FENNEMORE CRAIG

MEMORANDUM

TO: El Dorado Benson LLC

FROM: Norman D. James

DATE: August 17, 2017

RE: Villages at Vigneto; Dispute Over Scope of Section 7 Consultation

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A significant dispute has developed between the Los Angeles District of the U.S. Army Corps of Engineers ("the Corps") and the Arizona Ecological Services Office of the U.S. Fish and Wildlife Service ("the Service") concerning the Corps' request for consultation under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536. In short, by letter dated May 26, 2017, the Corps requested consultation on those aspects of the Villages at Vigneto, a private real estate development in southeastern Arizona, that are subject to the Corps' jurisdiction and control under the Clean Water Act.[1] The Service, however, maintains that the scope of consultation must extend to the entire private development, including future water utility service by the City of Benson, and has refused to initiate consultation.

For the reasons set forth below, we believe that the Service's position violates the ESA and its implementing regulations. The requirements of Section 7 apply only to actions in which there is discretionary federal involvement or control. *See* 50 C.F.R. § 402.03; *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664-68 (2007). Under Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a), the Corps' authority is limited to regulating the discharge of dredged or fill material into waters of the United States at specified disposal sites. The Corps lacks authority to regulate other aspects of the Villages at Vigneto, including work in upland areas and utility service by the City of Benson, and it has no obligation to consult with the Service on those aspects of the development.

Despite several inter-agency discussions about the limited scope of the Corps' regulatory authority under the Clean Water Act, the Service has not changed its position and will not initiate consultation. The Corps has indicated that it may attempt to resolve this dispute through elevation. Unfortunately, there is no formal elevation process, and it may take many months for elevation to occur. In the meantime, the Corps' Section 404 permit, which was suspended in 2016, will remain suspended.

This situation is particularly troubling given that there are no listed species or critical habitat within the development and, therefore, no legitimate reason to consult in the first place, as the Corps indicated in its May 26, 2017 letter and accompanying Biological Evaluation.

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[1] Notably, the Corps used the same scope of analysis in analyzing the effects of the action under the National Environmental Policy Act ("NEPA"), which is based on the extent of federal control and responsibility over the project. *See* 33 C.F.R. part 325, App. B, § 7.b. It was logical and appropriate for the Corps to use a similar scope of analysis in complying with ESA.

Moreover, we understand that other Ecological Services offices normally accept the Corps' position that its consultation obligation is limited by the scope of the Corps' regulatory authority. This problem appears to be the result of overzealous Service staff, rather than an agency policy that is being consistently applied throughout the country.

Under the circumstances, this dispute should be addressed at a higher level to ensure consistency within the Service's regions and field offices. Each Ecological Services office should be interpreting and applying the Service's Section 7 consultation regulations in the same manner. The requirements for initiating consultation should not vary from office-to-office, depending on the views of its staff. Moreover, the Service normally should accept the description of the proposed action provided the action agency. The action agency understands the scope and extent of its discretionary authority and control over the action. *See* 50 C.F.R. § 402.03. The Service should not second-guess the action agency in order to extend the scope of consultation to activities over which the action agency has no jurisdiction.

We therefore recommend that the Service's Director issue a memorandum to all of the regional offices, instructing all Service offices as follows:

- Service offices will apply 50 C.F.R. § 402.03 to properly limit Section 7 consultation to activities in which there is discretionary federal involvement or control.

- The scope of Section 7 consultation must be limited to those aspects of non-federal projects that are subject to discretionary federal control or responsibility.

- Service offices will respect the federal action agency's determination of the proper scope of the action that may be subject to Section 7 consultation, and will not second-guess the action agency's interpretation of its authority and jurisdiction.

- Absent extraordinary circumstances, the scope of the consultation will not exceed the action agency's discretionary authority over a project.

- An extended chain of "but for" causation will not be used to extend the scope of consultation to include activities over which there is no discretionary federal control or responsibility.

A. Background on the Villages at Vigneto.

The Villages at Vigneto is an 8,200-acre master-planned community in Benson, Arizona ("the Development"). The Corps initially issued the Section 404 permit for the Development in 2006. The permit authorizes the landowner to discharge fill material into 51 acres of waters of the United States within the Development. These "waters" consist of desert washes that cross the Development and rarely contain any water. To compensate for the impacts to waters of the United States, the developer agreed to renovate and maintain a 144-acre off-site parcel adjacent to the San Pedro River.

Before the permit was issued, the Corps conducted an analysis of whether the activities authorized by the permit would affect any listed species or critical habitat and concluded that

they would not.[2] Therefore, Section 7 consultation was not required. *See, e.g., Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005), *aff'g* No. CIV 02-195-TUC-CKJ, 2003 WL 22145716 (D. Ariz. Aug. 18, 2003) (the Corps was not required to consult with the Service when no listed species and no critical habitat were found in the development area).

Shortly after the Permit was issued, economic conditions deteriorated, affecting the regional real estate market and delaying the Development. Ultimately, El Dorado Benson LLC ("El Dorado") acquired the Development in 2014, including the Section 404 permit and other entitlements. El Dorado then obtained the City of Benson's approval of a community master plan. But in 2015, the Corps decided to reevaluate the environmental circumstances in and around the Development, and suspended the Section 404 permit during this review.

The principal environmental change since 2006 was the listing of two species under the ESA, the yellow-billed cuckoo and the northern Mexican gartersnake. Neither species is found within the Development. However, portions of the off-site mitigation parcel have been proposed as critical habitat for these species, and cuckoos have been detected within or near that parcel.

B. The Corps' Unsuccessful Efforts to Reinitiate Section 7 Consultation.

To address the two newly listed species and their proposed critical habitat, the Corps has attempted to reinitiate Section 7 consultation with the Service, beginning in 2016. Field work has confirmed that there are no listed species or critical habitat within the 8,200-acre Development site. The effects to listed species and critical habitat will result only from the restoration work on the off-site mitigation parcel, which will benefit the yellow-billed cuckoo and the northern Mexican gartersnake by improving and protecting habitat.

Accordingly, the Corps determined that the federal action may affect, but is not likely to adversely affect, any listed species or critical habitat. If accepted by the Service, this finding would eliminate the need to formally consult, allowing the Corps to reinstate El Dorado's permit. *See* 50 C.F.R. § 402.13 (discussing informal consultation). In making this determination, the Corps properly considered the federal action subject to Section 7 of the ESA to be reinstatement of the Section 404 permit, which authorizes the placement of fill material into 51 acres of desert washes, together with restoration of the off-site mitigation parcel, which is required as a condition of the Corps' permit.

The Service, however, will not concur with the Corps' assessment. The Service has taken the position that any effects related to the Development, including water utility service by the City of Benson, are caused by the Corps' Section 404 permit, notwithstanding the Corps' limited jurisdiction under the Clean Water Act. Boiled down, the Service relies on an extreme form of "but for" causation to justify its position: The Development cannot proceed without the Section 404 permit. Therefore, the entire Development is being caused by the Corps' permit. In turn, the Development cannot proceed without water service. Therefore, water service by the City of Benson is caused by the Corps' permit. This in turn means that the City's future

[2] *See* Environmental Assessment, 404(b)(1) Evaluation, Statement of Findings, Public Interest Review, Permit Application Number 2003-00826 SDM for Whetstone Partners LLP (approved June 2, 2006) ("EA"), pp. 17-28.

groundwater withdrawals are caused by the Corps' permit. This extended chain of "but for" causation, in the Service's view, requires Section 7 consultation on the potential, future impacts of groundwater withdrawals on the San Pedro River even though the federal action – the Corps' Section 404 permit – does not authorize groundwater withdrawals, utility service, or the Development itself.

As a matter of common sense, the Service is clearly overreaching in using this extended chain of "but for" causation to justify consultation. *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767-70 (2004) (rejecting the use of "but for" causation in determining the scope of a federal agency's analysis of effects under NEPA). This is not a case where the federal action is facilitating or inducing development, such as a transportation project that creates access to remote land. Section 404 permits and similar environmental actually impede development by causing project delays, increased costs, and restrictions on land use. Such permits restrict development rather than causing development to occur.

As discussed below, the Service's position conflicts with its own regulations and settled law. There is no legitimate basis to require the Corps to consult on effects related to the Development over which the Corps has no discretionary authority or control.

C. The Service's Position Is Clearly Erroneous.

1. The Corps Has No Discretionary Involvement In, or Control Over, Upland Land Uses and Water Utility Service.

The Service's Section 7 consultation regulations provide that "***Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.***" 50 C.F.R. § 402.03 (emphasis added). The Supreme Court has upheld the reasonableness of this regulation in light of the ESA's text and overall statutory scheme. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664-68 (2007). In this case, however, the Service has disregarded this important limitation on the applicability of Section 7.

The extent of the Corps' discretionary involvement in the Development is determined by the Corps' authority under Section 404 of the Clean Water Act (no other federal permits or authorizations are needed). This provision authorizes the Corps to regulate and issue federal permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). As the statute provides, the Corps' authority is limited to regulating the discharge of dredged or fill material at specified disposal sites. The Corps lacks authority to deny or condition a permit on impacts that are caused by other land and water uses. *See, e.g., United States v. Mango*, 199 F.3d 85, 92-93 & n.7 (2d Cir. 1999) ("[T]he activity that the [Corps] permits pursuant to Section [404] is the discharge. Therefore, the conditions must be related to the discharge itself.").[3] There is no "discretionary Federal involvement or control"

[3] A number of cases similarly have held that the Clean Water Act does not empower federal agencies to regulate private land use activities that may result in a discharge of pollutants. Instead, jurisdiction under the CWA is limited to regulating the discharge itself. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 750-51 (5th Cir. 2011) (summarizing decisions). The courts also have held that the ESA does not expand the agencies' authority under the Clean Water Act. *See, e.g., American Forest & Paper Ass'n v.*

over development activities occurring outside waters of the United States or the manner in which the City of Benson provides utility service to the project.

2. The Development Is Not an Indirect Effect of the Section 404 Permit.

The Service's Section 7 consultation regulations define "effects of the action" as "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. § 402.02. This regulation further defines "indirect actions" as effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.* Again, it is important to emphasize that the "action" must be subject to discretionary federal control.

Here, the "effects of the action" are the effects caused by the activities authorized by the Corps' Section 404 permit, i.e., the discharge of fill material into the desert washes, along with closely associated effects occurring in immediately adjoining uplands (e.g., road crossings) facilitated by the authorization, and the effects of restoring the off-site mitigation parcel (which is a requirement of the permit). The effects of other activities, occurring outside waters of the United States and not requiring Corps' approval, are not caused by the Corps' Section 404 permit. The Development is a private action being undertaken in accordance with state and local laws and requirements, including the City of Benson's planning and zoning requirements. Indeed, to the extent any governmental entity can be said to be responsible for the Development, it is the City of Benson, which has been authorized by Arizona law to regulate land uses within its municipal limits and has approved the Development's community master plan.

Finally, development is expected to occur on the Development site regardless of whether a Section 404 permit is issued. Included in the Corps' Biological Evaluation, as Appendix I, was an analysis performed for NEPA purposes entitled "No Federal Action Alternative Description." This document evaluated whether the Development site could be developed without a Section 404 permit. It concluded that the site could be developed, albeit in a less efficient and cohesive manner due to the inability to build an integrated system of roads and other infrastructure. The Service has dismissed this analysis as irrelevant and outside of its expertise. But if the site can be developed without the Section 404 permit, then the permit cannot be the cause of the site's development. To the extent it is appropriate to use "but for" causation, and ignoring the role of the City of Benson as the local planning and zoning authority, the causal chain is broken.

3. The Development Is Not an Interrelated or Interdependent Activity.

The Service has also suggested that the Development is an "interrelated" or "interdependent" activity that must be included in the Section 7 consultation. Again, however, the Service is misapplying its own regulations.

EPA, 137 F.3d 291, 298-99 (5th Cir. 1998) ("Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers."); *Platte River Whooping Crane Crit. Hab. Maint. Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (holding that ESA Section 7 does not expand the powers conferred on an agency by its enabling act).

Under the definition of "effects of the action," interrelated actions "are those that are part of a larger action and depend on the larger action for their justification." 50 C.F.R. § 402.02. Interdependent actions are "those that have no independent utility apart from the action under consideration." It is clear from the definition that the "larger action" and the "action under consideration" refer to the discretionary federal action that triggers the requirement to consult under Section 7.

Applying the foregoing definitions, the "larger action" and the "action under consideration" in this case is the Corps' Section 404 permit. That is the discretionary federal action subject to Section 7. Obviously, the Development is not a part of the Corps' permit, nor does the Development depend on the Corps' permit for its justification. The purpose of the Development is to improve and sell parcels of land for residential and commercial uses, not to discharge fill material into desert washes. For the same reason, the Development clearly has utility apart from the discharge of fill material authorized by the Corps' permit.

Furthermore, the Service has suggested that the Habitat Mitigation and Monitoring Plan ("HMMP"), which is part of the Corps' Section 404 permit, is an interrelated or interdependent action of the Development. This is clearly wrong. The HMMP sets forth the actions that must be undertaken to mitigate for impacts to waters of the United States, including restoration of the off-site mitigation parcel. Performance of the HMMP is a condition of the Corps' permit, and, as such, the HMMP is an interrelated or interdependent action *of the permit*. The HMMP depends on the permit for its justification, i.e., but for the permit, no HMMP would have been developed and implemented. And the HMMP has no independent utility because it exists solely to comply with a permit condition. But the relationship between the Corps' permit and the HMMP does not extend the scope of the effects analysis beyond the aspects of the Development over which the Corps has control and responsibility.

4. The Scope of Analysis under Section 7 Should Be No Greater than the Scope of Analysis Under NEPA.

Finally, as noted above, the scope of analysis used in the Corps' Biological Evaluation is the same as the Corps' scope of analysis under NEPA, i.e., the Corps evaluated the effects of the Development subject to its control. Under the Corps' NEPA implementation procedures, codified at 33 C.F.R. part 325, Appendix B, the scope of analysis is based on the extent of federal control and responsibility over the project. For example, the appendix states:

> [I]if an applicant seeks a [Corps] permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement[,] would extend to the portions of the project to be located on the permitted fill. However, the NEPA review would be extended to the entire project, including portions outside waters of the United States, only if sufficient Federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project.

33 C.F.R. part 325, App. B, § 7.b.C.(3).

In this case, the Corps is the only federal agency with any control or responsibility over the Development. Therefore, scope of the Corps' NEPA analysis was limited to the portions of the Development over which the Corps has jurisdiction. The Corps did not consider the effects caused by activities occurring outside waters of the United States over which there is no federal control. This approach is consistent with 50 C.F.R. § 402.03, which limits the applicability of Section 7 to actions in which there is discretionary federal involvement or control.

By rejecting the Corps' scope of analysis in the Biological Evaluation, the Service effectively declared that the Corps' NEPA analysis should extend to the effects of the entire Development, as well as future utility service by the City of Benson. This would force the Corps to violate its own regulations regarding the proper scope of analysis under NEPA. This anomalous result would be avoided if the Service complies with 50 C.F.R. § 402.03 and limits the scope of consultation to those aspects of the Development over which the Corps has discretionary control under the Clean Water Act.