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

CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, MONTANA ENVIRONMENTAL INFORMATION CENTER, FRIENDS OF THE EARTH, and WATERKEEPER ALLIANCE, INC.,
Plaintiffs,

v.

LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity, and U.S. ARMY CORPS OF ENGINEERS,
Defendants,

STATE OF MONTANA,
Defendant-Intervenor,

and

AMERICAN GAS ASSOCIATION, et al.,
Defendant-Intervenors.

Case No. CV-21-47-GF-BMM

NWP 12 COALITION'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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I. Introduction

The U.S. Army Corps of Engineers ("Corps") fully complied with the Clean Water Act ("CWA"), Endangered Species Act ("ESA"), and National Environmental Policy Act ("NEPA") when reissuing Nationwide Permit ("NWP") 12. 86 Fed. Reg. 2744 (Jan. 13, 2021). Plaintiffs continue to seek to expand the scope of the Corps' statutory authority and to ignore the restrictions placed on the agency action at issue—Corps Headquarters' reissuance of NWP 12.

The Corps' statutory authority is limited to "discharges" of dredged or fill material into "waters of the U.S." ("WOTUS"). 33 U.S.C. §1344(e). The 2021 NWP 12 authorizes minor, and typically temporary, discharges associated with "the construction, maintenance, repair and removal" of oil and natural gas pipelines and associated facilities. 86 Fed. Reg. at 2860.

To meet its obligations under the CWA, NEPA, and ESA, the Corps analyzed the activities ("discharges") authorized by the Headquarters' reissuance of NWP 12. Corps Headquarters determined that the discharges "are similar in nature" and "will cause only minimal adverse environmental effects," as required by the CWA; studied the reasonably foreseeable effects of the authorized discharges, consistent with NEPA; and concluded that the activities as restricted, due to the numerous binding and enforceable limitations in NWP 12, including

General Condition ("GC") 18, have "no effect" on listed species or designated critical habitat, satisfying the ESA.

Summary judgment should be granted in favor of the Federal Defendants and Defendant-Intervenors.

II. Plaintiffs Lack Standing for Their ESA Claim

Plaintiffs' attempt to rehabilitate their standing fails. Plaintiffs have not identified any specific, current application of NWP 12 that threatens imminent harm to their claimed interests.[1]

In response, Plaintiffs submit two untimely declarations referring to projects that post-date their complaint.[2] Hartl (an Arizona resident) cites a *suspended* NWP 12 verification for a Kentucky pipeline. (Doc. 78-1 ¶4). The Corps could still determine an individual permit is required for this project. And Hartl concedes the Corps engaged in formal consultation with the Fish & Wildlife Service ("FWS") on the project, resulting in a biological opinion that evaluated and addressed potential impacts to species (*id.* ¶¶5-6), and the Corps recently

[1] Plaintiffs cite a 2021 NWP 12 verification for the Byron pipeline, but that project would be constructed *under* the Yellowstone River, and there are no listed species or critical habitat in the area. (Doc. 67 at 15-16). Moreover, Plaintiffs concede they are not relying on the Krum declaration (which refers to Byron pipeline) for purposes of standing. (Doc. 78 at 3 n.1). Thus, venue is improper in this District for Plaintiffs' ESA claim. (Doc. 81 at 21-22).

[2] These declarations are not properly before the Court and should be struck. (Doc 81 at 19).

reinitiated consultation to address new information. (Doc. 81-2 at ¶¶28-29). The ongoing ESA consultation for the Kentucky pipeline is the same that would occur if NWP 12 were unavailable and an individual permit was instead required.

Nonetheless, Hartl claims his interests in "bats" will be harmed. He points to use of a "portable bat detector that connects to an iPhone" and plans to observe "wildlife, including Indiana bats and northern long-eared bats" during visits to National Forests and Parks "in Washington, DC, Virginia, West Virginia, and the Carolinas this May and June." (Doc. 78-1 ¶9). The dots do not connect. There is no link between discharges associated with a suspended verification for a project in Kentucky, where effects to species have been addressed, and Hartl's generalized interests in bats he may observe this May and June in geographically distinct states, untethered to any use of NWP 12. *Compare with Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 906, 909 (9th Cir. 2020) (injury-in-fact requirement established where contested agency action would be applied in geographic location reasonably close to plaintiff).

Hamel (a Georgia resident) refers to a natural gas pipeline project in South Carolina, which is under review by the Charleston District. (Docs. 78-2 ¶4; 81-1 ¶10). No NWP 12 verification has been issued, and the Corps could still require an individual permit.

Hamel alleges the project will harm designated critical habitat for the Atlantic sturgeon. (Doc. 78-2 ¶¶6-8). But the Charleston District is coordinating with the Services and currently believes the project will have "no effect" on the Shortnose sturgeon and Atlantic sturgeon and its designated critical habitat in the Pee Dee River because the project is located outside—and does not cross—sturgeon designated critical habitat. (Doc. 81-1 ¶¶13, 15-16). Moreover, this natural gas pipeline, contrary to Hamel's declaration, plainly could not cause "oil spill[s] in any of the river's tributaries." (Doc. 78-2 ¶7). And, finally, while Hamel asserts the project would harm his "ability to study and enjoy sturgeon and their habitats," he fails to identify any plans to visit South Carolina. (*Id*. ¶10). Hamel's claimed injuries are patently inconsistent with the facts and the expert agencies' determinations.

In sum, Plaintiffs have failed to identify any current NWP 12 project that harms their claimed interests in listed species or habitat. They have cited no projects where the Corps failed to consult, or an applicant failed to notify the Corps and caused harm to listed species or habitat. Indeed, NWP 12's binding conditions ensure that no activities that have any effect on species or habitat may occur without submission of pre-construction notification ("PCN"), any requisite consultation, and confirmation that the ESA's requirements are met. For the

reasons explained by the Federal Defendants, Plaintiffs' claims of procedural harm also fail. (Doc. 81 at 16-19).

Plaintiffs' ESA claim must be dismissed.

III. The Corps Met Its Obligations Under the ESA When Reissuing NWP 12

The discharges authorized by NWP 12 at the Headquarters-level are restricted in scope to those that have "no effect" on listed species or habitat. The Corps met its ESA obligations when it determined its "action"—Headquarters' reissuance of NWP 12—has "no effect" on species or habitat, and that determination is entitled to deference.

Plaintiffs seemingly conflate the Headquarters-level "action" with later NWP 12 actions that trigger GC 18. Project-specific uses of NWP 12 are new agency actions, *only* permitted by the Corps District after review of PCN, consultation, if appropriate, and written confirmation that the ESA's requirements are met. Such later project-specific uses of NWP 12 are distinct actions from the Headquarters' reissuance action. The Corps complies with the ESA independently for each discrete agency action.

A. Headquarters' reissuance of NWP 12 is restricted to only those activities that have "no effect" on listed species or designated critical habitat.

The ESA charges the action agency with defining the scope of its action and assessing whether that action has effects on listed species or habitat. 16 U.S.C.

§ 1536(a)(2). Based on the action agency's review of its action, it may be required to consult with the Services.

In defining the scope of the agency action, it is appropriate to consider restrictions on that action. The Services' regulations explain that a proposed action "include[es] any measures intended to avoid, minimize, or offset effects of the action," and the description of the action should be "[c]onsistent with the nature and scope of the proposed action … [to] provide sufficient detail to assess the effects of the action on listed species and critical habitat." 50 C.F.R. § 402.14(c)(1)(i).

The case law affirms this principle: "[T]he duty to consult is bounded by the agency action." *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1208 (10th Cir. 2014). "When an agency action has clearly defined boundaries, we must respect those boundaries…." *Id.* at 1209. Such boundaries include "'specific and binding plans'" and enforceable mitigation measures, such as GC 18 and other NWP conditions. *Nat'l Family*, 966 F.3d at 923; *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 956 (9th Cir. 2003) (appropriate for Forest Service and FWS to consider enforceable mitigation measures when evaluating project for ESA compliance).

Here, the Corps' "action," Headquarters' reissuance of NWP 12, has "clearly defined boundaries." Headquarters' reissuance is bounded in scope and restricted

due to GC 18, which *prohibits* use of NWP 12 if any activity "might" affect listed species or is in the vicinity of designated critical habitat. 86 Fed. Reg. at 2869. If GC 18 is triggered, the prospective permittee "cannot begin the activity until receiving written notification from the Corps" that the ESA's requirements have been met. *Id.* at 2809. NWP 12's restrictions are "specific and binding" and "enforceable," and cabin the activities *actually* authorized by Headquarters' reissuance.

For purposes of ESA §7(a)(2), the Corps completed a biological assessment to assess the effects of the Headquarters' "action." The Corps determined that Headquarters' reissuance of NWP 12, as restricted and conditioned, has "no effect" on listed species and critical habitat. Once a "no effect" determination is made, nothing more is required. *California ex rel. Lockyer v. Dep't of Agric.*, 575 F.3d 999, 1019 (9th Cir. 2009).

Plaintiffs argue that the Corps unlawfully relies on project-specific consultations to defer consultation on Headquarters' reissuance of NWP 12, or narrow the "action" Headquarters evaluated to reach its "no effect" determination. (Doc. 78 at 13, 19-20). But the Corps does not rely on project-specific ESA consultations to meet its ESA obligations for Headquarters' reissuance of NWP 12. Proposed project-specific uses of NWP 12 that trigger GC 18 are *new actions*, distinct from Headquarters' action. Those future, proposed uses of NWP 12 that

come within GC 18 require submission of PCN for their own ESA "effects" determination, and are not authorized until an independent ESA consultation, if required, is completed and the Corps District issues a verification.

B. Plaintiffs' cases involve unrestricted agency actions that "may affect" species and are readily distinguishable from Headquarters' reissuance of NWP 12.

Plaintiffs continue to rely on factually distinguishable cases involving "may affect" (rather than "no effect") agency actions. (Doc. 28 at 18-19).

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1998) ("*Conner*"), involved issuance of leases, which granted exclusive rights to undertake future post-leasing activities, without *any restrictions*. Because there were *no restrictions* to prohibit post-leasing activities, the Ninth Circuit held that consultation needed to address both leasing and post-leasing activities. *Id.* at 1458. That is not the case with Headquarters' reissuance of NWP 12, which restricts the authorized activities at the outset and *prohibits* later activities that even "might affect" listed species or habitat, until any necessary project-specific consultation is complete.

Lane County Audubon Society v. Jamison, 958 F.2d 290 (9th Cir. 1992) ("*Lane County*"), is similarly distinguishable. The action there—the Jamison strategy—set forth criteria for selecting land for logging in owl habitat. The agency failed to make *any* effects assessment because it contended the strategy was not an action. The court required consultation on the strategy, separate from any

future individual actions that would occur. *Id.* at 293. Indeed, the court concluded, as is the case here, that there were two separate agency actions subject to ESA consultation. *Id.* The court required consultation at both stages because both "actions" "may affect" listed species or critical habitat. Here, the Corps satisfied its ESA obligations by determining that the Headquarters-level action, as restricted, has "no effect" on listed species or habitat. And independent consultation is required for any proposed project-specific uses of NWP 12 that "might affect" species or habitat, before they are permitted.

Finally, the record here differs significantly and meaningfully from *Western Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 498 (9th Cir. 2011), where the Ninth Circuit held that BLM erred in finding that amendments to grazing regulations had "no effect" on listed species or critical habitat, citing "resounding evidence" from agency experts that the amendments "may affect" listed species and habitat.

Plaintiffs point to nothing showing that the restrictions on NWP 12 fail to work as structured, or that use of NWP 12 has resulted in effects to listed species or critical habitat that were not appropriately addressed through consultation. Indeed, the three NWP 12 projects cited in their declarations demonstrate that the process works. *See supra* at 2-4.

Similarly, Plaintiffs fail to show that the Services disagree with the "no effect" determination. (Doc. 81 at 31). The letter Plaintiffs cite (Doc. 78 at 26) is from a FWS field office and does not represent FWS's official position (Doc. 67 at 32 n.17). The Services could have requested consultation, but did not.

C. Programmatic consultation is not required and would add nothing.

An action agency is *not* required to undertake "programmatic consultation" for an action (program, rule, permit, or otherwise) that has no effect. The Services' regulations confirm this position. The preamble to the Services' 2015 regulations explains "this [rule] does *not* imply that section 7 consultation is required for a framework programmatic action that has *no effect* …." 80 Fed. Reg. 26,832, 26,835 (May 11, 2015) (emphases added); *see also* 84 Fed. Reg. 44,976, 44,996 (Aug. 27, 2019) (emphasizing that "many types of programmatic consultation would be considered an optional form of section 7 compliance"). Headquarters' action has "no effect," and therefore, programmatic consultation is not required.

Moreover, it's unclear what Plaintiffs think programmatic consultation would add. Plaintiffs concede (as they must) that the Corps need not evaluate all NWP 12 activities that could be authorized at some point in the future. (Doc. 78 at 17 n.7). Even if the Corps undertook a programmatic analysis of the Headquarters-level action, future project-specific uses of NWP 12 (which are their own federal actions) would be excluded. The Services' cumulative effects definition

specifically excludes future "Federal actions" because they will be analyzed in a future consultation. 50 C.F.R. § 402.02. The "action"—Headquarters' reissuance of NWP 12—has "no effect," and thus, the cumulative effects (and aggregate effects) of the Headquarters' action are zero. "Zero plus zero is still zero." (Doc. 60 at 48-49). However you slice and dice it, there is nothing.

Ultimately, it appears that the Plaintiffs seek to "ensure … appropriate mechanisms are in place for tracking, avoiding, minimizing, and mitigating impacts … to avoid jeopardy." (Doc. 78 at 17 n.7, 27-28). However, the "mechanisms" Plaintiffs seek—to track and avoid impacts to species—already exist in GC 18. *No activity* is authorized under NWP 12 that "might affect" listed species" *unless and until* the District Engineer provides confirmation that the ESA's requirements are met.

Programmatic consultation is not required for this "no effect" action. The Corps made a rational determination that Headquarters' reissuance of NWP 12 has no effect on species, which is entitled to deference. *Nat'l Family*, 966 F.3d at 923 (upholding EPA's "no effect" finding under deferential standard of review).

IV. Courts Have Routinely Held That NWP 12 Complies with the CWA and NEPA

The Corps fully complied with the CWA in reissuing NWP 12, and met its NEPA obligations by properly considering reasonably foreseeable environmental effects caused by the discharge of dredged or fill material into WOTUS. Plaintiffs'

CWA and NEPA claims are nothing more than a rehash of prior arguments rejected by courts across the country.

Most relevant is *Sierra Club v. Bostick*, which upheld the structure and substance of NWP 12.[3] No. CIV-12-742-R, 2013 WL 6858685 (W.D. Okla. Dec. 30, 2013), *aff'd* 787 F.3d 1043 (10th Cir. 2015) ("*Bostick*"). *Bostick* squarely rejects Plaintiffs' contention that use of NWP 12 for "separate and distant" crossings fails to meet the §404(e) standard. *Id.* at *19-20, *22-23; 787 F.3d at 1056; (Doc. 78 at 51). The Corps' "separate and distant" definition has been codified since 1988 and reflects the Corps' long-standing practice to calculate impacts, for purposes of satisfying the ½-acre NWP threshold, separately for each "separate and distant" crossing. (Doc. 81 at 2-3). The *Bostick* district court upheld the "single and complete linear project" definition, 2013 WL 6858685, at *19-20, and the Tenth Circuit affirmed, finding "[t]he Corps' use of the 'separate and distant' test was not arbitrary or capricious," 787 F.3d at 1056. The *Bostick* district court and Tenth Circuit further confirmed the Corps made the necessary minimal effects determination to comply with §404(e), when it reissued NWP 12, and that determination was entitled to deference. *Bostick*, 2013 WL 6858685, at *22-23; 787 F.3d at 1055. Nothing has changed.

[3] Plaintiffs argue that *Bostick* addressed an earlier iteration of NWP 12. But the Corps' approach and structure for its minimal effects determination are substantively the same as those reviewed and upheld by the Tenth Circuit. (Doc. 81 at 4 n.2).

Plaintiffs next assert that the Corps' reliance on "post-issuance procedures" and project-specific reviews fails to ensure compliance with §404(e). (Doc. 78 at 55-57). This argument, too, has been reviewed and rejected by the courts. The Corps' "reliance on post-issuance procedures" has been upheld as "a reasonable, if not the only possible, way for it to cement its determination that the projects it has authorized will have only minimal environmental impacts." *Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 501 (4th Cir. 2005); *see also Bostick*, 787 F.3d at 1058, 1060-61 (Corps need only make "reasoned predictions" regarding future minimal adverse environmental and cumulative effects).

Plaintiffs' NEPA claims fare no better. Plaintiffs contend that the Corps' cumulative effects analysis was lacking, and that the Corps was obligated to consider broader operations impacts, such as oil and gas spills and greenhouse gas ("GHG") emissions, from pipelines that might rely on NWP 12.[4] Numerous courts have found otherwise.

The D.C. Circuit rebuked Plaintiffs' expanded view of NEPA in *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015), confirming that the Corps' NEPA duties are limited by the nature of its permitting authority. The D.C. Circuit rejected Sierra Club's claim that the Corps should have analyzed the impact

[4] For the reasons explained by the Federal Defendants (Doc. 81 at 11-13), the Corps' assessment of potential effects from hydraulic directional drilling and to forested wetlands also complied with NEPA.

of the construction and operation of an entire pipeline when issuing NWP 12 verifications for that project, and upheld the Corps' NEPA and cumulative effects analyses for NWP 12.

The *Bostick* district court similarly upheld the Corps' cumulative effects analysis for NWP 12, and determined the agency reasonably studied the impacts of NWP 12, which did not require analysis of attenuated effects, such as oil spills. 2013 WL 6858685, at *9. *See also Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engr's*, 833 F.3d 1274, 1286, 1289 (11th Cir. 2016) (upholding Corps' approach for analyzing cumulative effects).

Plaintiffs rely on cases that are distinguishable because they either involve challenges to individual §404 permits for specific projects, where the Corps' role may be more significant, or where the agency's governing statute was interpreted more broadly than the Corps' limited authority under the CWA (like FERC in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017)).[5] (Doc. 78 at 42, 44-48).

The Corps met its NEPA obligations for the 2021 NWP 12 reissuance by evaluating the reasonably foreseeable effects of the discharges and properly declined to evaluate attenuated effects, such as oil spills and GHG emissions, which fall outside its jurisdiction and control. (Doc. 67 at 40-46).

[5] The Coalition does not concede that *Sierra Club v. FERC* was properly decided. (Doc. 67 at 46 n.22).

V. Vacatur of NWP 12 Is Not Appropriate

If the Court finds in Plaintiffs' favor, any remedy must be narrowly tailored to address deficiencies identified by the Court. (*Id*. at 50). The parties agree further remedy briefing would be warranted, but such briefing should be limited to the existing administrative record. As we explained, vacatur of NWP 12 is not warranted. (*Id.*).

VI. Conclusion

The Court should grant the Federal Defendants' and Defendant-Intervenors' cross-motions for summary judgment.

Date: May 27, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Reply in Support of Cross-Motion for Summary Judgment of American Gas Association, American Petroleum Institute, American Public Gas Association, Association of Oil Pipe Lines, and Interstate Natural Gas Association of America complies with the requirements of Local Rule 7.1(d)(2) and contains 3,241 words, excluding the parts exempted by Local Rule 7.1(d)(2)(E), according to the word count calculated by Microsoft Word for Microsoft 365.

/s/ Karma B. Brown

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I filed the above Reply in Support of Cross-Motion for Summary Judgment with the Court's electronic case management system, which caused notice to be sent to all parties.

/s/ Karma B. Brown