UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, et al., Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, et al., Defendants.	No. 2:20-cv-1106 Hon. Lance M. Africk

MEMORANDUM IN SUPPORT OF AGREED MOTION FOR VOLUNTARY REMAND OF THE PERMIT AT ISSUE IN THIS CASE

INTRODUCTION

Defendants Lt. General Todd T. Semonite, Colonel Stephen Murphy, Ryan McCarthy, and the United States Army Corps of Engineers (collectively "Corps"), with the agreement of Plaintiffs Atchafalaya Basinkeeper, Louisiana Crawfish Producers Association – West, and Healthy Gulf (collectively "Basinkeeper"),[1] respectfully request that the Court grant the Corps' motion for a voluntary remand without vacatur of the permit at issue in this lawsuit and accompanying Environmental Assessment/Finding of No Significant Impact for reconsideration pursuant to 33 C.F.R. § 325.7. The permit at issue, Permit No. MVN-2015-02209-WPP, was issued to the State of Louisiana under Section 404 of the Clean Water Act ("CWA") for dredging and filling activities in jurisdictional waters and under Section 10 of the Rivers & Harbors Act ("R&HA") authorizing related obstructions to navigable waters ("Permit"). 33 U.S.C. §§ 403, 1344. On remand, the Corps' reconsideration process would include providing public notice and seeking comment regarding the dredging and filling authorized under Section 404 of the Clean Water Act, the related obstructions authorized under Section 10 of the Rivers and Harbors Act, and the need (if any) for corrective measures. For the reasons discussed further below, this agreed motion comports with the relevant caselaw, and it will resolve this

[1] The Parties conferred on several occasions between September 28 and 30, 2020, regarding this motion, and Plaintiffs reviewed this supporting memorandum. Plaintiffs informed the Corps that they agree to the relief requested.

lawsuit in a manner that both conserves judicial resources and addresses the concerns raised by Basinkeeper.

BACKGROUND

I. FACTUAL BACKGROUND

This case challenges a permit issued by the Corps under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act for "[d]redging of accumulated sediment shoals in Grand Lake access channel, and depositing spoils into an adjacent pipeline canal, in accordance with the 12 drawings dated August 14, 2017." Ex. A, at 1. The Corps finalized an Environmental Assessment/Finding of No Significant Impact on September 21, 2017, and issued the Permit on September 29, 2017. Ex. A, at 3. The Permit authorizes the State to perform work through September 30, 2022, and requires that the State maintain the authorized activity. Ex. A, at 1 ¶¶ 1, 2. By January 2019 the State had completed all of the work that it intends to undertake pursuant to the Permit, however the disposed spoils and fill remain in the pipeline canal pursuant to the R&HA Section 10 provisions. Ex. B, ¶ 5.

Over a year later, on April 3, 2020, Basinkeeper filed its Complaint seeking to challenge the Permit under Section 404 of the Clean Water Act and the regulations implementing the National Environmental Policy Act. Complaint, ECF No. 1, ¶ 9. Specifically, Basinkeeper alleges: (1) the Corps issued the Permit without adequate public notice and comment; (2) the Corps' conclusions that the Permit would not

cause significant degradation of jurisdictional waters and is the least environmentally damaging practicable alternative were arbitrary and capricious; (3) the Corps failed to consider an adequate range of alternatives; and (4) the Corps' conclusion that the Permit is not contrary to the public interest was arbitrary and capricious. *Id.* ¶¶ 60-80. To remedy its alleged environmental harms, Basinkeeper requests "[a]n order declaring that the Corps violated the Clean Water Act" and "[a]n order vacating and remanding" the Permit. *Id.* at 14.

During meet-and-confer sessions and in response to the Corps' Motion to Dismiss (ECF No. 11), Plaintiffs have provided the Corps with new information that the Corps did not consider when reaching its public interest decision as well as new information pertaining to maintenance of the spoils disposed under the Permit. Special Condition 5 of the Permit expressly provides that the Corps may reevaluate its Permit decision "at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to . . . (c) Significant new information surfaces which [the Corps] did not consider in reaching the original public interest decision." Ex. A, at 3, ¶ 5(c). Such reevaluation may result in a determination that the Permit should be suspended, modified or revoked, as well as a determination that restoration is necessary. *Id.* at 1 ¶ 2, 3 ¶ 5. The Corps therefore believes, in the exercise of its discretion, that it should reevaluate its Permit decision as expressly provided for in Special Condition 5 of the Permit and expressly authorized under 33 C.F.R. § 325.7.

II. LEGAL BACKGROUND

A. The Clean Water Act

The Clean Water Act prohibits "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), unless the discharger "obtain[s] a permit and compl[ies] with its terms." *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted). A "discharge of a pollutant" occurs when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "[N]avigable waters," in turn, are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Under the Act, the Corps regulates discharges of dredged and fill material into waters of the United States through the issuance of permits under CWA Section 404. 33 U.S.C. § 1344(a).

Section 404 permitting is an adjudicatory process in which the project proponent submits an application to dredge material from one location and then discharge the resulting spoils in another area in connection with a specific project. The Corps then considers that application under the CWA and its applicable regulations, including a public notice and comment process, culminating in a final decision to either grant or deny that permit application. *See, e.g., Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986); 33 C.F.R. § 325.2. To reach a final permit decision, the Corps reviews the specific proposal and its impacts on waters of the United States and the public interest in accordance with applicable regulations at 33 C.F.R. Parts 325 and 327. The Corps' final decision is reviewable in federal court

under the Administrative Procedure Act. The Corps also may voluntarily reconsider its permit decisions under 33 C.F.R. Part 325.

B. The Rivers & Harbors Act

The R&HA was designed to preserve and protect the Nation's navigable waterways. *United States v. Pa. Indus. Chem. Corp.,* 411 U.S. 655, 663 (1973). The cornerstone of the statute is R&HA Section 10, 33 U.S.C. § 403, which prohibits permanent or temporary structures and activities that obstruct navigable waters unless they are expressly authorized by the Corps through individual permits that are granted based on case-specific evaluations, or through authorizations to proceed under nationwide permits that authorize activities that fall within specified parameters. *See* 33 C.F.R. §§ 322.1, 320.2(b), (d), (e). The Corps has interpreted that Act to require permits that cover the lifetime of an obstruction. *See* 33 C.F.R. §§ 322.3(a), 325.6(b).

C. The National Environmental Policy Act

NEPA is a procedural statute requiring federal agencies to consider the potential environmental impacts of their proposed actions, while at the same time guaranteeing broad public dissemination of relevant information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires that, for "major Federal actions significantly affecting the quality of the human environment," a federal agency must prepare a detailed statement on the potential environmental impact of the proposed action, including an analysis of alternatives to the proposed action, known as an Environmental Impact Statement ("EIS"). Council on

Environmental Quality ("CEQ") regulations allow an agency to first prepare an EA to determine whether a full EIS is necessary for a proposed action. 40 C.F.R. § 1501.3 (2018); 40 C.F.R. § 1508.9(a) (2018).[2] An EA is a concise document that briefly discusses the relevant issues and either reaches a conclusion that preparation of a site-specific EIS is necessary or concludes with a Finding of No Significant Impact ("FONSI"), in which case preparation of an EIS is unnecessary. *Sierra Club v. Espy*, 38 F.3d 792, 796 (5th Cir. 1994) (citing 40 C.F.R. § 1508.9 (2018)).[3]

In issuing a Section 404 permit, the Corps documents its determination not to prepare an EIS with a combined decision document, which includes an environmental assessment, a 404(b)(1) guidelines evaluation, a statement of findings, and a finding of no significant impact. *See* 33 C.F.R. pt. 325, App. B (7); *see also* 33 C.F.R. § 325.2(a)(6).

[2] The Council on Environmental Quality promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55978 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986, see 51 Fed. Reg. 15618 (Apr. 25, 1986). More recently, the Council published a new rule, effective September 14, 2020, further revising the 1978 regulations. The claims in this case arise under the 1978 regulations, as amended in 1986. All citations to the Council's regulations in this brief refer to those regulations as codified at 40 C.F.R. Part 1500 (2018).

[3] The Supreme Court has held that the CEQ regulations are entitled to substantial deference. *See Robertson*, 490 U.S. at 355-56; *accord Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) ("CEQ's interpretation of NEPA is entitled to substantial deference"). The CEQ regulations require each federal agency to adopt implementing procedures to supplement the CEQ regulations. 40 C.F.R. § 1507.3 (2018). The Corps' regulations described herein adopt and supplement the CEQ regulations. *See also* 33 C.F.R. pt. 325, App. B, further describing NEPA implementation procedures for the Corps' regulatory program.

LEGAL STANDARD

"It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) (collecting cases); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010); *Hornbeck Offshore Serv., L.L.C. v. Salazar*, Case No. 16-cv-2089, 2010 WL 3523040 (E.D. La. 2010) (same, citing *ConocoPhillips*); *Atchafalaya Basinkeeper v. Mallard Basin, Inc.*, Case No. , 2012 WL 13041531 *3 (W.D. La. 2012) (same, identifying 33 C.F.R. § 325.7 as a source of such authority for Corps permits). This is true even for Corps permits for ongoing or completed projects. *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1444 n.25 (5th Cir. 1991) (identifying 33 C.F.R. § 325.7 as a source of such authority for Corps permits). In the Fifth Circuit "[t]he rule is that once a judicial suit is filed, an agency should not unilaterally reopen administrative proceedings—the agency should first ask the court to remand the case to it." *Broussard v. U.S. Postal Serv.*, 674 F.2d 1103, 1108 (5th Cir. 1982) (citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1316 (5th Cir. 1977) and *Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962), cert. denied, 370 U.S. 922 (1962)). Plaintiffs also must be provided with notice of the Agency's intent to reconsider its prior decsion. *ConocoPhillips*, 612 F.3d at 832 & n.7; *Hornbeck,* 2010 WL 3523040 *3 (citing *ConocoPhillips*).

ARGUMENT

A voluntary remand of the Permit (with Basinkeeper's agreement) for reevaluation under 33 C.F.R. 325.7 is not only the most efficient means to address the various concerns raised in Baskinkeeper's Complaint, it also reflects the Corps' authority and interest in reconsidering its own administrative decisions. Voluntary remand also will serve the interests of judicial economy by allowing the Corps to reconsider and possibly rectify decisions due to new developments without further expenditure of judicial resources. *See, e.g.*, *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 & n.3 (D.C. Cir. 1993) (granting agency's opposed motion for voluntary remand to consider newly developed evidence). "Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." *B.J. Alan Co. Inc. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). Courts "prefer[ ] to allow agencies to cure their own mistakes rather than wast[e] the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp.*, 989 F.2d at 524.

On remand, the Corps will provide public notice regarding the permitted project, seek the public comment that Basinkeeper argues should have informed the Corps' original decision, and use those comments to inform its reevaluation of the Permit under 33 C.F.R. § 325.7. The Corps anticipates that the reevaluation process will take between approximately three and six months and result in a corresponding

decision document, barring unforeseen circumstances or circumstances beyond the Corps' control. This will enable Basinkeeper, the State (as permittee), and other interested members of the public to actively participate in the permitting process as Basinkeeper alleges should have happened before. *See Belville Mining Co. v. United States,* 999 F.2d 989, 998 (6th Cir. 1993) (reconsideration appropriate where based on a legitimate concern that the challenged action "had serious procedural and substantive deficiencies"). Agencies need not confess error as a basis for a remand, and courts need not find error before granting remand. *See SKF USA, Inc. v. United States,* 254 F.3d 1022, 1058 (C.A.F.C. 2001); *Ethyl Corp.*, 989 F.2d at 524 n.3; *see, Carpenters Indus. Council v. Salazar,* 734 F. Supp.2d 126, 133-34 (D.D.C. 2010) (the court is not required to "independently determine whether legal error occurred in order to grant a request for voluntary remand"); *Franciscan All., Inc. v. Price,* Case No. 7:16-cv-108, 2017 WL 3616652 *3 (N.D. Tex. July 10, 2017) (same).

Moreover, on remand the Corps intends to seek public comment regarding whether restoration is needed pursuant to 33 C.F.R. § 325.7 and Special Condition 5 of the Permit. The basis for seeking comment and considering this issue on remand is new information regarding maintenance of the spoil disposal area that was first provided to the Corps by Basinkeeper in recent case-related discussions and filings. The courts generally recognize that voluntary remand is appropriate where new evidence becomes available after the agency takes action. *Carpenter Indus.*, 734 F. Supp.2d at 132 (citing *Ethyl Corp.,* 989 F.2d at 523). This same process will also allow

the Corps to cure any procedural defect that may exist under NEPA. *See Basinkeeper v. U.S. Army Corps of Engineers*, No. CV 15-6982, 2016 WL 3180643, at *4 (E.D. La. June 8, 2016) ("Because the Corps has asserted that it will issue public notice, request public comment, prepare a revised Environmental Assessment of NOD-13, consult with state and federal agencies with an interest in NOD-13 or its application to specific projects, and conduct a re-evaluation of NOD-13, . . . remand will serve judicial economy and will give Defendants an opportunity to cure any potential mistakes.")

The timing of this request also is objectively reasonable. The courts recognize that "there is no hard and fast rule regarding what constitutes 'reasonable time' with respect to voluntary remand," and remands granted some years after the underlying agency action have been upheld. *Frito-Lay, Inc. v. U.S. Dep't of Labor*, 20 F. Supp.3d 548, 555–56 (N.D. Tex. 2014) (citing *Crager v. United States*, 25 Cl. Ct. 400, 403–04, 411 (1992) and *Elkem Metals Co. v. United States*, 193 F. Supp.2d 1314, 1322–23 (Ct. Int'l Trade 2002)); *Franciscan All., Inc. v. Price*, 2017 WL 3616652 *4 ("courts have found time periods in excess of three years to be reasonable"). In this case, by agreement of the parties, the Corps is seeking a voluntary remand within just a few months after Basinkeeper alerted it to the alleged procedural defects in its permitting process under the CWA and NEPA and provided new information regarding the maintenance of spoil disposal areas under the Permit.

Finally, a voluntary remand without vacatur for reevaluation that includes potential restoration or modification under Special Condition 5 of the Permit not only provides most of the relief Basinkeeper requests in its Complaint (ECF No. 1, ¶ 9), but also is more favorable than the remedy this Court could award if Basinkeeper were to prevail on the merits. In this permit challenge governed by Section 706(2) of the Administrative Procedure Act, the Court is authorized to "hold unlawful and set aside" the Permit and underlying findings and conclusions that it finds to be, *inter alia*, arbitrary and capricious or not reached in observance of procedures required by law.[4] 5 U.S.C. § 706(2); *see also O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 238 (5th Cir. 2007) ("As a general rule, when an agency decision is not sustainable on the basis of the administrative record, then the matter should be remanded to [the agency] for further consideration." (internal quotation marks and citation omitted)). The Court is not authorized to require the Corps to take or consider enforcement action against the State (*e.g.,* issue a restoration order), however, and the State is not a party to this case against which judgment could be entered. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (the Corps' exercise of enforcement discretion is discretionary nonreviewable). Moreover, if the Permit is vacated, the State will be relieved of the continuing

[4] The Corps does not concede that vacatur would be appropriate even if Basinkeeper prevailed on the merits. Instead, the parties would need to brief that issue under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993) and its progeny, including *Sugar Cane Growers Co-op of Florida v. Veneman,* 289 F.3d 89 (D.C. Cir. 2002).

obligations that the Permit currently imposes—including the disposal site maintenance obligations imposed by General Condition 2.

CONCLUSION

For all of the foregoing reasons, with the agreement of Basinkeeper, the Corps respectfully requests that the Court grant its request for a voluntary remand of the permit at issue in this case.

Respectfully submitted this 30th day of September, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2020, I electronically filed the foregoing through the CM/ECF system which caused all Parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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