The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOUND ACTION, FRIENDS OF THE SAN JUANS, AND WASHINGTON ENVIRONMENTAL COUNCIL, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant.	No. 18-cv-00733-JLR CORPS' REPLY MEMO IN SUPPORT OF ITS MOTION TO DISMISS CLAIM 1 FOR LACK OF JURISDICTION Note on Motions Calendar: November 15, 2018 ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Court should dismiss the first count in Plaintiffs' Complaint for lack of jurisdiction. Plaintiffs' opposition expounds at length about alleged harms from past armoring projects on the shoreline of Puget Sound that were authorized by Washington State under State law. They further allege that the Seattle District of the U.S. Army Corps of Engineers ("Corps") has abdicated its responsibility to regulate such projects under the Clean Water Act ("CWA"). Although the Corps disputes characterizations, Plaintiffs' allegations are not at issue in the Corps' motion to dismiss. Rather, the Corps has demonstrated that the "Spellmon Memo" (Doc. 13-1) challenged by Plaintiffs is not final agency action under the Administrative Procedure Act ("APA"). This Court therefore lacks jurisdiction over Plaintiffs' first claim for relief. Nor do the declarations and other documents upon which Plaintiffs rely satisfy Article III standing requirements, and for this reason as well, Plaintiffs' first claim must be dismissed.

I. Plaintiffs Rely on the Wrong Standard of Review.

In their effort to demonstrate that the "Spellmon Memo" is final agency action and that they satisfy Article III standing, Plaintiffs rely heavily on their flawed assertion that the Corps' motion is a facial, not factual, jurisdictional challenge and that this Court therefore must resolve the Corps' motion solely upon the face of the Complaint. Pl. Memo at 2, 21 & 22 n.5. There is nothing to this argument. Rather than relying only on the pleadings, the Corps has brought a factual jurisdictional challenge, conclusively evidenced by the fact that the Corps attached the Spellmon Memo and "Draft Report" of the interagency work group to its motion, and argued its motion based on these documents. Plaintiffs understand the nature of the Corps' motion, because their opposition relies extensively on the Spellmon Memo and Draft Report, as well as on four declarations of their own and another document they attached to their memorandum.

The law is clear on this point. When resolving a factual attack on jurisdiction, a court may look beyond the complaint to public documents without having to convert the motion into one for summary judgment. *Gemtel Corp. v. Comty. Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994) (citing *Mack v. South Bay Beer Distrib., Inc*., 798 F.2d 1279, 1282 (9th Cir. 1986)). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2014). In such a circumstance, the court does not presume the truthfulness of the plaintiff's allegations. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2012) (citing Moore's Federal Practice, ¶ 12.30[4], at 12–38). Accordingly, Plaintiffs bear the burden to demonstrate that they challenge final agency action under *Bennett v. Spear,* 520 U.S. 154 (1997), and satisfy the requirements of Article III, based on the evidence presented to the Court.

II. Because the Spellmon Memo is Not Final Agency Action, this Court Lacks Jurisdiction Over Plaintiffs' First Claim For Relief.

A. The Spellmon Memo Does Not Conclude the Corps' Decision-Making Process.

Plaintiffs concede that an agency's decision to defer action on the merits is interlocutory and, thus, does not mark the consummation of an agency decision-making process under *Bennett*. However, Plaintiffs argue that the Spellmon Memo was not a deferral. In doing so, Plaintiffs challenge the justification in the Spellmon Memo for deferring; namely, the 2017 Executive Order and pending nationwide rulemakings addressing the regulatory definition of "waters of the United States," including the definition in the "2015 Rule." Plaintiffs argue that the regulatory definition of "high tide line" in the 2015 Rule is the same as the pre-2015 definition, no agency

has proposed changing it, and thus no relation exists between the nationwide rulemaking activities and the Corps' decision to defer, proving that there has been no deferral at all.

Several flaws undermine this reasoning. First, the Spellmon Memo identified the February 28, 2017 Executive Order and the rulemakings it directed as the reason why the Seattle District should defer considering alternative tidal datum metrics for use in the Seattle District. Spellmon Memo ¶¶ 3-4. Among other things, the Executive Order directed the Environmental Protection Agency ("EPA") and the Corps to propose and consider a rule to rescind or revise the 2015 Rule, 82 Fed. Reg. 12,497, and to consider revising their interpretation of "navigable waters," *id.*, which includes "waters of the United States." 33 U.S.C. § 1362(7). Thus, read in context, the basis for the deferral in the Spellmon Memo did not turn on the future, specific outcome of those rulemakings, but rather on the understanding that the direction in the Executive Order and those ongoing rulemakings could impact how waters of the United States in Puget Sound are identified, which includes consideration of the "high tide line." Plaintiffs' assertion that those rulemakings are irrelevant is based on their prediction that the rulemakings will not change the definition of high tide line, and is therefore beside the point. That does not undermine the fact that the Spellmon Memo deferred considering alternative tidal datum metrics.

Second, Plaintiffs' assertion that no relevant connection exists is also incorrect. The direction in the Executive Order includes the two-step rulemaking process detailed in our opening brief, of rescinding the 2015 Rule and issuing a replacement rule setting out a definition of "waters of the United States." Corps Memo at 9-10 & 16. While the 2015 Rule and the proposed rescission of that Rule did not alter or propose modifying the definition of "high tide line," that does not mean the proposal for a replacement rule now undergoing interagency review before publication will not. And, more importantly, even if that proposal does not propose

changing the definition of high tide line, a commenter during notice and comment proceedings may request such a change or raise issues implicating that definition.

Third, this connection is hardly idle speculation, given, for example, that the 2015 Rule -- which is now in effect in portions of the nation, including Washington State, Corps Memo at 9 -- already includes the phrase "high tide line" in regulations that define "waters of the United States." Indeed, the very fact that "high tide line" already is part of the 2015 Rule, *id.* at 8 (33 C.F.R. § 328.3(a)(8)), which the Corps has proposed to rescind and plans to replace with a new rule, demonstrates that this phrase already is relevant to defining "waters of the United States."

Finally, Plaintiffs' suggestion that their first claim involves the definition of "high tide line" in isolation is absurd, since that term and its definition are significant to Plaintiffs because they play a role defining the scope of waters of the United States in the Puget Sound and Washington State shoreline. In sum, there are multiple connections between "high tide line" and its definition and the nationwide rulemakings. These connections demonstrate the context in which the Spellmon Memo was drafted, and confirm that it was, in fact, a deferral.

That the Spellmon Memo did not set a schedule for the Seattle District to revisit the issue of alternative tidal datum metrics once those rulemakings are complete does not mean that the Memo has consummated the decision-making process. Rather, the context in which, and how, the Seattle District may address alternative tidal datum metrics in the future will depend in large part on how the nationwide rulemakings are resolved. Further, that the Spellmon Memo sensibly did not guess at what those contingencies may be does not convert its deferral into a final action.

Nor does the Spellmon Memo constitute a substantive evaluation of, or a merits decision on, the alternative tidal datum metrics discussed in the Draft Report. To the contrary, the Draft Report and Spellmon Memo's explanations confirm that the Corps did not reach a decision on

the merits. In this regard, it is notable that Plaintiffs fail to mention even once in their brief that the report they champion is "draft," while in their complaint Plaintiffs acknowledge that the report is only a "draft" that contains a "draft recommendation." Complaint ¶ 48. This omission speaks volumes, underscoring that the Spellmon Memo deferral and discussion of next steps did not take up and resolve the merits of the tidal datum issue. This conclusion is also obvious from the Spellmon Memo itself. On its face, it is an informal memorandum that provides direction on how limited Corps' resources should be spent in an ongoing analysis, given the Executive Order and pendency of related ongoing nationwide rulemakings. That is why the Memo explained that taking up and resolving the merits of alternative datum metrics "would not be an organizationally consistent use of resources within the Corps." Spellmon Memo ¶ 4.

Plaintiffs also rest their arguments on the personal expression of concern in the Memorandum by the now former Commander of the Corps' Northwestern Division,[1] stating that "I maintain that elevations such as [Mean Annual Highest Tide] as they would be applied in Puget Sound are not consistent with the intent of the current definition of [high tide line]." *Id.* ¶ 5. A cursory review of this statement in the context of the Spellmon Memo shows that it was only his perspective, and an aside, expressed after explaining the basis for the deferral. The statement also appears in the Memo without analysis or explanation, confirming that it does not represent the Corps' adoption of a position nor mark the consummation of the decision-making process on that issue. *Id.* ¶ 5. Indeed, by referencing the "current definition" of high tide line, the statement acknowledges that the ongoing rulemakings could alter that definition.

The ultimate problem for Plaintiffs is that the administrative process they seek to make

[1] On July 27, 2018, Major General Spellmon was succeeded as Commander of the Northwest Division by Brigadier General D. Peter Helmlinger.

the basis for their lawsuit has not run its course. Rather, the work-group evaluation reflected in the Draft Report and the deferral reflected in the Spellmon Memo are interlocutory steps agencies routinely undertake as they evaluate options and how they may better perform their regulatory functions. Whether an agency begins a work-group evaluation, alters the direction of that inquiry, or defers some avenues of analysis, that decision simply is not an appropriate matter for judicial intervention and review. If every time a supervisor provides direction on the course of an ongoing interagency dialogue were considered a reviewable final agency action, then courts would be flooded with litigation by parties dissatisfied with the direction of interlocutory agency proceedings. The APA finality requirement protects against that untoward result.

Finally, the cases Plaintiffs rely upon to argue that the "potential for future hypothetical changes cannot vitiate the finality of the agency decision," Pl. Memo at 14, are inapposite. Plaintiffs' argument is circular, because it assumes as a premise the very point Plaintiffs bear the burden of proving, i.e., that the Spellmon Memo is a final agency action. But it is not. It is a deferral; it did not take up or resolve on the merits the tidal datum issue Plaintiffs seek to litigate. It therefore does not mark the consummation of the decision-making process.

B. The Spellmon Memo Has No Legally Binding Effect.

As explained in our opening brief, by its own terms, the Spellmon Memo does nothing to fix a legal relationship or deny a right. Corps Memo at 18-20. Nor does it change the status quo regarding the use of tidal datum in the Seattle District, which is a long-standing practice established through prior case-by-case CWA permit decisions and enforcement actions. Because the Spellmon Memo only deferred consideration of tidal datum metrics, and, thus, did not disturb the status quo, it did not meet the second requirement in *Bennett,* to enact a "certain change in the legal obligations" of any party. *Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005).

Plaintiffs counter that "when responding to requests for decisions, agency decisions to *not* change the status quo are still final agency actions." Pl. Memo at 17. This argument suffers multiple flaws. First, the Corps was under no obligation to act on the merits of the recommendation in the Draft Report, and a request for a decision on that recommendation could not possibly mandate a merits decision on it. In other words, no statute required a decision on the merits or barred the Corps from deferring a decision to change the status quo. The cases Plaintiffs rely upon illustrate the flaw in their reasoning. For example, in *City of Chicago v. U.S.*, 396 U.S. 162 (1969), the Court found that the Interstate Commerce Commission had a duty to act, after undertaking an investigation, where the relevant statute stated that "it shall be [the Commission's] duty to make a report in writing in respect [to such an investigation], which shall state the conclusions of the Commission, together with its decision . . .." *Id.* at 166 (quoting 49 U.S.C. § 14(1)). It was only in this context, where the relevant statute required a decision on the merits, that the Court found no meaningful distinction between "'negative' and 'affirmative' orders" for purposes of judicial review. *Id.* at 166-67. The Corps faces no such obligation here.

Second, Plaintiffs' theory, that even a decision to defer is final if it simply references or does not change the status quo, conflicts with the cases we cited that apply the finality rule in *Bennett*. *See* Corps Memo at 16-17. Moreover, the cases Plaintiffs cite are inapposite. In *Oregon Natural Desert Association v. U.S. Forest Service*, 465 F.3d 977 at 987 & 990 (9th Cir. 2006), the court found an "annual operating instruction" to be final only because it comprised a merits-based, case-specific decision that imposed legal standards, such that it was "a discrete, site-specific action representing the Forest Service's last word from which binding obligations flow." Likewise, in *Havasupai Tribe v. Provencio*, 2018 WL 5289028 (9th Cir. Oct. 25, 2018), the court found the agency's action to have the force of law only because the case-specific

Mineral Report at issue "determined that such rights [i.e., a vested right to minerals on public lands] existed with respect to Canyon Mine."[2]

Third, Plaintiffs argue that the Corps' deferral is final under the Supreme Court's decision in *U.S. Army Corps of Eng'rs v. Hawkes Co.,* 136 S. Ct. 1807 (2016). There, the Court held that the Corps' case-specific, merits-based "approved jurisdictional determination" that a particular landowner's property was not a water of the United States was final and thus reviewable because that decision "narrows the field of potential plaintiffs and limits the potential liability a landowner faces," 136 S. Ct. at 1814, by "creating a five-year safe harbor." *Id.* But unlike that case, the deferral in the Spellmon Memo did not address on the merits any particular location or find that a particular property does or does not contain waters of the United States. Moreover, because the Spellmon Memo deferral did not establish the Seattle District's historical tidal datum approach, it cannot be the source of a "safe harbor," such as the Supreme Court found to exist based on the site-specific determination in *Hawkes*.

Finally, Plaintiffs (Pl. Memo at 20) find it "astonishing" that our brief "blithely" suggested that Plaintiffs will not be left without any recourse, because, among other things, they can bring their own enforcement action under the CWA citizen suit provision to address alleged ongoing violations that they believe require CWA Section 404 permits. 33 U.S.C. § 1365. Plaintiffs' excessive protestations cannot hide the obvious. Congress enacted the citizen suit

[2] Plaintiffs also mistakenly rely on *Alliance To Save Mattaponi v. U.S. Army Corps*, 515 F. Supp. 2d 1 (D.D.C. 2007), which found an EPA failure to veto a specific CWA permit issued by the Corps to be reviewable agency inaction under the APA. But in that case, unlike the situation here, the CWA sets out a statutory process for such vetoes. 33 U.S.C. § 1344(c). Even then, that decision was wrongly decided even in that specific context. *See, e.g., City of Olmstead Falls v. EPA,* 266 F.Supp.2d 718, 723 (N.D. Ohio 2003), *aff'd,* 435 F.3d 632 (2006); *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers,* 915 F.Supp. 378, 381 (N.D. Ga. 1995), *aff'd,* 87 F.3d 1242, 1249 (11th Cir. 1997).

provision to allow private CWA enforcement actions, where the government has not filed suit, *id.* § 1365(b)(1)(B), regardless of whether the government believes a violation exists.

In sum, the Spellmon Memo only deferred a decision on the merits of the issue Plaintiffs seek to litigate and it has no legally binding effect. Because the Spellmon Memo is not final agency action, Plaintiffs' first claim should be dismissed.

III. Plaintiffs Lack Article III Standing for Their First Claim for Relief.

In our opening brief, we demonstrated that Plaintiffs lack standing because they did not even allege, let alone make the required demonstration, that the Spellmon Memo has been applied at any particular site within the Puget Sound in a manner that harms even one of their members' legally cognizable interests. In their response, Plaintiffs rely on the wrong standard of review and four declarations in their effort to demonstrate they satisfy Article III requirements. Because Plaintiffs have failed to satisfy their burden, claim one must be dismissed.

As explained *supra* at 1-2, our motion raises a factual jurisdictional challenge and, therefore, Plaintiffs bear the burden to demonstrate that they satisfy Article III standing requirements. Recognizing this, Plaintiffs rely on declarations attached to their brief and other exhibits. These documents demonstrate that Plaintiffs have not satisfied Article III requirements.

The constitutional requirements applicable here bear repeating: because Plaintiffs are organizations, at least one of their members must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Moreover, Plaintiffs must show that the injury "is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citation omitted). Thus, standing cannot exist "apart from [a] concrete application that threatens imminent harm to [the plaintiff's]

interests." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

The fundamental problem Plaintiffs face is that none of their declarations demonstrates a single location where allegedly illegal shoreline armoring has occurred due to the Spellmon Memo, and that has or imminently will adversely affect one of their members' cognizable interests at that location. Even accepting Plaintiffs' four declarations as true, they arguably establish, at most, injury from some past instances of shoreline armoring. But Plaintiffs in their first claim for relief challenge the Spellmon Memo, not past actions they allege have caused harm. To establish standing for their claim, therefore, Plaintiffs must demonstrate a particular "injury in fact" to one of its members that is "fairly traceable" to the Spellmon Memo (i.e., "the challenged conduct of the defendant"), and that the "injury in fact" is "'concrete and particularized' and 'actual or imminent.'" These fundamental requirements are not satisfied by Plaintiffs' declarations (or their Complaint, *infra* at 12 n.4). Accordingly, the first claim of the Complaint must be dismissed.

The closest Plaintiffs come to demonstrating the required concrete application is in paragraph 16 of the Carey Declaration, Doc. 17-2, where Ms. Carey cites a "2018 project" in "Mason County that included 100 feet of new hard armoring on a stretch of shoreline documented as an important feeder bluff with surf smelt spawning" and a "similar project in Kitsap County that included the construction of 100 feet of hard armoring in a forage fish spawning habitat area." But notably absent from this declaration is any showing that Ms. Cary has a legally cognizable interest in these locations. In other words, nowhere does Ms. Carey document any cognizable aesthetic or recreational interest at either of these two locations within Puget Sound. And it simply will not suffice, for purposes of standing, for Ms. Carey to assert a

general interest in the entire Puget Sound.[3] If standing could be established on that basis, then almost anyone could satisfy Article III requirements to challenge any project anywhere in Puget Sound or along the Washington Coast, regardless of is location.

A second defect is that Ms. Carey's declaration fails to demonstrate that the alleged harm from the two projects she cites was "traceable" to the Spellmon Memo. The Carey declaration at most implies that the two identified projects occurred after the Spellmon Memo was issued, *see* Carey Dec. ¶ 16, but even if true, that temporal coincidence is hardly adequate to establish causation. Put another way, Plaintiffs cannot establish causation because Plaintiffs cannot demonstrate that the situation at these two locations (or any others posited in the declaration) would have been any different, even if the Spellmon Memo did not exist.

As a final attempt to establish standing, Plaintiffs attach a 2015 administrative request that the Corps issue formal "Jurisdictional Determinations" at four sites of alleged shoreline armoring. Pl. Memo at 23. This is the basis for Plaintiffs' second claim for relief alleging under the APA that the Corps has unreasonably delayed in responding to their request. Complaint ¶¶ 64-67. Whether Plaintiffs can satisfy standing requirements for their second claim based on these four projects is not now before the Court, and the Corps reserves its position on that issue. What is clear and relevant now, however, is that none these four projects can supply standing for Plaintiffs' *first* claim for relief. The four projects in Plaintiffs' 2015 request predate the Spellmon Memo and Plaintiffs fail to show any alleged injury from those projects traceable to

[3] Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), a cognizable interest at one location will not establish standing in another absent the required showing at that location. *See Summers,* 555 U.S. at 494-96. Is it not enough for Plaintiffs to allege that their interests are part of the same ecosystem. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

that Memo. Moreover, Plaintiffs conclusory assertions regarding these four projects suffer from the same fatal flaws that plague their declarations regarding their first claim.[4]

In sum, Plaintiffs broadly disagree with the way that the Corps' Seattle District has in the past applied the "high tide line" regulatory provision when implementing the CWA Section 404 permit program. Based on that disagreement, Plaintiffs request this Court to order extraordinarily broad and sweeping change in the how the Corps regulates the entire shoreline of Puget Sound and the Washington Coast. The requirements of Article III, however, prevent this Court from entertaining Plaintiffs' grievances "apart from any concrete application" of the challenged government action "that threatens imminent harm to [the plaintiffs'] interests." *Summers*, 555 U.S. at 494. This is the case-by-case approach mandated by the Constitution and Plaintiffs cannot avoid its requirements.

CONCLUSION

For these reasons, the United States respectfully requests that the Court dismiss Plaintiffs' first claim for relief for lack of jurisdiction pursuant to Rule 12(b)(1).

Respectfully submitted,

/s/ David Kaplan
David J. Kaplan
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[4] Even assuming Plaintiffs' standing should be considered only on the face of the Complaint, for the same reasons above and in our opening brief, Plaintiffs' general allegations do not satisfy Article III. Nor could Plaintiffs rely on a judicial presumption that jurisdictional facts exist, because a plaintiff may not "rely on a bare legal conclusion to assert injury-in-fact, or engage in an 'ingenious academic exercise in the conceivable' to explain how defendants' actions caused his injury." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (citation omitted). Rather, in the pleading "[a] plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973). In any event, given that Plaintiffs submitted detailed declarations to demonstrate standing, no presumption of adequate jurisdictional facts should apply here.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018, I electronically filed the foregoing memorandum with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ David Kaplan