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-JLB CORPS' MOTION TO DISMISS CLAIM 1 FOR LACK OF JURISDICTION Note on Motions Calendar: October 26, 2018 ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Court should dismiss Count 1 of Plaintiffs' two-count Complaint for lack of subject matter jurisdiction. The memorandum that Plaintiffs challenge provided direction to the Seattle District of the United States Corps of Engineers ("Corps") regarding how it should focus its resources in pursuing new approaches to enhance shoreline habitat protection in the Puget Sound and Washington coast, in view of the regulatory uncertainty caused by ongoing national rulemakings to define Clean Water Act ("CWA") jurisdiction. This memorandum is not a final merits decision on the CWA jurisdictional approach Plaintiffs' dispute or prefer – it merely defers consideration. It is not a final agency action within the meaning of the Administrative Procedure Act ("APA") and, thus, is unreviewable. But even if it were reviewable final agency action, dismissal is still warranted because Plaintiffs lack standing to challenge it.

The memorandum Plaintiffs challenge in their first claim was issued on January 19, 2018, by the head of the Northwestern Division of the United States Corps of Engineers ("Corps") to the Corps' Seattle District providing guidance about the Seattle District's participation in a regional interagency working group. According to Plaintiffs, the regional interagency workgroup, composed of staff from three federal agency local offices – Region 10 of the Environmental Protection Agency ("EPA"); the West Coast Region of the National Oceanic and Atmospheric Administration ("NOAA"); and the Corps' Seattle District – completed a draft report in November 2016. That draft report considers possible ways for each agency to improve protection of marine shoreline habitat along the Puget Sound and Washington coast, and includes a recommendation that the Seattle District use a new and different tidal datum metric when it implements the existing regulatory definition of "high tide line" to determine whether a given portion of the Puget Sound shoreline or Washington coast constitutes "waters of the United

States" under the Clean Water Act ("CWA"). Plaintiffs contend that the Seattle District has used an inappropriate tidal datum metric in the past, and thereby failed to assert regulatory jurisdiction and require CWA permits for projects that discharged dredged or fill material into portions of the Puget Sound shoreline and Washington coast that Plaintiffs believe should be regulated under the CWA.

Among other things, the memorandum that Plaintiffs challenge in their first claim directs the Seattle District to shift its current focus away from considering whether to use new and different tidal datum metrics to identify the high tide line. Instead, the memorandum directs the Seattle District to evaluate other possible initiatives that might increase protection of shoreline habitat. Plaintiffs contend that this memorandum constitutes final agency action that is judicially reviewable under the APA, and that it is arbitrary and capricious or not in accordance with law. Complaint ¶ 62-63. Plaintiffs also disagree with the alternative tidal datum metric recommended by the draft report, and request that the Court order the Seattle District to adopt their preferred metric. *Id.* at 21 ¶ B.

Irrespective of Plaintiffs' view of the proper tidal datum metric, the memorandum they challenge does not constitute final agency action. This Court therefore lacks jurisdiction to review the memorandum and Plaintiffs' first claim must be dismissed. Fed. R. Civ. P. 12(b)(1). The memorandum explains that the Department of Army and EPA are currently undertaking a nationwide rulemaking to reconsider and modify the regulatory definition of "waters of the United States" that governs the geographic scope of waters regulated by the CWA; thus, it would be inappropriate for the Seattle District to consider at this time changing the tidal datum it might use to identify the extent of CWA regulatory jurisdiction at specific locations within the Puget Sound shoreline or Washington coast. Because this direction to defer further consideration

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neither marks the consummation of the relevant decisionmaking process nor establishes legal consequences, it does not qualify as final agency action. Plaintiffs' claim, therefore, must be dismissed.

The first claim must also be dismissed because Plaintiffs lack constitutional standing to pursue it. Plaintiffs have not pled, and they cannot establish, a specific application of the memorandum that threatens concrete and imminent harm to their interests—a showing that is necessary to establish Article III standing. Although Plaintiffs may well have standing to pursue a future challenge to a final CWA permitting decision or to bring a CWA citizens suit to enforce the Act directly for alleged unauthorized discharges, where the scope of CWA jurisdiction is at issue, they cannot adjudicate their theories in the abstract, as they seek to do here. For these reasons, and as discussed below, the United States respectfully requests that the Court dismiss Count I of the Complaint.

BACKGROUND

II. Clean Water Act Overview

Congress enacted the CWA, 33 U.S.C. §§ 1251-1388, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). To that end, the CWA prohibits "the discharge of any pollutant by any person," *id.* § 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).

The CWA establishes two permitting programs for authorization to discharge pollutants to "waters of the United States." *See* 33 U.S.C. §§ 1342 & 1344; *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009). Under Section 1342, EPA administers the CWA National Pollutant Discharge Elimination System program (often referred to as "NPDES" or "Section 402" permits), under which persons may discharge pollutants to waters of the United States under certain conditions. Under Section 1344, the Corps administers the separate CWA program for issuing permits for the discharge of dredged or fill material (commonly referred to as "Section 404" permits).[1]

A. Section 404 Permits

The CWA authorizes the Corps to regulate discharges of dredged and fill material into waters of the United States through the issuance of permits under Section 1344. The Corps may issue individual permits on a case-by-case basis. 33 U.S.C. § 1344(a). This process requires that the project proponent submit an application to discharge dredged or fill material in a particular 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). To avoid needless repetition and delays, Congress also enacted Section 1344(e), which authorizes the Corps to issue general permits on a state, regional or nationwide basis for certain classes of activities, in lieu of individual permits.

Judicial review of Corps' decisions to grant or deny an individual Section 404 permit is available under the Administrative Procedure Act in federal district court. *See, e.g., Friends of*

[1] Sections 402 and 404 of the CWA are codified at 33 U.S.C. §§ 1342 and 1344, respectively. Except for references to Section 402 and 404 permits, all CWA sections cited in this brief refer to the United States Code codification.

the Earth, 800 F.2d at 831. When challenging such permit decisions, an interested party may argue that the relevant discharges do, or do not, require a Section 404 permit because the Corps erred in determining the reach of waters of the United States. *See, e.g., Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1153 (9th Cir. 2005).

B. CWA Enforcement

If dredged or fill material is discharged into waters of the United States without a required Section 404 permit, or if the terms of such a permit are violated, then the United States may enforce the CWA and/or the permit requirements in an administrative action, *see* 33 U.S.C. §§ 1319(a) & (g); 33 C.F.R. § 326.3(c), or bring an enforcement action in district court to obtain injunctive and other relief, *see* 33 U.S.C. § 1319(b); 33 C.F.R. § 326.5. At that time, the discharger may contend, inter alia, that its conduct did not violate the CWA because it did not involve a discharge into the waters of the United States.

The CWA also authorizes citizens to bring enforcement actions in district court for ongoing CWA violations. *See generally Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). The citizen suit provision authorizes suits "against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). An "effluent standard or limitation" is defined to include "an unlawful act under subsection (a) of section 1311," *id.* § 1365(f), which includes discharges into waters of the United States without a required CWA permit. *Id.* § 1311(a).

II. CWA Implementing Regulations Defining "Waters of the United States"

The regulatory definition of "waters of the United States" is the subject of ongoing rulemakings and litigation, and multiple stays and injunctions. As a result, different sets of

regulations currently apply in different parts of the United States. Below we summarize these provisions and proceedings pertinent to this case.

A. The Corps' 1986 Regulations

The Corps' 1986 regulations defined "waters of the United States" to mean, in part:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: . . .
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a) (1)-(4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section.

51 Fed. Reg. 41,206, 41,250 (Nov. 13, 1986) (originally codified at 33 C.F.R. § 328.3(a)). As discussed in section B below, this portion of Section 328.3(a) was modified in 2015.

The 1986 regulations also provide that "[t]he lateral limits of jurisdiction in [waters of the United States listed in Section 328.3(a)] may be divided into three categories" that include "territorial seas, tidal waters, and non-tidal waters." 51 Fed. Reg. at 41, 250 (codified at 33 C.F.R. § 328.2). Section 328.4(b) addresses "Tidal Waters of the United States" and provides that:

> [t]he landward limits of jurisdiction in tidal waters:

> (1) Extends to the high tide line, or
>
> (2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

51 Fed. Reg. at 41, 251 (codified at 33 C.F.R. § 328.4(b)). Section 328.4(c) in turn addresses "Non-Tidal Waters of the United States" and it defines the limits of jurisdiction in non-tidal waters as follows:

> (1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or
>
> (2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.
>
> (3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

Id. (33 C.F.R. § 328.4(c)). These provisions have not been modified.

The phrase "high tide line" thus defines the landward limit of tidal waters of the United States (as identified in 33 C.F.R. § 328.3(a)(1)), in the absence of adjacent non-tidal waters. Section 328.3(d) defined "high tide line" as

> the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

51 Fed. Reg. at 41,251 (originally codified at 33 C.F.R. § 328.3(d) and codified at 33 C.F.R. § 328.3(c)(7) in the 2015).[2]

B. The 2015 Rule and Ensuing Litigation

EPA and the Department of the Army promulgated a rule in 2015 that revised the definition of "waters of the United States." 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). The stated purpose of that rule was to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act." *Id.* at 37,054.

Although the 2015 Rule did not modify the Corps' prior regulatory definition of "high tide line" in Section 328.3(d), it substantially modified the definition of "waters of the United States," which included changes to that definition by incorporating use of the "high tide line" into that and other definitions. For example, as modified by the 2015 Rule, "waters of the United States" defined in Section 328.3(a) means, in relevant part:

> (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters, including interstate wetlands;
>
> (3) The territorial seas; * * *
>
> (8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section *and all waters located within 4,000 feet of the high tide line* or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or *within 4,000 feet of the high tide line* or ordinary high water mark. * * *

[2] EPA also has responsibility for implementing much of the Clean Water Act and it has promulgated parallel regulations defining "waters of the United States."

80 Fed. Reg. at 37,104-05 (codified at 33 C.F.R. § 328.3(a)) (emphasis added); *see also id.* at 37,105 (codified at 33 C.F.R. § 328.3(c)(2)(iii)) (definition of "neighboring" based in part on "high tide line").

Thirty-one states and many other parties immediately challenged the 2015 Rule in district and appellate courts spanning the country. *See* 83 Fed. Reg. 5200, 5201 (Feb. 6, 2018). The Supreme Court subsequently held that district courts, not circuit courts, have original jurisdiction to review the 2015 Rule. *Nat'l Ass'n of Mfrs v. Department of Defense,* 138 S. Ct. 617, 626 (2018). At this time, various district courts have preliminarily enjoined the 2015 Rule in 28 states.[3] The 2015 Rule is not currently enjoined in Washington State and thus, subject to further litigation regarding the "applicability rule" discussed below, the 2015 Rule modification defining "waters of the United States" currently applies in Washington.

C. The Presidential Executive Order and Rulemaking to Reconsider the Scope of "Waters of the United States" Establishing CWA Jurisdiction

On February 28, 2017, the President signed an Executive Order directing EPA and the Corps to reconsider the 2015 Rule. Exec. Order No. 13,778, 82 Fed. Reg. 12,497. The Order declared it to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." *Id.* § 1. Consistent with the President's directive, EPA and the Corps initiated a comprehensive "two-step process intended to review and revise the definition of 'waters of the United States' consistent with the Executive Order." 82 Fed. Reg. 34,899 (July 27, 2017). In the

[3] *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055, 1056-57 (D.N.D. 2015); *Georgia v. Pruitt,* 2018 WL 2766877 (S.D. Ga. June 8, 2018)*; Texas v. EPA*, No. 3:14-cv-162, Doc. 140 (Sept. 12, 2018); *North Dakota v. EPA*, No. 15-cv-59 (D.N.D. Sept. 18, 2018).

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first step, EPA and the Corps proposed in July 2017 to rescind the 2015 Rule. *Id.* If finalized, this proposal would recodify the prior regulatory definition of "waters of the United States," promulgated by the Corps in 1986, as discussed above. The proposal remains under administrative consideration.

"In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of 'waters of the United States.'" *Id.* As part of this process, EPA and the Corps "will conduct a separate notice and comment rulemaking that will consider developing a new definition of 'waters of the United States' taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion." *Id.* at 34,902 (citing *Rapanos v. United States*, 547 U.S. 715 (2006)). EPA and the Corps are developing a proposed rule for this second step and the proposed rule is currently undergoing interagency review prior to publication of the proposed rule.

The Corps and EPA have also promulgated an "applicability rule," which postponed the effective date of the 2015 Rule until February 6, 2020, in light of the litigation challenging the 2015 Rule and to provide regulatory certainty pending completion of the Corps' and EPA's ongoing two-step rulemaking process. 83 Fed. Reg. at 5202. The applicability rule has been challenged in several district courts, and has recently been enjoined nationwide by a district court in South Carolina, but the United States has asked the district court to stay judgment and will appeal that decision. *South Carolina Coastal Conserv'n League v. Pruitt*, No. 2:18-cv-330, Docs. Nos. 66-67 & 73-74 (D.S.C. Aug. 16, 2018). The applicability rule has also been challenged in this Court. *Puget Soundkeeper Allicance v. Wheeler* (No. 2:15-cv-1342). Due to the injunction in *South Carolina Coastal, supra*, the applicability rule is enjoined in Washington, and the 2015 Rule therefore currently applies in Washington.

III. Proceedings before the Corps: The Staff-Level Workgroup's Draft Report and the Seattle District's Memorandum Deferring Further Consideration of Alternative Tidal Datum Metrics

In January 2016, before EPA and the Corps initiated their two-step rulemaking process to reconsider the 2015 regulatory definition of "waters of the United States," the Seattle District convened a "staff-level workgroup" comprised of employees of the Seattle District, EPA Region 10, and the National Oceanic & Atmospheric Administration's West Coast Region. *See* "DRAFT Federal Involvement in Shoreline Habitat in Tidally-Influenced Waters of Washington State," at 1 (hereinafter "Draft Report," attached hereto as Exhibit 2). The purpose of this regional undertaking was to provide "a review and analysis of actions that the [Seattle District]; the [EPA]-Region 10 …; and [NOAA]-West Coast Region . . . can take to enhance marine shoreline habitat along Puget Sound and the coast of Washington." Draft Report at iii. As one part of its analysis, the workgroup evaluated five alternative tidal datums, or metrics for establishing elevations, that could be relevant when the Seattle District applies existing regulations to determine the "high tide line," for use in identifying the jurisdictional reach of tidal waters of the United States for the Puget Sound shoreline and Washington coast. The five alternatives were:

- Alternative 1: Mean Higher High Water (MHHW)
- Alternative 2: Mean Monthly Highest Tide (MMHT)
- Alternative 3: Mean Annual Highest Tide (MAHT)
- Alternative 4: Highest Astronomical Tide (HAT)
- Alternative 5: Washington State Ordinary High Water Mark (WOHWM).

Id. at iii; *see id.* at 1. In general, each of these alternatives reflect a different approach, using different metrics of tidal data over an approximately 19-year period, to establish a geographic elevation. Based on this staff-level analysis, the workgroup developed the Draft Report, dated

November 2016. The Draft Report characterized Alternative 1 as "represent[ing] the Seattle District's Regulatory status quo in terms of interpreting the location of the high tide line" for Puget Sound and the Washington coast. *Id.* at 19. It noted that continuing to use this alternative when implementing CWA Section 404 decisions "would have no change to the regulated public." *Id.* at 19. The Draft Report recommended instead that the Seattle District consider using Alternative 3, concluding that "as a technical finding Alternative 3, MAHT, constitutes an appropriate application of the regulatory definition of the statutory term high tide line [sic[4]] in Washington State[.]" *Id.* at 26. The Draft Report explained that "[t]he recommended alternative does not constitute a position adopted by any agency. Rather, it seeks to inform agency leadership of considerations that may not have been known prior to this effort." *Id.*

In January 2018, Major General Scott Spellmon, then the Commander of the Corps' Northwestern Division, issued a memorandum to address "Next Steps regarding Puget Sound Shoreline Habitat." Exhibit 1 at 1 (hereinafter "Spellmon Memo" or "Memorandum").[5] The stated intention of the Memorandum was "to address recent efforts and set the direction for ongoing regional dialogue." *Id.* Referencing the workgroup's investigations of "approaches for improving" protection of shoreline habitat and possible alternative tidal datum metrics, the Memorandum explained that, since this "regional dialogue began, the Army and EPA have initiated rulemaking to review and rescind or revise the 2015 . . . Rule (33 C.F.R. 328) in an ongoing effort associated with the Executive Order, signed on February 28, 2017." Spellmon Memo ¶ 3. It further noted that the high tide line definition "is contained in the regulations that

[4] The Draft Report erred in describing "high tide line" as a statutory term. That term is established by Corps regulation and is not in the CWA.

[5] Major General Scott Spellmon has since been succeeded by Brigadier General D. Peter Helmlinger, who is the current Commander of the Corps' Northwestern Division.

are the subject of this ongoing interagency rulemaking effort." *Id.*; *see* 33 C.F.R. § 328.3. The Memorandum therefore deferred further Seattle District consideration of alternative tidal datum metrics to establish the high tide line "[i]n light of this ongoing national EPA and Army rulemaking process" as well as Washington State's ongoing "work to promote natural and restorative approaches to protect waterfront property." *Id.* ¶ 4. The Memorandum explains that, given this ongoing national rulemaking process, further efforts to consider alternative tidal datum metrics to establish the high tide line "would not be an organizationally consistent use of resources within the Corps." *Id.* The Memorandum also expressed an ongoing concern of the then Commander of the Corps' Northwestern Division regarding the consistency of the Draft Report's Alternative 3 recommendation with the intent of the existing regulatory definition of high tide line. *Id.* ¶ 5.

Based on the ongoing rulemaking process, the Memorandum shifted the Seattle District's "current focus . . . to other initiatives that can improve protection of important shoreline habitat," Spellmon Memo ¶ 4, and it directed the District to work with EPA and NOAA and "to continue to coordinate with and participate in the multi-agency Shorelines Work Group established by the Puget Sound Federal Task Force . . . to more effectively manage shoreline permitting processes across agencies and within existing authorities." *Id.* ¶ 8.

IV. Plaintiffs' First Claim for Relief

In the Complaint, Plaintiffs allege that the Draft Report included "a draft recommendation to the Corps' Northwestern Division that it adopt" a different tidal datum metric, namely the "mean annual highest tide," as the means to establish "the high tide line" for determining the scope of CWA regulatory jurisdiction for Puget Sound shoreline and the Washington coast. Complaint ¶ 48. Plaintiffs allege that using the "mean annual highest tide"

would expand the shoreline areas of Puget Sound that would be considered "waters of the United States" beyond those areas encompassed by the tidal datum metric used by the Seattle District. *Id.* ¶ 43. Plaintiffs, however, disagree with the Draft Report's recommendation that the Seattle District adopt Alternative 3, alleging instead that the Seattle District should use Alternative 4 -- the "astronomical high tide" -- to define the "high tide line" when determining the reach of waters of the United States for the Puget Sound shoreline and the Washington coast. *Id.* ¶ 59 & at 21 ¶ B.

Plaintiffs further contend that the Spellmon Memo "formally directed the Seattle District to stop considering a change to its high tide line jurisdictional boundary." *Id.* ¶ 50. Plaintiffs allege that the "Corps' decision to reject the recommended change to the Seattle District's high tide line definition is a final agency action under [the] APA." *Id.* ¶ 63. They further allege that the Memorandum's failure to adopt a new tidal datum metric is arbitrary, capricious, or not in accordance with law, and that the Memorandum lacks adequate explanation for its decision. *Id.* ¶¶ 57-63. As relief, Plaintiffs request that the Court find the Corps' decision arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA standard of review, *id.* at 21 ¶ A, that the Court set aside the Corps' decision, and that the Court order the Corps to "adopt highest astronomical tide as its definition of 'high tide line.'" *Id.* at 21 ¶ B.

ARGUMENT

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

Judicial review under the APA is limited to "final agency action." 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court are subject to judicial review."). Finality is a "threshold question[]" that determines whether judicial review is

available. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). If the challenged agency action is not final, the Court lacks jurisdiction to review it and the claim must be dismissed. *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104-05 (9th Cir. 2007) ("The APA applies to waive sovereign immunity only after final agency action. 5 U.S.C. § 704. Before final agency action has occurred, an action . . . is premature and a federal court lacks subject matter jurisdiction to hear the claim."); *see San Francisco Herring Ass'n v. U.S. Dep't of Interior*, 683 Fed. Appx. 579 (9th Cir., Mar. 17, 2017).

The Supreme Court has explained that, with regard to finality, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). More specifically, two conditions must be satisfied for agency action to be "final." "First, the action must mark the 'consummation' of the agency's decisionmaking process" and "must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citation omitted). Second, the agency action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (citation omitted). A party seeking judicial review under the APA must challenge a specific final agency action, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894 (1990), and that party bears the burden to demonstrate that the action challenged is "final" and thus that the court has jurisdiction. As explained below, the Spellmon Memo does not meet either prong of the finality test.

A. The Spellmon Memo Does Not Conclude the Corps' Decisionmaking Process

The Memorandum provided interim direction to Seattle District personnel as they considered, together with staff-level employees at EPA and NOAA, and the State of Washington,

possible approaches that might provide additional protection for shoreline habitat on Puget Sound and the Washington coast. As part of that direction, the Commander at that time of the Corps' Northwestern Division directed the Seattle District to "shift focus" of its ongoing dialogue with the EPA and NOAA regional offices towards other means to improve shoreline protection, rather than the draft recommendation addressing the high tide line. Rather than reaching any conclusions, the Memorandum deferred further consideration of the recommendation that the Seattle District adopt an alternative tidal datum metric at a time when "the [Corps] and EPA have initiated rulemaking to review and rescind or revise the 2015 Clean Water Rule (33 C.F.R. 328) in an ongoing effort associated with the Executive Order, signed on February 28, 2017." *Id.* ¶ 3. Given the uncertainty concerning the applicable regulations, including the pendency of nationwide rulemaking, the Memorandum thus reasonably deferred consideration of a change to the Seattle District's historical approach for establishing the high tide line to identify locations regulated by the CWA. At the same time, the Memorandum directs the Seattle District to continue its regional inter-agency dialogue and to consider other initiatives that may improve protection of shoreline habitat. *Id.* ¶¶ 6-9.

That direction does not constitute judicially reviewable final agency action under the Administrative Procedure Act. The Spellmon Memo does not mark the consummation of the relevant decisionmaking process. Rather, on its face, the Memorandum simply leaves the preexisting status in the Seattle District unchanged and defers consideration of alternative approaches that might be used in future CWA permitting decisions. The case law is clear that deferring agency action does not constitute final agency action under the APA. *See, e.g., American Petroleum Institute v. EPA*, 216 F.3d 50, 68 (D.C. Cir. 2000) ("A decision by an agency to defer taking action is not a final action reviewable by the court."); *In re Bluewater*

Network, 234 F.3d 1305, 1313 (D.C. Cir. 2000) ("Likewise, an agency's pronouncement of its intent to defer or to engage in future rulemaking generally does not constitute final agency action reviewable by this court."). By their very nature, decisions to defer consideration, such as the Memorandum challenged here, are interlocutory in nature and thus cannot conclude the relevant decisionmaking process under the test for finality.

Moreover, even if the workgroup's efforts to improve shoreline habitat were considered in isolation, the Memorandum does not conclude that process. The Memorandum expressly embraces "other initiatives that can improve protection of important shoreline habitat," Spellmon Memo ¶ 4, and directed the Seattle District to continue to work with EPA and NOAA and "to continue to coordinate with and participate in the multi-agency Shorelines Work Group established by the Puget Sound Federal Task Force . . . ." *Id.* In this regard, it is important to note that the workgroup's Draft Report also involved consideration of numerous other ways that the relevant agencies may enhance shoreline marine habitat. Draft Report at 39-41. It is also important to note that Draft Report expressly states that it does not represent the views of the relevant agencies. Draft Report at 26. This further confirms that the Memorandum is interlocutory in nature.

If interim, internal guidance of this sort were considered final agency action, then so would thousands of other memoranda that give direction to agency employees as they pursue ongoing projects. That Plaintiffs disagree with the direction provided in the Spellmon Memo does not make that Memorandum final and does not entitle Plaintiffs to judicial review of it.

In sum, the Spellmon Memo does not "mark the 'consummation' of the agency's decisionmaking process" under *Bennett v. Spear*. Because Plaintiffs cannot satisfy this requirement for finality, their first claim should be dismissed for lack of jurisdiction.

B. The Spellmon Memo Does Not Establish Legally Binding Obligations

The Spellmon Memo also does not meet the second required element for final agency action, which is that it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow' . . . ." *Bennett v. Spear*, 520 U.S. at 178 (citations omitted). To satisfy this requirement, the agency action must "impose an obligation, deny a right or fix some legal relationship." *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2007). It is not enough that the action maintain the status quo established in other proceedings. *See Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). Thus, "if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non final for the purpose of judicial review." *Id.*

By its own terms, the Spellmon Memo does nothing to fix a legal relationship or deny a right. Nor does the Memorandum change the status quo regarding the use of tidal datum in the Seattle District, a long-standing historical practice established through, among other actions, case-by-case CWA permit decisions and enforcement actions. Because the Memorandum only deferred the consideration of alternative tidal datum metrics, and, thus, did not disturb the status quo, it did not enact a "certain change in the legal obligations" of any party. Accordingly, the Spellmon Memo does not qualify as final agency action.

The practical effect of the Spellman Memo on the public and regulated community is nonexistent—it simply defers a decisionmaking process that may or may not have altered the status quo. But that does not mean that the Seattle District's approach to establishing the high tide line is immune from review. For example, if the Corps issues a CWA permit that implicates its high tide line calculation, that permit would be a final agency action subject to challenge

because it determines rights and obligations and gives rise to legal consequences. A plaintiff with standing can then challenge that permit decision. But until that time, APA review is unavailable because the Spellmon Memo does not qualify as final agency action. Alternatively, Plaintiffs can in appropriate circumstances bring their own enforcement action under the CWA citizen suit provision against a discharger. 33 U.S.C. § 1365.

The courts have consistently held that directions to defer consideration, like that in the Spellmon Memo, do not have legal force and effect, because they do not change the previously existing legal status. *See American Petroleum Institute*, 216 F.3d at 69 ("[a] decision to defer has no binding effect"); *see also In re Bluewater Network,* 234 F.3d at 1313. Thus, absent "a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Home Builders v. Norton*, 415 F.3d at 15. Similarly, identifying the preexisting status quo and that it has not changed does not make an agency action final and subject to judicial review. *See, e.g., Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427-28 (D.C. Cir. 2004) (an EPA letter was not reviewable agency action when it restated the agency's longstanding interpretation of certain regulations) (discussing other cases).

Because the Spellmon Memo's deferral does not change the preexisting legal status, it does not does satisfy the second finality requirement under *Bennett v. Spear,* and Plaintiffs first claim therefore should be dismissed. Indeed, if agency memoranda, such as the Spellman Memo — which only provided direction regarding an interagency dialogue and notes that the preexisting status quo for applying the high tide line is unchanged — were considered reviewable final agency action, courts would be flooded with a never ending stream of litigation whenever parties are dissatisfied with the direction of agency proceedings, and agencies would lose their ability to disseminate important information and guidance to agency employees.

Plaintiffs may find their inability to obtain the broad and general relief they seek regarding how the Seattle District regulates the Puget Sound shoreline and Washington coast frustrating, but in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Supreme Court made clear that the APA does not provide for such broad "programmatic" challenges. "Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality," courts only intervene "in the administration of the laws" when "a specific 'final agency action' has an actual or immediately threatened effect." 497 U.S. at 894. The Court found that because "the 'land withdrawal review program"' plaintiffs had challenged in that case was "not an identifiable action or event. . . . [Plaintiffs] cannot demand a general judicial review of the [agency's] day-to-day operations." *Id.* at 899. The Court further acknowledged that "[t]he case-by-case approach that this requires is understandably frustrating to an organization such as respondent . . . . But this is the traditional, and remains the normal, mode of operation of the courts." *Id.* at 894.

Following *Lujan,* the Ninth Circuit has rejected broad programmatic challenges that are not directed at particular final agency actions that have an actual or immediately threatened effect on plaintiffs. *See Ecology Ctr. v. United States Forest Service*, 192 F.3d 922, 925-26 (9th Cir. 1999) (court had no jurisdiction over claims that Forest Service failed to monitor properly condition of forest, "[b]ecause the Center fails to identify any 'concrete action . . . that harms or threatens to harm' it," quoting *Lujan*, 497 U.S. at 891); *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 669-670 (9th Cir. 1998) (court lacked jurisdiction over challenge to Forest Service/Bureau of Land Management program to protect Port Orford Cedar, because "none of the activities allegedly comprising the POC Program had an 'actual or immediately threatened effect' as required by *Lujan*"); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1067

(9th Cir. 2002) ("in order to win scrutiny of the Forest Service's forest-wide management practices, Neighbors must challenge a specific, final agency action, the lawfulness of which hinges on these practices").

In sum, the Spellmon Memo does not meet either prong of the finality test in *Bennett v. Spear*. Plaintiffs therefore cannot meet their burden to establish jurisdiction, and their first claim should be dismissed.

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

A plaintiff seeking relief in federal court must establish the three elements that constitute the "irreducible constitutional minimum" of Article III standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), namely, that the plaintiff has "(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, "a plaintiff must show that [the injury suffered] … is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560); *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). For an organizational plaintiff such as Sound Action to have standing, it must demonstrate that at least one of its "members would otherwise have standing to sue in [the member's] own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Wash. Envtl. Council*, 732 F.3d at 1139. It is thus black-letter law that Plaintiffs only have standing to bring a claim where there is a specific threat to their interests: no plaintiff has standing "apart from [a] concrete application that threatens imminent harm to his interests." *Summers v. Earth Island Inst.,* 555 U.S. 488, 494 (2009); *see also Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). Article III

of the Constitution allows the courts to "review and revise legislative and executive action" only when doing so is necessary to "redress or prevent actual or imminently threatened injury to persons." *Summers*, 555 U.S. at 492.

The requirement that a plaintiff show actual or imminent injury, traceable to the final action challenged, ensures that legal questions are decided in a concrete factual context. It is also essential to protecting the separation of powers within our government. Without this requirement, the courts would be free "to shape the institutions of government" as they saw fit, and that is "not the role of courts, but that of the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). The Supreme Court has warned that if plaintiffs are not held to this requirement, the "distinction between" the branches of government "would be obliterated." *Id.* at 350.

The requirements of standing apply equally in environmental cases: a "generalized harm to . . . the environment will not alone support standing." *Summers*, 555 U.S. at 494; *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (holding that requirements of standing are not met when plaintiff alleges harm in an "immense tract of territory"). In this regard, courts have rejected the theory that an environmental organization may act as "a roving environmental ombudsman seeking to right environmental wrongs wherever [it] might find them." *Friends of the Earth v. Gaston Copper Recycling Corp.* 204 F.3d 149, 157 (4th Cir. 2000). Rather, an environmental plaintiff has no standing to sue "apart from any concrete application that threatens imminent harm to his interests." *Summers*, 555 U.S. at 494; *accord Laidlaw*, 528 U.S. at 181 ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.").

Plaintiffs' challenge to the Spellmon Memo's direction to the Seattle District regarding an inter-agency dialogue about shoreline protection does not allege, and cannot establish, the necessary "concrete application that threatens imminent harm to [its] interests." *Summers,* 555 U.S. at 494. Instead, Plaintiffs have asserted a generalized grievance about an approach to establishing the reach of CWA jurisdiction that the Seattle District has applied for years before deciding to defer any reconsideration of it in the Spellmon Memo. Even if the Memorandum could qualify as final agency action, Plaintiffs do not even allege that the Corps has applied the Memorandum in any particular circumstance that harms its members' interests. To establish standing, Plaintiffs must challenge the Corps' concrete application of the Spellmon Memo and use of tidal datum that Plaintiffs disputes at a particular property in which Plaintiffs can demonstrate a legally cognizable interest, such as might occur in a final Corps Section 404 permit decision. *See, e.g., Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1153 (9th Cir. 2005) (reviewing jurisdictional determination in the context of a permit challenge). Absent a challenge to such a "concrete application," *Summers*, 555 U.S. at 494, Plaintiffs cannot demonstrate imminent harm to any legally protected interest. Plaintiffs therefore lack standing to challenge the Spellmon Memo.

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,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, I electronically filed the foregoing motion 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