IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, BOLD ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, and FRIENDS OF THE EARTH, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS and LIEUTENANT GENERAL TODD T. SEMONITE (in his official capacity as U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers), Defendants, and THE STATE OF MONTANA, TRANSCANADA KEYSTONE PIPELINE, LP, TC ENERGY CORPORATION, AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION Defendant-Intervenors.	Case 4:19-cv-00044-BMM **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

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INTRODUCTION

The Court should deny Plaintiffs' Motion to Supplement the Administrative Record. The administrative record currently before the Court documents the U.S. Army Corps of Engineers' ("Corps") decision in early 2017 to reissue Clean Water Act Nationwide Permit 12. Plaintiffs propose to supplement that administrative record with eight documents that post-date the decision and relate to project-specific verifications that have been suspended pending further environmental analysis. These documents have no relevance to the Court's review of the 2017 decision to reissue Nationwide Permit 12—the claims that are currently being briefed—and supplementation is improper. A ninth document proffered by Plaintiffs is a 2012 biological opinion concerning a different agency action that expired on March 18, 2017 - the Corps' 2012 reissuance of Nationwide Permit 12 and other nationwide permits. Not only is this biological opinion moot, having been superseded by a 2014 biological opinion issued after the Corps reinitiated Endangered Species Act Section 7 consultation, but the superseding biological opinion is *already* part of the existing administrative record. Thus, the Court should likewise deny the motion to supplement with the moot biological opinion.

STANDARD OF REVIEW

Plaintiffs' Clean Water Act ("CWA"), National Environmental Policy Act ("NEPA"), and Endangered Species Act ("ESA") claims are reviewed under the Administrative Procedure Act ("APA"). *Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 602 (9th Cir. 2008); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601-03 (9th Cir. 2014); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (*en banc*). The APA provides that a reviewing court may only set aside agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This narrow, deferential standard prohibits a court from engaging in *de novo* fact-finding or substituting its judgment for the agency's. *Jewell*, 747 F.3d at 602-03; *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*). "Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

Because the Court here sits in the same position as an appellate court of review, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Jewell*, 747 F.3d at 602-03. The Ninth

Circuit, however, has crafted certain "narrow exceptions to this general rule." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

> [Courts may] allow expansion of the administrative record in four narrowly construed circumstances: (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 ….

Fence Creek Cattle Co. v. U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010).

These exceptions must be "narrowly construed and applied." *Lands Council*, 395 F.3d at 1030. The exceptions are narrow because they all serve the same limited purpose: to "explain the record where a failure to do so might frustrate effective judicial review." *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 286 n.36 (D.C. Cir. 1981).Where the exceptions do apply, the Ninth Circuit has emphasized that the exceptions should be approached "with caution, lest 'the exception … undermine the general rule.'" *Jewell*, 747 F.3d at 603 (quoting *Lands Council*, 395 F.3d at 1030). "Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, *de novo* rather than with the proper deference to agency processes, expertise, and decision-making." *Lands Council*, 395 F.3d at 1030. Thus, in no event can post-record information or the exceptions be used "to determine the correctness or wisdom of the agency's decision … even if the court has also examined the administrative record." *Jewell*, 747 F.3d at 602

(citation omitted); *Klamath Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, No. 1:12-cv-1558-CL, 2014 WL 525116, at *4-5 (D. Or. Feb. 6, 2014).

In addition to demonstrating that specific extra-record materials meet one of the four exceptions, Plaintiffs first bear the burden of overcoming the presumption that the agencies properly designated the administrative records by presenting clear evidence that the administrative record is so inadequate that it will frustrate judicial review. *Pinnacle Armor v. United States*, 923 F. Supp. 2d 1226, 1232 (E.D. Cal. 2013) ("The party seeking supplementation bears the burden of overcoming this presumption by 'clear evidence.'") (citation omitted). This is because the limited exceptions to record review "operate to identify and plug holes in the administrative record." *Lands Council*, 395 F.3d at 1030.

ARGUMENT

I. The Court Should Reject the Attempt to Supplement the Administrative Record for the 2017 Nationwide Permit Decision with Post-Decisional Exhibits A Through H

A. The "Relevant Factors" Exception Does Not Apply

Plaintiffs first argue that these eight post-decisional documents are necessary to determine whether the Corps considered all relevant factors when it reissued Nationwide Permit 12 in January 2017 and to show how the Corps' nationwide permit process "plays out." ECF No. 75 at 3-5. The arguments should be rejected.

First, supplementation under the "relevant factors" exception is permitted only for "information available at the time, not post-decisional information." *Tri–Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (quoting *Rock Creek All. v. U.S. Fish & Wildlife Serv.*, 390 F. Supp. 2d 993, 1002 (D. Mont. 2005)). Courts routinely deny supplementation requests under this exception when the documents were created after the agency decision under review. *E.g.*, *All. for the Wild Rockies v. Zinke*, 265 F. Supp. 3d 1161, 1175 (D. Mont. 2017). These May and June 2017 Keystone XL-specific documents post-date the Corps' January 2017 issuance of Nationwide Permit 12.

Second, there is no need to further explain the Corps' regulatory process, because the existing administrative record fully explains it. *See, e.g.*, NWP005278, NWP005284, NWP005289–303, NWP005303–28, NWP005330–39, NWP005345–46, NWP005348. Indeed, as Plaintiffs illustrate via their citations, Corps regulations clearly set forth that process. *See* ECF No. 75 at 2–3 (citing 33 C.F.R. § 330). Any specific application of that process is simply not at issue in Claims One, Two, and Four. Plaintiffs voluntarily agreed to stay their project-specific challenges to the uses of Nationwide Permit 12 for the Keystone XL project. They cannot now, under the guise of the "relevant factors" exception, use post-decisional project-specific information to challenge the 2017 nationwide

permit issuance.[1] The Corps could not have acted arbitrarily and capriciously because of information that did not even exist at the time of the challenged decision.

Thus, Plaintiffs cannot satisfy their burden to present clear evidence that the existing administrative record is so inadequate that it will frustrate judicial review. *Friends of the Payette v. Horseshoe Bend Hydroelec. Co.*, 988 F.2d 989, 997 (9th Cir. 1993) (upholding decision to exclude extra-record testimony where the "administrative record sufficiently explained the [agency's] decision and showed that the agency considered the relevant factors"); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) ("The original record here adequately explains the basis of the [agency's decision] and demonstrates that the [agency] considered the relevant factors.").

B. The "Complex Subject Matter" Exception Does Not Apply

Plaintiffs also assert that supplementation is warranted under the exception for documents necessary to explain technical terms or complex subject matter. ECF No. 75 at 5-6. This exception requires more than a simple assertion that an extra-record document will assist with the Court's judicial review. Each document

[1] In addition, Plaintiffs repeatedly rely on factual assertions in the parties' Stipulation to Stay Claims Three & Five 1–2, ECF No. 53. But again, the relied upon statement simply repeats Corps regulations: unless the Permit requires a pre-construction notice and Corps verification, the Permit authorizes the work in question without the need for any further action from the Corps.

must be considered carefully to "determine whether it truly assists the court in understanding technical or complex matters." *Alsea Valley All. v. Evans*, 143 F. Supp. 2d 1214, 1216 (D. Or. 2001). Furthermore, application of this exception requires, as a threshold matter, a showing that the existing record is so inadequate as to frustrate judicial review. *Bair v. Cal. State Dep't of Transp*., 867 F. Supp. 2d 1058, 1067 (N.D. Cal. 2012) (*citing Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988)). When the moving party fails to explain with the existing record is inadequate, as here, supplementation under this factor is inappropriate. *Pinnacle Armor*, 923 F. Supp. 2d at 1245.

Notwithstanding their characterizations, Plaintiffs are not truly offering Exhibits A through H to explain some technical matter. Indeed, as articulated above, any such "complexity" is already explained in the record and Corps regulation. Instead, Plaintiffs seek to use the information in an effort to show that, at a project-specific level, the Corps is not implementing Nationwide Permit 12 in the manner presumed when it reissued the permit in early 2017. *E.g.*, ECF No. 73 at 23. But again, this is a project-specific argument relevant to Plaintiffs' stayed Claims Three and Five. Such arguments can be presented if and when Plaintiffs resurrect these claims, but post-decisional examples of permit implementation do nothing to explain "technical terms" or "complex subject matter" about the Corps'

designation of the implementation process when it reissued the permit in early 2017.

C. Plaintiffs' Practicality Appeal Does Not Fall Under the Recognized Exceptions

Finally, Plaintiffs attempt to craft a pragmatic argument, suggesting that supplementation is appropriate now because Exhibits A through H "will almost certainly become part of the administrative record for this case anyway." ECF No. 75 at 6. As well as sidestepping any of the narrow record review exceptions, this argument is also factually incorrect, as it elides the point that there are different agency actions at issue, each with their own administrative records. Plaintiffs' Claims One, Two, and Four challenge the Corps' 2017 decision to issue Nationwide Permit 12. That action is complete and the administrative records supporting that decision have been filed with the Court. However, Plaintiffs' Claims Three and Five are currently stayed, pursuant to the Plaintiffs' agreement, because the Corps suspended those verifications. *See* ECF No. 53. There have been no administrative records filed for those actions.

And, even then, it would not be the pre-construction notices and verifications attached to Plaintiffs' motion that would form the basis of the Court's review. The District Engineer exercised his discretion to suspend the verifications based on the need for Endangered Species Act and General Condition 18 compliance. *Id.* at 1. In addition, TC Energy committed to filing new pre-

construction notices. *Id.* at 2. While it is possible that the Corps could reinstate the authorizations under the NWP, it is also possible that the Corps will issue a new decision on TC Energy's new pre-construction notices. *See* 33 C.F.R. § 330.5(d)(2). Furthermore, as this Court is well aware, the project route through Nebraska changed because of the Nebraska Public Service Commission's selection of the mainline alternative route in late 2017. *Indigenous Envtl. Network v. United States Dep't of State*, 317 F. Supp. 3d 1118, 1119 (D. Mont. 2018). Thus, it is highly unlikely that the Corps' letter to TC Energy (stating that the prior route in Nebraska did not require any PCN verifications) will be the relevant agency determination if and when TC Energy submits a new PCN for mainline alternative route.

Although there may eventually be new Corps decisions with respect to the KXL-specific requests for verification under Nationwide Permit 12, and those decisions will have new administrative records, the question as to whether those records will also contain the documents proffered as Exhibits A though H is irrelevant to whether the administrative record for the Corps' 2017 Nationwide Permit 12 decision should be supplemented with those documents. They are different agency actions, with different administrative records. Whether both actions are taken by the same agency, or will eventually be challenged by Plaintiffs in the same lawsuit, does not relieve Plaintiffs of the burden to show that the

documents meet one of the narrow exceptions to supplement the Corps' administrative record for the 2017 Nationwide Permit 12 decision. Since Exhibits A through H post-date that decision, Plaintiffs cannot make that showing.

II. The Court Should Reject the Attempt to Supplement the Administrative Record for the 2017 Nationwide Permit Decision with the Moot and Extra-Record Exhibit I

Plaintiffs assert that the Court should supplement the administrative record with a superseded 2012 biological opinion from the National Marine Fisheries Service ("NMFS") because it is: (1) referenced in the administrative record; and (2) relevant to Plaintiffs' argument that the Corps "is aware of its obligation to undertake" ESA Section 7(a)(2) consultation on nationwide permit 12. Neither argument is persuasive.

As shown by the references in the existing administrative record, the 2012 NMFS biological opinion failed to take into account changes made to the nationwide permits during the rulemaking process for the 2012 nationwide permits. NWP030588. The Corps reinitiated consultation, which resulted in the "no jeopardy" 2014 biological opinion for the 2012 nationwide permits. The 2014 biological opinion expired along with the 2012 nationwide permits on March 18, 2017. 77 Fed. Reg. 10183. Although the 2014 biological opinion expired, it is included in the record for the 2017 nationwide permits because the Corps considered it in responding to questions from the Office of Information and

Regulatory Affairs during the regulatory planning and review process required under Executive Order 12866.[2] Thus, during the decisionmaking process for the 2017 nationwide permits, the Corps did not directly or indirectly consider the moot 2012 biological opinion. The agency's designation of the administrative record, without the 2012 biological opinion, is entitled to the presumption of regularity. Reference to the moot 2012 biological opinion elsewhere in the record does not overcome the presumption of regularity. *E.g.*, *The Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009) (references to the biological opinion in record documents and public comments does not demonstrate the document itself was before the decisionmaker); *Conservation Cong. v. United States Forest Serv.*, No. 2:13-CV-01922-TLN-CMK, 2016 WL 10637090, at *4 (E.D. Cal. Oct. 12, 2016) (a plaintiff must rebut the presumption of regularity with "concrete evidence" that the agencies considered the document at issue) (citations omitted).

Plaintiffs argue that the moot 2012 biological opinion is "relevant" to their argument that the Corps failed to consult on the 2017 issuance of Nationwide Permit 12. But this is not the standard:

[2] After reinitiation of ESA Section 7(a)(2) consultation, a superseding biological opinion moots the prior biological opinion. *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1124 (9th Cir. 1997); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012).

> Rather than explaining why the Administrative Record is deficient, Plaintiffs provide short explanations on how these documents may be "relevant" to their claims. The Court cannot find that the Administrative Record needs supplementation simply because it does not contain every conceivable document that might be relevant.

Knight v. U.S. Army Corps of Engineers, No. 4:18-CV-352, 2019 WL 3413423, at *3 (E.D. Tex. July 29, 2019) (citations omitted); *see also Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F.Supp.2d 1, 7 (D.D.C. 2006) ("The administrative record is not, however, composed of 'every potentially relevant document existing within [the] agency.'"). Here, as with Exhibits A-H, Plaintiffs cannot satisfy their burden to present clear evidence that the existing administrative record is so inadequate that it will frustrate judicial review. *See Friends of the Payette*, 988 F.2d at 997; *Rybachek*, 904 F.2d at 1296 n.25. The superseding 2014 biological opinion is included in the administrative record (and relied upon by Plaintiffs in their merits brief). In addition to the 2014 biological opinion, Plaintiffs support their merits arguments with reference to numerous other administrative record documents. *See* ECF No. 73 at 31-34. Thus, supplementation of the existing administrative record with the moot 2012 biological opinion is not necessary for judicial review of Plaintiffs' ESA claim.

Finally, despite moving for supplementation under the record review exceptions, Plaintiffs assert that judicial review of Plaintiffs' ESA citizen-suit claim is not governed by the APA's record review rule. Because the ESA citizen-

suit provision contains no internal scope or standard of review, the Court's review of "[a]n agency's compliance with the ESA is reviewed under the [APA]." *Karuk Tribe,* 681 F.3d at 1017; *Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011) (same). This has been the settled standard for more than thirty years, as the Ninth Circuit has consistently reviewed ESA citizen-suit claims in accordance with APA record review principles, and continues to do so today. *See Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004); *Jewell*, 747 F.3d at 602-03 (applying APA "standards" for scope and standard of review to ESA Section 7 claims against consulting and action agency and excluding the parties' competing expert testimony).

In recent years, a handful of litigants have pushed the view that stray statements from *Washington Toxics Coalition v. EPA*413 F.3d 1024, 1034 (9th Cir. 2005), and *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), have overturned the applicability of the APA standard and scope of review to citizen-suit claims. Yet courts within this district have held that:

> *Kraayenbrink* leaves us uncertain whether the panel discarded the APA record review rule entirely or simply found that the extra-record documents presented to the district court in that case fit within one of the four standard exceptions outlined above. The better view, in the opinion of this Court, is that the traditional four exceptions still apply to plaintiffs' requests for supplementation of the administrative record for ESA claims, but the narrowness of the construction and application of these exceptions, see *Lands Council v. Powell*, 395 F.3d

> 1019, 1030 (9th Cir. 2005) ("these exceptions are narrowly construed and applied"), should be relaxed for such claims.

All. for Wild Rockies v. Kruger, 950 F. Supp. 2d 1172, 1177 (D. Mont. 2013) (*quoting All. for the Wild Rockies v. U.S. Dep't of Agric*., CV 11–76–M–CCL, ECF 64 at 6 (July 23, 2012)). "This interpretation is consistent with Ninth Circuit precedent on the applicability of APA record review standards to ESA claims." *Wildwest Inst. v. Ashe*, No. CV 13-6-M-DLC, 2013 WL 12134034, at *2 (D. Mont. Oct. 18, 2013) (citations omitted). Thus, the District of Montana has thrice rejected the "overbroad interpretation of *Kraayenbrink*" advanced here and reaffirmed that "APA record review principles apply to ESA claims."[3] *Id.*

In the end, the Court does not need to reach this question here because the moot 2012 biological opinion was not considered by the decisionmaker and the 2014 superseding biological opinion is part of the existing record, which more than adequately supports judicial review of Plaintiffs' claim.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court deny Plaintiffs' Motion to Supplement the Administrative Record.

[3] With all due respect to this Court's prior ruling on this issue, cited by Plaintiffs, that ruling was made in the context of whether to allow Plaintiffs to submit expert witness testimony, not a run-of-the-mill question concerning supplementation of the record. Federal Defendants respectfully submit that in this situation, the *Kruger* decision and other District of Montana decisions are more on point.

Respectfully submitted this 23rd day of December, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I filed the above pleading with the Court's electronic case management system, which caused notice to be sent to all parties.

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