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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.,
ARCTIC SLOPE REGIONAL
CORPORATION, STATE OF ALASKA,
KUUKPIK CORPORATION, and
NORTH SLOPE BOROUGH

Intervenor-Defendants.

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

**CONOCOPHILLIPS ALASKA, INC.'S MOTION
REGARDING FURTHER PROCEEDINGS**

This Court's Order re Motions for Summary Judgment directs that "[w]ithin 21 days of the date of this Order, the parties in the Kunaknana case shall file and serve, either jointly or separately, a motion(s) or stipulation that proposes the further proceedings that should occur in

Kunaknana, et al. v. U.S. Army Corps of Engineers, et al., 3:13-cv-00044-SLG - 1

this matter.”¹ The parties have conferred in good faith but have been unable to agree upon a stipulation regarding further proceedings.

This Court has held that with respect to the determination of the U.S. Army Corps of Engineers (“USACE”) that a supplemental environmental impact statement (“SEIS”) was unnecessary, the agency failed to provide an adequate explanation addressing (i) the changes to the CD-5 project since the 2004 Final Environmental Impact Statement (“FEIS”), and (ii) the new information USACE relied upon in making its Least Environmentally Damaging Practicable Alternative (“LEDPA”) determination for purposes of Section 404 of the Clean Water Act (“CWA”).² The Court discussed in its order, but did not expressly resolve, plaintiffs’ contention that USACE’s NEPA supplementation determination also fails to provide an adequate explanation addressing post-2004 information regarding climate change.³ The Court declined to reach and to decide plaintiffs’ CWA claim at this time.⁴

In light of the Court’s decision, and the parties’ inability to agree upon a stipulation, ConocoPhillips moves this Court to enter an order as follows:

1. USACE’s decision to issue a CWA § 404 permit to ConocoPhillips Alaska, Inc. to develop the CD-5 project shall be remanded without vacatur to USACE for the limited purpose of remedying the errors identified in the Court’s Order re Motions for Summary Judgment. Specifically, the remand pertains to USACE’s decision that the 2004 FEIS does not require supplementation to address: changes in the CD-5 project since the 2004 FEIS; and new

¹ Dkt. 175 at 58

² *Id.* at 57-58.

³ *Id.* at 54-56.

⁴ *Id.* at 56.

information relied upon by USACE in its CWA § 404 permitting decision. In addition, the scope of the remand includes post-2004 climate change information.

2. USACE shall complete the remand, and provide notice to the parties and to this Court on or before September 15, 2014 (*i.e.*, 90 days from the date of this motion).

3. During the 90-day period of the remand, activities occurring within the project area pursuant to the CD-5 CWA § 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 gravel seasoning and bridge installation activities described in the Second Declaration of James I. Brodie.

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 their contentions, if any, regarding the adequacy of the supplemental explanation provided by USACE for its decision that the 2004 FEIS does not require supplementation to address (a) changes in the CD-5 project since the 2004 FEIS, (b) new information relied upon by USACE in its CWA § 404 permitting decision, and (c) post-2004 climate change information. Defendants and Intervenor-Defendants shall thereafter have a period of 30 days to file briefs in response.⁵ No reply briefs shall be permitted unless invited by the Court.

⁵ The briefs of the Federal Defendants and of ConocoPhillips shall be no more than 25 pages. The briefs of the remaining Intervenor-Defendants shall be consolidated to the maximum extent practicable, and limited to no more than 10 pages each.

6. Upon submission of the additional briefing by the parties addressing the remanded issues and supplemental explanation, the Court will address the remaining claims of the plaintiffs in this litigation on an expedited basis.

As addressed in the accompanying supporting memorandum and declarations, ConocoPhillips opposes an order vacating the CD-5 CWA § 404 permit. Vacatur is unnecessary and unwarranted in this case because (i) given the nature of the identified errors, USACE may be able to provide an adequate explanation for its decision that NEPA supplementation is not necessary, (ii) under the circumstances of this case, vacating the underlying permit would be unduly disruptive, and (iii) the aquatic environment is adequately protected and no environmental resources will be irrevocably lost during the limited time period of the remand.

DATED: June 17, 2014

STOEL RIVES LLP

By: /s/ Jeffrey W. Leppo
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ConocoPhillips Alaska, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2014, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No. 3:13-cv-00044-SLG who are registered CM/ECF users will be served by the CM/ECF system.

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