UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, ROBERT SHEPHERD, CHAIRMAN, Plaintiffs, v. UNITED STATES CORPS OF ENGINEERS, ROBERT J. RUCH, IN HIS OFFICIAL CAPACITY AS DISTRICT COMMANDER, AND STEVEN E. NAYLOR, IN HIS OFFICIAL CAPACITY AS REGULATORY PROGRAM MANAGER, Defendants.	Civ. No. 11-3026-RAL Judge Roberto A. Lange

PLAINTIFFS' REPLY BRIEF ON THE MERITS

INTRODUCTION

The Corps has taken final agency actions approving "farm roads" and nationwide permits in violation of the Clean Water Act ("CWA") and has knowingly violated the National Historic Preservation Act ("NHPA") in its review of permit applications from Merlyn Drake. Judgment should enter for plaintiffs.

ARGUMENT

I. The Corps committed multiple violations of the NHPA.

The Corps claims that the Tribe has never identified historical sites on Drake's private property, Corps brief, p. 26, however, the Corps never provided that opportunity to the Tribe. Worse, the Corps only cites to its limited review of *recorded* historic properties. Id., citing RA 3413, 3522. The Corps never took any steps to identify historic properties *eligible* for inclusion. The Tribe's Historic Preservation Officer ("THPO") has previously filed affidavits that Drake's

property likely includes burial sites and stone features. ECF No. 18, attachment 42, ¶ 12. One example, the Tribe is concerned about Drake leveling a mound in late 2008:

RA 3044. As the CWA's Best Management Practices ("BMP") require, this upland borrow material was used to build the road. 33 C.F.R. § 323.4(a)(6)(viii). It's common knowledge that many mounds contain burial sites whose preferred location was above water.[1] The Tribe is aware that there are several dozen mounds at or near Enemy Swim Lake and is surveying the many more that have been disturbed.[2] Of course, such knowledge is not always "shared readily with outsiders," which requires increased consultation efforts. Pueblo of Sandia v. United States, 50 F.3d 856, 861 (10th Cir. 1995), citing, National Register Bulletin 38. The Tribe's homesteads

[1] See http://lakeshorepreserve.wisc.edu/landscape/nativeamericans_2.htm#8 (Indian mounds in the Midwest generally); http://www.startribune.com/2009-indian-burial-grounds-rest-in-peace/51103647/ (eastern Dakota).
[2] https://vimeo.com/108012265

were their campgrounds; their churches are marked in stones; and their cemeteries are often the mounds.

In its overview of the NHPA, the Corps incorrectly argues that the "only activities" that trigger "obligations under the NHPA" are those undertakings "involving federal funding, or the issuance of a federal license." Corps brief, p. 7, citing, Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750, 754 (D.C. Cir. 1995). The D.C. Circuit Court of Appeals has rejected the Corps' limited interpretation, explaining that Sheridan Kalorama "held that Congress intended to expand the definition of an undertaking - formerly limited to federally funded or licensed projects - to include projects requiring a federal permit or merely federal approval. Thus, under Sheridan Kalorama, a project, activity, or program, does not require federal funding to be an undertaking under section 106 of the NHPA. Instead, only a Federal permit, license, or approval is required." CTIA v. Federal Commc'ns Comm'n, 466 F.3d 105, 112 (D.C. Cir. 2006).

A. The Corps' 2006 approval of Drake's bridge is an undertaking.

The Corps argues that a project not requiring a section 404 permit (an assertion the Tribe vigorously disputes as applied to Drake's road work) does not require NHPA compliance because, without a permit, the project cannot be an undertaking. Corps response brief, pp. 12-13. The Corps' argument is wrong because it overlooks both agency approval of Drake's project as a farm road and the on-going involvement and regulation required of the agency under the Clean Water Act.

An agency's approval of an exemption, under a separate statute, is still subject to the NHPA. In Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board, 252 F.3d 246 (3rd Cir. 2001), a railroad filed a "Notice of Exemption," seeking to abandon a portion

of railway. 252 F.3d at 255. The agency approved the application for the exemption, subject to conditions. Id. "[O]nce a carrier abandons a rail line, the line no longer is part of the national transportation system and the [Surface Transportation Board's ("STB")] jurisdiction terminates." Id. at 262. But the Third Circuit held that the agency's approval of the exemption triggered section 106 of the NHPA:

> The exemption procedures of [the statute] and [the regulation] are intended to expedite the approval of the proposed abandonment by making it effective almost immediately, subject to any conditions imposed by the STB. Consideration of the § 106 historic preservation process, on the other hand, necessarily requires the STB to proceed more slowly. The fact that Congress has introduced a procedure which permits the slowing of the overall abandonment process reflects Congress's intent to balance immediate, fast-track approval of the abandonment by the carrier with a more deliberate consideration of preservation of historically significant properties.

Id. 251-52. The Corps' farm road approval is an undertaking subject to the section 106 process.

There exists a significant legal difference between the Advisory Council on Historic Preservation's ("ACHP") definition of an undertaking and the Corps' definition in Appendix C. The Corps limits an undertaking to a permit and excludes an approval. 33 C.F.R. Part 325, Appendix C. Congress has defined the term "undertaking" more broadly to include, "those requiring a Federal permit, license, or *approval*." 54 U.S.C. § 300320. The ACHP's regulations adhere to the NHPA's definition of undertaking as "a project, activity, or program . . . those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y). Here, the Corps failed to follow the definition of an undertaking established by Congress and the ACHP.

The Corps represents that "[t]here is nothing for the Corps to permit or authorize" and "[t]he Corps does not have jurisdiction to control [an exemption]." Corps response p. 13. The record demonstrates that Drake applied for a Department of the Army permit, thereby seeking and receiving the Corps' approval before beginning his bridge project. RA 1456; 1556. The

Corps did review Mr. Drake's Application for a permit. RA 1553, 1556, 1563, 1566. Consistent with the CWA, the Corps informed Drake that he is legally required to abide by the 15 BMP's. RA 1566-1568. The Corps has conducted site inspections to determine Drake's compliance with the BMP's and the Corps has enforced the BMP requirement. RA 2486.

The Corps' attempts to avoid the statements that its 2006 approval set forth Drake's legal rights and obligations, as "imprecise language." Corps brief, p. 12. Not so. When dismissal of the Tribe's lawsuit depends on the Corps' 2006 decision constituting final agency action, the Corps represents that the 2006 decision "determined Drake's rights and obligations with respect to matters covered in each letter." ECF No. 27, p. 23. That argument is inconsistent with the Corps' position on the merits that its approval of Drake's project is not subject to the NHPA, and that it "did not determine Mr. Drake's legal rights." Corps brief, p. 12.

1. **The Corps' 2006 determination that its authorization of Drake's proposed bridge and road is not an undertaking under the NHPA is arbitrary and capricious because the Corps relied on factors which Congress has not intended it to consider.**

The Corps and the ACHP are squarely at odds over what constitutes an undertaking. The Corps represents to the Court that both "the ACHP and the Corps have issued *guidance* in making a determination." Corps brief, p. 11. This is not accurate and misrepresents the force and effect of Appendix C. The Corps knew, or should have known, that Appendix C cannot be accorded the same legal deference as the ACHP's regulations. The ACHP's regulations are controlling because Congress required that the Corps' Appendix C must be consistent with the regulations issued by the ACHP. 54 U.S.C. 306102. Further, if the Corps is going to rely on Appendix C and its interim guidance, then the Corps must first receive the ACHP's approval. 36 C.F.R. 800.14.

"Although it is generally true that deference may not apply to an agency's interpretation of a statute if Congress has entrusted more than one agency with administering the statute, that is not this case. Congress has entrusted one agency with interpreting and administering section 106 of the NHPA; the [ACHP]." CTIA v. FCC, 466 F.3d at 116. "The ACHP is an expert federal agency created by Congress pursuant to the National Historic Preservation Act." Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686, 695 (3rd Cir. 1999). "[T]he Advisory Council regulations command substantial judicial deference." McMillan Park Committee v. Nat'l Capital Planning Commission, 968 F.2d 1283, 1288 (D.C. Cir. 1992).

Here, the Corps relied solely on Appendix C, RA 3413, which is a legally void regulation. See Tribe's opening brief, pp. 13-16. The Corps argues that Appendix C's legal shortcomings are not relevant because the "ACHP 2008 correspondence and 2007 Corps' Guidance [were] all issued after the exemption determination." Corps brief, p. 13 n. 7. This explanation lacks candor because the Corps knew, certainly well before its 2006 and 2009 approvals, that Appendix C was inconsistent with the NHPA and the ACHP's regulations.

As early as 2002, the Corps understood that Appendix C did not conform with the ACHP's regulations:

> On January 11, 2001, the Advisory Council on Historic Preservation (ACHP) finalized its regulations at 36 CFR Part 800 to comply with the 1992 amendments to the National Historic Preservation Act (NHPA). Currently the Corps Regulatory Program uses procedures found at 33 CFR part 325, Appendix C, to comply with the NHPA and other laws dealing with historic properties. Since the principle law and the ACHP implementing regulations have been changed, the Corps of Engineers has determined that it is necessary to address these changes.

Request for Comments, 67 FR 10822, 10822 (Mar. 8, 2002). Later in 2002, the Corps once again explained that "significant changes" to the NHPA and the ACHP regulations required changes to Appendix C. Unified Agenda, 67 FR 74095, 74098 (Dec. 9, 2002). In 2003, the

Corps published the same planning information in the Federal Register, but this time specified that the Corps would either propose changes to Appendix C or "work with the ACHP to develop other Federal agency program alternatives, to comply with the requirements of the NHPA and other historic preservation laws." Unified Agenda, 68 FR 72459, 72462 (Dec. 22, 2003).

In 2004, the Corps issued an advanced notice of proposed rulemaking to solicit comments on "how our permit application processing procedures should be revised as a result of the 1992 amendments to the National Historic Preservation Act and the Advisory Council on Historic Preservation's revised regulations on protection of historic property." Procedures for the Protection of Historic Properties, 69 FR 57662, 57622 (Sept. 27, 2004).

In 2005, the Corps issued its "Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800."[3] The Corps explained that it had already issued "interim guidance" in 2002 "to address the changes to the section 106 process until our permit processing procedures can be revised through the Administrative Procedures Act process." 2005 Interim Guidance, p. 1. Also in 2005, the Corps again announced that it needed to revise Appendix C due to the "substantial changes in policy" achieved by Congress's 1992 amendments to the NHPA and the ACHP's new 2000 and 2004 regulations. Unified Agenda, 70 FR 64132, 64134 (Oct. 31, 2005).

To date, the ACHP has never approved Appendix C and the Corps knew, long before its May 6, 2006 approval, that Appendix C was legally deficient.[4]

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[3] http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/InterimGuidance_25apr05.pdf See Department of Defense, Unified Agenda, Statement of Regulatory Priorities, 72 FR 69793, 69794 (Dec. 10, 2007).

[4] The Corps argues to the Court that "[i]t was not appropriate for the Corps to consider the degree of agency control or the type of federal involvement." Corps brief, p. 13. This litigation position contradicts the Corps own 2005 interim guidance, which instructs that the "scope of the

(footnote continued)

2. The Corps' 2006 determination that its authorization of Drake's proposed bridge and road is not an undertaking under the NHPA is arbitrary and capricious because the Corps entirely failed to consider an important aspect of the problem.

The Corps' May 1, 2006 approval of Drake's project was conditioned by law on his compliance with BMPs when building the bridge and road. RA 1568. The Corps acknowledges that "the BMP's are part of the exception," Corps brief, p. 13, but then argues that it "does not have jurisdiction to control" an exemption. Id. BMP compliance is required by the CWA, 33 U.S.C. § 1344(f)(1)(E), and the Corps' regulations, 33 C.F.R. § 323.4(a)(6), but the Corps only responds with the non-sequitor that "an exemption is simply not subject to regulation," Corps brief, p. 13, when it plainly is. E.g., U.S. v. Smith, 2014 WL 3687223, at *1 (S.D.Ala.,2014) ("This permitting exemption requires that the roads be constructed in accordance with 15 mandatory Best Management Practices.").

The Corps' argument is premised on its belief that the BMP's applicable to Drake were subject to the "Corps' discretionary enforcement." Corps brief, p. 12.[5] Failure to stay within "the conditions of the exemption that are already contained in the CWA and the Corps' regulations," Corps brief, p. 12, is "prohibited" and "subject to regulation," 33 U.S.C. §

(footnote continued from previous page)

undertaking is also dependent upon the amount of Federal control and responsibility for a particular project. The district engineer will take into account the magnitude and nature of the undertaking and the degree of Federal involvement, as well as the nature and extent of potential effects on historic properties. Work that is required of the applicant as part of a permit condition is also part of the undertaking." 2005 interim guidance, p. 3.

[5] The Corps moved to dismiss "Counts 1 through 6" arguing that "the laws governing the exemptions . . . do not have statutory factors by which to measure the Corps' management decisions." Sisseton-Wahpeton Oyate v. U.S. Corps of Engineers, 918 F.Supp.2d 962, 974 (D.S.D. 2013). Count 5 sets forth the Tribe's BMP claim. The Court rejected the Corps' argument "because the grounds for exemption were Congressionally created," the exemptions did not involve a Corps decision to "modify, suspend or revoke a § 404 permit," and challenges to Corps actions have reached the U.S. Supreme Court. Id.

1344(f)(1). The BMP's are mandatory requirements of the CWA designed to achieve a specific purpose: "to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized." Id. Likewise, the Corps' regulation provides that the 15 BMPs "must be applied to satisfy this provision . . .." 33 C.F.R. § 323.4.

B. The Corps' determination that the SWO THPO need not be consulted when issuing Drake the NWP 14 permit on May 4, 2009, was arbitrary and capricious and unlawful for at least four separate reasons.

The Corps states that it only reviewed those sites "recorded in the permit area," Corps response, p. 19. Such a limited review does not comply with the NHPA. The ACHP received comments that section 106 review be limited to "properties formally deemed eligible," but the ACHP disagreed because of "the reality that not every single acre of land in this country has been surveyed for historic significance" and "the NHPA's intent to consider all properties of historic significance." 65 FR 77698, 77705 (Dec. 12, 2000). Further the Corps' review of Drake's project does not even pass muster under the Corps' own legally deficient Appendix C and 2005 interim guidance. "Review of listed properties is often inadequate to convey negative information or the potential to impact historic properties not currently identified (e.g. deeply buried prehistoric sites)." 2005 interim guidance, p. 3.

1. The Corps' failure to assume "historic properties were present" is arbitrary and capricious because the Corps entirely failed to consider an important aspect of the problem.

The Corps concedes that the ACHP's regulation, 36 C.F.R. § 800.3(a), require the agency to assume "historic properties were present" when determining whether Drake's undertaking "is a type of activity that has the potential to cause effects on historic properties." Corps brief, p. 15.

Yet the Corps does not assert that it assumed the presence of historic properties when approving Drake's undertaking, and the record demonstrates that the Corps did not follow this important presumption. RA 3413, 3522, 3598.

Here, this initial assumption is critical because the Corps knew that Drake was taking significant fill from shoreline to build the crossings over two wetlands. As stated above, shorelines are common places for Dakota remains, spiritual sites. Had the Corps applied the regulation's assumption, then consultation would have occurred and the Tribe could have participated in the section 106 process.

2. The Corps' determination not to consult with the SWO THPO was arbitrary and capricious because the Corps offered an explanation that runs counter to the evidence before the agency.

Drake filed another Application for a Department of the Army Permit on October 8, 2008. RA 2987. The "THPO", Dianne Desrosiers, called the Corps on January 7, 2009, and spoke to Steven Naylor. The Corps argues that the THPO was only calling about the 2003 road project and not the 2006 bridge project, consequently, the Corps did not need to follow its own advice, RA 3597, and consult with the THPO about Drake's most-recent permit application. Corps brief, p. 18. The Corps' argument is not supported by the record.

According to Mr. Naylor, on January 7, 2009, the THPO called about the "subject road crossing." RA 3291. That is certainly true, and it is also true that Ms. Desrosiers did not know what part of that crossing was authorized by the Corps' 2003 farm road determination or the Corps' 2006 farm road determination. Ms. Desrosiers did not specify to the Corps that she was calling about either the Corps' 2003 or 2006 farm road authorization because she would have had no idea that two separate non-public authorizations existed. In fact, the exact start and stop

point for these two determinations is still unclear,[6] but the bridge is definitely part of the "subject road crossing." Ms. Desrosiers informed Naylor that the "Tribe has issues w/ the crossing" and provided contact information "for future reference." Id.

Two months later, during a March 9, 2009 conference call, Mr. Naylor "gave history/background, NWP's, 3 – exemptions, current NWP pending, Steve contact w/ SWST in Jan." RA 3597. The Corps' Tribal Liaison officer, Joel Ames, advised Mr. Naylor in this call that, "we have not been notified of issue w/exempt x-ing by tribe and have fulfilled our responsibility, if we made [sic] aware of concerns, then we should consult/coord." Id. By this point in time, Mr. Naylor knew of the THPO's concerns with the road and the Corps was required to consult. Mr. Oehlerking's notes from the conference call confirm that "Martha/Joel recommended coord. w/ Tribe on pending NWP 14's to assure we not missing something." Id. The record demonstrates that the Corps' decision not to consult the THPO runs counter to the evidence before the agency and counter to the recommendation that a superior Corps official provided to Mr. Naylor. RA 3597.

3. The Corps' determination not to consult with the SWO THPO to identify historic properties is arbitrary and capricious because the Corps entirely failed to consider an important part of the problem.

The Corps ignores the two premises to this argument – namely that the Corps was required to assume in its initial potential for effects determination that historic properties were present, which it failed to do, and that the Corps should have determined that Drake's activity had the potential to cause effects on such historic properties, which is also failed to do. Tribe's

[6] As late as April 23, 2009, Corps officials acknowledged that "I couldn't really tell from the maps which part of the road is completed and which part will be the new extension." RA 3672.

opening brief, p. 22. The Corps violated the ACHP regulations by expressly considering the Area of Potential Effects ("APE") without consulting the Tribe.

On November 3, 2008, the Corps' Mr. Naylor and Mr. Oehlerking "discussed Sec. 106 – we have no clearance, but no sites listed or eligible in APE of 2 crossings," (the presence of such sites must be assumed at this stage of analysis.). RA 3036. Despite this record, the Corps now argues that "the APE determination occurs later in the Section 106 process and was not at issue in this case." Corps' response brief, p. 14, n. 8. The record shows that the Corps was considering the APE on November 3, 2008. RA 3036. The ACHP's regulations require the Corps to consult with the THPO when identifying, determining, and documenting the APE. See 36 C.F.R. § 800.3(f)(2) ("agency official shall make a reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties."); 36 C.F.R. § 800.4(a)(1) ("In consultation with the SHPO/THPO, the agency official shall determine and document the area of potential effects, as defined in § 800.16(d).").

The Corps identified the area of potential effects, RA 3036, which required the Corps to consult the THPO, and its failure to do so is not consistent with the law.

4. The Corps' determination that Drake may oversee his own compliance with the NHPA is arbitrary and capricious because the Corps relied on factors which Congress has not intended it to consider and is implausible.

The Corps' May 4, 2009 NWP 14 determination allowed Drake to oversee his own compliance with the NHPA. According to the Corps, Appendix C and General Condition 20 to the NWP "require nationwide permittees to notify the Corps if a proposed NWP project may affect certain historical properties." Corps brief, p. 15. "Once such a notification is provided" by the permittee, then the Corps must complete "a NHPA review pursuant to Appendix C

procedures." Id. The Corps attempts to place the burden on the "NWP user to investigate whether its proposed project will impact historic properties, and if so, to notify the Corps so that an appropriate review may be commenced." Id. Allowing Drake to determine his own compliance with the NHPA violates the NHPA. 54 U.S.C. § 306108; 36 C.F.R. §§ 800.2(a), 800.3(a).

The Corps cites to 36 C.F.R. § 800.2(a)(3) of the ACHP's regulations, "Use of Contractors," to justify placing the burden of complying with section 106 on the permit holder; misrepresenting that Appendix C is "virtually identical" to the ACHP's regulation. Corps response brief, p. 17. Although the ACHP regulation allows a federal agency to "use the services of applicants . . . to prepare information, analyses and recommendations under this part," 36 C.F.R. § 800.2(a)(3), the ACHP's regulation requires the agency to remain "legally responsible for all required findings and determinations." Id. Even when an applicant prepares a document, "the agency official is responsible for ensuring that its content meets applicable standards and guidelines." Id. Further, the Corps did not hire Drake to draft any analysis.[7]

The ACHP's regulation allow an applicant to prepare what effectively amounts to a draft analysis for the federal agency's consideration. In contrast, the Corps' regulations "require nationwide permittees to notify the Corps if a proposed NWP project may affect certain historical properties." Corps brief, p. 15. The Corps' regulation is not "virtually identical to the ACHP's." Id.

[7] The Corps concedes that there is zero evidence in the record that Drake did anything at all in regard to the NHPA. Corps brief, p. 17.

II. Both the Corps' 2006 and 2009 decisions violated the Clean Water Act and the Corps' regulations.

A. The Corps' determination in 2006 and 2009 to not subject Drake's Applications for a Permit to notice and public comment was arbitrary and capricious and unlawful.

The Corps argues that an activity not requiring a permit and an activity authorized under a NWP do not require a permit application. Corps brief, p. 21. The Corps' response fails to address the most critical ingredient to the Tribe's argument: Drake twice requested and filed an Application for a Department of the Army Permit. RA 1456, 2987. When contemplating the construction of a two lane bridge, as well as a road extension traveling through two additional wetlands, Drake's decision to apply for a permit is not surprising. According to the Corps' regulations, "public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought." 33 C.F.R. § 325.3(a) (emphasis added).

Here, Congress has "directly spoken" on the "precise question." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). The CWA provides that public notice is required when the Corps receives a complete application:

> Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1344(a). Congress has made its intent clear, once the "applicant submits" a complete "application for a permit" the Corps "shall publish" public notice. Here, the Corps failed to do so. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43.

Corps regulations likewise provide that public notice will be issued when the application is complete:

> Timing of processing of applications. The district engineer will be guided by the following time limits for the indicated steps in the evaluation process: (1) The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with paragraph 325.1(d) of this part.

33 C.F.R. § 325.2(d). No regulation provides that when the Corps receives a completed application for a Department of the Army permit, the Corps may forego the public notice requirement.

The Corps is correct that "all incoming applications for individual permits should be reviewed for possible eligibility under regional general permits or NWP's." 33 C.F.R. § 330.1(f). But this regulation clearly envisions that the Corps must do so "within 15 calendar days," 33 C.F.R. § 330.1(f), in order to not run afoul of the timeline for notice imposed by 33 U.S.C. § 1344(a) and 33 C.F.R. § 325.2(d). "Section 325.2(a)(2) is the regulation requiring the District Engineer to determine within fifteen days of receiving a permit application whether the application is complete, and then to issue public notice of the pending review if it is. The quoted section of § 330.1(f) thus does no more than admonish the Corps, even if it is considering verifying an NWP for a proposed project that is in the individual permitting process, not to delay in fulfilling its existing obligations under § 325.2(a)(2)." Crutchfield v. County of Hanover, Virginia, 325 F3d 211, 220-21 (4th Cir. 2003). Here, Drake filed his application on September 9, 2005, RA 1456, and public notice should have been issued no later than September 24, 2005. The Corps approved Drake's project as a farm road, many months later, on May 1, 2006, RA 1566.

"Although the Corps is to be given some leeway in the interpretation of its own regulations, where the agency's action clearly diverges from its regulations, the matter ceases to be one of interpretation and becomes one of the Corps' failure to follow its own rules." Water

Works & Sewer Bd. of the City of Birmingham v. U.S. Dept. of Army, Corps of Engineers, 983 F.Supp. 1052, 1073 (N.D.Ala. 1997). The Corps does not rely on the plain language of its own regulations, nor does it cite to a single court decision supporting its interpretation.

Although the statute is clear that once the applicant submits a complete application for a permit the Corps shall issue public notice, the Corps "subsequent interpretation of those regulations," Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261, 278 (2009), confirms that the Corps must publish notice after receiving a complete application for a permit. "The Corps is a highly decentralized organization," 33 C.F.R. § 320.1(a)(2), yet it is remarkably consistent with its position on public notice:

- "Under the Corps' Regulatory Program, a public notice is the primary method for advising all interested parties of a proposed activity for which a permit is sought."[8]
- "Under the Corps' Regulatory Program, a public notice is the primary method for advising all interested parties of a proposed activity for which a permit is sought."[9]
- "Permit applications received by the Corps of Engineers are given identification numbers and reviewed for completeness. A request for additional information may be sent if necessary. A public notice initiating a 15- or 30-day public comment period will be issued within 15 days of receiving all the required information."[10]

The application maintained by the Corps headquarters likewise informs the applicant that listing the names of the adjoining property owners is necessary in order to notify them of the proposed activity, which is usually by public notice.[11] The Corps' public notice arguments are entitled to no weight by the Court because "[d]eference to what appears to be nothing more than an

[8] http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices.aspx Sacramento District.
[9] http://www.spn.usace.army.mil/Missions/Regulatory/PublicNotices.aspx San Francisco District.
[10] http://www.nwp.usace.army.mil/Missions/Regulatory/Apply.aspx Portland District.
[11] http://www.usace.army.mil/Portals/2/docs/civilworks/permitapplicationinstructions.pdf

agency's convenient litigating position would be entirely inappropriate." Bowen v. Georgetown University Hosp., 488 U.S. 204, 213 (1988).

B. The Corps' 2006 decision that Drake's proposed bridge and road were a farm road was arbitrary and capricious.

According to the Corps, "to date" Drake has never developed his land. Corps response, p. 26. The Corps' interpretation of farming, in 2006 and today, is per se arbitrary and capricious:

RA 2150, Oct. 29, 2006.

RA 2968, Oct. 5, 2008.

RA 3007, Oct. 22, 2008. The Corps' argument defies any plausible understanding of farming.

The Corps relies exclusively on records from Attorney Jack Hieb, RA 0070, neighbor Doug Block 1331, 1337, 1338, 1339, and two Corps' documents, RA 1429, 1513. Each is addressed in turn.

Attorney Hieb has represented Enemy Swim lake residents opposing Drake's development since at least 1998. RA 0023. When Mr. Hieb could not obtain a copy of the Corps' applications and approvals, he contacted the State. "Hieb says that Drake came in for coverage under a nationwide permit regarding access to dwellings. But he finessed the application. Jack is willing to file a formal complaint with any agency needing a formal complaint in order to proceed." RA 0044. A week later Mr. Hieb jokes with state officials that Drake's new road is a so-called "cattle crossing" the cattle owned by the prior landowner did not need a road. RA 0070. The Corps cannot honestly represent that at the time it made its decision on May 1, 2006, it relied upon Mr. Hieb's pre-application sarcasm to conclude that Drake was actively farming cattle.

Even more preposterous, the Corps relies on Doug Block's letter and pictures from July 5, 2005, to support its farm road approval. Mr. Block wrote a letter to the Corps complaining that Mr. Drake was staging the north side of the inlet, by hauling in cattle. RA 1331. Mr. Block's pictures, RA 1337, 1338, 1339, unequivocally show the surroundings from his vantage point while in the water. Thus, it's easy to determine that Mr. Block is facing east and southeast when taking those three pictures. The Corps' response fails to account for the lay of the land. Mr. Block alleged that "these photos [demonstrate] the Corps was misled by a false application which led to erroneous Corps decisions." RA 1331. It is illogical and inconceivable for the Corps to represent that at the time it made its decision on May 1, 2006, it relied upon Mr. Block's pre-application allegations of fraud against Mr. Drake.

The Corps' reliance on two records indicating that cattle were observed during an August 23, 2005, site visit, RA 1429, 1513, is not helpful because these records do not inform any decision maker where the pasture is located.

The Corps failed to take a hard look at Drake's application and merely rubberstamped a farm road approval based upon its past practice. All of Mr. Drake's neighbors and many others filed repeated complaints that Drake is not a farmer: Senator Tim Johnson; Day County Conservation Officer Robert Losco; Attorney Drew Johnson and his clients the Dalys and Grebners; Attorney Hieb and his client Block; and even Alvah Quinn. Tribe's opening brief, p. 29. Anyone could see that the massive bridge was necessary to support his excavation equipment. The inlet/wetland has not been fenced off, there has yet to be any cattle using this bridge, and this land is not farmed.

Under the circumstances, the Corps failed to fulfill its legal duty to narrowly construe the farm road exemption.

Tribal Consultation. The Corps argues that neither E.O. 13175 nor its 1998 Tribal Consultation Policy require it to engage in meaningful consultation with Indian tribes. Corps brief, p. 23. The Corps cites to five cases that found that executive orders may not create a private right of action. Id. The cases cited by the Corps can be distinguished.

The Corps fails to acknowledge that, in the present case, E.O. 13175 and the 1998 Corps Tribal Consultation Policy do not stand alone. As the Corps' 1998 Tribal Consultation Policy provides, the Corps is bound by Army Regulation 200-4, *Cultural Resources Management*, Oct. 1, 1998 ("AR 200-4"), and Army Regulation 200-1, *Environmental Protection and Enhancement*, Dec. 13, 2007 ("AR 200-1"). The 1998 Policy is based, in part, on AR 200-4.

Likewise, the Corps is bound by NWP General Condition 16, which requires the Corps to make determinations "through appropriate consultations with Indian tribes." 72 FR at 11158.

The present case, therefore, is consistent with Yankton Sioux Tribe v. Kempthorne, 442 F.Supp.2d 774 (D.S.D. 2006), because the Corps' regulations, AR 200-4, AR 200-1, and NWP General Condition 16, require the Corps to engage in prior consultation with Indians tribes. "An agency must comply with its own internal policies even if those are more rigorous than procedures required by the APA." Yankton Sioux Tribe, at 784. "When the BIA has established a policy requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given." Id.

Here, AR 200-1, 200-4, and NWP General Condition 16 create a justified expectation that Indian tribes will be given an opportunity to engage in meaningful consultation. As with the BIA in Yankton Sioux Tribe, Executive Order 13175 and the 1998 Tribal Consultation Policy are in line with the Corps' regulations. Here, the Corps has repeatedly ignored its responsibility to engage in tribal consultation. The Corps justifies its lack of consultation because it was not aware of any cultural sites on the Drake property, Corps brief, p. 26, which shows why tribal consultation is critical. The Corps is expected, as evidenced through its Policy and regulations, to engage in meaningful consultation to ensure that it has the requisite information. The Corps' failure to engage in consultation is arbitrary and capricious and contrary to law.

Lastly, the Corps suggests that it was a reasonable decision to not consult the Tribe, stating that "the Tribe does not now nor has it ever claimed any sovereign or regulatory authority over Mr. Drake's land." Corps response, p. 26. First, the Corps has no knowledge of the Tribe's claims because the Corps has never consulted the Tribe. Second, the Corps' assertion contradicts

the general rule in Federal Indian Law that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." Montana v. United States, 450 U.S. 544, 565 (1981). The Tribe's sovereignty is not at stake in this lawsuit, but the Tribe certainly could seek to exercise such inherent sovereign authority within the boundaries of the Lake Traverse Reservation recognized by Pubic Laws 93-491, 95-398, and 98-513, including the Drake property. Third, the Corps' position directly contradicts Congress's determination that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government." 25 U.S.C. § 3601(2).

C. The Corps' 2009 decision to issue Drake the NWP 14 permit was arbitrary and capricious because the Corps knew Drake was "piecemealing" a single project and because the Corps failed to consult with the Tribe.

According to the Corps, both the road crossing the wetland and the bridge crossing the creek are to access Drake's farm pasture, but the road on the so-called farm pasture is to access Drake's new residence. RA 3670. This position is arbitrary and capricious.

The Corps relies on just a portion of the "single and complete project" definition, 72 FR at 11197 (date). The first part of this definition specifies that a "single and complete project must have independent utility (see definition)." 72 FR at 11197. "Independent utility" is defined as:

> A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. **Portions of a multi-phase project that depend[s] upon other phases of the project do not have independent utility**. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

72 FR at 11196 (emphasis added). Drake's permit applications sufficiently describe his road as a "multi-phase project that depend upon other phases of the project." RA 1457, 1545, 2958, 2987-88, 3034, and 3601.

The Corps misses the point of the Tribe's statement that the Corps cannot create a new exception. Tribe's brief, p. 32. The Tribe was referring to 33 U.S.C. § 1344(f), not the NWP. Congress created exceptions to the permitting requirement and the Corps cannot add to them.

General Condition 16 requires consultation, 72 FR at 11158. The Corps puts the cart before the horse and argues that the Tribe hasn't claimed a tribal right. The Corps hasn't consulted to find out. If it did, it would understand that the Tribe and its members have always, continuing to this day, exercised their treaty rights to spear fish from Drake's land. The Corps asserts that any such reserved right by the Tribe is not credible. Corps response, p. 34. This notion has long been rejected by the Supreme Court: "the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905). Here, the 1867 Treaty does not cede the Tribe's hunting and fishing rights. 15 Stat. 505.

The Corps argues that EPA approval is required for the Tribe to issue water quality certifications. Corps response, p. 35. But the Corps misses the point because both the Corps, RA 3057, 3059, and the EPA, RA 3133, asserted jurisdiction over Drake's project. Yet the Corps never consulted the Tribe on the matter in violation of General Condition 16.

In regard to mitigation, the Corps cannot explain how its initial calculation of wetland loss never changed, even though Drake increased the size of his project. As it stands, the Corps admits that it is entirely dependent upon Drake for their calculations. Corps response, p. 36.

This matter should be remanded so the Corps can determine wetland loss, which is much larger than .09 acres, as required by General Condition 20.

The Corps has no response to any of the Tribe's arguments pertaining to Drake's excavation, Drake's change in purpose after building a road and bridge across the wetland and creek, the change in water quality, and its unwillingness to take a hard look at any new information. Tribes' opening brief, p. 34.

Finally, this lawsuit is about reviewing final agency action, it is not the Tribe's attempt to "commandeer the federal enforcement machinery," Corps response, p. 1, or require the Corps to exercise its enforcement discretion, Id., p. 7. By way of comparison, since this lawsuit has been filed the Corps has allowed Drake to dredge the inlet in 2015 to create more shoreline:

The Corps is also aware that Drake routinely pollutes Enemy Swim Lake as in 2012:

And since this lawsuit has been filed, the Corps is aware that Drake's activity in 2011 resulted in entire swaths of cattails being dislodged from the wetland into the lake:

Again, this lawsuit is about APA review of final agency action and inaction.

CONCLUSION

Plaintiffs respectfully request that the Court find that the Corps acted contrary to the NHPA and the CWA and federal regulations in approving Drake's 2006 road/bridge and 2009 road projects, and acted in an arbitrary and capricious manner, all in violation of the APA. The Corps' decisions should be vacated and such other and further relief granted as will cure the violations found. Depending on the Court's disposition of the issues, additional briefing may be warranted on the matter of relief.

Respectfully submitted,

Dated: April 15, 2016

/s/ Debra Flute

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

In accordance with the Order Setting Briefing Schedule (Nov. 25, 2015), it is hereby certified that this brief contains 6,819 words, not including the caption, signature block, and this Certification or the Certificate of Service below.

/s/ Debra Flute

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I caused the foregoing Plaintiffs' Reply Brief on the Merits to be served electronically on counsel in this case who are registered with the Court's ECF system by filing it electronically with the Court. Any other counsel will be served by first class mail.

/s/ Debra Flute