THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SAM KUNAKNANA, et al.,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Defendants,

and

CONOCOPHILLIPS ALASKA, INC., et al.,

Intervenor-Defendants.

Case No. 3:13-cv-00044-SLG

ORDER RE FURTHER PROCEEDINGS

In December 2011, Defendant U.S. Army Corps of Engineers issued a Record of Decision ("2011 ROD") that granted Intervenor-Defendant ConocoPhillips Alaska, Inc. a permit to fill approximately 58.5 acres of wetlands in the National Petroleum Reserve – Alaska in order to develop a drill site known as Colville Delta 5 ("CD-5").[1] Over one year later, in February 2013, Plaintiffs initiated this lawsuit challenging that decision, asserting it violated the National Environmental Policy Act ("NEPA") and Section 404 of the Clean Water Act ("CWA").[2]

[1] *See* Docket 175 at 17–18 (Order re Mots. for Summ. J.) (discussing 2011 ROD).

[2] Docket 1 (Compl.); *see also* Docket 117 (First Am. Compl.).

On May 27, 2014, this Court issued an Order on the parties' cross-motions for summary judgment.[3] With respect to Plaintiffs' NEPA claim, the Court granted summary judgment in favor of Plaintiffs as follows: "the Corps' determination that a Supplemental Environmental Impact Statement ["SEIS"] was unnecessary was arbitrary and capricious because the Corps failed to provide a reasoned explanation for that determination that addressed the changes to the CD-5 project since the 2004 [Alpine Satellites EIS] and the new information the Corps relied upon in making its Least Environmentally Damaging Practicable Alternative ["LEDPA"] determination for purposes of Section 404 of the Clean Water Act."[4] The Court did not rule on Plaintiffs' CWA claim at that time because it recognized that rectifying the NEPA violation might lead the Corps to reexamine its decision issuing the permit, thereby mooting the CWA claim.[5] Instead, the Court held that a ruling on the CWA claim would be deferred until after the NEPA claim has been resolved.[6]

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[3] Docket 175 (Order re Mots. for Summ. J.).

[4] Docket 175 at 57–58 (Order re Mots. for Summ. J.). The Court also addressed the Corps' issue exhaustion argument with respect to Plaintiffs' claim that the Corps failed to provide a reasoned explanation for its decision not to prepare an SEIS in light of new information concerning climate change. *See* Docket 175 at 52–56. Rather than resolve the issue exhaustion question at that time, the Court determined that "whether, and to what extent, the Corps should evaluate post-2004 climate change information [would be] better determined after further briefing from the parties on the appropriate remedy for the Corps' failure to adequately explain its decision not to prepare an SEIS for CD-5 to address changes to the project as well as new information relied upon in the 2011 ROD." Docket 175 at 56.

[5] *See* Docket 175 at 56 (Order re Mots. for Summ. J.) (explaining it would be premature to rule on Plaintiffs' CWA claim because "NEPA procedures are designed to ensure the agency and the public have an opportunity to consider all of the relevant environmental information 'before decisions are made and before actions are taken'" (quoting 40 C.F.R. § 1500.1(b))).

[6] Docket 175 at 56 (Order re Mots. for Summ. J.).

Additional briefing then ensued as to the further proceedings each party proposed to have occur before the agency and the Court.[7] That briefing concluded on July 1, 2014.[8]

In their recent submissions, the Corps, ConocoPhillips, and Plaintiffs agree that the Court should remand the permitting decision to the Corps so that the Corps may rectify the NEPA violation identified by the Court. However, Plaintiffs ask the Court to vacate the permitting decision pending completion of the remand, while the Corps and ConocoPhillips assert vacatur is unwarranted.[9] All of the other Intervenor-Defendants have joined with ConocoPhillips's proposal.[10] Having considered the parties' arguments, and for the reasons set forth below, the Court will grant the Corps' and ConocoPhillips' request for a limited remand without vacatur and deny Plaintiffs' request for vacatur of the permitting decision pending this limited remand.

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[7] *See* Docket 175 at 58 (Order re Mots. for Summ. J.).

[8] *See* Docket 177 (Corps Br.); Dockets 179, 180 (ConocoPhillips Br.); Docket 184 (Pls. Br.); Docket 178 (Kuukpik Joinder in ConocoPhillips Br.); Docket 183 (ASRC Joinder in ConocoPhillips Br.); Docket 185 (North Slope Borough Joinder in ConocoPhillips Br.); Docket 186 (State of Alaska Joinder in ConocoPhillips Br.); Docket 195 (ConocoPhillips Resp.); Docket 196 (Corps Resp.); Docket 198 (Pls. Resp.); Docket 192 (ASRC Joinder in ConocoPhillips Resp.); Docket 193 (Kuukpik Joinder in ConocoPhillips Resp.); Docket 194 (State of Alaska Joinder in ConocoPhillips Resp.); Docket 197 (North Slope Borough Joinder in ConocoPhillips Resp.); *cf.* Docket 189 at 2 (Order re Mots. for Further Proceedings) ("No replies shall be permitted except by further order of the Court.").

[9] *See* Docket 177 at 2–3 (Corps Br.); Docket 180 at 6–7 (ConocoPhillips Br.); Docket 184 at 7 (Pls. Br.).

[10] *See* Docket 178 (Kuukpik Joinder in ConocoPhillips Br.); Docket 183 (ASRC Joinder in ConocoPhillips Br.); Docket 185 (North Slope Borough Joinder in ConocoPhillips Br.); Docket 186 (State of Alaska Joinder in ConocoPhillips Br.).

I. Vacatur Is Unwarranted.

"Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action. In other words, a court should vacate the agency's action and remand to the agency to act in compliance with its statutory obligations."[11] However, "[i]n rare circumstances, when [a court] deem[s] it advisable that the agency action remain in force until the action can be reconsidered or replaced, [the court may] remand without vacating the agency's action."[12] In determining whether vacatur is warranted, a court should balance two factors: (1) the seriousness of the agency's error and (2) the disruptive consequences of vacatur, in light of the fact that it is "an interim change that may itself be changed."[13]

Here, the Corps asserts the first factor counsels against vacatur because the Corps' NEPA violation can be "[r]eadily [c]orrected."[14] The Corps maintains that on remand, "it will be able to provide a complete explanation of what it considered and how it reached its determination that preparation of an SEIS for the CD-5 project was

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[11] *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 632 F. Supp. 2d 968, 982 (N.D. Cal. 2009) (quoting *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007), *rev'd on other grounds sub nom. Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009)); *see also* 5 U.S.C. § 706(2) (directing reviewing court to "set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[12] *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010).

[13] *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992–93 (9th Cir. 2012) (per curiam) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

[14] Docket 196 at 4 (Corps Resp.); *see also Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (recognizing seriousness of agency's error depends, at least in part, on whether it is readily curable on remand).

unnecessary."[15] Thus, it appears the Corps is asserting that it in fact took a "hard look" at the environmental consequences of issuing the permit in light of changes to the CD-5 project and certain new information, but it simply neglected to adequately set out its reasoning in the administrative record. As such, the Corps asserts its error is not that serious. However, Plaintiffs point out that the absence of such an explanation in the record raises "serious doubts" about whether the Corps did in fact previously take the requisite "hard look."[16] Plaintiffs maintain that if the Corps failed to make any analysis of the need for an SEIS, such an error is less readily curable on remand and therefore considerably more serious, since "the fundamental purpose of NEPA . . . is to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions early enough so that it can serve as an important contribution to the decision making process."[17]

Yet, whichever is the degree of seriousness of the Corps' NEPA violation, vacatur at this junction is not warranted because, as ConocoPhillips has demonstrated, the disruptive consequences it would have in the midst of the construction project weigh so heavily against it. The Section 404 permit was issued in December 2011, and

[15] Docket 196 at 6 (Corps Resp.).

[16] *See* Docket 198 at 11 (Pls. Resp.).

[17] *See California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) (citation omitted); *see also* Docket 198 at 11 (Pls. Resp.) (arguing remand without vacatur "would do nothing to ensure that the agency takes a 'hard look' at the environmental consequences and the need for supplemental NEPA analysis *prior* to issuing a substantive decision" (emphasis in original)). Plaintiffs also assert that "[r]emand without vacatur would allow the Corps to provide an improper post hoc rationalization." *See* Docket 198 at 14. *But see Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) ("[I]n [*Citizens to Preserve Overton Park, Inc v. Volpe*, 401 U.S. 402 (1971)], the [Supreme] Court approved the procedure of remanding so that an agency can provide an explanation for an inadequately articulated decision. Needless to say, if it is appropriate for a court to remand for further explanation, it is incumbent upon the court to consider that explanation when it arrives." (citation omitted)).

ConocoPhillips has proceeded with the construction work authorized by that permit according to its long-announced schedule. [18] As a result, the project is already substantially constructed. For whatever reason, Plaintiffs did not file this lawsuit until February 2013, over one year after the December 2011 permitting decision, which contributed to the cross-motions for summary judgment not becoming ripe until January 2014—after construction was scheduled to begin.

ConocoPhillips indicates that the following construction work has already occurred at CD-5: the gravel footprint has been laid, four bridge structures have been installed, and a multi-season ice pad has been created.[19] Vacating the permit at this time during remand would not eliminate this substantial amount of construction that has already taken place.[20]

This summer and fall, ConocoPhillips plans to conduct tie-in work, install decking on two bridges, install the spans on the Nigliq Channel bridge, and "season" (i.e., compact) the gravel on the CD-5 road and pads.[21] The gravel seasoning can only be done in summer, when temperatures are consistently above freezing.[22]

If the permitting decision is vacated during the remand, the partially completed

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[18] Docket 174 at 9 (Order Denying Pls. Mot. for TRO & Prelim. Inj.).

[19] Docket 181 at 3–4 ¶ 7 (Brodie Decl. in Supp. of ConocoPhillips Br.). The bridges are at different stages of completeness, but for all four the piling and abutment work has been completed. *See* Docket 181 at 3, 5–6 ¶¶ 7–8.

[20] The Court previously denied Plaintiffs' February 2014 motion for injunctive relief, in large part because Plaintiffs had delayed filing the motion until construction on CD-5 was already underway. Docket 174 at 9–12 (Order Denying Pls. Mot. for TRO & Prelim. Inj.).

[21] Docket 181 at 4–6 ¶ 8 (Brodie Decl. in Supp. of ConocoPhillips Br.).

[22] Docket 181 at 4 ¶ 8(b) (Brodie Decl. in Supp. of ConocoPhillips Br.).

project would, in the words of ConocoPhillips Senior Environmental Coordinator Lynn DeGeorge, "be subject to an extraordinary level of regulatory confusion." For example, "permit requirements regarding maintenance, operation and mitigation would be vacated, leaving the constructed, but subsequently unauthorized infrastructure, unregulated."[23] And halting construction at this time could result in more environmental harm than if the project is allowed to proceed.[24] Accordingly, the Court finds that vacatur of the permitting decision during this limited remand would be highly disruptive and is not warranted.[25]

II. Scope of Remand.

The Court addresses three points with respect to the scope of remand. First, in its briefing, the Corps seeks ninety days to "complete and file with the Court an

[23] Docket 182 at 2 ¶ 5 (DeGeorge Decl. in Supp. of ConocoPhillips Br.).

[24] *See* Docket 182 at 5–6 ¶ 10 (DeGeorge Decl. in Supp. of ConocoPhillips Br.) ("Partially constructed roads, pads, or bridges would sustain damage from erosion and other natural forces and become environmental, safety and aesthetic liabilities. Stopping the project midway through construction would also create new environmental impacts resulting from an extra year of construction, from the need to duplicate activities and from unanticipated and harmful delay in gravel seasoning. . . . Based on my familiarity with project development and environmental permitting, I believe proceeding with gravel seasoning and other planned activities for summer and fall of 2014 will result in fewer and less intense adverse environmental impacts than would result from stopping construction at this point."); *cf.* Docket 184 at 13 (Pls. Br.) (recognizing remand without vacatur is appropriate "where vacating the permit would cause more environmental harm than it would prevent").

[25] Plaintiffs request that absent vacatur, the Court (1) issue a permanent injunction halting CD-5 construction activities until the Corps complies with NEPA, and (2) resolve Plaintiffs' CWA claim. Docket 184 at 15–20 (Pls. Br.). However, a permanent injunction is not warranted at this time because Plaintiffs have not demonstrated that the harm to their environmental and subsistence interests from ConocoPhillips's planned summer and fall construction activities outweighs the potential harm to ConocoPhillips, the people of Nuiqsut, and the environment from stopping construction at this time. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010) (permanent injunction warranted only if plaintiffs demonstrate that balance of hardships weighs in plaintiffs' favor and that public interest would not be disserved). Additionally, for the reasons set forth in this Order and in the Court's Order on the summary judgment motions, the Court will not rule on Plaintiffs' CWA claim until their NEPA claim has been resolved.

explanation for the determination that neither changes to the proposed project or new circumstances or information in this instance required the preparation of a[n] [SEIS], and explaining the post-2004 information the Corps relied upon in making its [LEDPA] determination for purposes of Section 404 of the Clean Water Act."[26] However, as discussed in the preceding section, based on the record, it is unclear whether the Corps previously conducted a reasoned analysis of whether to prepare an SEIS and failed to adequately set out that analysis in the record, or whether it failed to conduct the reasoned analysis in the first instance. If the latter is the case, and the requisite analysis had not yet been done before the permit was issued, the Court does not intend to foreclose the possibility that on remand the Corps might decide that preparation of an SEIS is warranted.[27]

Second, in their motion Plaintiffs ask the Court to direct the Corps to provide an opportunity for public comment prior to issuing a final decision on whether to prepare an SEIS. This request will be denied. "Although NEPA requires agencies to allow the public to participate in the preparation of an SEIS, there is no such requirement for the decision *whether* to prepare an SEIS."[28]

Third, Plaintiffs and ConocoPhillips request that the scope of the remand include post-2004 climate change information.[29] And the Corps "agrees that the Court may properly order that post-2004 climate change information should be addressed on

[26] Docket 177 at 2 (Corps Br.).

[27] The Court continues to express no opinion on whether an SEIS is required. *See* Docket 175 at 58 (Order re Mots. for Summ. J.).

[28] *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

[29] *See* Docket 180 at 7 (ConocoPhillips Br.); Docket 184 at 21 (Pls. Br.); *cf. supra* note 4.

remand."[30] Accordingly, the scope of the remand will include post-2004 climate change information.

ORDER

For the foregoing reasons, the Court hereby DENIES Plaintiffs' Submission on Further Proceedings at Docket 184 and GRANTS the Corps' Motion for Additional Proceedings at Docket 177 and ConocoPhillips' Motion Regarding Further Proceedings at Docket 179 as follows[31]:

1. The Corps' decision to issue a permit to ConocoPhillips under Section 404 of the Clean Water Act to develop the CD-5 project is remanded without vacatur to the Corps for the limited purpose of remedying the errors identified in the Court's Order re Motions for Summary Judgment at Docket 175 and addressing post-2004 climate change information. Specifically, on remand the Corps shall set forth a reasoned explanation as to whether or not the 2004 Alpine Satellites EIS warrants supplementation to address the changes in the CD-5 project since the 2004 Alpine Satellites EIS and the new information relied upon by the Corps in its permitting decision. The scope of the remand shall also address whether post-2004 climate change information warrants the preparation of an SEIS.

2. The Corps shall complete the remand and provide its determination on remand to the parties and to this Court on or before **August 27, 2014**.[32]

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[30] Docket 196 (Corps Resp.).

[31] This Order contains some terms that differ from ConocoPhillips's and the Corps' proposed orders.

[32] August 27, 2014 is ninety days from the date of the Court's Order on the cross-motions for summary judgment.

3. During the remand, activities occurring within the project area pursuant to the CD-5 Section 404 permit shall be limited to existing gravel surfaces and bridge structures (i.e., with no work occurring in waters of the United States). Allowed activities include the gravel seasoning and bridge installation activities described in the Second Declaration of James I. Brodie (Docket 181).

4. This Court shall retain jurisdiction and hold plaintiffs' CWA claim in abeyance pending completion of the remand.

5. Upon completion of the remand, Plaintiffs shall have a period of 30 days to file a brief of no more than 25 pages addressing the status of this litigation in light of the Corps' determinations on remand. The Corps and Intervenor-Defendants shall thereafter have a period of 30 days to file briefs in response. The briefs of the Corps and of ConocoPhillips shall be no more than 25 pages each. The briefs of the remaining Intervenor-Defendants shall be limited to no more than 5 pages each. No reply briefs shall be permitted unless requested by the Court.

6. Upon submission of the additional briefing by the parties, the Court will address all of Plaintiffs' remaining claims in this litigation.

DATED this 22nd day of July, 2014, at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE