AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

Counsel for Intervenor-Defendant

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

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,

PLAINTIFFS,

V.

LIEUTENANT GENERAL SCOTT A. SPELLMAN, IN OFFICIAL CAPACITY, AND U.S. ARMY CORPS OF ENGINEERS,

FEDERAL DEFENDANTS.

AMERICAN GAS ASSOCIATION, ET AL.

INTERVENOR-DEFENDANTS.

STATE OF MONTANA.

INTERVENOR-DEFENDANT.

No: 4:21-CV-00047-BMM

STATE OF MONTANA'S REPLY BRIEF IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This Court should grant Defendants' cross-motion for summary judgment in favor of Defendants. In issuing Nationwide Permit 12 ("NWP 12"), the Corps complied with the Clean Water Act ("CWA"), National Environmental Policy Act ("NEPA"), and Endangered Species Act ("ESA"). NWP 12—like other NWPs—eliminates unnecessary and burdensome regulatory obstacles that stymie routine activities with minimal adverse effects. And NWP 12—like other NWPs—advances Congress's goal of regulating these projects with minimal "duplication, needless paperwork, and delays." 33 U.S.C. § 1344(q); *see also* 33 CFR § 330.1(b).

To minimize redundant briefing, Montana agrees with the Corps that NWP 12 complies with CWA Section 404(e), NEPA, and the ESA. *See* ECF 81. For purposes of this reply brief, Montana focuses on Plaintiffs' CWA and ESA claims.

I. NWP 12 complies with Section 404(e) of the CWA.

Under the CWA, the Corps may issue a nationwide permit if the Corps determines that the activities falling under that permit "will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). This analysis does not cover every possible adverse effect,

but rather is limited to "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." 40 C.F.R. § 230.11(g)(1).

Plaintiffs continue to assert two primary arguments with respect to the CWA. They claim that both the Corps' "separate and distant" justification and its post-issuance procedures violate CWA Section 404(e)'s minimal effects mandate. ECF 75, at 65. But Plaintiffs fail to show that that the Corps' determination under Section 404(e) lacks a "substantial basis in fact." *Sierra Club v. Bostick*, 787 F.3d 1043, 1055 (10th Cir. 2015). And in doing so, Plaintiffs fail to consider the multi-level regulatory process that provides numerous safeguards to our nation's waters.

For linear projects, the Corps has long treated each crossing of a waterway to be a "single and complete project" if the crossings are "separate and distant." *See* Regulatory Guidance Letter 88-06, at 1, 3 (June 27, 1988). And courts have routinely upheld the Corps' use of the "separate and distant" treatment of linear projects. *See, e.g.*, *Bostick*, 787 F.3d at 1055; *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs*, 88F.3d 906 (8th Cir. 2017); *Optimus Steel, LLC v. U.S. Army Corps of Eng'rs*, 492 F. Supp. 3d 701, 722–23 (E.D. Tex.

2020). If Congress wanted to limit the number of times a linear project could cross a waterway, or if Congress wanted to speak to this question generally, it could do so. But Congress chose not to, instead giving the Corps discretion so long as the activities "cause only minimal adverse environmental effects when performed separately." 33 U.S.C. § 1344(e).

The Corps' tiered structure is important when looking at its "separate and distant" treatment. Division and district engineers both play important roles at the regional and local level. 33 CFR § 330.5(c)–(d). District engineers, specifically, verify that proposed activities are sufficiently separate and distant, taking into account location-specific considerations. 86 Fed. Reg. 2744, 2778 (Jan. 13, 2021); *see also* 33 CFR § 330.5(d). To the extent Plaintiffs take issue with these individual verifications, they can bring those claims in a separate suit.

Plaintiffs next take issue with the Corps' project-level review. They allege that certain non-PCN (Pre-Construction Notification) projects *might* have more than minimal adverse effects. ECF 78, at 65–67. But the Corps must only make "reasoned predictions" about future minimal adverse environmental and cumulative effects. *See Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 501 (4th Cir. 2005); *Bostick*, 787 F.3d at

1058–59. As long as the Corps undertakes some pre-issuance analysis of environmental impacts, it can rely on post-issuance procedures "to cement its determination that the projects it has authorized will have only minimal environmental impacts." *Bulen*, 429 F.3d at 501.

And again, the Corps is not the only entity involved in approving permit projects or setting standards to protect the integrity of this nation's waters. States, among others, undertake rigorous review of projects authorized by NWP 12, providing important and independent environmental safeguards. ECF 64, at 9–13. Thus, to the extent Plaintiffs' complaint is simply that the Corps should do more because more can be done, States and other federal agencies are doing more in conjunction with the Corps. *Id.*

Just because Plaintiffs want the Corps to undertake a more rigorous or detailed review of individual projects does not mean the Corps violated the CWA. Requiring this detailed analysis would run counter to the very purpose of NWPs, which is to streamline projects where individualized review would be a purposeless waste of time.

II. Plaintiffs Lack Standing to Bring ESA Claim.

A. Individual Standing

Plaintiffs lack standing to bring their ESA claim because they have not alleged any injury-in-fact that is fairly traceable to NWP 12. They assert that by pointing to Plaintiffs' own declarations, Defendants "attempt to misdirect the Court's attention." ECF 78, at 13 n.1. Plaintiffs now claim they "are not relying on Mr. Krum's declaration" about injury from the Byron Pipeline but instead are relying on new arguments about procedural injury. *Id.* They fail to persuade.

The new declarations assert no harm sufficient to establish standing. As Federal Defendants note, these new purported harms alleged post-date the filing of this action. ECF 81, at 27. But standing is evaluated based on facts that were known at the time of the commencement of the lawsuit. *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007).

The alleged harms fail to meet the minimum requirements to establish standing. Again, Plaintiffs must demonstrate a "concrete and particularized" injury that is "fairly traceable to the challenged action" and is likely redressable by a favorable court decision. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). A concrete and particularized injury is one that is "certainly impending" or where there is a "substantial

risk" the harm will occur. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013). And it must have a "geographic nexus between the individuals asserting the claim and the location suffering the environmental impact." *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 909 (9th Cir. 2020) (cleaned up). As Defendants have argued, Plaintiffs failed to establish standing through the first round of declarations. The new declarations also fail to establish standing.

1. Hartl Declaration

Mr. Hartl's two declarations demonstrate the deficiencies in Plaintiffs' standing arguments. Mr. Hartl asserts that he is "interested in viewing threatened and endangered species in their natural habitats," including Indiana bats and northern long-eared bats. ECF 45-4, ¶ 23; ECF 78-1, ¶ 10. But Mr. Hartl only alleges speculative and hypothetical harms about what might happen under non-specified NWP 12 projects. ECF 45-4, ¶¶ 24–30. His initial declaration only identifies the Keystone Pipeline, which was cancelled after the Biden Administration revoked its

permit. Executive Order 13990 (Jan. 20, 2021). The initial declaration fails to identify any other projects under NWP 12.

Plaintiffs argue that they do not have to identify any specific project because the Corps does not publish a list of NWP 12 projects. ECF 78, at 17 (citing *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003)). But *Citizens for Better Forestry* is meaningfully distinct because the environmental plaintiffs established that there was a reasonable probability that their concrete interests in certain areas would be threatened. 341 F.3d at 972. In that case, the challenged rule eliminated explicit environmental requirements from previous versions of the rule, which led to harm that was not attenuated and likely to occur. *Id.* at 974–75. Here, Plaintiffs do not argue that NWP 12 has somehow undone environmental regulations—their argument is just that the Corps should do *more* to prevent the purported harm. They also fail to show that they "*will* suffer harm by virtue of their geographic proximity to and use of areas that *will* be affected by" the Corps' issuance of NWP 12. *Id.* at 971.

Because Mr. Hartl's initial declaration identifies no specified project, it rests instead on hypotheticals, claiming without citation that

these species have "historically been affected by pipeline development" and that NWP 12 "*may* adversely affect listed species." ECF 45-4, ¶¶ 26–27. These concerns are neither concrete, fairly traceable to NWP 12, or redressable by this court. *See Summers*, 555 U.S. at 493.

Only now—after Defendants pointed out the deficiencies in Plaintiffs' ESA claims—does Mr. Hartl discuss a specific pipeline project.[1] He says he "bec[a]me aware" of a methane gas transmission pipeline in Bullitt County, Kentucky. ECF 78-1, ¶¶ 3–4. But standing is evaluated by the facts that existed at the time of the commencement of the action. *Skaff*, 506 F.3d at 838. Even if Mr. Hartl's interest in observing or studying specific species existed at the commencement of the lawsuit, there was no "impending" threat or "substantial risk" to those injuries at that time. *See generally* ECF 45-4. And importantly, he does not ever say that he intends to visit Kentucky where this purportedly harmful pipeline project is located. ECF 78-1, ¶¶ 3, 9. *But see Citizens for Better Forestry*, 341 F.3d at 971 (requiring geographic nexus); *Nat'l Family*

[1] Mr. Hartl discussed the Keystone project in his first declaration, but the Biden Administration revoked the Keystone permit, cancelling the project. *See* Executive Order 13990 (Jan. 20, 2021). Plaintiffs can assert no harms stemming from a project that no longer exists.

Farm Coal., 966 F.3d at 909. He instead alleges that he has some travel plans in May or June to other locations and he wants to "find bats after dark and observe them." ECF 78-1, ¶ 9. Mr. Hartl's general concerns about the impact that the Kentucky project[2] will have on his ability to study bats in other parts of the country is not a concrete harm that is fairly traceable to the NWP 12 permitting process undergone by the Corps. *See Nat'l Family Farm Coal.*, 966 F.3d at 909. And it is not clear how declaring that NWP 12 violated the ESA, NEPA, CWA, or APA, and remanding for so-called compliance will bolster Mr. Hartl's ability to study bats in other states. ECF 45-4, ¶ 9.

Plaintiffs cannot defy the space-time continuum by compounding general, individual interests in species at the beginning of the lawsuit with perceived harms they identify months later in litigation. The Court looks at standing at the beginning of the lawsuit. *See Skaff*, 506 F.3d at 838; *see also White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000); *Friends of*

[2] The Corps recently suspended the permit for the Bullitt County Pipeline, which has not yet started construction. *See* ECF 81-2, ¶ 29; *see also* Marcus Green, *Feds suspend permit for LG&E's proposed Bullitt County pipeline*, WDRB.com (Apr. 27, 2022), https://www.wdrb.com/in-depth/feds-suspend-permit-for-lg-e-s-proposed-bullitt-county-pipeline/article_d6f2f21e-c67f-11ec-bdc6-cb51779a0802.html.

the Earth, Inc. v. Laidlaw Env't. Servs., Inc., 528 U.S. 167, 189 (2000). Plaintiffs' reliance on Hartl's new declaration does not alter their deficiencies in standing to bring their ESA claims. *See* ECF 64, 13–14.

2. Hamel Declaration

For similar reasons, Mr. Hartl's declarations fail to establish standing for Plaintiffs to bring their ESA claim. Mr. Hamel has an interest in studying sturgeon, which he claims "may be adversely affected by oil [spills]" that "are likely to occur from NWP 12-authorized activities." ECF 45-3, ¶ 13. But Mr. Hamel admits that he does know where NWP 12 projects will occur or whether they will cross habitat for imperiled sturgeon. ECF 45-3, ¶ 11. Abstract concerns about sturgeon are not concrete, traceable to NWP 12, or redressable by this court. *See Summers*, 555 U.S. at 493.

Like they did with Mr. Hartl's declarations, Plaintiffs now seek to bolster Mr. Hamel's initial declaration with new evidence. Mr. Hamel says he has now "bec[o]me aware" of a new pipeline project in South Carolina. ECF 78-2, ¶ 3. Again, though, a court only looks to the facts that existed at the time of the commencement of the lawsuit. *Skaff*, 506 F.3d at 838. At the time of the lawsuit, Mr Hamel did not even know about

the South Carolina project.[3] ECF 78-2, ¶ 3. Just because Mr. Hamel has an interest in observing specific species that existed at the time of the lawsuit, he cannot use a later-discovered project (that the Corps hasn't even finished reviewing) to retroactively establish standing. *Skaff*, 506 F.3d at 838. And even if he could, he does not allege that he ever plans to visit South Carolina to observe the sturgeon that may be impacted. *See Nat'l Family Farm Coal.*, 966 F.3d at 909 (requiring a geographic nexus). General claims of harm stemming from a later-discovered pipeline project don't establish standing for Plaintiffs' ESA claims.

B. Organizational Standing

An organization—like Plaintiffs here—may seek judicial relief only where the organization satisfies "the requirement for individual standing." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). Because Plaintiffs fail to establish individual standing, they also fail to establish organizational standing.

To the extent Plaintiffs claim to suffer any organizational harm, these claims also do not establish standing for their ESA claim. Plaintiffs

[3] The Corps has not completed its review of the PCN for this project. ECF 81-1, ¶ 22.

do not claim that they have had to divert resources apart from this litigation, that they have had trouble securing funds or obtaining members, or that they have been unable to perform their usual business activities. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc); *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1225 (9th Cir. 2012) (Ikuta, J., concurring).

The Center for Biodiversity claims that the Corps' programmatic consultation on NWP 12 fails to track the aggregate impacts of projects, which harms the Center's interest in protecting imperiled species. *See* ECF 78, at 9; ECF 45-4, ¶ 10; *see also* ECF 45-2, ¶ 17 (Waterkeeper Alliance, Inc. claiming the same). But as Mr. Hartl notes, the Center's business is "taking action to protect imperiled species"—exactly what it is doing in this litigation. ECF 45-4, ¶ 15. "[M]erely going about [] business as usual" does not establish an organizational harm. *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019).

Friends of the Earth claims that failure to engage in the programmatic consultation they desire jeopardizes listed species and limits their ability to collect information about the impact of these projects. ECF 45-

8, ¶¶ 11–13. Montana Environmental Information Center and Waterkeeper Alliance, Inc, appear to claim that by reissuing NWP 12, the Corps harms their respective organizational interests because the organizations cannot participate in the public commenting process. ECF 45-5, ¶¶ 14–17; ECF 45-2, ¶¶ 14. But there is no right to obtain this specific information, nor is there a right to public comment or public involvement in section 7 of the ESA. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 660 n.6 (2007). These claims of harm, therefore, all fail to establish standing. *Id.*

Finally, the Sierra Club claims harm from having to submit and litigate FOIA requests as a result of not having access to certain information. ECF 45-1, ¶ 10. Again, there is no right to access this information. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 660 n.6. And litigating these issues is simply "business as usual." *Am. Diabetes Ass'n*, 938 F.3d at 1155; *see also* ECF 45-1, ¶ 15 (describing other litigation

efforts by the Sierra Club). Like the other Plaintiffs, the Sierra Club fails to show an organizational harm sufficient to establish standing.

To summarize: Plaintiffs do not have standing to bring their ESA claim.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Federal Defendants' briefing, this Court should grant Federal Defendants' cross-motion for summary judgment.

DATED this 27th day of May, 2022.

Austin Knudsen
Montana Attorney General

DAVID M.S. DEWHIRST
Solicitor General

/s/Kathleen L. Smithgall
KATHLEEN L. SMITHGALL
Assistant Solicitor Generals
P.O. Box 201401
Helena, MT 59620-1401
kathleen.smithgall@mt.gov

Counsel for Intervenor-Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,664 words, excluding tables of content and authority, certificate of service, certificate of compliance, and exhibit index.

/s/ Kathleen L. Smithgall
KATHLEEN L. SMITHGALL

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: May 27, 2022

/s/Kathleen L. Smithgall
KATHLEEN L. SMITHGALL