United States District Court
Southern District of Texas
ENTERED
March 31, 2016
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FRIENDS OF LYDIA ANN CHANNEL,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:15-CV-00514
	§	
U.S. ARMY CORPS OF ENGINEERS, *et al*,	§	
	§	
Defendants.	§	

ORDER

On this day came on to be considered Plaintiff Lydia Ann Channel's ("Plaintiff") Motion for supplemental and extra-record evidence. (D.E. 30). For the reasons stated herein, Plaintiff's Motion is GRANTED.

I. JURISDICTION

This case is brought under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. The Court has jurisdiction over this case. 28 U.S.C. §§ 1331, 1361; *see also* 16 U.S.C. § 1540(g)(2)(A)(i).

II. PROCEDURAL HISTORY

Plaintiff, a Texas nonprofit membership organization, seeks declaratory and injunctive relief against Defendant United States Army Corps of Engineers ("USACE") and three of its executives for their failure to comply with the APA, the ESA, and NEPA, and regulations associated with these laws. The suit arises from USACE's approval, and the subsequent construction and operation, of an industrial barge fleeting facility in the Lydia Ann Channel. The Lydia Ann Channel is an expanse of water within the Redfish Bay State Scientific Area, directly adjacent to the Mission-Aransas National Estuarine Research Reserve. Plaintiff claims

that this area is home to at least eight federally-listed endangered species, and is widely used by the public and its members for recreational purposes.

On June 10, 2014, USACE received an Application for Department of the Army Permit for the Lydia Ann Moorings Project ("Permit Application"). USACE0008. The listed applicant is Lydia Ann Channel Moorings, LLC ("LAC Moorings"). Two individuals signed on LAC Moorings's behalf—Christopher Todd Pietsch ("Pietsch") and Robert Bryan Gulley ("Gulley"). On the Permit Application, both Pietsch and Gulley listed their email address as "MikeSkipper@aol.com." Plaintiff alleges that this email address belongs to Everett Michael Skipper a/k/a "Mike Edwards," who was convicted in 2009 of attempting to bribe the City of Corpus Christi's Fire Marshal in exchange for a certificate of occupancy for a local bar. Pietsch also used Mike Edwards's phone number on the Permit Application. *See* USACE0006, 08.

After receiving the Permit Application, USACE issued a Notice of Application – Internal USACE Review. USACE0026. The Notice of Application included a one paragraph description of the proposed project:

> The applicant proposes to install 82 individual mooring dolphins 100-feet apart on the east side of the Lydia Ann Channel to provide temporary mooring for barges and tugs inside Lydia Ann Channel. The mooring structures will be 24-inch steel pipe with rubber tires acting as bumpers, concrete filled, and placed 30-feet below the bottom surface of the channel. The applicant's plans are enclosed in 7 sheets.

Id. The 7-sheet plan is not in the Administrative Record ("Record"). The project description did not mention that the mooring station could handle over 200 barges at a time, containing petrochemical products, dangerous chemicals, and hazardous cargo. Nor did it mention that the tugs and barges would pass over or near sensitive shoreline environments or marine archeological sites.

On July 18, 2014, USACE sent an Interagency Coordination Notice for Letter of Permission ("ICN") to federal and state agencies. USACE0034. The ICN is three pages long and contains the same project description as the Notice of Application, with the exception that it does not mention the 7-sheet plan. USACE0034-36. The ICN's only mention of species or habitats is: "Preliminary indications are that no known threatened and/or endangered species or their critical habitat will be affected by the proposed work. . . . Our initial determination is that the proposed action would not have a substantial adverse impact on Essential Fish Habitat or federally managed fisheries in the Gulf of Mexico." USACE0035. The ICN gave the agencies 15-calendar-days to respond. *Id.*

On July 22, 2014, the U.S. Fish and Wildlife Service responded, saying in part, "the permit application indicates you have determined that the proposed action would have no effect on federally listed species or critical habitat. The Service does not provide concurrence on no effect calls; however, we believe your agency has complied with section 7(a)(2) of the Endangered Species Act by making a determination." USACE0038.

On July 30, 2014, the Texas Parks and Wildlife Department ("TPWD") responded, raising a number of concerns. TPWD asked LAC Moorings to resolve three items brought up at a previous meeting between LAC Moorings and the coordinating agencies: (1) the need to acquire a lease from the Texas General Land Office; (2) to identify, avoid, and/or compensate for the potential impacts to seagrass beds in the immediate project vicinity; and (3) to have an emergency pollution action plan. USACE0039. TPWD additionally recommended that LAC Moorings: (4) "provide information on how the mooring dolphins will be installed in the channel"; (5) develop a monitoring program and action plan to ensure marine mammals and sea turtles will not be impacted because "there is a high probability of marine mammals and/or sea

turtles in or near the project area"; and (6) "coordinate with the [Texas General Land Office] Oil Spill Response Division and the U.S. Coast Guard to develop a risk assessment of the local habitats and a pollution response plan." *Id.* TPWD asked LAC Moorings to provide USACE and all the coordinating agencies with a revised plan that addressed these topics.

The only reply to TPWD came in an email from Mike Edwards, sent one day after TPWD's response. Mike Edwards stated:

1. Lease terms have been agreed to and returned to the GLO. We are waiting final lease which they say we should receive soon.

2. There are NO sea grass' in location of moorings to be installed. Moorings will be in deep water and will protect the shoreline from damage currently being done by barges.

3. Emergency pollution action plan will be in place and APPROVED by Coast Guard prior to accepting any barges into our mooring fleet. This is REQUIRED as part of our USCG Emergency Safety Plan. This will be a 24 hour manned operation. We will have enough 18"Oil Spill Response Boom to completely encircle an entire tier of barges.

4. Moorings will be determined by a state licensed MARINE ENGINEER. Usually the case is to be driven into the mud slowly. This is a slow and deliberate process which will be closely monitored by crew.

USACE0043. The email concluded, "We hope this answers your questions presented by the Texas Parks and Wildlife." *Id.* Neither this email, nor other Record evidence, addressed the concerns about mammals and sea turtles. Absent is a scientific study in the Record that shows that there is no sea grass in the area. Lastly, the only correspondence from the Coast Guard in the Administrative Record is the Coast Guard stating that it had "no objections" to the project. USACE 0045. Also notably absent is a discussion of a finalized emergency pollution plan.

The Texas Historical Commission, which is in charge of underwater archeological sites, responded on November 20, 2014. USACE0051. The Commission's letter was addressed to Charles E. Pearson at Coastal Environments, Inc. ("CEI"), a company subcontracted by Naismith

Marine Services to perform an underwater survey. Naismith Marine Services was hired by LAC Moorings. The Commission thanked CEI for its "well-written and very well-researched report," but explained that it could not accept CEI's findings because an archeologist was not present during the investigation. The well-written report is not in the Record.

On November 3, 2014, USACE's Operations Division or Navigation Branch (OD/N) expressed "concerns that the proposed fleeting facility may pose a hazard to navigation given the location is in a bend of the [Galveston Intracoastal Waterway] GIWW and in a high-traffic area." USACE0063. On December 11, 2014, OD/N sent an email to the USACE officials coordinating the project, stating:

> Operations is concerned with the present location of the proposed fleeting facility. Specifically it is located at a bend in a high-traffic section of the channel that is influenced by sea conditions due to its proximity to the [Corpus Christi Ship Channel]. Currently there is no set-back policy developed / applied for the Lydia Ann channel. We am [sic] working with folks here to apply the set-back requirement to the Lydia Ann as it is the route used by the vast majority of channel traffic. The other issue is that we are also proposing to re-align the land-locked section of the Lydia Ann channel to follow the naturally deep water portion of the channel.
>
> We recognize the critical need for fleeting facilities and we are certainly willing to work with the applicant to develop a solution agreeable to all parties.
>
> At this stage, our tasks are:
> 1. apply the set-back policy to the current Lydia Ann channel
> 2. coordinate a bank-to-bank survey of land-locked portion of Lydia Ann. Add colored contours based on the survey results.
> 3. We'll meet as an internal team to look at potential realignment option for Lydia Ann (e.g. following natural deep areas).
> 4. Apply set-back policy to any proposed channel alignments
> 5. Coordinate results with USCG, Industry, etc.

USACE0065.

Kimberly McLaughlin ("McLaughlin"), the Chief of Regulatory Division at USACE in Galveston, Texas told OD/N that USACE was "in a position to make a favorable permit decision

and I am hesitant to hold up the project at such a late point in the process. I am told that the project, as proposed, will keep the barges well within the setback of the channel." USACE0070. OD/N said it understood McLaughlin's concerns, but asked for a few weeks because it needed the latest hydrographic data before it could propose a set-back policy. USACE0069. McLaughlin asked OD/N to "remain engaged and keep the effort moving forward" because the "applicant is expecting a decision." USACE0068. On January 12, 2015, McLaughlin told OD/N that it needed to "provide a response ASAP otherwise we will make a permit decision mid-week." USACE0089. OD/N responded that day, explaining that it still had not received the hydrographic survey, and that it could not make a determination without that data. *Id.*

On January 15, 2015, USACE approved the project under NEPA's Letter of Permission procedure, without a final set-back policy. In a Memorandum for Record, USACE explained:

> In reference to the Operations Division (OD/N) concerns, we did not hear from the OD/N on the status of the setback line for the Lydia Ann Channel within a timely manner; therefore we determine in the best interest for the Public, the Corps and the Permittee that this issue/concern to be self-resolved. In reference to the concerns raised by OD/N, we find, even while the setback line for the Lydia Ann Channel has yet to be developed, that this project will not impede navigation through the Lydia Ann Channel.

USACE 0100. It appears that a proposed set-back policy was created, but was never finalized. A January 13, 2015 email from OD/N references "set-back policy files," and the Memorandum for Record says, "Based upon the proposed Lydia Ann Channel setback, received on 13 January 2015, we have determined that the project will not affect navigation of this waterway." USACE0092, 101. The set-back policy files are not in the Record.

The project as constructed, however, is different than the one listed in the Permit Application materials. One day before USACE issued the Letter of Permission, LAC Moorings changed the project design. Instead of 82 moorings with a 24-inch monopole design, LAC

Moorings contracted with a marine construction company for 67 moorings using a 30-inch pole. Further, 30 of the 67 moorings will utilize a tripod design, using two 12-inch beams as supports. USACE0094. Also unlike the original proposed project, the top of each 30-inch pole "will be blasted & painted with two coats of coal tar epoxy." *Id.* Moreover, the constructed project includes a number of structures not listed in the project description, including a two-story operations headquarters. (D.E. 1 ¶ 141). USACE's Memorandum for Record and the Letter of Permission both list the 24-inch monopole design as the accepted project, and do not mention any structures outside of the moorings. USACE 0098, 108.

Plaintiff brought suit on December 12, 2015. On March 15, 2016, USACE filed a 125-page Administrative Record. (D.E. 29). At the Court's request, the parties briefed the issue of whether the Court may consider evidence outside of the Record. (D.E. 30, 31, 33). When USACE filed its brief, it notified the Court that it had suspended LAC Moorings's Letter of Permission. (D.E. 32). Pursuant to USACE regulations, the barging facility remains operational while USACE reevaluates the project. 33 C.F.R. § 325.7. USACE told the Court that reevaluation will take six months to one year. The Court held a status conference on March 30, 2016 to consider these issues.

III. DISCUSSION

a. National Environmental Protection Act

NEPA is a procedural statute that requires federal agencies to document environmental conditions, both existing and foreseeable, that are related to a proposed agency action. 42 U.S.C. § 4332. Each federal agency creates its own regulations governing its procedures for conforming with NEPA. Because NEPA is a procedural statute that does not provide a private right of action, plaintiffs must bring their NEPA claims with claims arising from other statutes. If the

agency's action constitutes an administrative action—which it does here—it is governed by the APA. 5 U.S.C. § 701. In APA cases, the reviewing court may generally only set aside the federal agency's action if it finds that the agency abused its discretion, or acted arbitrarily, capriciously, or contrary to law. *Id.* § 706(2).

Under NEPA, federal agencies must prepare an Environmental Assessment ("EA") for all proposed actions for which the environmental effects are uncertain, to determine whether a significant effect will result from the proposed action. 42 U.S.C. § 4332(2)(E). The purpose of the EA is to determine if there is enough likelihood of significant environmental consequences to justify the time and expense of preparing a more rigorous Environmental Impact Statement ("EIS"). An EIS must be prepared for any "major Federal action significantly affecting the quality of the human environment." *Id.* § 4332(2)(C), 40 C.F.R. § 1502.3.

A federal agency may be exempt from performing an EA or EIS if its action qualifies as a "categorical exclusion." 40 C.F.R. § 1508.4. Agencies designate which classes of actions may be regarded as categorical exclusions. *Id.* § 1507.3(b)(2).

USACE's NEPA regulations allow the Corps to grant a permit through a categorical exclusion called a Letter of Permission. A Letter of Permission is "an abbreviated processing procedure which includes coordination with federal and state fish and wildlife agencies . . . and a public interest evaluation, but without the publishing of an individual public notice." 33 C.F.R. § 325.2(e)(1). In the present case, USACE issued the Letter of Permission under 33 C.F.R. § 325(e)(1)(i), for a project:

> Subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

b. Record Rule

Plaintiff seeks the following discovery:

(1) the deposition of Everett Michael Skipper a/k/a "Mike Edwards" regarding, among other things, (i) the veracity of statements he made in various documents filed with USACE, (ii) his personal relationships with USACE employees and (iii) whether he used those relationships to obtain authorization for the barge fleeting facility, and (iv) the differences between what was actually built and what was authorized by the LOP.

(2) depositions of other LAC Moorings employees and representatives about the application, the facility, and their contacts and communications with governmental representatives (including USACE representatives) in connection with the barge fleeting facility.

(3) depositions of USACE personnel who were actively involved in considering and/or acting upon LACM's application regarding their communications with LACM representatives, the application, the facility, and what was and was not considered in evaluating and approving the LOP.

(4) access to the barge fleeting facility for Plaintiff's experts to assess its actual structure and operations and their effects on endangered species, the environment as a whole, navigational safety, etc.

(5) evidence regarding contaminants and impacts upon endangered species and their habitat within the Lydia Ann Channel after construction of the barge fleeting facility.

(6) evidence regarding barge traffic in the Lydia Ann Channel prior to construction of the LAC Moorings fleeting facility, including the timing and frequency of that traffic, the practices and locations of barges and tugs, their numbers within the Lydia Ann Channel at different points in time, whether and when USACE or other governmental officials may have encouraged tugs to hold in the Lydia Ann Channel or otherwise in close proximity to San Jose Island, the environmental impacts of those practices, governmental oversight and/or critiques of those practices (including by USACE), permit requests (if any) for those practices, and efforts or lack thereof to stop those practices.

(D.E. 30 at 16-17). USACE argues that the present case is exempt from discovery and initial disclosures because it is "an action for review of an administrative record." Fed. R. Civ. Proc. 26(a)(1)(B)(i). USACE argues that the only evidence the Court can consider is the 125-page

Record. USACE is incorrect, both because this case presents exceptions to the "record rule," and because this case is still at the initial disclosure stage.

USACE relies on the long-standing practice of courts to decide federal agency cases strictly on their administrative record. *Tagg Bros. v. United States*, 280 U.S. 420 (1930). This practice is called the "record rule," which forbids the use of new evidence in judicial review of agency decisions. *See* Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 Cal. L. Rev. 929, 934 (July 1993). Under the record rule, a court reviewing agency action under the APA ordinarily "cannot review evidence outside of the administrative record." *La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, --- F. Supp. 3d ---, 2015 WL 6605023, at *8 (S.D. Tex. Sept. 30, 2015). The APA requires courts reviewing agency action to review the "whole record or those parts of it cited by a party." 5 U.S.C. § 706; *see also Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010). "[A]bsent clear evidence to the contrary, an agency is entitled to a presumption that it properly designated the administrative record." *Calloway v. Harvey*, 590 F. Supp. 2d 29, 37 (D.D.C. 2008).

That said, parties can "expand" the record under two theories: (1) supplementation of the administrative record; and (2) extra-record evidence. Supplementation completes the record by adding something that "should have properly been included in the administrative record [but] was not . . . [due to] a clerical error" or for any other reason. *La Union*, 2015 WL at 6605023, at *8. A complete administrative record should include all materials that "might have influenced the agency's decision," and not merely those upon which the agency relied in its final decision. *Id.* (quoting *Amfac Resorts, L.L.C. v. U.S. Dept. of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C.

2001)). Supplementation, therefore, accords with the record rule and does not pose the same difficulties as consideration of extra-record evidence not considered by the agency.

Extra-record evidence is evidence "outside of or in addition to the administrative record that was not necessarily considered by the agency." *Calloway*, 590 F. Supp. 2d at 38. The request for extra-record evidence is "at odds" with the record rule. *Gulf Coast Rod Reel and Gun Club, Inc. v. U.S. Army Corps of Eng'rs*, 2015 WL 1883522, at *2 (S.D. Tex. April 20, 2015).

The Fifth Circuit has articulated eight situations in which courts have "utilized supplementation or considered extra-record evidence":

1. When agency action is not adequately explained in the record before the court;
2. When looking to determine whether the agency considered all relevant factors;
3. When a record is incomplete;
4. When a case is so complex that a court needs more evidence to enable it to understand the issues;
5. When evidence arising after the agency action shows whether the decision was correct or not;
6. In certain NEPA cases;
7. In preliminary injunction cases; and
8. When an agency acts in bad faith.

Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003), *vacated on other grounds sub nom. Davis Mountains Trans-Pecos Heritage Ass'n v. Fed. Aviation Admin.*, 116 F. App'x 3, 16 (5th Cir. 2004) (confirming that "the district court correctly stated the law regarding extra-record evidence in NEPA cases"); *see also La Union*, 2015 WL 6605023, at *9; *Gulf Coast*, 2015 WL 1883522, at *2.

Beyond these eight exceptions, the Fifth Circuit recognized in a non-NEPA case three "unusual circumstances justifying a departure" from the record rule:

1. The agency deliberately or negligently excluded documents that may have been adverse to its decision;

2. The district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors; or
3. The agency failed to explain administrative action so as to frustrate judicial review.

Medina, 602 F.3d at 706. The Southern District of Texas recently discussed the relationship between *Davis Mountains*'s eight exceptions and *Medina*'s three exceptions, finding that any differences between the two lists "does not have much practical significance." *Gulf Coast*, 2015 WL 1883522, at *4. Most, if not all, of the eight *Davis Mountains* exceptions fit within *Medina*'s three broader categories. *Id.* Further, *Medina*'s second exception reflects the rationale for the NEPA exception in *Davis Mountains*: "determin[ing] whether the agency considered all the relevant factors." *Id.* at *3.

Most significantly, the Fifth Circuit has held that district courts may review evidence in addition to the administrative record to determine whether an agency adequately considered the environmental impact under NEPA of a particular project. *Sabine River Auth. v. Dept. of Interior*, 951 F.2d 669, 678 (5th Cir. 1992). The Fifth Circuit observed that "deviation from the 'record rule' occurs with more frequency in the review of agency [NEPA] decisions than in the review of other agency decisions." *Sierra Club v. Peterson*, 185 F.3d 349, 370 (5th Cir. 1999). "The reason for this deviation is significant":

> NEPA imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of its proposed action, and review of whether the agency's analysis has satisfied this duty often requires a court to look at evidence outside the administrative record. To limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA. The omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's aid in calling such omissions to its attention. Thus, we have held that the consideration of extra-record evidence may be appropriate in the NEPA context to enable a reviewing court to determine that the information available to the decisionmaker included a complete discussion of environmental effects and alternatives.

Id. (citing *National Audubon Society v. Hoffman*, 132 F.3d 7, 14-15 (2d Cir. 1997)).

"To obtain discovery from an agency in an APA case, a party must overcome the standard presumption that the 'agency properly designated the Administrative Record.'" *Amfac Resorts*, 143 F. Supp. 2d at 12. That is, a party must provide good reason to believe that discovery will uncover evidence relevant to the court's decision to look beyond the record. *See id.* "Thus, a party must make a significant showing—variously described as 'strong', 'substantial', or 'prima facie.'" *Id.* (citations omitted).

Therefore, supplemental and extra-record evidence are allowed in Fifth Circuit APA cases. The question for the Court is whether Plaintiff has made a strong showing that its discovery requests meet a record rule exception. The Court finds that Plaintiff has met its burden with respect to all of its discovery requests. Specifically, Plaintiff has made a strong showing that its discovery requests satisfy *Davis Mountains*'s exceptions (2), (3), (5), and (6).

Beginning with *Davis Mountains*'s second exception—when looking to determine whether the agency considered all relevant factors—USACE claims that it properly used the Letter of Permission procedure because "it was determined that the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition." USACE0099. No Record evidence supports USACE's finding on the first two factors, and the only evidence on the third factor is that LAC Moorings consulted "the tow industry." USACE0007, 101. With the current Record, the Court cannot judge USACE's determination that a mile and a half long barge fleeting facility that services over 200 barges is "minor." Likewise, the Court cannot assess USACE's finding that this project, located in an environmentally sensitive area with numerous threatened and endangered species, will have no significant impacts on environmental values. The Court also

cannot evaluate USACE's finding that there was no appreciable opposition when the only interest group mentioned in the Record is the tow industry.[1] The Record is also missing the public interest evaluation required by USACE's regulations. 33 C.F.R. § 325(e)(1). In short, the Court needs more evidence to determine if USACE merely parroted the requirements of 33 C.F.R. § 325.2(e)(1)(i), or if USACE appropriately considered and arrived at these conclusions. Plaintiff has made a strong showing that USACE may not have considered all relevant factors. *Davis Mountains*'s second exception applies to Plaintiff's discovery requests (3) and (6). Therefore, the Court grants Plaintiff's request for this supplemental and extra-record evidence.

Regarding *Davis Mountains*'s third exception—when a record is incomplete—the Record frequently references reports, policies, and documents that USACE considered in granting the Letter of Permission. Many of these materials, however, are not in the Record. For example, in the Notice of Application, the project description says, "[t]he applicant's plans are enclosed in 7 sheets." USACE0026. These 7 sheets are not in the Record. The "very well-researched report" referenced by the Texas Historical Commission is absent, as well. USACE0051. So too are OD/N's proposed set-back policies. USACE0092 ("I'll send the set-back policy files in separate email."), USACE0101 ("Based upon the proposed Lydia Ann Channel setback . . . we have determined that the project will not affect navigation of this waterway."). Moreover, at the March 30, 2016 status conference, Plaintiff presented the Court with a page missing from the Record—the final page of the Letter of Permission. (*See* D.E. 34).

In addition, USACE and LAC Moorings repeatedly claim that the facility will benefit the environment because barges "are presently grounding in areas on shore and damaging shoreline,

[1] According to Plaintiff, the tow industry representatives that were surveyed now manage the Lydia Ann facility. (D.E. 33 at 2).

sea grass, etc." *See* USACE0007, 09, 14, 43, 70, 87, 101. The Record does not support or oppose this claim. There are no studies or surveys about how the Lydia Ann Channel was utilized before (or after) the project. The most in-depth discussion is in a document from LAC Moorings that says, "[p]resently approximately 30 tows per day ground themselves along the Lydia Ann Channel outside Port Aransas, Texas. . . . The result is damaged and changing shoreline along the channel." USACE0007.

There are also no environmental studies in the Record. Yet, USACE alleges that the project will have "no effect" on threatened and endangered species because "[t]he project is of such limited size, duration, and scope that any impacts to any T&E species and/or their critical habitat would be minimal to the fullest extent practicable." USACE0103. Perhaps a mile and a half long barge fleeting facility that services over 200 barges and will last at least 20 years will have minimal impacts on threatened and endangered species and their habitats. *See* USACE0053. The Court cannot weigh in without more evidence.

Moreover, in his response to TPWD, Mike Edwards said that an "[e]mergency pollution action plan will be in place and APPROVED by Coast Guard prior to accepting any barges into our mooring fleet." USACE0043. The Record is missing this emergency pollution action plan, even though the facility is up and running.

Lastly, throughout the Record, USACE relied heavily on Mike Edwards's representations. For example, USACE accepted as true Mike Edwards's response to TPWD that "[t]here are NO sea grass' in location of moorings to be installed." *Id.* The Record does not indicate Mike Edwards's credentials, which were sufficient for the U.S. Army Corps of Engineers to accept his unsubstantiated claims. Plaintiff argues that USACE improperly relied on Mike Edwards because of his personal relationships with Corps' employees. USACE alleges

that Plaintiff's "vague allegations" do not warrant discovery outside the Record, and that it is not uncommon for applicants to have personal relationships with Corps' employees, as "[m]embers of the Corps inevitably become known to members of the community that they regulate." (D.E. 31 at 10-11).

Plaintiff has made more than vague allegations. Specifically, Plaintiff points out that the USACE employees responsible for the Permit Application:

> (1) performed no scientific studies at all,
>
> (2) relied on an accelerated procedure that was obviously inappropriate for the project,
>
> (3) misrepresented that the [United States Fish and Wildlife Service] had made a finding the facility would have no adverse effects on fish and wildlife,
>
> (4) prepared no EA and ignored all NEPA requirements,
>
> (5) ignored Skipper's use of an obvious alias,
>
> (6) [failed] to evaluate public interest, consulted only two tug boat operators who are now managers of the fleeting facility,
>
> (7) authorized the facility while the Corps' own Navigation Section was asking for more time to finish an evaluation of its concerns over the navigational threats posed by the facility,
>
> (8) rushed authorization of the facility because the applicant "was losing money," [and]
>
> (9) may have been aware that the facility would be built in a way that did not comply with the LOP before the LOP was issued.

(D.E. 33 at 7). Further, Plaintiff points to Everett Michael Skipper's history of bribing government officials; that neither Everett Michael Skipper nor Mike Edwards was listed on the Permit Application, but his email address and phone number were used; and that after the initial Permit Application, Everett Michael Skipper was the only LAC Moorings representative coordinating with USACE and the other agencies.

If, as USACE claims, members of the Corps had "inevitable" personal relationships with Everett Michael Skipper, surely they would have known that he was a convicted felon for attempting to bribe a public official. Likewise, it is clear that members of the Corps knew Everett Michael Skipper well enough to rely on his unsubstantiated responses to the TPWD, including that "[t]here are NO sea grass' in location of moorings." USACE 0043. The Court cannot assign appropriate weight to Mike Edwards's opinions, or USACE's decision to follow them, without more evidence.

Plaintiff has made a strong showing that the Record is incomplete. *Davis Mountains*'s third exception applies to Plaintiff's discovery requests (1), (2), (3), (4), and (6). Therefore, the Court grants Plaintiff's request for this supplemental and extra-record evidence.

Regarding *Davis Mountains*'s fifth exception—when evidence arising after the agency action shows whether the decision was correct or not—the project as built is far different than the one USACE approved. The only evidence regarding the as-built facility a the construction contract LAC Moorings entered the day before the Letter of Permission was issued by USACE. USACE0094. The Record does not show whether USACE made a NEPA determination on the as-built project. More importantly, after the facility was constructed, USACE suspended the Letter of Permission. (D.E. 32). USACE provided two justifications for the suspension: (1) "the pilings are not in compliance with the permitted plans"; and (2) "the Corps has received additional information that the project's purpose and need has changed since issuance of the LOP." (D.E. 32-1). The suspension letter, however, does not explain how the "project's purpose and need has changed." Plaintiff has made a strong showing that evidence arose after USACE's action that will inform whether USACE's decision was correct. *Davis Mountains*'s fifth

exception applies to Plaintiff's discovery requests (1), (4), and (5). Therefore, the Court grants Plaintiff's request for this supplemental and extra-record evidence.

Lastly, regarding *Davis Mountains*'s sixth exception—certain NEPA cases. A main purpose of NEPA is for agencies to compile "a comprehensive analysis of the potential environmental impacts of its proposed action." *Sierra Club*, 185 F.3d at 370. "To limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA." *Id.* The Court finds that this case presents one of those circumstances. The paltry 125-page Record contains no scientific studies, no public interest surveys, relies on conclusory statements from a convicted felon who is underhandedly, but significantly, involved in this project, and is missing a number of documents USACE relied upon.

USACE is correct that NEPA cases are not supposed to turn into a battle of the experts. *Spiller v. White*, 352 F.3d 235, 244 (5th Cir. 2003). However, there is no battle of experts here because the Record contains no environmental study or expert report. Further, the Fifth Circuit has allowed expert testimony in NEPA cases. *Fritiofson v. Alexander*, 772 F.2d 1225, 1230 (5th Cir. 1985) (noting that expert witnesses testified at trial on "various deleterious environmental effects" that could flow from a project); *Sierra Club v. Sigler*, 532 F. Supp. 1222, 1228-29 (S.D. Tex. 1982) (allowing expert testimony on the importance of an affected bay and its wildlife and marine resources), *aff'd in part, rev'd in part on other grounds*, 695 F.2d 957 (5th Cir. 1983).

Plaintiff has made a strong showing that this NEPA case is "unusual." *See Medina*, 602 F.3d at 706. *Davis Mountains*'s sixth exception applies to Plaintiff's discovery requests (3), (4), and (6). Therefore, the Court grants Plaintiff's request for this supplemental and extra-record evidence.

Overall, USACE argues that "the Corps has explained its decision in the administrative record," and that "the Court can evaluate the record and determine whether all relevant factors were considered." (D.E. 31 at 12). The Court disagrees. For all the reasons stated above, including the absence of numerous important documents referenced and relied upon by USACE, the Court is unable to determine if USACE's permitting decision was arbitrary, capricious, or contrary to law. *See Sabine River Auth.*, 951 F.2d 669, 678.

In sum, Plaintiff has made a strong showing that its discovery requests are covered by at least one of *Davis Mountains*'s exceptions. The Court therefore grants Plaintiff's request for supplemental and extra-record evidence.

c. Initial Disclosures

Although the Court is allowing Plaintiff to conduct supplemental and extra-record discovery, the Court is not making a final decision on whether this evidence is admissible. *See La. Crawfish Producers Ass'n – West v. Mallard Basin, Inc.*, 2015 WL 8074260 (W.D. La. Dec. 4, 2015). "At this stage . . . admissibility is not at issue. *See* Fed. R. Civ. Proc. 26(b)(1). Rather, at this stage, the Court simply reviews the request for relevance and proportionality." *Id.* at *5.

IV. CONCLUSION

For the reasons stated herein, Plaintiff's Motion for supplemental and extra-record evidence is GRANTED. The Court will review the evidence discovered, and determine its admissibility depending on whether it meets the *Davis Mountains* exceptions.

SIGNED and ORDERED this 31st day of March, 2016.

Janis Graham Jack
Senior United States District Judge