UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, and 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

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INTRODUCTION

Plaintiffs Sisseton-Wahpeton Tribe and its Chairman challenge two decisions by the United States Army Corps of Engineers ("Corps") with respect to two proposals by Merlyn Drake to construct road crossings over regulated waters in the area of Enemy Swim Lake in northeast South Dakota. First, Plaintiffs challenge the Corps' decision in 2006 that a bridge Mr. Drake proposed to construct over Enemy Swim Creek is not subject to regulation under Clean Water ("CWA") section 404, 33 U.S.C. § 1344, because it qualifies for the statutory exemption for the construction of farm roads under CWA section 404(f)(1)(E), 33 U.S.C. § 1344(f)(1)(E). Second, Plaintiffs challenge the Corps' 2009 verification that Mr. Drake's proposal to construct culverted road crossings over two gullies that lie west of the bridge is subject to an existing Nationwide Permit for linear transportation projects.

Plaintiffs raise numerous arguments under the CWA and the National Historic Preservation Act ("NHPA"). As is shown below, none of Plaintiffs' arguments has merit, and the Court should therefore uphold the challenged Corps decisions and enter judgment in favor of the Corps. Moreover, even if the Court were to agree with any of Plaintiffs' arguments, it should remand this matter to the Corps for further action and should not vacate the Corps decisions at issue. The Court should not grant the mandatory injunction Plaintiffs seek – an order requiring that the Corps issue and enforce a cease and desist order to Mr. Drake prohibiting him from using his road. Among other things, this would be contrary to this Court's previous ruling in this case that these Plaintiffs may not "commandeer the federal enforcement machinery." *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs*, No. 3:11-cv-030260-RAL, __ F.Supp.3d __, 2015 WL 4931152 * 4 (D.S.D. Aug. 18, 2015) (quoting *Dubois v. Thomas*, 820 F.2d 943, 949 (8th Cir. 1987)).

BACKGROUND

I. Statutory and Regulatory Background

A. Clean Water Act

The Clean Water Act ("CWA") establishes a comprehensive program designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters unless authorized by a CWA permit. 33 U.S.C. § 1311(a). The Act defines "navigable waters" as "waters of the United States," which, in turn, is defined by regulation to include certain wetlands. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a), (b).

CWA section 404 authorizes the Corps to regulate discharges of dredged and fill material into regulated waters through the issuance of permits. 33 U.S.C. § 1344. The Corps may issue individual permits or general permits. *See id.* § 1344(a), (e). Individual permits are issued on a case-by-case basis after a resource-intensive review that involves extensive site-specific documentation and review, opportunity for public hearing, public interest review, and a formal determination. *See* 33 C.F.R. pts. 323, 325.

1. Nationwide Permits

In 1977, Congress authorized the Corps to issue general permits for similar categories of activities in order to avoid unnecessary delay and administrative burdens on the public and the Corps, 33 U.S.C. § 1344(e); *see* H.R. Conf. Rep. No. 830, 95-830, at 98 (1977), reprinted in 1977 U.S.C.C.A.N. 4424, 4473. CWA section 404(e) authorizes general permits "for any category of activities involving discharges of dredged or fill material if the Secretary determines

that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1).

Nationwide Permits ("NWPs"), which are a type of general permit, identify categories of activities for which the Corps does not require an individual section 404 permit, even though the activity may result in some discharge of dredged or fill material into navigable waters. 33 C.F.R. §§ 323.2(h), 330.2(b). The NWP program is "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." *Id.* § 330.1(b). In contrast to individual permits, NWPs are issued when the Corps formally adopts and publishes the NWPs in the *Federal Register* after a hearing and opportunity for public comment. *See Indus. Highway Corp. v. Danielson*, 796 F. Supp. 121, 124 (D.N.J. 1992), *aff'd without opinion*, 995 F.2d 217 (3d Cir. 1993); 33 C.F.R. § 330.1(b) (nationwide permits are a type of general permit issued by the Chief of Engineers). As a result, individual parties do not "apply" for NWPs, and the Corps does not "issue" NWPs to individual parties. *See id.* Instead, the NWPs themselves authorize the limited dredging and filling activities within their scope. *See Riverside Irr. Dist. v. Stipo*, 658 F.2d 762, 764 (10th Cir. 1981).

Before issuing NWPs, which are effective for five years, 33 U.S.C. § 1344(e)(2), the Corps must evaluate whether the individual and cumulative adverse environmental impacts of the activities authorized by each NWP are no more than "minimal," as required under CWA section 404(e)(1). *Id.* § 1344(e). At this stage, analysis of potential adverse effects consists of "reasoned predictions." *Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 501 (4th Cir. 2005). The Corps prepares appropriate documentation under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C), and analyzes more than fifteen factors relevant under the U.S.

Environmental Protection Agency's ("EPA's") CWA Section 404(b)(1) guidelines for permit issuance. 33 U.S.C. § 1344(b)(1); 40 C.F.R. § 1508.10; 40 C.F.R. pt. 230 ("404(b)(1) Guidelines"). The Corps further imposes additional terms through conditions applicable to NWPs. 33 C.F.R. § 320.1(c). Finally, the Corps conducts a "public interest review" of "probable impacts, including cumulative impacts, of the proposed activity" on the public interest. *Id.* § 320.4(a)(1).

Before issuing or reissuing an NWP, CWA section 404(e) and the Corps' regulations require "an opportunity for public notice and comment." 33 U.S.C. § 1344(e); 33 C.F.R. §§ 330.1(b), 330.5(b)(2). The Corps memorializes its 404(b)(1), NEPA, and other environmental analyses in a Decision Document for each NWP. While the Corps' regulations governing the issuance and administration of the NWPs are set forth in 33 C.F.R. pt. 330, the NWPs are published in the *Federal Register* and not subsequently reproduced in the *Code of Federal Regulations.*

If a party's proposed discharge meets the terms and conditions of an NWP, then no individual permit is necessary and that party "may simply operate under the nationwide permit without informing the Corps in advance unless the nationwide permit in question requires advance approval[.]" *New Hanover Twp. v. Army Corps of Eng'rs*, 992 F.2d 470, 471 (3d Cir. 1993). *See* 33 C.F.R. §§ 320.1(c), 325.5(c)(2), 330.1(c) & (e), 330.4(a). The prospective permittee simply proceeds under the authority of the relevant NWP, subject to the Corps' ultimate authority to determine compliance with that NWP. 33 C.F.R. § 330.2(c) ("After determining that the activity complies with all applicable terms and conditions, the prospective permittee may assume an authorization under an NWP").

In certain cases, the Corps must verify that an NWP applies to a proposed discharge

before a prospective permittee may proceed with that discharge. 33 C.F.R. §§ 330.1(e), 330.6(a)(1). Upon receiving a request for a verification, the Corps determines whether the activity complies with the terms and conditions of the NWP and notifies the party. *Id.* § 330.6(a). The Corps may add conditions to ensure NWP compliance or minimize adverse effects. *Id.* § 330.6(a)(3)(i).

General conditions apply to all NWPs. 33 C.F.R. § 330.4. No activity may affect properties listed or eligible for listing on the National Register of Historic Places. *Id.* § 330.4(g). A person proceeding under an NWP must notify the Corps if an authorized activity may adversely affect historic properties listed on or eligible for listing on the National Register of Historic Places. *Id.* § 330.4(g)(2); *id.* pt. 325, app. C(13). After the Corps is provided with such notification, the Corps will notify the State Historic Preservation Officer and the Corps may suspend the NWP for the activity. *Id.* No activity may commence or proceed under an NWP in these circumstances until the Corps has complied with the provisions of 33 C.F.R. pt. 325, Appendix C. 33 C.F.R. § 330.4(g).

The NWP at issue in this case is NWP 14, which authorizes linear transportation projects, such as road crossings, in non-tidal waters as long as the discharge does not cause the loss of greater than one-half acre of waters of the United States. 72 Fed. Reg. 11,092, 11,183-84 (Mar. 12, 2007).[1]

2. Statutory Exemptions

CWA section 404(f)(1) provides narrow exemptions to the permitting requirements applicable to discharges of dredged or fill material for, among other things, the construction of

[1] NWP 14 was reissued in 2012, and is currently in effect. 77 Fed. Reg. 10,184, 10,273 (Feb. 21, 2012).

farm or forest roads. 33 U.S.C. § 1344(f)(1)(E). Under CWA section 404(f)(2), an otherwise exempt discharge may still be subject to regulation, or "recaptured," if it is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2). *See Coon v. Willet Dairy, LP*, 536 F.3d 171, 174-75 (2d Cir. 2008) (construing recapture provision).

B. National Historic Preservation Act

In enacting the NHPA, Congress directed federal agencies to: (1) consider the impact of federal undertakings on historic resources of national significance; and (2) assume responsibility for the preservation of historic resources that they own or control. The core of a federal agency's responsibilities under the NHPA can be found in section 106 of the NHPA, 16 U.S.C. § 470f[2], which provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation [ACHP] established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Id. NHPA is a procedural statute. *See Pres. Coal., Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982); *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003). Section 106 requires agency

[2] On December 19, 2014, NHPA was moved from title 16 of the U.S. Code to Title 54. Pub. L. No. 113-287, 128 Stat. 3094. The Advisory Council on Historic Preservation's website contains the title and a conversion chart tracking the recodification: www.achp.gov/news-nhpa-move.html (last visited March 7, 2016). Because the version codified at Title 16 was in effect at the time of the claims at issue in this case, the brief refers to those cites.

decision-makers to consider specified information concerning the effects of a federal undertaking on National Register-eligible resources prior to the agency's issuance of a final decision. This is referred to as the section 106 process.

The only activities triggering federal obligations under the NHPA include conducting an undertaking involving federal funding, or the issuance of a federal license. *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 754 (D.C. Cir. 1995) As discussed above, in the NWP context, prospective permittees must notify the Corps prior to undertaking any activity that may affect historic resources listed or eligible for listing on the National Register of Historic Places ("NRHP"). 33 C.F.R. § 330.4(g).

II. Factual Background

This Court is already familiar with the factual background in this case. *See Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs*, __ F.Supp.3d __, 2015 WL 4931152; *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs*, 918 F.Supp.2d 962 (D.S.D. 2013). Accordingly, Defendants do not provide an in-depth factual background statement here. Instead, we below refer to the relevant portions of the Administrative Record in response to Plaintiffs' merits arguments on the remaining claims.[3]

[3] Plaintiffs' factual statement is filled with, among other things, ad hominin attacks against Mr. Drake and Corps regulatory personnel (*e.g.*, that Mr. Drake lied to the Corps and that the Corps was dishonest in its communications to the South Dakota Congressional Delegation), and statements based on materials outside of the Administrative Record and/or that concern claims the Court has already dismissed and that the Court should not consider on the merits (*e.g.*, that the Tribe raised concerns *after* the Corps made the challenged decisions). *See* Pls.' Br. at 1-10. In the argument section below, we provide the Court with those record citations that support the Corps' decisions at issue here, and/or which refute the factual assertions made in Plaintiffs' actual legal arguments.

In November 2005, Mr. Drake requested permission to construct a bridge over Enemy Swim Creek so that he could access his pasture on both sides of the creek. RA 1456-1460.4 The Corps was already familiar with Mr. Drake's property in this area, having determined in 2003, that Mr. Drake's then-proposed road crossing over a wetland complex southeast of the bridge crossing was exempt from regulation as a farm road. RA 0014. In the context of reviewing Mr. Drake's work on that crossing, Corps personnel observed cattle grazing in Mr. Drake's pasture in the vicinity of the bridge site. RA 1429. In addition, Douglas Block had provided the Corps with photographs showing cattle on Mr. Drake's property. RA 1338 (Mr. Block's photographs showing cattle grazing on Mr. Drake's property). Both Mr. Block and attorney Jack Hieb had represented that cattle had been using the area in question for many years. RA 1331, 1338, 0070. The Corps reviewed Mr. Drake's application and, consistent with its knowledge of Mr. Drake's use of the property for cattle grazing and its previous determination regarding the exempt road crossing, determined on May 1, 2006, that Mr. Drake's proposed bridge qualified for the farm road exemption. RA 1566.

Over two years later, in October 2008, Mr. Drake sought permission to construct culverted road crossings across two gullies west of the bridge and in the vicinity of Mr. Drake's north shore property. RA 2987. The Corps was aware that Mr. Drake intended to build a residence on his north shore property and that these crossings would therefore not qualify under the farm road exemption, but concluded that they might qualify as linear road crossings under NWP 14. RA 3035. On March 12, 2009, Mr. Drake indicated that he wished to lengthen the culverts to be used at the crossings. 3601-3609. The Corps reviewed the proposed crossings, as

[4] We previously provided the Corps' Administrative Record to the Court on a disk. Each page of every document in the record is identified by a Bates Stamp number preceded by the letters RA.

amended, and verified that each crossing qualified for NWP 14. RA 3703. The Corps so informed Mr. Drake by letter dated May 9, 2009. *Id.*[5]

STANDARD OF REVIEW

The Corps' final agency actions regarding CWA authorizations are reviewed under the standards set forth in the Administrative Procedure Act ("APA"), which provides that agency action will not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Sierra Club v. EPA*, 252 F.3d 943, 946-47 (8th Cir. 2001).[6] The "arbitrary and capricious" standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard is also highly deferential and presumes the validity of agency actions so long as the agency considered the relevant factors and articulated "a rational connection between the facts found and the choices made." *Id.* "If an agency's determination is supportable on any rational basis, [the Court] must uphold it." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004). This level of deference is particularly appropriate "when an agency is acting within its own sphere of expertise." *Id.; see also Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1087-88 (D.C. Cir. 2014) (citing cases). "'Even when an agency explains its decisions with 'less than ideal clarity,' a reviewing court will not upset the decision on the account 'if the agency's path may reasonably be discerned." *Nebraska v. EPA*, 812 F.3d 662, 669 (8th Cir. 2016) (quoting *Alaska Dep't of Envtl. Conservation v. EPA*,

[5] The Corps' letter enclosed a Preliminary Jurisdictional Determination which estimated that 0.5 acres of wetlands existed at crossing 1, that .07 acres of wetlands would be impacted by that crossing, that 0.4 acres of wetlands existed at crossing 2, and that .02 acres of wetlands would be impacted by that crossing. RA 3706-3708.

[6] Judicial review of challenges under NHPA is also under the standards set forth in the APA. 5 U.S.C. § 706; *see Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998).

540 U.S. 461, 497 (2004)). In applying these standards, moreover, a reviewing court considers only material contained in the administrative record before the agency at the time that it made its decision. *Voyageurs*, 381 F.3d at 766.

Questions of statutory interpretation are governed by the two-step test set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). Under the first step, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If congressional intent is clear from the statutory language, the inquiry ends. *Id.* at 842-43. If the statute is silent or ambiguous, however, a court must accept the agency's interpretation of an ambiguous statute as long as that interpretation is reasonable. *Chevron*, 467 U.S. at 843 & n.11; *see also Sierra Club*, 252 F.3d at 947.

Where the agency's decision is based on an interpretation of its own regulations rather than on a statute, its interpretation is controlling "unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation and citation omitted); *see also Mages v. Johanns*, 431 F.3d 1132, 1139 (8th Cir. 2005). Under this standard, "an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). Rather, the reviewing court will consider whether the agency's interpretation of the regulation is a "fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462.

The Corps' factual determinations are likewise entitled to deference. The Corps' factual determinations should be upheld if they are supported by the administrative record even if alternative determinations might also be supported by the record. *Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992).

ARGUMENT

I. Plaintiffs' NHPA Claims Lack Merit.

Plaintiffs allege two violations of the NHPA. First, Plaintiffs allege that the Corps failed to identify the bridge exemption as an undertaking subject to the Section 106 process. Second, Plaintiffs allege that the Corps, in verifying NWP 14 permit, failed to consult with necessary parties, applied its NHPA regulations, and improperly allowed Mr. Drake to oversee compliance with the NHPA. As shown below, none of these arguments has merit.

A. The 2006 Bridge Exemption is not a Federal Undertaking under the NHPA.

In order to trigger Section 106, there first must be an undertaking as defined by the NHPA. Without an undertaking, the Section 106 process is inapplicable. 16 U.S.C. § 470f. The NHPA defines the term "undertaking" as follows:

> "Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including—
>
> (A) those carried out by or on behalf of the agency;
> (B) those carried out with Federal financial assistance;
> (C) those requiring a Federal permit, license, or approval; and
> (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

16 U.S.C. § 470w(7). ACHP's regulations contain the same definition. 36 C.F.R. § 800.16(y). Both the ACHP and the Corps have issued guidance in making a determination. ACHP 36 C.F.R. pt. 800; 33 C.F.R. pt. 325, App. C(1)(f).

An exemption from Section 404's permitting requirements does not meet any of these definitions. As discussed above, the Corps administers the Section 404 permit program, which provides, generally, that a permit is required for the discharge of dredge or fill material into waters of the United States. Some otherwise regulated discharges, however, are not subject to the Corps' jurisdiction under Section 404 by virtue of statutory exemptions. Section 404(f)

exempts from regulation discharges associated with certain specified activities, including construction of farm roads, provided the discharges do not convert an area of waters of the United States to a new use, and do not impair the flow or circulation of waters of the United States or reduce the reach of waters of the United States. *See* 33 C.F.R. §§ 323.4; 323.4(a)(6). The person claiming the exemption must establish that his activities are exempt. *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986)("Akers must establish that his activities are exempt."). With respect to exempt work, the Corps has no permitting jurisdiction and no authority or obligation to notify others of the landowner's contemplated activities. If an exemption applies, the landowner can simply perform the activity. The Corps does not approve the work. 33 U.S.C. § 1344(f)(1); 33 C.F.R. § 323(4)(a).

Plaintiffs' argument that the exemption is an undertaking is premised on their misunderstanding of the Corps' role. Plaintiffs argue that the Corps' May 1, 2006, letter to Mr. Drake verifying that his proposed activity was exempt from Section 404's permitting requirements was an undertaking. RA 1566. It was not. The Corps has no role in approving or authorizing an exemption. The Corps' letter has been mischaracterized as determining Mr. Drake's legal rights and obligations. Pls.' Br at 12. Some of that may be attributed to imprecise language contained in the Corps' motion for partial dismissal. The Corps, in its letter, did not determine Mr. Drake's legal rights but rather stated that he was not subject to the Corps' jurisdiction so long as his activity fit within the parameters of the exemption. The Corps attached to its letter the conditions of the exemption that are already contained in the CWA and the Corps' regulations. *See* 33 U.S.C. § 1344(f)(1)(E); 33 C.F.R. § 323.4(a)(6). As long as Mr. Drake stayed within these conditions, he is exempt from Section 404. Should Mr. Drake's project exceed these conditions, then he is subject to the Corps' discretionary enforcement.

Although Plaintiffs take umbrage with the definition of "undertaking" contained in the Corps' Appendix C, Pls.' Br. at 14, the Corps' lack of jurisdiction over an exemption from the Section 404's permit requirements is not an undertaking under the definition contained in the NHPA and ACHP regulations.[7] A Section 404 exemption is not carried out by or on behalf of the agency, does not use financial assistance, is not a permit, license, or approval—indeed, it is an *exemption* from regulation, nor is it subject to State or local regulation administered pursuant to the Corps' delegation or approval. It was not appropriate for the Corps to consider the degree of agency control or the type of federal involvement. It is an exemption. The Corps does not have jurisdiction to control it.

Plaintiffs argue that the presence of the recapture provision and general exemption conditions show a federal involvement. But the recapture provision and the BMPs are part of the exemption. As long as those are satisfied, the activity goes forward as exempt. There is nothing for the Corps to permit or authorize. Any subsequent argument that the activity exceeds the exemption is committed to the Corps' enforcement discretion. *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs*,, 2015 WL 4931152, *4 (Corps' enforcement authority is discretionary). An exemption is simply not subject to regulation. Under NHPA's definition of "undertaking," under ACHP's regulations and guidance, and under Appendix C, it

[7] Plaintiffs argue that the Court should give no consideration to Appendix C's definition of "undertaking" because it is in conflict with ACHP's regulations. Although a Section 404 permit exemption is not an "undertaking" under any definition, the Court need not consider Plaintiffs' argument. As to Plaintiff's two cited cases, the first, *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985), was decided in 1985, prior to the Corps' 1990 amendment of Appendix C, subsequent amendment of the NHPA in 1992, and revisions to ACHP's regulations in 2000. The second case, *Comm to Save Cleveland's Huletts v. U.S. Army Corps of Eng'rs*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001), concerned the Corps' procedures in issuing a permit, which is not applicable here. Plaintiffs further cite to ACHP 2008 correspondence and 2007 Corps' Guidance, all issued after the exemption determination.

is not an undertaking. Because there was no undertaking, NHPA did not apply.

B. The Corps' Verification of NWP 14 Permit Complied with Section 106.

Plaintiffs challenge the Corps' verification of NWP 14 permit as arbitrary and capricious under the NHPA for four reasons. First, they argue that the Corps failed to consult with the Tribe's THPO. Second, they argue that the Corps failed to assume historic properties were present. Third, they argue that the Corps wrongfully determined that Mr. Drake could oversee his NHPA compliance. And fourth, they argue that the Corps used deficient regulations. Plaintiffs' arguments are premised on a misunderstanding of the NWP process and the obligations imposed by Section 106. In accordance with its and the ACHP's regulations,[8] the Corps properly determined that the construction of the road crossings had "no potential to cause effects" to historic properties, and that no further consultation under Section 106 was required. *See* 65 Fed. Reg. 77698, 77698 (Dec. 12, 2000) ("There is no consultation requirement for [a no potential to cause effects] decision."); *see also McGehee I*, 2011 WL 2009969, *4 (upholding Corps' finding under Section 800.3(a)(1) of "no potential to cause effects" given the "limited nature and scope" of federally authorized activity). The Corps properly found that there was no

[8] Plaintiffs' rely exclusively on ACHP regulations, arguing that the Corps incorrectly applied its regulations. For purposes of the challenged decision, however, the Corps' and the ACHP's interpretation is the same. 2005 Interim Guidance at § 6(h) (citing to Section 800.3(a)(1) of ACHP regulations to clarify that the Section 106 process is fulfilled when "[i]t is determined there is no potential to cause effects on historic properties."). To the extent that the Corps' definition of "permit area" is narrower than the ACHP's definition of "area of potential effects" ("APE"), any possible conflict is immaterial here, given that the Corps considered effects outside the permit area. *See McGehee v. U.S. Army Corp of Eng'rs*, ("*McGehee I*")No. 3:11-cv-160-H, 2011 WL 2009969, *5 (W.D. Ky. May 23, 2011) (holding that even though "the Corps defines 'permit area' differently than the definition of 'area of potential effects' [. . .], both sets of regulations recognize that effects of an undertaking outside the footprint of a project should be considered); *id.* ("Even if it could be argued that the agency was required to progress further along in the 106 process, it is not an abuse of discretion for the agency to conclude that the plaintiffs' home was not within the area of potential effects."). Moreover, the APE determination occurs later in the Section 106 process and was not at issue in this case.

potential for this activity to cause effects to historic properties within or even outside the permit area. *See* RA 3523; 3036; 3598; 3610; 3612. That conclusion was reasonable under the Corps' Appendix C and Section 800.3(a)(1) of the ACHP's regulations.

The Corps' regulations establish procedures that must be followed in addressing NHPA issues that may arise, *inter alia*, in the context of permit decisions, generally requiring the Corps to take a variety of actions to assure that the potential impacts of a proposed activity in historic properties is given appropriate consideration during the public interest review. 33 C.F.R. pt. 325, App. C. In the case of NWPs, of course, the actual permits are often issued years before they are utilized for any particular project, making it difficult to assess the potential historic property impact at any particular location at the time the permits are issued. Therefore, the Corps' regulations – as well as similar provisions in General Condition 20 to the NWP 14 permit – establish special procedures for addressing NHPA compliance in the context of nationwide permits. Both of these provisions require nationwide permittees to notify the Corps if a proposed NWP project may affect certain historical properties. 33 C.F.R. § 330.4(g); 61 Fed. Reg. 65,874, 65,920 (Dec. 13, 1996). Once such a notification is provided, the project may not be considered authorized by the NWP until the Corps has completed a NHPA review pursuant to Appendix C procedures. *Id.*; *see also* 33 C.F.R. pt. 325, App. C (Part 13). However, "[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106[.]" 36 C.F.R. § 800.3(a)(1); *see also* 65 Fed. Reg. at 77,718 ("There is no consultation requirement for [a no potential to cause effects] decision."); 2005 Interim Guidance at § 6(h) (citing to Section 800.3(a)(1) of ACH regulations to clarify that the Section 106 process is fulfilled when :[i]t is determined there is no potential to cause effects on historic properties.");

Valley Cmty. Pres. Comm'n v. Mineta, 373 F.3d 1078, 1090 (10th Cir. 2004) ("[S]ection 800.3 does not mandate consultation with the public in the instance where it has been determined that the undertaking 'does not have the potential to cause effects on historic properties.'").

Since any project that "may effect" historic properties is not authorized until the Appendix C review process is completed, 33 C.F.R. § 330.4(g), nationwide permittees risk violating the CWA if they proceed with a project under a NWP without adequately investigating these issues. The Corps' regulations therefore encourage potential permittees to investigate their projects with the SHPO or other authorized persons, and to closely monitor the project for historic property impacts during construction. 33 C.F.R. § 330.4(g)(3) & (4); *see also Sierra Club v. Slater*, 120 F.3d 623, 636 (6th Cir. 1997). In sum, these regulations serve to place a significant burden on an 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.

Plaintiffs, in arguing that the Corps did not properly follow its or ACHP's regulations by engaging in consultation, confuses the terminology. Pls.' Br. at 23. The Corps did not make a finding of "no effect," which would then require coordination with the SHPO. 36 C.F.R. § 800.3(c). Rather, the Corps found that there was no potential to cause effects on historic properties. As a result, it "had no *further* obligations" under the statute or ACHP's regulations. 36 C.F.R. § 800.3(a)(1) (emphasis added); *McGehee v. U.S. Army Corps of Eng'rs*, No. 3:11-cv-160-H, 2011 WL 3101773 2009969, *4 (W.D. Ky. July 19, 2011) ("Plaintiffs confuse the 'no potential to cause effects' determination with a 'no effects' determination. A 'no effects' determination, like a delineation of the APE happens further along in the Section 106 Process. 36 C.F.R. § 800.4.").

Plaintiffs also allege that the Corps acted arbitrarily and capriciously because it wrongfully allowed Mr. Drake to oversee his own compliance with NHPA in violation of ACHP's regulations. Pls.' Br. at 24-25. This argument misstates the language of ACHP's regulations, NWP 14's General Guidance, and Appendix C.[9] ACHP's regulations provide:

> (3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

36 C.F.R. § 800.2(a)(3). The language of NWP 14 General Condition 20 and Appendix C are virtually identical to Section 800.2. General Condition 20, which cites to 36 C.F.R. § 800.3(a), provides that a non-federal permittee, or applicant under ACHP's regulations, must submit notification if the authorized activity may have the potential to cause effects to any historic properties. The district engineer shall also make efforts to carry out appropriate identification efforts including background research, consultation, interviews, field investigation, and field survey. The General Guidance then provides that "[b]ased on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on historic properties." NWP 14 General Condition 20. If the engineer determines that it does not, Section 106 consultation is not required. *Id.* (citing 36 C.F.R. § 800.3(a)).

In this case, Mr. Drake did not report that the activity had the potential to cause effect on historic properties. The Corps also carried out its own identification efforts, following its own

[9] Plaintiffs argue that the Corps' regulations are not entitled to deference. As demonstrated, however, there is no significant difference between the Corps' and ACHP's regulations applicable to this case.

guidance and the regulations promulgated by the ACHP, which have largely been incorporated into the Corps' regulations. *See* April 25, 2005, Interim Guidance. Upon receipt of Mr. Drake's application, in November of 2008, the Corps reviewed the application and circumstances of the application given its familiarity with the property. RA 3036. The Corps looked at other projects authorized by NWPs in the area and examined other cultural sites in the area that were listed or eligible to be listed in the National Register of Historic Places. *Id.* In January of 2009, Mr. Naylor, the Corps' State Program Regulatory Manager, spoke with Ms. Desrosiers, the Tribe's THPO, regarding the exempt 2003 crossing. RA 3291.[10] During the telephone call, Mr. Naylor explained the history and permitting process of CWA Section 404 and the basis of the Corps' authority. After Ms. Desrosiers explained that the Tribe had issues with the 2003 exemption, Mr. Naylor explained that the crossing was exempt. *Id.* She then requested a copy of the application and Corps' response. *Id.*[11]

On January 8, 2009, Mr. Naylor submitted a request for archeological review of the permit areas to effect a determination for Section 106 compliance, noting that current guidelines were to follow Appendix C and its interim guidance for a NWP. RA 3413. Mr. Naylor also spoke with Richard Harnois, the Corps' senior field archaeologist, requesting that he check the

[10] Plaintiffs suggest that the telephone call was about the 2006 exemption at issue in this case, Application 200530352. RA 1455-60. That is incorrect. As the notes reflect, the subject of the call was the previous exemption in 2003, Application 200330442, which is no longer at issue here. RA 3291.

[11] Plaintiffs cite to Ms. Desrosiers's affidavit filed in conjunction with the evidentiary hearing. As this affidavit is not part of the administrative record, it may not be considered. To the extent the Court considers it, because the Corps reasonably found that the proposed activity had no potential to affect cultural resources, NHPA consultation was not triggered. As has been evidenced in this case, the Tribe has been very involved in Mr. Drake's activity on his land, including participating in the public meeting on January 25, 2005, and discussing the issues in numerous phone calls with the Corps. RA 343. Finally, a tribal representative were cited in several newspaper articles. RA 0550, 0589-90.

register and maps at the South Dakota SHPO to determine whether there was the potential to affect cultural resources. RA 3414. Through this request, the assumption was that historic properties might be present and therefore reviewed records available for sites in the area.

Mr. Harnois undertook that investigation and on January 23, obtained the maps for the survey/site coverage relating to the NWP application. RA 3523. Mr. Harnois found that there were no sites or surveys recorded in the permit area and that the closest site was across the lake, approximately one mile to the south, well outside the bounds of the permit area. *Id.* Personnel for the Corps then participated in several telephone calls to discuss the permits and associated issues. RA 3597, 3610, 3612. After discussing Mr. Harnois' investigation for potential sites, office review, and whether the Tribe identified any site in the area, the Corps, in accordance with NHPA regulations, determined that, based on all the facts and review, further coordination was not necessary under the NHPA because the actions had no potential to affect cultural resources. This determination terminated the Corps' Section 106 process.

Here, based on the facts and its review, the Corps reasonably determined that the action had no potential to impact cultural resources. That determination terminated the Section 106 process and no consultation was required. The Court should reject Plaintiffs' arguments and uphold the Corps' determination.

II. Plaintiffs' CWA Arguments Lack Merit.

Plaintiffs make several CWA-related arguments in an attempt to show that the Corps was arbitrary and capricious in its 2006 determination that Mr. Drake's then-proposed bridge was exempt as a farm road under CWA section 404(f)(1)(E), and its 2009 verification that two culverted road crossing were covered under NWP 14. Plaintiffs first argue that the Corps' regulations required the Corps to provide public notice of Mr. Drake's permit applications. Pls.'

Br. at 26-28. Plaintiffs also argue that the Corps was required to first consult with the Tribe under several consultation policies and Executive Order ("E.O.") 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), prior to making a decision on the 2006 exemption determination and 2009 NWP verification. *Id.* at 28-29.

In addition, Plaintiffs argue that the Corps' 2006 farm road determination was arbitrary and capricious because the bridge in question is not part of a farm road, but rather is related to development activities. Id. at 28-30. Plaintiffs also argue that the Corps' 2009 NWP 14 verification was arbitrary and capricious because certain general conditions applicable to NWPs were not complied with. *Id.* at 31-34. As is shown below, none of Plaintiffs' theories has merit.

A. The Corps' regulations did not require public notice in this case.

Plaintiffs incorrectly argue that the Corps' regulations required the Corps to provide an opportunity for public comment merely because Mr. Drake submitted permit applications to the Corps with respect to both the exempt bridge and the road crossing subject to NWP 14. This argument should be rejected as contrary to both the CWA and the Corps' regulations.

The regulation that Plaintiffs refer to as requiring public notice, 33 C.F.R. § 325.2(a)(2), plainly applies only to the Corps' processing of applications where an individual CWA section 404 permit is required. In those circumstances, the Corps is not only required to issue a public notice with respect to a complete individual permit application, but it must also consider any comments that are received on the application, and, unless the application is included within a categorical exclusion, the Corps must prepare either an environmental assessment or an environmental impact statement on the application under NEPA. 33 C.F.R. § 325.2(a)(2), (3), (4). The Corps must determine whether a public hearing is required on the application. *Id.* § 325.2(a)(5). It must also evaluate the application under the public interest review criteria of the

Corps' regulations, as well as EPA's CWA section 404(b)(1) Guidelines. *Id*. § 325.2(a)(6).[12]

As described above in the Background Section, none of these things are required for activities that are either exempt under CWA section 404(f), or covered by an NWP. Discharges for the purpose of constructing qualifying farm roads, such as Mr. Drake's bridge crossing, are altogether *exempt* from the requirement to obtain a permit. 33 U.S.C. § 1344(f)(1)(E) ("[T]he discharge of dredged or fill material . . . for the purpose of construction or maintenance of farm roads . . . is not prohibited by or otherwise subject to regulation under this section."). *See also* 33 C.F.R. § 323.4(a)(6) (discharges that may result from the construction and maintenance of farm roads that are constructed and maintained in accordance with best management practices are not prohibited or otherwise subject to regulation under CWA section 404). Having determined that Mr. Drake's bridge crossing qualified under the statutory exemption for the construction of farm roads, the Corps was not required to further process Mr. Drake's permit application for the bridge, and, in particular, was not required to provide an opportunity for public comment on the application under 33 C.F.R. § 325.2(a)(2). Indeed, doing so would be contrary to Congress' determination to exempt this activity from the requirement to obtain a permit in the first place.

The same is true with respect to the road crossings covered under NWP 14. As explained above in the Background Section, when the Corps issues NWPs, it provides an opportunity for public comment, and undertakes all necessary environmental analysis under NEPA, the Corps' public interest review regulations, and EPA's CWA section 404(b)(1) Guidelines. No additional

[12] Plaintiffs cite two cases in support of their argument that the Corps' regulations required the Corps to issue a public notice because Mr. Drake submitted permit applications for activities that the Corps determined to be either exempt or subject to an NWP. Pls.' Br. at 27. Neither case so holds. Rather, in both, the courts merely acknowledged in passing that the Corps had issued a public notice for a project where an individual section 404 permit was required. *See Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1343 (8th Cir. 1994); *Hurst v. United States*, 739 F. Supp. 1377, 1380 (D.S.D. 1990).

public comment is required when the Corps verifies that a project qualifies under an NWP. In fact, the Corps' regulations specifically provide that District Engineers should review all incoming applications for individual permits for possible eligibility under the NWP program and, if the activities qualifies for an NWP, the District Engineer should "verify the authorization and so notify the applicant." 33 C.F.R. § 330.1(f). The regulation does not require that the Corps first issue a public notice before it verifies the authorization and notifies the applicant. *See id.* Accordingly, after the Corps determined that Mr. Drake's proposed road crossings were covered under NWP 14 in 2009, there was no requirement (and no need) for the Corps to provide any opportunity for public comment on Mr. Drake's permit application with respect to the crossings. The Corps properly verified the application and so notified Mr. Drake under 33 C.F.R. § 330.1(f).

In addition, taking Plaintiffs' argument to its logical conclusion, if the Corps were required to provide an opportunity for public comment under 33 C.F.R. § 325.2(a)(2), then it would likewise be required to apply all of the other requirements of 33 C.F.R. § 325.2(a), including analysis under NEPA, *id.* at § 325.2(a)(4), the public interest review criteria of the Corps' regulations, and EPA's CWA section 404(b)(1) Guidelines. *Id.* § 325.2(a)(6). Indeed, Plaintiffs appear to argue that this is the case. *See* Pls.' Br. at 27 (arguing that EPA's 404(b)(1) Guidelines and the Corps public interest review applies to *all* applications, even where the activity is exempt); *id.* at 27-28 (arguing that Corps was required to determine whether it should hold a public hearing on Mr. Drake's applications). This would be completely inconsistent with the NWP program's purpose to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." *Id.* § 330.1(b). Plaintiffs' interpretation is contrary to Congressional intent and the Corps' regulations, and it should therefore be rejected.

Moreover, even if Plaintiffs' interpretation of the regulations could be considered to be a reasonable one, it is not the only reasonable interpretation of the regulations. The Corps' interpretation of its regulations as not requiring an opportunity for public comment on Mr. Drake's applications in the circumstances of this case is not plainly erroneous or inconsistent with the regulations and is therefore controlling. *Auer v. Robbins*, 519 U.S. at 461; *Mages v. Johanns*, 431 F.3d at 1139.[13] The Court should therefore reject Plaintiffs' argument that the Corps was required to issue a public notice of Mr. Drake's applications with respect to the bridge and the road crossings at issue in this case.

B. Neither E.O. 13175, nor the Corps' consultation policies identified by Plaintiffs provide support for Plaintiffs' claims against the Corps in this case.

Plaintiffs argue that the Corps was required to consult with the Tribe with respect to the bridge under E.O. 13175 and several internal Corps consultation policies, and that its failure to do so makes the Corps' decision arbitrary and capricious. Pls.' Br. at 28-29. These arguments are incorrect.

Executive Orders do not have the force and effect of law unless they are issued pursuant to a statutory mandate or delegation of authority from Congress. *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234-35 (8th Cir. 1975). In addition, before an Executive Order may form the basis for a claim, a plaintiff must show "that it was intended to create a private right of action."

[13] In addition, the Court may not impose any additional decision-making procedures on the Corps in this case that the Court or Plaintiffs might prefer. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-56 (1990) (a court may not impose particular procedures for an agency's informal adjudication beyond those required by the APA unless a particular statute other than the APA or the due process clause to the Constitution require such procedures); *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (internal quotation marks and citations omitted).

Id. at 236. Plaintiffs have not even attempted to show that E.O. 13175 is legally enforceable against the Corps, and, as is shown below, it is not.

E.O. 13175 was issued by President Clinton under the general authority vested in the President "by the Constitution and the laws of the United States of America." 65 Fed. Reg. 67,249 (Nov. 6, 2000).[14] In *Indep. Meat Packers Ass'n*, the Eighth Circuit found that such a general recitation of authority was not sufficient to make an Executive Order legally enforceable against a federal agency. *Indep. Meat Packers Ass'n*, 526 F.2d at 234-35. In addition, E.O. 13175 specifically provides that it "is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." 65 Fed. Reg. at 67,252. It clearly was not intended to create a private right of action. *Northern Arapaho Tribe v. Burwell,* 118 F. Supp.3d 1264, 1281, (D. Wyo. 2015) ("Thus, the plain language of Executive Order 13175 does not provide any right enforceable in this judicial action alleged by the Tribe."); *Fritcher v. Armento*, 2013 WL 1896303, at * 3 (E.D. Cal. May 6, 2013) (finding that E.O. 13175 does not create a right of action). Thus, as was the case with respect to the Executive Order at issue in *Indep. Meat Packers Ass'n*, there is no "role for the judiciary in the implementation of" E.O. 13175, and Plaintiffs may not enforce it against the Corps here. *Indep. Meat Packers Ass'n*, 526 F.2d at 236. The Court should therefore reject Plaintiffs' arguments that are based upon the Corps' alleged non-compliance with E.O. 13175.

[14] E.O. 13175 provides that federal agencies should have a process to ensure the meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. 64 Fed. Reg. at 64,250. It defines "policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the relationship between the Federal Government and Indian tribes, or on the distribution of power between the Federal Government and Indian tribes." *Id.* at 67,249.

See Watershed Assocs. Rescue v. Alexander, 586 F. Supp. 978, 987-88 (D. Neb. 1982) (declining to review the Corps' actions under an Executive Order that the court found not to have the force and effect of law and that did not create a private right of action under *Indep. Meat Packers Ass'n*).

The Court should likewise reject Plaintiffs' arguments that are based on the consultation policies identified by Plaintiffs. The only consultation policy identified by Plaintiffs that was in effect when the Corps made its 2006 exemption determination and its 2009 NWP verification at issue here was the Department of Defense American Indian and Alaska Native Policy, signed by then Secretary of Defense Cohen on October 20, 1998 ("1998 Policy").[15] That policy specifically provides that it "neither enlarges nor diminishes the Department's legal obligations with respect to federally recognized tribes, nor does the policy provide an independent cause of action upon which the Department may be sued." 1998 Policy at 1 n. (b). It similarly provides that it "is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities substantive or procedural, not otherwise granted or created under existing law." *Id.* at n. 2. Thus, like E.O. 13175, it does not create a private right of action enforceable by Plaintiffs here. *See Indep. Meat Packers Ass'n*, 526 F.2d at 236. *See also Yankton Sioux Tribe v. HHS*, 533 F.3d 634, 644 (8th Cir. 2008) (upholding district court's

[15] Plaintiffs provide a hyperlink in their brief to the 1998 Department of Defense policy and E.O. 13175, along with several other consultation policy documents that post-date the last Corps final action at issue here, which is the Corps' May 4, 2009, NWP 14 verification with respect to the road crossings. Pls.' Br. at 14. One such document, a May 10, 2010, Corps Memorandum, affirms the continuing applicability of six Tribal Policy Principles issued by the Corps on February 18, 1998. Those general principles do not establish an enforceable right to consultation, but rather set forth policy guidance to the Corps. *See* Memorandum for Commanders, Directors, and Chiefs of Separate Offices, HQ USACE dated May 10, 2010, enclosing U.S. Army Corps of Engineers Tribal Policy Principles. http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/CoP/2013_nap_brochure.pdf

dismissal under Fed. R. Civ. 12(b)(6) of plaintiffs' claim that the Department of Health and Human Services failed to consult with the tribe in question in part because the tribal consultation policy at issue created no private right of action).

In addition, it was reasonable for the Corps to understand that no formal consultation with the Tribe was necessary regarding the bridge and the road crossings. All of Mr. Drake's work has occurred on land privately owned by him, not tribal land, and the Tribe does not now nor has it ever claimed any sovereign or regulatory authority over Mr. Drake's land. The Corps knew that two tribal officials (Quinn and DeCoteau) had attended the January 2005 meeting and thus were aware that the Corps had made decisions about CWA section 404 exemptions and other NWPs not at issue here that would allow Mr. Drake to discharge fill material into Enemy Swim Lake. Opinion and Order (Sept. 18, 2014) (ECF 69) at 16. However, the Tribe never requested that the Corps consult with it. The Corps was not aware of any historic tribal sites on Mr. Drake's private property, nor has the Tribe ever identified any such sites. RA 3413, 3522. Thus, even if E.O. 13175 or the 1998 Policy provided Plaintiffs with a right of action, which they do not, it was reasonable for the Corps not to engage in formal consultation with the Tribe.

C. The record supports the Corps' determination that the bridge qualifies for the farm road exemption.

Despite the fact that Mr. Drake has to date not developed anything on any property associated with the Corps' 2006 determination that the bridge falls under the CWA section 404(f) exemption related to the construction of farm roads, Plaintiffs continue to argue that Mr. Drake is a developer and that no agricultural activities have ever occurred on the property. However, the administrative record supports the Corps' determination that Mr. Drake used the property as pasture for cattle and that the bridge crossing therefore qualified for the farm road exemption.

For example, in a meeting that took place on site in August 2005, the Corps noted that Mr. Drake was then using his pasture for cattle grazing. RA 1429. In addition to observing grazing cattle on the site visit, the Corps also noted that Mr. Block had provided the Corps with photographs showing cattle on Mr. Drake's property, further demonstrating that Mr. Drake was using the property for agricultural purposes. RA 1513 (notes of meeting); RA 1338 (Mr. Block's photographs showing cattle grazing on Mr. Drake's property). In fact, when Mr. Block provided the photographs of the cattle in Mr. Drake's pasture to the Corps in July 2005, he indicated that he observed the cattle crossing "the exact stream locations as they have for years prior" to that time. RA 1331, 1338. Indeed, Mr. Block's photographs appear to show cattle grazing in the very area where the exempt bridge crossing now exists, and Mr. Block complained that the cattle were degrading the stream bank in that area. RA 1339. In November 2004, attorney Jack Hieb also confirmed in an email transmitted to a South Dakota state official, and later forwarded to the Corps, that cattle have been grazing in the same pasture for the past 50 years. RA 0070. Thus, the record supports the Corps' determination that Mr. Drake was using the property in question for farming purposes as it had long been used in the past, and that Mr. Drake's proposed bridge crossing therefore qualified under the farm road exemption. The Court should therefore uphold the Corps' 2006 exemption determination with respect to the bridge. *See Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d at 763 ("If an agency's determination is supportable on any rational basis, [the Court] must uphold it."). This is especially true here because the Corps' determination that a CWA section 404(f) exemption (or NWP) applies is within the Corps' sphere of expertise. *Id. See also Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1344-45 (8th Cir. 1994) (deferring to Corps' interpretation of CWA statutory and regulatory scheme with respect to Corps' determination of scope of analysis required for CWA section 404 permit).

Plaintiffs further argue that the Corps' farm road determination was arbitrary and capricious because other individuals believed that Mr. Drake's intent was development, and not agriculture. Pls.' Br. at 29. The Corps was well-aware of the allegations that Mr. Drake had been deceptive regarding the purpose and need for the bridge, as Mr. Block continuously alleged this to be the case. *See, e.g.*, RA 1513. However, the Corps closely re-examined the relevant facts and determined that Mr. Drake qualified for the farm road exemption. *See id.* The fact that others might disagree is beside the point: it is the Corps' determination that is entitled to deference, not the opinion of those in the community who are antagonistic to Mr. Drake. *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d at 763; *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d at 1344-45. Moreover, the Corps' determination that the bridge was exempt as a farm road is supported by the record and should therefore be upheld, regardless of whether alternative determinations might also be supported by the record. *Arkansas v. Oklahoma*, 503 U.S. at 112-13.

Plaintiffs assert that Mr. Drake informed the Natural Resource Conservation Service ("NRCS") that Mr. Drake's wetland was "unusable pasture." Pls.' Br. at 29. The form that Plaintiffs refer to (which may have been filled out by the NRCS and not Mr. Drake, as Plaintiffs assert) indicates that the area in question contained cattails and standing water and was therefore apparently identified on the NRCS soil map as unusable pasture. This obviously does not refer to the upland pasture in the vicinity of the wetlands that are shown with grazing cattle in Mr. Block's photos. *See* RA 1338, 1339. Thus, the form does not contradict the Corps' determination that Mr. Drake was involved in farming activities at the property. Plaintiffs also attempt to attach significance to the fact that Mr. Drake did not have an approved grazing plan in place with the NRCS. Pls.' Br. at 29. However, the Corps understood that Mr. Drake did not

obtain such a plan from the NRCS because funding was not available for the particular program for which a grazing plan would be necessary. RA 1513. Regardless of any grazing plan, Mr. Block's photographs clearly show cattle grazing on Mr. Drake's upland pasture in the same area where they had in prior years according to both Mr. Block and attorney Heib. RA 1331, 1338, 0070.

Plaintiffs also attempt to take issue with the size of the bridge, suggesting that the bridge is larger than necessary for a farm road because it is 21 feet wide, 20 feet long, and built with steel I-beams and decking. Pls.' Br. at 30. However, there is nothing unreasonable about the size of the bridge or its construction materials. Mr. Drake constructed the bridge with materials that he had available and which are reasonably suited to ensure its structural integrity and longevity.[16] Mr. Drake or any lessee may need to move cattle on or off the property and may also need to deliver hay to the property. The bridge is not overly wide or long for the movement of cattle trucks or hay wagons, and a certain amount of leeway is prudent in order to allow for safe passage. In addition, the bridge span is wholly above the stream and therefore not indicative of any impacts to the stream. RA 1459. Thus, Plaintiffs' argument regarding the width and length of the bridge are baseless.

Plaintiffs also appear to suggest that the bridge is bigger than necessary because Enemy Swim Creek is only six inches deep at this location. Pls.' Br. at 30. However, as Plaintiffs should well know, the Creek can be much higher during runoff periods. The record reflects that it was nearly as high as its banks in April 2006. RA 1562. Mr. Drake proposed to make the bridge deck five feet above the high water level, and the State of South Dakota water rights

[16] The Corps had previously explained that an economic justification is not required for the farm road exemption and that it did not understand the cost of Mr. Drake's work to be significant in any event because he was performing all the work himself with his own equipment. RA 1512.

engineers and its Department of Game Fish and Parks officials approved the design as not obstructing public access or fish passage. RA 2430. *See also* 33 C.F.R. § 323.4(a)(6)(iii) (farm roads should be "bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows"). Accordingly, the height of the bridge does not disqualify it for the farm road exemption, as Plaintiffs argue.

Plaintiffs note that Mr. Drake has never built the fence that he previously indicated he intended to build. Pls.' Br. at 30. However, the Corps never required that Mr. Drake build any fence; nor is the farm road exemption conditioned on the building of any fence. *See* RA 1564. Plaintiffs also argue in a contradictory fashion that Mr. Drake has, in fact, never needed a fence because he has never had cattle at the site. *See id.* However, Plaintiffs' main ally, Mr. Block, previously complained that Mr. Drake's or his lessee's "cattle continuously push nutrient [and] rich soil in [the] stream." RA 1337 (photograph with Mr. Block's handwritten notation). Plaintiffs also incorrectly argue that the Corps could not reasonably presume that cattle would cross over the bridge if the stream contains only six inches of water. Pls.' Br. at 30. Plaintiffs miss the point: Congress obviously intended that the farm road exemption would allow for *vehicle use*, and not just the herding of cattle. *See* 33 U.S.C. § 1344(f)(1)(E). Moreover, as discussed above, the stream can be bank-full during certain times of the year, and the cattle may very well use the bridge during those times, either on their own or as prodded by humans.

Finally, Plaintiffs argue that the Corps was required to narrowly construe the CWA section 404(f) exemption. Pls.' Br. at 30. While the Corps agrees that the CWA 404(f) exemptions are to be narrowly construed, Plaintiffs fail to show that the Corps has not done so with respect to the bridge, which has minimal, if any, water quality impacts. In addition, contrary to Plaintiffs' apparent position, the CWA section 404(f) exemptions should not be

construed so narrowly as to defeat Congress' intention in providing for the exemptions, which is to allow qualifying activities to go forward without the expense and delay of obtaining a permit. *June v. Town of Westfield, N.Y.*, 370 F.3d 255, 258 (2d Cir. 2004). Moreover, the Corps' determination that the bridge fell within the CWA section 404(f)(1)(E) exemption for the construction of farm roads is well within the Corps' area of expertise and the Court should defer to it. *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d at 763; *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d at 1344-45. The Court should therefore reject all of Plaintiffs' arguments and uphold the Corps' 2006 determination that the bridge is exempt.[17]

D. The Corps reasonably verified that the road crossings were covered under NWP 14.

Plaintiffs first argue that the Corps' verification that the road crossings are covered under NWP 14 is arbitrary and capricious because a general condition subject to all NWPs provides that NWPs may only authorize single and complete projects. Pls.' Br. at 31-32. Plaintiffs argue that Mr. Drake's road is the single and complete project, as opposed to the crossings in question.

[17] Although Plaintiffs note that some arguments they wish to make are with respect to claims that have been dismissed, then nonetheless have chosen to improperly make the arguments anyway. Pls.' Br. at 31 n.15. The Court should refuse to consider arguments that Plaintiffs concede are not properly before the Court. If the Court nonetheless considers them, it should reject them. Regarding Plaintiffs' farm road BMP argument, as discussed above, the bridge's dimensions are reasonable under the circumstances and the Court should defer to the Corps' determination that the bridge qualifies under the farm road exemption. Regarding Plaintiffs' recapture argument, the bridge does not bring an area of the navigable waters into a use to which it was not previously put because, as shown above, the record supports the Corps' determination that Mr. Drake had been conducting farming activities, specifically grazing cattle, at the property prior to the time that the bridge was constructed. Indeed, Mr. Block informed the Corps that Mr. Drake's cattle were crossing the property in July 2005 at "the exact stream locations as they have for years prior" to that time. RA 1331, 1338 Accordingly, Plaintiffs arguments are both improper and incorrect.

Plaintiffs further speculate that it is unlikely that Mr. Drake intends to build a single residence at his north shore property because he already owns a home at the lake.

NWP 14 applies to linear transportation projects. 72 Fed. Reg. at 11,183.[18] When the Corps reissued NWP 14 in 2007, it specifically explained that "in the case of linear transportation projects a 'single and complete project' consists of a *single crossing of a water of the United States*, or more than one crossing at the same location." 72 Fed. Reg. at 11,109. The Corps defined the term "single and complete project" with respect to linear transportation projects as "all crossings of a single water of the United States (*i.e.*, a single waterbody) at a specific location; [f]or linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project." 72 Fed Reg. at 11197. Thus, it is each crossing in question that is the "project," and not the entirety of the road that the crossing is associated with, as Plaintiffs argue. Therefore, the two crossings that the Corps verified under NWP 14 at issue in this case each individually constitute a single and complete project under the Corps NWP regulations. Plaintiffs' contrary argument is incorrect.

In addition, to the extent Plaintiffs argue that Mr. Drake intends to build something other than a new home, and that "[t]he Corps cannot create a new exception of a mixed use of agricultural use and service of a residence," they fail to understand what NWP 14 authorizes. Pls.' Br. at 32. NWP 14 authorizes discharges associated with linear transportation projects regardless of what the project may be used for. 72 Fed. Reg. at 11183 (explaining that linear transportation projects include, for example, "roads, highways, railways, trails, airport runways, and taxiways"). Thus, for purposes of NWP 14, it makes no difference if Mr. Drake builds one

[18] This is the version of NWP 14 that applied to the Corp's 2009 NWP 14 verification in this case.

residence or several, or whether he also uses the crossings in question for agricultural purposes. *See also* 72 Fed. Reg. at 11110 (explaining that NWP 14 "does not prohibit new projects simply because there may be future development activities").

While Plaintiffs' argument is far from clear, they are completely wrong to the extent they argue that the exempt bridge has anything to do with whether the road crossings are single and complete projects for purposes of NWP 14. The general condition with respect to single and complete projects applies only to NWPs. It does not apply to activities that are *exempt* from regulation under CWA section 404(f). Thus, the exempt bridge has nothing to do with whether the road crossings were single and complete projects. Indeed, a note to NWP 14 specifically states that discharges for the construction of farm roads may be exempt under section 404(f) of the CWA, in which case NWP 14 would be superfluous. 72 Fed. Reg. at 11184. Nothing in the Corps' regulations suggests that NWP 14 may not apply to a road crossing that is connected to an exempt farm road, and Plaintiffs cite no authority to the contrary. Rather, Plaintiffs simply offer their own erroneous interpretation of the regulations. However, the Corps' interpretation of its own regulations is controlling, and Plaintiffs' contrary interpretation should therefore be rejected. *Auer v. Robbins*, 519 U.S. at 461; *Mages v. Johanns*, 431 F.3d at 1139.

Plaintiffs are also incorrect in their argument regarding General Condition 16, which provides that "[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." 72 Fed. Reg. at 11192. Plaintiffs claim *no* reserved tribal rights on Mr. Drake's private property, and they identify no reserved tribal rights whatsoever that have been impaired by the two NWP 14 road crossings at issue here.

Plaintiffs argue that Mr. Quinn informed the Corps that the Tribe was concerned about Mr. Drake's bridge crossing because they spear northern pike in that area. Pls.' Br. at 32. It is clear, however, that Mr. Quinn was not talking about spearing northern pike in the gullies where the road crossings are located. Mr. Quinn's communication regarding pike occurred on November 9, 2004, which is long before Mr. Drake submitted his October 2, 2008, application with respect to the road crossings. RA 2988. Mr. Quinn testified that he had been concerned about the proposed bridge crossing at the east side of Enemy Swim Lake that was never constructed, and which would have been distant from the road crossings at issue here, while the Corps understood him to have been concerned with the crossing covered by the December 2, 2003, exemption determination that is no longer at issue here. *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Army Corps of Eng'rs*, 918 F.Supp.2d at 969. Regardless of which of those areas Mr. Quinn was talking about, there is nothing in the record that even remotely suggests the Tribe had concerns about fishing in the area of the two road crossings on Mr. Drake's private property. The crossings in questions were over gullies with very little or no water flowing through them. RA 2989. The Tribe does not claim to have reserved fishing rights in the area of the two crossings, nor could it credibly do so. Thus, Plaintiffs have not established that the road crossings in question impair any reserved tribal rights and their argument with respect to General Condition 16 should therefore be rejected. Plaintiffs' assertion that the Corps failed to consult with the Tribe under General Condition 16 is likewise of no moment because regardless of whether or not the Corps consulted with the Tribe, General Condition 16 speaks only to reserved tribal rights, and Plaintiffs have identified no such rights that are impaired by the road crossings over the gullies.

Plaintiffs' additional argument with respect to General Condition 16 and the need for a CWA section 401 water quality certification is completely without foundation. Pls.' Br. at 32-33. Plaintiffs' argue that general condition 16 was somehow not complied with because the Corps did not consult with the Tribe with respect to the need for a CWA section 401 water quality certification from the Tribe. *Id.* CWA section 401 requires that a water quality certification be obtained from the relevant State before a federal license or permit may be issued for activities that may result in a discharge into intrastate navigable waters. 33 U.S.C. § 1341(a)(1); *PUD No. 1of Jefferson Cty. v. Washington Dep't. of Ecology*, 511 U.S. 700, 707 (1994). Under CWA section 518(e), 33 U.S.C. § 1377(e), EPA is authorized to grant a Tribe's application to be treated in the same manner as a State for purposes of developing a water quality standards program and issuing CWA section 401 water quality certifications if the Tribe meets certain eligibility criteria. 33 U.S.C. § 1377(e). *See Montana v. EPA*, 137 F.3d 1135, 1138-39 (9th Cir. 1998). As Plaintiffs are undoubtedly aware, the Tribe has not been granted such authority here, and Plaintiffs do not even claim that the Tribe has such authority. Moreover, because the Tribe could only have such authority if EPA approved the Tribe's application for such authority, it would not be a *reserved tribal right* for purposes of General Condition 16. Accordingly, CWA section 401 has no bearing on the question of whether the road crossings impaired any reserved tribal rights and, even if it did, the Tribe lacks the authority to provide a CWA section 401 certification with respect to the road crossings. In addition, it cannot be arbitrary and capricious for the Corps not to have consulted with the Tribe over a CWA section 401 certification when the Tribe has no role in issuing such a certification for the discharges associated with the road crossings at issue. Plaintiffs' argument should therefore be rejected.

Finally, Plaintiffs' argument that the Corps failed to comply with General Condition 20, regarding mitigation, is also incorrect. Pls.' Br. at 33-34. In 2009, General Condition 20(e) provided that compensatory mitigation will be required for all wetland losses that exceed one tenth of an acre and require pre-construction notification. 72 Fed. Reg. at 11,193. *See also id.* at 11,196 (defining "Loss of Waters of United States"). Plaintiffs argue that Mr. Drake's changes to the length of the culverts for the two crossings in March 2009 resulted in wetland losses that are greater than a tenth of an acre. Pls.' Br. at 33-34. Plaintiffs base this argument on the fact that the Corps' Preliminary Jurisdictional Determination shows that wetland impacts at crossing 1 would be .07 acres, and wetland impacts at crossing 2 would be .02 acres. *Id.* at 33. Plaintiffs argue that Drake's lengthening of the culverts therefore had to result in impacts of greater than a tenth of an acre. *Id.* at 33-34.

However, it is clear from Mr. Drake's March 12, 2009, handwritten notes in which he explained the culvert changes that the *total* wetland impacts including the lengthened culverts would be .07 acres at crossing 1, and .02 acres at crossing 2. Mr. Drake proposed to increase the previously proposed 70 foot culvert at crossing 1, to 80 feet. RA 3601. Mr. Drake proposed to increase the previously proposed 40 foot culvert at crossing 2, to 60 feet. RA 3602. Mr. Drake's handwritten notes showed the total area of wetland fill to be 3,200 square feet at crossing 1, with the 80-foot culvert (the 80-foot culvert by 40 feet wide). *Id.* He showed the total area of wetland fill to be 900 square feet at crossing 2, with the 60-foot culvert (the 60-foot culvert by 15 feet wide). *Id.* Three-thousand-two-hundred square feet equates to .07 acres, and 900 square feet equals .02 acres, and this is precisely what the Corps' Preliminary Jurisdictional Determination provides as the wetland impacts at each crossing. RA 3138.

A "Preliminary Jurisdictional Determination" is a "written indication[] that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. § 331.2 (definition of "Preliminary JDs"). A Preliminary Jurisdictional Determination is advisable in nature and not appealable. *Id.*[19] In this case, the Corps' Preliminary Jurisdictional Determination estimated the jurisdictional wetlands present at the location of the two crossings (.5 acres at crossing 1, and .4 acres at crossing 2) was made in the Corps' office on December 15, 2008. RA 3138-3139. While the Preliminary Jurisdictional Determination is dated December 15, 2008, which is when the Corps made its desk-top estimate of the jurisdictional wetlands present at the two crossings, it was not sent to Mr. Drake until May 4, 2009, when the Corps sent its letter verifying applicability of NWP 14 for the crossings. RA 3703-3716. It was a working document within the Corps until that time and therefore subject to change. It is clear that the Corps used Mr. Drake's final statement of total wetland impacts from his March 12, 2009, notes to arrive at the wetland impacts stated in the Preliminary Jurisdictional Determination. This is obvious because the statement of impacts in the Preliminary Jurisdictional Determination corresponds exactly to the total area of impacts calculated in Mr. Drake's handwritten notes addressing the enlarged culverts at each crossing. The Corps simply updated the area of impacts on the Preliminary Jurisdictional Determination before transmitting the document to Mr. Drake. It did not then change the date of the document, which was not material to its purpose of allowing Mr. Drake to request an approved jurisdictional determination in the event he disagreed with the estimate of waters of the United States indicated on the Preliminary Jurisdictional Determination. *See* RA 3703 (May 4, 2009,

[19] By contrast, an "Approved jurisdictional determination" is final in nature and appealable. 33 C.F.R. § 331.2 (definition of "Approved jurisdictional determination").

letter explaining that the Preliminary Jurisdictional Determination is not appealable and that if Mr. Drakes wants an approved jurisdictional determination he must request one).[20] Therefore, Plaintiffs' argument that the Corps failed to comply with General Condition 20 regarding mitigation is incorrect because neither crossing (nor even the combination of the two crossings) were to result in more than one tenth of an acre of wetland losses based upon Mr. Drake's final proposal for each crossing. *See Nebraska v. EPA*, 812 F.3d at 669 ("'Even when an agency explains its decisions with 'less than ideal clarity,' a reviewing court will not upset the decision on the account 'if the agency's path may reasonably be discerned.'") (citation omitted); *Voyageurs National Park Ass'n v. Norton*, 381 F.3d at 763 ("If an agency's determination is supportable on any rational basis, [the Court] must uphold it.").[21]

III. Even If the Court Were To Rule for Plaintiffs on Any Issue, It Should Reject The Relief Plaintiffs Seek.

Even if the Court were to find in favor of Plaintiffs with respect to any of their merits arguments, the Court should not grant Plaintiffs the relief requested in their brief. Plaintiffs request that the Court vacate the Corps' 2006 exemption determination with respect to the bridge, and its 2009 NWP determination with respect to the road crossings. Pls.' Br. at 35. Plaintiffs further request that the Court issue a mandatory injunction to the Corps requiring that

[20] It must be kept in mind that the Corps made the NWP determination almost six years ago, in 2009, while the administrative record was compiled in 2015, and that the record was compiled sequentially based upon the date of each document. So while the Preliminary Jurisdictional Determination occurs in the administrative record by its December 15, 2008, date, it was transmitted to Mr. Drake on May 4, 2009, and also occurs as an attachment to the May 4, 2009, letter. RA 3703-3716.

[21] Plaintiffs' Amended Complaint includes a claim that the Corps somehow impermissibly "coached" Mr. Drake with respect to the bridge and the road crossings and this claim survived Defendants' motion to dismiss. However, Plaintiffs make no such argument in their merits brief in support of this claim and have therefore abandoned it.

the Corps "issue and enforce a cease and desist order to Drake to cease any use of the road and bridge . . ." *Id.* The Court should reject both of these requests.

The Supreme Court has made clear that "[i]f the record before the agency does not support the agency action, if the agency has not considered all the relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Therefore, if the Court were to overturn the Corps' exemption determination with respect to the bridge, or the NWP 14 verification with respect to each road crossing, it should remand the matter to the Corps for appropriate action.

While the Court has the authority to "hold unlawful and set aside" a final agency action that it finds to be arbitrary and capricious, 5 U.S.C. § 706(2)(A), the Court must take into account the rule of prejudicial error. *Id.* § 706. Whether a final agency action found to be arbitrary and capricious should be vacated depends upon the seriousness of the action's deficiencies and "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks and citation omitted). *See also Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289 (11th Cir. 2015) (collecting cases and determining that court had discretion as to whether or not to vacate an NWP after the Corps conceded that it had underestimated the acreage of waters that might be affected). In this case, the Court should not automatically vacate the Corps determinations at issue here if it rules in Plaintiffs' favor on any issue. Rather, the Court should consider the seriousness of any deficiencies and the potential disruptive consequences of any vacatur. The Court may also request additional briefing on remedy before deciding whether

or not any remand order should also vacate any Corps determination that the Court finds to have been arbitrary and capricious.

Under no circumstances should the Court order the Corps to issue and enforce an administrative order to Mr. Drake requiring that he cease and desist any use of the road and the bridge. It is well-settled that the courts should not dictate how an agency should proceed on remand. When Congress provided for judicial review of final agency actions under the APA, it purposefully withheld from the judiciary the authority to make the underlying decisions that Congress entrusted to the agencies. *See* 5 U.S.C. § 706 (limiting relief to orders to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions"). The Supreme Court has accordingly made clear that "the function of the reviewing court ends when an error of law is laid bare[;] [a]t that point the matter once more goes to the [agency] for reconsideration." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). In fact, this Court has already held in this case that the Corps' has administrative enforcement discretion and that Plaintiffs may not compel the Corps to take CWA enforcement actions through these judicial proceedings. *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs*, 2015 WL 4931152, at * 4 ("CWA enforcement authority is considered to be discretionary . . . [and] [c]itzens may not "'commandeer the federal enforcement machinery'") (quoting *Dubois v. Thomas*, 820 F.2d 943, 949 (8th Cir. 1987)). *See also SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment). The Court should therefore deny Plaintiffs' request for a mandatory injunction against the Corps, which is simply another attempt by Plaintiffs to use these judicial

proceedings to "commandeer the federal enforcement machinery." *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs,* 2015 WL 4931152 * 4.

In addition, the only portions of the road that are before the Court are the exempt bridge and the two crossings covered under NWP 14. The remainder of the road is either no longer at issue due to the Court's ruling on Defendants' motion to dismiss, or is constructed in uplands and not within the Corps' jurisdiction under the CWA. Therefore, even if the Court were to elect to require the Corps to issue a cease and desist order, Plaintiffs' request for an injunction is far overbroad.

Accordingly, in the event the Court were to rule against the Corps on any merits issue, it should remand this matter to the Corps for any appropriate further agency proceedings and not prescribe in any manner the course the Corps should take. The Court should deny Plaintiffs' request for a mandatory injunction against the Corps.

CONCLUSION

For all these reasons, the Court should reject Plaintiffs' arguments on the merits and enter judgment in favor of the Corps on all remaining claims in Plaintiffs' Amended Complaint.

Date: March 11, 2016

Respectfully Submitted,

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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 13,921 words, not including the cover page and tables, or this certification or the Certificate of Service.

/s/David A. Carson

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2016, I caused the foregoing Defendants' 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/David A. Carson*