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Northern Plains Resource Council v. United States Army Corps of Engineers

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***Northern Plains Resource Council v. United States Army
Corps of Engineers*, No. CV-19-44-GF-BMM, ___ F.Supp.3d ___,
2020 WL 1875455 (D. Mont. April 15, 2020)**

Liz M. Forster

Environmental activist and indigenous rights groups have challenged the validity of the Keystone XL Pipeline since its initial approval in 2010. In April 2020, less than a month after crews broke ground, the opposing groups notched a major win when the United States District Court for the District of Montana revoked a key permit for the project on the grounds that the United States Army Corps of Engineers had inadequately assessed the pipeline’s impact on endangered species.

I. INTRODUCTION

Northern Plains Resource Council v. United States Army Corps of Engineers addressed whether the Defendants, the United States Army Corps of Engineers (“Corps”), acted arbitrarily and capriciously when deciding not to consult with the United States Fish & Wildlife Service (“FWS”) before reauthorizing a nationwide water permit.¹ The Northern Plains Resource Council, Bold Alliance, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, and Friends of the Earth (“Plaintiffs”) argued that the Corps needed to consult with FWS under Section 7(a)(2) of the Endangered Species Act (“ESA”) to determine whether Nationwide Permit 12 (“Permit 12”), which, in part, authorized the construction of the Keystone XL Pipeline, would jeopardize species listed as endangered or threatened under the ESA, or adversely modify critical habitat.²

The United States District Court for the District of Montana found “resounding evidence” that the permit “may affect” listed species and their habitat.³ Based on this evidence, the court found that the Corps’ “no effect” determination and its subsequent decision to forgo consultation with FWS was arbitrary and capricious under the Administrative Procedure Act (“APA”).⁴

II. FACTUAL AND PROCEDURAL BACKGROUND

Under the CWA, the Corps regulates the discharge of any pollutant, including dredged or fill material, into U.S. waters.⁵ Any party

1. N. Plains Res. Council v. U.S. Army Corps of Eng’rs, ___ F.Supp.3d ___, 2020 WL 1875455 (D. Mont. April 15, 2020) (hereinafter *Northern Plains I*).

2. First Am. Compl. For Declaratory and Injunctive Relief ¶ 107, Sept. 10, 2019.

3. *Northern Plains I*, at *4 (quoting 50 C.F.R. § 402.14(a)).

4. *Id.* at *7.

5. *Id.* at *1 (citing 5 U.S.C. § 706 (2)(A)).

pursuing a project discharging dredged or fill material must obtain a permit from the Corps.⁶ The permitting process seeks to fulfill the ultimate goal of the CWA: to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷

The Corps can, after notice and a public hearing, issue general permits on state, regional, or nationwide bases for activities that are “similar in nature” and will cause only minimal adverse effects separately and cumulatively.⁸ Permit 12 authorizes activities nationwide that involve the discharge of dredged or fill material into U.S. waters for construction, maintenance, repair and removal of utility lines and associated infrastructure that may cause permanent or temporary filling, flooding, excavation, or draining of jurisdictional waters.⁹ The Corps first issued Permit 12 in 1977 and reissue the permit every five years.¹⁰

In 2017, the Corps reissued Permit 12.¹¹ During scoping, the Corps determined that the projects authorized by Permit 12 had no effect on listed species or critical habitat.¹² Accordingly, the Corps did not consult with FWS.¹³ The Keystone XL Pipeline—which needs the Corps’ approval because it crosses the Yellowstone River in Montana and the Cheyenne River in Nebraska—was included in the group of projects authorized by Permit 12.¹⁴

After the Corps reissued Permit 12, the Plaintiffs sued the Corps, alleging: (1) the Corps violated the National Environmental Policy Act (“NEPA”) and the APA because it failed to adequately assess the environmental impacts of the projects authorized by Permit 12;¹⁵ (2) the Corps violated the CWA and the APA because Permit 12 authorized activities that will “cause more than minimal adverse environmental effects”;¹⁶ (3) the Corps’ approval of the Keystone XL Pipeline’s crossing of the Yellowstone and Cheyenne rivers violated the CWA and the APA because the Corps arbitrarily and capriciously disregarded the possibility hydraulic fluids needed to drill the crossing could leach into the waterway and nearby soil;¹⁷ (4) the Corps violated the ESA and the APA because it failed to consult with FWS to assess the cumulative impacts of the discharges allowed under Permit 12 on protected species or critical habitat;¹⁸ and (5) the Corps’ approval of the Keystone XL Pipeline’s crossing of the Cheyenne and Yellowstone rivers violated the ESA and the APA because the Corps arbitrarily and capriciously deferred to the

6. *Id.*

7. *Id.* (quoting 33 U.S.C. § 1251(a)).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (citing 82 Fed. Reg. 1860, 1860, 1985–86 (Jan. 6, 2017)).

12. *Id.* at *3.

13. *Id.*

14. *Id.*

15. Am. Compl. ¶¶ 191–97.

16. *Id.* at ¶¶ 198–205.

17. *Id.* at ¶¶ 206–17.

18. *Id.* at ¶¶ 218–27.

permittee's ESA analysis rather than conducting its own.¹⁹ The Corps has suspended the verifications for the Yellowstone and Cheyenne rivers, so the issues are not in front of the court.²⁰ The Corps moved for partial summary judgment on claims one, two, and four.²¹

III. ANALYSIS

After hearing the parties' arguments, the court held that the Corps' reissuance of Permit 12 violated the ESA since the agency failed to initiate a formal consultation with FWS to assess Permit 12's impacts on protected species and critical habitat.²² The court, thus, denied the Corps' motion on claim four.²³ Furthermore, since consulting with FWS could alter the Corps' analysis on the environmental impacts of the projects and the Corps' NEPA and CWA determinations, The court denied, without prejudice, the Corps' motions on claims one and two.²⁴

A. Regulations Protecting Endangered Species

Under Section 7(a)(2) of the ESA, federal agencies must ensure that any action it authorizes, funds, or carries out is "not likely to jeopardize the continued existence" of any species protected under the ESA or to destroy or adversely modify its habitat.²⁵ If an agency finds that its actions may affect listed species or critical habitat, it must initiate a formal consultation with FWS.²⁶ Once an agency initiates consultation and supplies FWS with the required information, FWS evaluates whether the agency action is likely to jeopardize the continued existence of a protected species, or destroy or adversely modify critical habitat.²⁷ If an agency finds its actions are not likely to have such impacts, it does not need to consult with FWS.²⁸

Additionally, General Condition 18 of 82 Fed. Reg. 1998-2005 ("General Condition 18") prohibits the use of any nationwide permit for activities that are likely to directly or indirectly jeopardize the existence of a species protected under the ESA or adversely modify critical habitat.²⁹ Under General Condition 18, a non-federal permittee must submit a Preconstruction Notification ("PCN") to the Corps certifying that its

19. *Id.* at ¶¶ 228–36.

20. *Id.* at ¶ 235. Plaintiffs note that the Corps may reinstate these verifications at any time.

21. *Id.* at *1.

22. *Northern Plains I* at *7.

23. *Id.*

24. *Id.* at *9.

25. *Id.* at *3 (citing 16 U.S.C § 1536(a)(2)).

26. *Id.*

27. *Id.*

28. *Id.* (citing 50 C.F.R. § 402.14(b)(1)).

29. *Id.* at *2.

project will not violate General Condition 18.³⁰ If the Corps determine that the activity complies with the ESA, and the project meets other regulatory requirements, the permittee can begin its desired project.³¹

B. “No Effect” Determination under the ESA

Based on the Plaintiffs’ ESA claim, the court focused on two issues: (1) whether the actions authorized by Permit 12 met ESA standards; and (2) whether the Corps’ decision to not consult with FWS based on its “no effect” determination was arbitrary and capricious under the APA.

The court based its analysis on whether the Corps “considered the relevant factors and articulated a rational connection between the facts found and choices made.”³² In the Corps’ reauthorization of Permit 12, it noted that discharges of dredged or filled material can permanently convert wetlands, streams, and other aquatic resources into terrestrial ecosystems.³³ Further, documents stated that changes in land use can reduce ecosystem services, such as food production, infectious diseases control, and climate and air quality regulation.³⁴ Water flow changes, land use changes, and chemical imbalances can also alter freshwater ecosystems.³⁵ Overall, the Corps wrote, the construction of utility lines like the Keystone XL Pipeline “will fragment terrestrial and aquatic ecosystems.”³⁶ Based on this evidence—and the Corps’ admission that prior versions of Permit 12 have affected terrestrial and aquatic ecosystems³⁷—the court concluded that the reauthorization of Permit 12 would affect protected species.³⁸

Additionally, the court found that the Plaintiffs’ expert testimony corroborated the finding that Permit 12 would affect protected species by detailing how the Permit 12 projects would impact two protected species—the pallid sturgeon and American burying beetle.³⁹ For instance, pollution and sedimentation in rivers and streams caused by construction would bury the sturgeons’ food source.⁴⁰

Combined, the Corps’ acknowledgments and Plaintiffs’ expert testimony constituted “resounding evidence” that the discharges authorized by Permit 12 may affect listed species.⁴¹ The Court determined

30. *Id.*

31. *Id.*

32. *Id.* at *3 (citing Nat’l Ass’n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003)).

33. *Id.* at *4.

34. *Id.*

35. *Id.*

36. *Id.* (citing 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017)).

37. *Id.*

38. *Id.* at *5.

39. *Id.*

40. *Id.*

41. *Id.* at *6 (See *W. Watersheds Project v. Kraayenbrick*, 632 F.3d 472 (9th Cir. 2011)).

that such evidence should have compelled the Corps to consult with FWS.⁴² Because the Corps failed to adequately consider the evidence of Permit 12's impact on listed species in its "no effect" determination, the Court held that the Corps acted arbitrarily and capriciously.⁴³

C. Improper Reliance on Project-Level Review and Permittee's PCN

The Court next addressed whether the Corps' project-level review of Permit 12's impacts on protected species and the permittee's PCN sufficiently supported the Corps' "no effect" determination.⁴⁴ The United States Court of Appeals for the Ninth Circuit and district courts have ruled extensively on the adequacy of project-level reviews for nationwide permits.⁴⁵ As the Court notes, courts repeatedly have found that project-level reviews do not meet the requirements of the ESA.⁴⁶ For instance, in *Conner v. Burford*,⁴⁷ the Ninth Circuit found the Corps must "consider the effect of the entire agency action."⁴⁸ Similarly, the United States District Court for the District of Columbia held that the Corps needed to initiate a comprehensive consultation for nationwide permits "to avoid piece-meal destruction of panther habitat."⁴⁹ Based on these cases, the Court held that the Corps could not rely on project-level review for its analysis of the impact of Permit 12 on listed species and their habitat.⁵⁰

Furthermore, the Court held that the Corps could not adopt the Keystone XL Pipeline developer's PCN certifying that its project complied with General Condition 18 to fulfill the ESA obligations.⁵¹ The court said the Corps itself must analyze whether its actions "may affect listed species," and delegation of this duty to the permittee violates the ESA.⁵²

42. *Id.*

43. *Id.* at *7.

44. *Id.* at *6.

45. *See Nat'l Wildlife Fed'n v. Brownlee*, 402 F.Supp.2d 1, 10 (D.D.C. 2005).

46. *Id.* at *6.

47. 848 F.2d 1441, 1453–58 (9th Cir. 1988).

48. *Id.*

49. *Id.* (quoting *Nat'l Wildlife Fed'n v. Brownlee*, 402 F.Supp.2d at 10). The court also references *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F.Supp.2d 1248, 1266–67 (W.D. Wash. 2007) (holding that project-level analysis "improperly curtails the discussion of cumulative effects"); *Cottonwood Envtl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir. 2015) (holding that the Forest Service needed to redo its consultation at a programmatic level); *Lane Cty Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992) (holding that the Bureau of Land Management's strategy of submitting for ESA consultation individual timber sales rather than its overall logging strategy in northern spotted owl habitat violated the ESA).

50. *Id.*

51. *Id.* at *7.

52. *Id.* at *7 (citing 50 C.F.R. § 402.14(a)).

D. NEPA and CWA Claims

The court did not rule on the merits of the Plaintiffs' NEPA claims because the Corps determined the environmental consequences under NEPA could change once it consults with the FWS on the ESA claim.⁵³ For the same reason, the court did not rule on the merits of the Plaintiffs' CWA claim.⁵⁴ Instead, the court denied, without prejudice, the Corps' motions on those claims.⁵⁵ Thus, the Corps can refile both motions after consulting with FWS if it still believes that Permit 12 complies with NEPA and the CWA.⁵⁶

E. Effect of the Ruling

The court ultimately vacated the Corps' authorization of Permit 12.⁵⁷ Vacating the permit halted all projects authorized by Permit 12—construction of the Keystone XL and other pipelines, construction non-pipeline utility infrastructure, and maintenance and repair of existing utility infrastructure—pending the Corps' consultation with FWS and compliance with all environmental regulations.⁵⁸ The court also barred the Corps from authorizing any dredge or fill activities.⁵⁹

Since the court's order, the scope of its ruling has narrowed. On May 11, 2020, the court decided only to bar the Corps from authorizing oil and gas pipeline construction and dredge or fill activities initially authorized by Permit 12.⁶⁰ Accordingly, the Corps could authorize non-pipeline construction and routine maintenance, inspection, and repair on existing Permit 12 projects.⁶¹ However, the court did not go so far as to keep the Corps' "no effect" determination in place while the case is on appeal, as the Corps requested.⁶² Granting the Corps' request, the court held, "could seriously injure protected species and critical habitats—the very danger' that the ESA 'aims to prevent.'"⁶³

The United States Supreme Court upheld the court's ruling, but only relative to the Keystone XL Pipeline.⁶⁴ Accordingly, the Court affirmed the court's order halting construction on the pipeline until the

53. *Id.* at *8.

54. *Id.* at *9.

55. *Id.* at *8.

56. *Id.*

57. *Id.*

58. *Id.* at *9.

59. *Id.*

60. *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, ___ F.Supp.3d ___, 2020 WL 3638125, 2020 U.S. Dist. LEXIS 108357.

61. *Id.*

62. *Id.* at *7.

63. *Id.* (citing *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012)).

64. *Army Corps of Eng'rs v. N. Plains Res. Council*, ___ S. Ct. ___, 2020 WL 3637662, 2020 U.S. LEXIS 3545.

Corps completes consultation with FWS.⁶⁵ This order cleared the way for other oil and gas pipeline projects authorized under Permit 12.⁶⁶

V. CONCLUSION

In holding that the Corps' failure to consult with the FWS on the impact of Permit 12 violated the ESA, the court reaffirmed that federal agencies cannot sidestep environmental reviews to shepherd energy development.⁶⁷ Furthermore, the court declared that federal agencies cannot ignore evidence of a project's adverse impact on the survival of a protected species and its habitat; if "resounding evidence" of harm exists, federal agencies must engage with the FWS to analyze that harm.⁶⁸

65. *Id.*

66. *Id.*

67. *Northern Plains I*, at *7.

68. *Id.*