

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

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Defendants,

TC ENERGY CORPORATION, et al.,

Intervenor-Defendants,

STATE OF MONTANA,

Intervenor-Defendant,

AMERICAN GAS ASSOCIATION, et al.,

Intervenor-Defendants.

CV-19-44-GF-BMM

ORDER

Northern Plains Resource Council, et al. (“Plaintiffs”) filed a Motion to Supplement the Administrative Record. (Doc. 74.) Plaintiffs seek to supplement the administrative record with nine documents (“Exhibits A-I”). (*Id.* at 2; Docs. 75 & 75-1 to 75-9.) Defendants U.S. Army Corps of Engineers, et al. (“Federal Defendants”) and Intervenor-Defendants American Gas Association, et al. oppose Plaintiffs’ motion. (Doc. 74 at 2; Doc. 89.) Intervenor-Defendants TC Energy Corporation, et al. (“TC Energy”) do not oppose Plaintiffs’ use of Exhibits A-I in Plaintiffs’ merits briefs, but state that supplementation of the record would be inappropriate because the agencies did not consider Exhibits A-I in making the

decisions in question. (Doc. 74 at 2.) TC Energy reserves the right to argue that Exhibits A-I have no probative value to the issues currently pending before the Court. (*Id.*) Intervenor-Defendant the State of Montana did not provide a position regarding Plaintiffs' motion. (*Id.*)

BACKGROUND

Nationwide Permit 12 ("NWP 12") involves a streamlined process by which the United States Army Corps of Engineers (the "Corps"), pursuant to the Clean Water Act ("CWA"), approves the construction of pipelines and other linear utility projects through waters and wetlands. *See* 33 U.S.C. § 1344(e)(1); 33 C.F.R. § 330.1(b). An applicant may construct various projects that meet NWP 12's terms and conditions without any notification to, or further review by, the Corps. *See* 33 C.F.R. § 330(c), (e)(1). For some projects, however, an applicant must submit a preconstruction notification ("PCN") to the Corps' district engineer and delay construction until the district engineer verifies that the project meets NWP 12's terms and conditions. *See id.* §§ 330.1(e)(1), 330.6(a)(1). Plaintiffs challenge the Corps' reissuance of NWP 12 and the Corps' application of NWP 12 to oil pipelines, including the Keystone XL Pipeline ("Keystone"). (Doc. 36 at 87-88.)

Plaintiffs allege five claims in their Amended Complaint. (Doc. 36.) Plaintiffs' Claims Three and Five relate to the Corps' verification of Keystone's crossings of the Yellowstone River and the Cheyenne River. (Doc. 36 at 78-81,

85-87.) The Corps has suspended the Yellowstone River and the Cheyenne River verifications. (Doc. 36 at 87.) The Court stayed Claims Three and Five pending further action by the Corps, pursuant to the parties' stipulation. (Doc. 56 at 1.)

Plaintiffs' Claims One, Two, and Four challenge the Corps' decision to issue NWP 12 in 2017. (Doc. 36 at 73-77; 81-84.) Plaintiffs allege that the Corps' reissuance of NWP 12 violated the National Environmental Policy Act ("NEPA"), the CWA, the Endangered Species Act ("ESA"), the Administrative Procedure Act ("APA"), and applicable regulations. (*Id.*) The parties stipulated to a briefing schedule regarding Plaintiffs' Claims One, Two, and Four. (Doc. 56 at 1-2.) Plaintiffs, Federal Defendants, and TC Energy each have submitted motions for partial summary judgment. (Docs. 72, 87, 90.)

The administrative record currently before the Court documents the Corps' decision to reissue NWP 12 in 2017. (Doc. 89 at 6.) Plaintiffs move the Court to supplement the administrative record with Exhibits A-I. (Doc. 75 at 2.) Exhibit A, Exhibit B, and Exhibit C consist of preconstruction notifications ("PCNs") submitted by TC Energy to the Army Corps of Engineers ("Corps") in 2017. (Docs. 75-1 to 75-3.) Exhibit D and Exhibit E consist of the Corps' verification and accompanying memorandum for the record for the Yellowstone River in Montana. (Docs. 75-4 & 75-5.) Exhibit F and Exhibit G consist of the Corps' verification and accompanying memorandum for the record for the Cheyenne

River in South Dakota. (Docs. 75-6 & 75-7.) Exhibit H contains the Corps' June 22, 2017 letter to TC Energy stating that the water crossings in Nebraska do not require certain approvals. (Doc. 75-8.) Exhibit I contains a Biological Opinion released by the National Marine Fisheries Service ("NMFS") in 2012 for a prior version of NWP 12. (Doc. 75-9.)

DISCUSSION

A district court generally limits its review of an agency decision to the administrative record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The APA provides that a reviewing court only may 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). "[T]he 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).

The Ninth Circuit has established four narrow exceptions to the general rule. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); *Nw. Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006) (citing *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)). A district court may admit evidence outside of the administrative record in four circumstances: (1) when supplementation would be necessary to determine whether the agency has considered all relevant factors and has explained its

decision; (2) when the agency has relied on documents not in the record; (3) when supplementation would be necessary to explain technical terms or complex subject matter; or (4) when plaintiffs make a showing of agency bad faith. *Lands Council*, 395 F.3d at 1030 (quoting *Sw. Ctr. For Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)); see also *All. for Wild Rockies v. Kruger*, 950 F. Supp. 2d 1172, 1177 (D. Mont. 2013) (citing *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006)).

The exceptions “operate to identify and plug holes in the administrative record.” *Lands Council*, 395 F.3d at 1030. The exceptions are “widely accepted,” yet “narrowly construed and applied.” *Lands Council*, 395 F.3d at 1030. The Ninth Circuit has emphasized that courts must approach the exceptions “with caution, lest ‘the exception . . . undermine the general rule.’” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601-03 (9th Cir. 2014) (quoting *Lands Council*, 395 F.3d at 1030).

The first exception permits a district court to use evidence outside the administrative record “to develop a background against which it can evaluate the integrity of the agency’s analysis.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). A district court may use evidence outside the administrative record to develop a background because “[i]t will often be impossible, especially when highly technical matters are involved, for the court

to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not.” *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980).

The exception does not permit a district court, however, to use evidence outside of the administrative record “to judge the wisdom of the agency’s action.” *Locke*, 776 F.3d at 993. That is, a district court may admit the evidence to help the court understand whether the agency complied with the APA’s requirement that the agency’s decision be neither arbitrary or capricious, but a district court may not use the evidence as a basis for questioning the agency’s scientific analyses or conclusions. *Id.*

I. Exhibits A-H

Plaintiffs assert that the Court should admit Exhibits A-H under the first exception to the general rule because the documents are necessary to determine whether the Corps considered all relevant factors and explained its decision. (Doc. 75 at 4; *see Lands Council*, 395 F.3d at 1030.) The Court agrees and concludes that the admission of Exhibits A-H will help to develop a background against which it can evaluate the integrity of the Corps’ analysis. *See Locke*, 776 F.3d at 993. Plaintiffs assert that the NEPA and the CWA required the Corps to analyze the direct, indirect, and cumulative effects of the projects authorized by NWP 12 and

to ensure that the projects would, individually and cumulatively, have only minimal adverse effects on the environment. (Doc. 75 at 4.) Plaintiffs fault the Corps for deferring too much of the analysis to the project level. (*Id.*)

Plaintiffs present Exhibits A-H to show how that process played out in the context of Keystone. (*Id.* at 5.) Exhibits A-C indicate that Keystone will cross hundreds of jurisdictional waterways, many of which are near each other and common waterways. (*See generally* Docs. 75-1 to 75-3.) Plaintiffs represent that Exhibits D-H demonstrate the Corps' understanding that NWP 12 does not require the Corps to perform a cumulative effect analysis when it issues river verifications. (*See generally* Docs. 75-4 to 75-8.) Plaintiffs assert that Exhibits A-H demonstrate how NWP 12 allows TC Energy to construct Keystone through waterways even though the Corps has not prepared a project-level analysis that evaluates Keystone's cumulative effects as mandated by the NEPA and the CWA. (Doc. 75 at 5-6.)

The Court carefully will use Exhibits A-H for the limited purpose of understanding whether the Corps considered all relevant factors and complied with the APA's requirement that an agency's decision be neither arbitrary or capricious. *See Locke*, 776 F.3d at 993. The Court will not use Exhibits A-H to judge the wisdom of the Corps' actions or to question the Corps' scientific analyses or

conclusions. *See id.* The administrative record will be supplemented to include Exhibits A-H.

II. Exhibit I

Exhibit I is a Biological Opinion released by NMFS in 2012 for a prior version of NWP 12. (Doc. 75-9.) Plaintiffs assert that Exhibit I will assist the Court in evaluating Plaintiffs' Fifth Claim that the Corps failed to conduct programmatic consultation with NMFS and the United States Fish and Wildlife Service, as required by the ESA, when it reissued NWP 12 in 2017. (Doc. 75 at 8-9.)

Plaintiffs note that the 2012 Biological Opinion found that the Corps' implementation of the nationwide permit program, including NWP 12, jeopardized the continued existence of endangered and threatened species under NMFS's jurisdiction. (Doc. 75 at 9.) Plaintiffs represent that the 2012 Biological Opinion's finding led the Corps to modify nationwide permits to allow NMFS to determine whether NWP 12 would jeopardize threatened and endangered species within NMFS's jurisdiction. (*Id.*) Plaintiffs assert that the 2012 Biological Opinion demonstrates that the Corps remains aware of its obligation to undertake programmatic consultation under the ESA and that the Corps recognizes that the programmatic consultation aids in protecting federally listed species. (*Id.*)

The Court will admit the 2012 Biological Opinion for the limited purpose of analyzing Plaintiffs' Fifth Claim that the Corps failed to conduct programmatic

consultation with NMFS and the United States Fish and Wildlife Service, in violation of the ESA, when it reissued NWP 12 in 2017. *See Locke*, 776 F.3d at 993. The Court will not use Exhibit I to judge the wisdom of the Corps' actions or to question the Corps' scientific analyses or conclusions. *See id.* The administrative record will be supplemented to include Exhibit I.

ORDER

It is hereby **ORDERED** that Plaintiffs' Motion to Supplement the Administrative Record (Doc. 74) is **GRANTED**.

DATED this 8th day of January, 2020.



Brian Morris
United States District Court Judge