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**Attorneys for Defendants**

**THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

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| SAM KUNAKNANA, CLARENCE AHNUPKANA, ROBERT NUKAPIGAK, MARTHA ITTA, and JOHN NICHOLLS,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES ARMY CORPS ENGINEERS, et al.,<br><br>Defendants | ) | Case No. 3:13-cv-00044-SLG<br><br>DEEFNDANTS' MOTION FOR ADDITIONAL PROCEEDINGS |

Defendants United States Army Corps of Engineers, *et al,.* (hereinafter referred to as the Corps) submit this motion pursuant to the Order Re Motions for Summary Judgment (Docket

175) filed May 27, 2014. Pursuant to that Order, the parties are, "either jointly or separately," to submit either a "motion(s) or stipulation that proposes the further proceedings that should occur in this matter." *Id.* at 57. The parties have not been able to reach an agreement on such further proceedings. Accordingly, the Corps moves the Court to defer entry of any order requiring any remedy in this action, and to establish the following proceedings:

1. The Corps shall within ninety (90) days complete and file with the Court an explanation for the determination that neither changes to the proposed project or new circumstances or information in this instance required the preparation of a supplemental environmental impact statement ("SEIS"), and explaining the post-2004 information the Corps relied upon in making its Least Environmentally Damaging Practical Alternative ("LEDPA") determination for purposes of Section 404 of the Clean Water Act.

2. Following the Corps' submission of the forgoing explanation, the following supplemental briefing schedule shall be established:

a. Within thirty (30) days of the Corps' filing of its explanation, Plaintiffs shall file a supplemental brief limited to twenty-five pages addressing their claims that preparation of an SEIS was required and that the Corps' LEPDA violated the requirements of the Clean Water Act.

b. Within thirty (30) days of the filing of Plaintiffs' supplemental brief, the Corps and the Intervenor-Defendants in this action shall file responses to Plaintiffs' supplemental brief. The briefs of the Corps and Intervenor-Defendant, ConocoPhillips Alaska, Inc. shall each be limited to twenty-five pages. The briefs of the other Intervenor-Defendants shall each be limited to ten pages.

c. No reply briefs shall be filed unless otherwise ordered by the Court.

d. The permit issued by the Corps for the CD-5 project at issue shall remain in place

pending completion of the above proceedings, and further decision by this Court on the pending claims in this action.

**STATEMENT**

The Corps issued ConocoPhillips a Clean Water Act ("CWA") § 404 permit for the project at issue in this action (CD-5) in December 2011. The Corps documented the basis for its action in a Record of Decision ("ROD"), and determined that a 2004 Alpine Satellite Development Final Environmental Impact Statement ("FEIS") without supplementation was sufficient for purposes of compliance with the National Environmental Policy Act ("NEPA").[1] Plaintiffs filed this litigation fourteen months later, contending that Corp's decision violated NEPA and the Clean Water Act § 404. In October 2013, Plaintiffs moved for summary judgment on these claims. (Docket 107). The Corps filed a response in opposition to Plaintiffs' motion and in support of its cross motion for summary judgment in November 2013. (Docket 131).

In January 2014, after the completion of summary judgment briefing, Plaintiffs filed a motion to preliminarily enjoin construction activities for the CD-5 project.[2] As to the four-prong test for preliminary injunctive relief, the Court: (i) assumed without deciding that plaintiffs were likely to succeed on the merits of one or more of their NEPA or CWA claims; (ii) found it "questionable" whether plaintiffs had shown irreparable harm, but nonetheless, solely for the purposes of the motion, assumed irreparable harm to plaintiffs' subsistence interests from winter and early spring CD-5 construction; (iii) found that the balance of equities tipped far in favor of ConocoPhillips and the other Intervenor-Defendants; and (iv) similarly found that a preliminary

[1] AR 6763-6935 (ROD); AR 183-2730 (FEIS).

[2] Dkt. 149.

injunction was not in the public interest.[3] Based upon these findings this Court denied the motion.[4]

On May 27, 2014, this Court issued its Order re Motions for Summary Judgment. In relevant part, the Court held that Corps' determination that an SEIS was unnecessary was not supported by a sufficient explanation addressing (i) the changes to the CD-5 project since the 2004 FEIS, and (ii) the new information the Corps relied upon in making its permit decision under CWA § 404.[5] The Court in its Order found that the Corps' decision that the preparation of a SEIS was not required was inadequate and therefore arbitrary,[6] and it granted Plaintiffs' motion for summary judgment only as to their contention that the Corps failed to provide a reasoned explanation that changes to the CD-5 project since the 2004 FEIS did not require the preparation of an SEIS.[7] The Court, however, did not decide whether the preparation of an SEIS was required.[8]

The Court also discussed in its order, but did not decide, whether the Corp's NEPA supplementation determination provides a sufficient explanation addressing post-2004 information regarding climate change.[9] In light of the foregoing, the Court declined to reach and to decide plaintiffs' CWA claim.[10] Finally, the Court directed the parties to file a stipulation or

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[3] Dkt. 174 at 7-12.

[4] *Id.*

[5] Dkt. 175 at 57-58.

[6] *Id*. at 47.

[7] *Id*. at 57-58.

[8] *Id.* at 47 n. 233, 58.

[9] *Id.* at 54-56.

[10] *Id.* at 56.

motion(s) within 21 days of its order addressing further proceedings.[11]

## ARGUMENT

### I. ENTRY OF A FINAL DECISION OR JUDGMENT ON ANY CLAIM IS NOT APPROPRIATE.

Plaintiffs presented two claims in their First Amended Complaint for Injunctive and Declaratory Relief (Docket 117). Their First Claim for Relief alleges violation of the Clean Water Act.[12] Their Second Claim for Relief alleges that the Corps violated NEPA by failing to prepare a supplemental NEPA analysis.[13] The Court did not rule on either of these claims. While it found that the Corps' decision that NEPA supplementation was not required was arbitrary because of its conclusory nature, the Court nevertheless specifically did not find that any NEPA supplementation was required. Therefore, whether any relief should be granted on Plaintiffs' claims is premature because there is no final judgment.[14]

Within the context of the Court's Order (Docket 175), it appears that, before it rules on Plaintiffs' Second (NEPA) Claim, the Court first wants the Corps to provide a reasoned, rather than conclusory, explanation why supplementation of the 2004 FEIS was not required prior to issuance of the permit for the CD-5 project. The schedule the Corps proposes above will provide that explanation, and allow the Court to address Plaintiffs' NEPA claim. Moreover, the Court's statements, Docket 175 at 47-51, 56, and its Order, *id.* at 58, also indicate that the Court wants to receive and consider the expanded NEPA explanation before it addresses Plaintiffs' Clean Water

[11] *Id.* at 58.

[12] Docket 117 at 24-26.

[13] *Id*. at 26-27.

[14] Given that Plaintiffs present multiple claims any partial judgment could only be entered pursuant to Fed. R. Civ. P. 54(b).

Act claim. Defendants believe that the Court could proceed to address the Clean Water Act claim without waiting for the Corps' NEPA explanation, but the schedule the Corps proposes reflects the Court's apparent preference in this regard as well. The ninety days the Corps proposes for the submission of the explanation is also the amount of time the Corps has informed undersigned counsel that it needs to prepare and file the explanation.

**II. THE PERMIT SHOULD REMAIN IN PLACE.**

The Corps understands that the Plaintiffs will request either that the permit for the CD-5 project be voided, or that any further actions under the permit be enjoined or suspended until the Court has rendered a final decision in this action. That is not necessary or appropriate. First, the Court has only determined that the Corps did not adequately explain its decision not to conduct an SEIS, and the Court has not found any violation of the CWA. It has also not given any indication that it finds any likelihood that Plaintiffs will prevail on either of their claims. Absent such a finding, the determinations the Court made when it denied Plaintiffs' motion for temporary restraining order and preliminary injunction, Docket 174, remain applicable. Further, as shown by the Declaration of Michiel Holley, which is attached as Exhibit 1 hereto, any potential harm caused by further construction activities under the permit that might occur this summer would be minimal or temporary. The Corps also understands that Intervenor-Defendant ConocoPhillips will describe in detail its further activities under the current permit and show that no significant irreparable injury would occur if these activities are permitted to continue during the period contemplated by the Corps' proposed schedule.

However, even assuming that the Court had found that the Corps had violated either NEPA or the CWA, the imposition of any injunctive relief or suspension or voiding of the existing permit is not automatically required. In *Winter v. Natural Resources Defense Council*,

555 U.S. 7 (2008), the Supreme Court made it clear that the traditional four-factor test for an injunction applies when considering a permanent injunction to remedy a NEPA violation and there is no presumption that an injunction is warranted, regardless of the underlying legal violation or claim. *Id*., 555 U.S. at 32-33; *see also Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010). In *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012), the Ninth Circuit endorsed the long-standing two-pronged balancing test first established by the D.C. Circuit Court of Appeals to determine whether vacatur of agency action is appropriate. Under this test, a court should evaluate "how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"[15] Applying this balancing test, numerous decisions have been remanded *without* vacatur, including cases involving an agency's failure to provide an adequate explanation for purposes of NEPA or other substantive laws.[16]

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[15] *Id.* (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

[16] *See, e.g., Heartland Reg'l Med. Ctr. v. Sebelius,* 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."); *American Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009) (remand without vacatur because the agency's "failure adequately to explain itself is in principle a curable defect"); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002) (remand rather than vacatur is appropriate where deficiencies may be corrected); *WorldCom v. FCC,* 288 F.3d 429, 434 (D.C. Cir. 2002) (remand without vacatur where "non-trivial likelihood" that agency would be able to justify rule on remand); *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (remand without vacatur may be appropriate "'[w]hen an agency may be able readily to cure a defect in its explanation of a decision'" (quoting *Heartland*, 566 F.3d at 198); *Oregon Natural Desert Ass'n v. McDaniel* No. CV 09-369-PK, 2011 WL 3841550, at *3 (D. Or. July 8, 2011) ("A court should remand without vacating the agency action when the agency can cure a defect by providing further explanation of its decision."). *See also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("when equity demands, [a challenged action] can be left in place while the agency" cures the defect). Some courts have vacated an agency's decision but stayed the mandate for vacatur pending completion of remand. *See, e.g., Hawaii Longline Ass'n v. Nat'l*

The current circumstances in this case counsel against vacatur. First, vacatur would be premature because there is no final judgment. Moreover, vacatur would moot Plaintiffs' CWA claim, and Plaintiffs would then have to reassert that claim in a new action challenging the Corps' decision on remand. For these reasons, and in light of the very limited scope of the Court's ruling in its Order (Docket 175), and the Corps' ability to present a fuller explanation for its determination that an SEIS is not needed, the Court should exercise its discretion and decline to suspend or vacate the CD-5 permit, or to enter any injunctive relief pending further proceedings in this action.

Dated this 17th day of June 2014.

Respectfully submitted,

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*Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 11-12 (D.D.C. 2003) (district court is "vested with equitable authority to stay the mandate" pending completion of the remand).

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2014, I electronically filed the foregoing using the Court's CM/ECF System. I certify that the following and all participants in the case who have entered an appearance are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

Brian Litmans
Suzanne Bostrom
Jeffrey W. Leppo
Cameron Leonard
John Tretow
Andrew Naylor
Bruce Falconer
Harold Curran

/s/ Dean K. Dunsmore
DEAN K. DUNSMORE