wildearth Guardians v. Salazar*, 2010 WL 2998667, slip  
24 op. at \*1 (D. Colo. 2010). *Northwest Environmental Defense Center* instructs that extra-record  
25 evidence in record review cases is appropriate to provide evidence of a party’s standing to bring  
26 a claim in federal court. *See Nw. Envtl. Def. Ctr.*, 117 F.3d at 1527–28. Nothing in *Northwest*

1 *Environmental Defense Center* or in any other case cabins this holding to affidavits. *See id.*; *see*  
2 *also Wildearth Guardians*, 2010 WL 2998667, slip op. at \*1. Therefore, discovery may be  
3 appropriate to establish Plaintiff’s standing to bring claims four and five in this Court.

4 “[D]iscovery should ordinarily be granted where pertinent facts bearing on the question  
5 of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.”  
6 *Laub v. U.S. Dep’t of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (citing *Butcher’s Union*  
7 *Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986)). First, jurisdiction is  
8 controverted. Defendants have previously moved to dismiss claims four and five for lack of  
9 standing. (Dkt. No. 21.) Additionally, a more satisfactory showing of the facts is necessary for at  
10 least two reasons. First, as discussed above, the administrative record that the Court is required to  
11 rely on likely does not contain facts sufficient to establish standing because the Article III  
12 standing requirement does not apply to agency proceedings. *See Nw. Env’tl. Def. Ctr.*, 117 F.3d at  
13 1527–28. Second, the administrative record is mostly limited to the Environmental Protection  
14 Agency’s action and it does not go to the State of Washington’s likely response to that action.  
15 Washington’s response to that action is what would allegedly harm Plaintiff. Therefore, Plaintiffs  
16 will be granted leave to take discovery into the issue of standing on claims four and five because  
17 jurisdiction is controverted and a more satisfactory showing of the facts is necessary.

18 For the foregoing reasons, Plaintiff’s motion for leave to take discovery into standing to  
19 bring claims four and five (Dkt. No. 129) is GRANTED. The deadline for this discovery shall be  
20 in accordance with the case management schedule already set by this Court. (*See* Dkt. No. 135.)

21 DATED this 4th day of January 2019.

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John C. Coughenour  
UNITED STATES DISTRICT JUDGE