UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 14-6099

SIERRA CLUB, INC., CLEAN ENERGY FUTURE OKLAHOMA, and EAST TEXAS SUB REGIONAL PLANNING COMMISSION,

Plaintiffs-Appellants,

v.

LIEUTENANT GENERAL THOMAS P. BOSTICK, MAJOR GENERAL MICHAEL J. WALSH, COLONEL RICHARD PRATT, COLONEL RICHARD PANNELL, and UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants-Appellees,

and

TRANSCANADA KEYSTONE PIPELINE, LP, TRANSCANADA CORPORATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN GAS ASSOCIATION, ASSOCIATION OF OIL PIPE LINES, AMERICAN PETROLEUM INSTITUTE, and UTILITY WATER ACT GROUP,

Defendant-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (Case No. 5:12-cv-00742-R) (JUDGE DAVID L. RUSSELL)

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the 10th Circuit Court of Appeals and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

-*Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) ("the agency bears the primary responsibility to ensure that it complies with NEPA… [and] an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.");

-*Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10th Cir. 2011) (a party's NEPA claims are not waived if the "problems underlying the claim are 'obvious' or otherwise brought to the agency's attention.");

-*Jette v. Bergland*, 579 F.2d 59, 63-64 (10th Cir. 1978) ("the responsibility for complying with NEPA rests with the department or service… [and NEPA] contemplates that the agency shall take the initiative in considering environmental values…. [Therefore, the] court is not supposed to cooperate in avoidance of the provisions of [NEPA] by putting great emphasis upon exhaustion of remedies…");

-*Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1162–64 (10th Cir. 2012) (Corps cannot limit its NEPA analysis to analyzing impacts of dredge and fill material to waterways, and must analyze the full host of impacts of the project).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more issues of exceptional importance:

1. The proceeding affects many other projects nationwide, and would allow the Corps to continue approving massive crude oil pipelines under Nationwide Permit 12 without ever analyzing their impacts, such as the risks and impacts of oil spills.

2. The panel opinion would permit agencies to avoid NEPA compliance by claiming ignorance of the law, and would strictly require public comment for an agency to be held to even NEPA's most basic requirements.

3. The panel opinion conflicts with the following decisions of other circuits:

-*Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 866-68 (9th Cir. 2005) (oil spills are an "obvious" impact that the Corps must consider);

-*Calvert Cliffs, Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (an agency cannot avoid analyzing impacts under NEPA by relying on another agency's regulation of that impact);

-S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior, 588 F.3d 718, 726 (9th Cir. 2009) (an agency cannot avoid analyzing impacts under NEPA by relying on another agency's regulation of that impact).

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I. Introduction and Summary

This case involves the Army Corps of Engineers' (the "Corps") approval of TransCanada's 485-mile Keystone Gulf Coast Pipeline's ("Pipeline") 2,227 water crossings, without any evaluation of the risks and impacts of oil spills into those jurisdictional waters as required by the National Environmental Policy Act ("NEPA").

The panel opinion found Appellants had waived its oil spill claims by not raising them in their public comments in the NEPA process for the Corps' Nationwide Permit 12, under which the Corps approved these crossings, even though the Corps admits (and the panel assumed) it had prior knowledge of the risk and impacts of oil spills. That is in direct conflict with *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) and *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10th Cir. 2011) (a party's NEPA claims are not waived if the "problems underlying the claim are 'obvious' or otherwise brought to the agency's attention."). The panel opinion also creates a split in circuit authority by conflicting with *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 866-68 (9th Cir. 2005) (applying *Public Citizen* and finding oil spills are an obvious risk the Corps must analyze under NEPA). Because the panel found "waiver," it did not reach the merits of Appellants' claim. Appellants seek *en banc* review to correct

this plain error and vacate the panel opinion, which essentially eliminates the exceptions to the waiver doctrine.

II. Combined Statement of Facts and Course of Proceedings

A. Legal Background

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") or environmental assessment ("EA") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EA/EIS must analyze all direct, indirect, and cumulative impacts of an agency action, as well as alternatives. 40 C.F.R. §§1508.7, 1508.8; *Pennaco Energy Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1150-51 (10th Cir. 2004).

The Corps' NEPA obligations arise from its approval of the Pipeline's crossings of 2,227 jurisdictional waterways pursuant to §404 of the Clean Water Act ("CWA"), which prohibits the fill of U.S. waters unless authorized by a Corps permit. 33 U.S.C. §1344. The Corps must conduct an environmental review pursuant to NEPA when issuing §404 permits. 33 C.F.R. §325.2(a)(4).

However, §404(e) of the CWA allows the Corps to issue "nationwide permits" (NWP) for categories of activities that it determines will "cause only minimal adverse environmental effects." 33 U.S.C. §1344(e). The Corps may then approve specific projects within that category by "verifying" they meet the terms of the NWP without going through any project-specific environmental review that

individual §404 permits require. 33 C.F.R. §323.3(a). The Corps must prepare a NEPA analysis in conjunction with its issuance of a NWP, but normally does not prepare any project-specific NEPA analysis at the project level.

In February 2012, the Corps issued NWP 12 for pipelines and other utility lines that result in up to a 1/2-acre of loss of U.S. waters. 77 Fed. Reg. 10184 (Feb. 12, 2012). Prior to issuing NWP 12, the Corps prepared a 45-page EA that narrowly analyzed the impacts of discharges of fill material of up to a 1/2 acre during pipeline construction, maintenance and repair. However, the parties and the panel agree that the Corps did not analyze the risks and impacts of oil spills at all.

B. The Corps' Approval of the Gulf Coast Pipeline

From 2008-2012, the Department of State acted as the lead agency in the NEPA process for the larger Keystone XL Pipeline, which included the Gulf Coast Pipeline as its southern segment. The Corps was a cooperating agency in that NEPA process based on its §404 permitting action. Appellants submitted extensive comments on oil spills in that process, which led to a 103-page analysis of oil spills and impacts in the Keystone XL EIS with the Corps' full participation. In fact, the Corps' name is on the front cover of that document. App. 952.

However, in 2012, the Corps switched processes and approved the Gulf Coast Pipeline's 2,227 water crossings as "single and complete projects" that each qualified under NWP 12. The Corps did not prepare any project-specific NEPA

analysis for the Pipeline, and claimed that Appellants should have submitted its oil spill concerns in the NWP 12 NEPA process *that had already concluded* months prior. The Corps took this position even though it had never before used NWP 12 to approve a massive crude oil pipeline without any project-specific NEPA analysis, and had actually stated in the NWP 12 EA that there would be project-specific NEPA analyses for oil pipelines. According to the Corps:

> NEPA requires consideration of all environmental impacts, not only those to aquatic resources, so there may well be situations where aquatic impacts are minimal even though environmental impacts more generally are not. These other environmental impacts would be addressed by the lead agency preparing the environmental impact statement [for specific projects]."

77 Fed. Reg. at 10197. Of course, that turned out to be false.

C. Course of Proceedings

On June 29, 2012, Sierra Club challenged the Corps' issuance of NWP 12, as well as its approval of the Pipeline, as violating NEPA and the CWA in the U.S. District Court of the Western District of Oklahoma. On December 30, 2013, the district court affirmed the Corps' action, finding, *inter alia*: (a) the Corps did not need to comply with NEPA when it approved the Pipeline, because it discharged its NEPA obligations when it issued NWP 12; and (b) Appellants' NEPA claims against the NWP 12 EA were waived because they did not comment on the Corps' lack of analysis of oil spills or other impacts from pipelines. App. 2805.

Appellants appealed from that order, and this Court affirmed on May 29, 2015. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1063 (10th Cir. 2015). The panel opinion recognized waiver is inapplicable where the "problems underlying the claim are 'obvious' or otherwise brought to the agency's attention." *Id*. at 1048. (citing *Forest Guardians*, 641 F.3d at 430). And it assumed that the impacts of oil spills are obvious, and the Corps knew about them. Nevertheless, the panel found the waiver exceptions inapplicable because the *deficiency in the Corps' EA* was not necessarily obvious or brought to the Corps' attention. *Id*. at 1049-51.

In a concurring opinion, Judge McHugh found: "the failure to consider any environmental impacts beyond those associated with the discharge of dredged and fill material would have been, and in fact was, obvious to the Corps during the reissue process *so that no party was required to bring the defect to the Corps' attention*." *Id*. at 1065 (emphasis supplied).[1] Thus, the panel split 2-1 on the issue of whether Appellants' oil spill claims were barred by the doctrine of waiver, which was the majority's sole basis for not reaching the merits of this claim.

[1] Judge McHugh ultimately concurred in the panel opinion's affirmance because she found Appellants waived their argument that the Corps improperly deferred portions of its NEPA analysis to the project verification stage. *Id*. at 1067.

III. Argument

A. The panel opinion violates Supreme Court and 10th Circuit precedent.

1. The panel opinion violates Public Citizen and Forest Guardians by holding the NEPA waiver doctrine applicable even where an agency has actual knowledge of an obvious impact.

The panel opinion warrants rehearing because it is contrary to well-established Supreme Court and 10th Circuit precedent holding a party's NEPA claims are not waived where the "problems underlying the claim are 'obvious' or otherwise brought to the agency's attention." *Forest Guardians*, 641 F.3d at 430; *Public Citizen*, 541 U.S. at 765 ("an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.").

The panel opinion does not dispute that potential oil spills are an obvious impact resulting from the Corps' approval of oil pipelines' crossings of jurisdictional waters, that Appellants brought the issue to the Corps' attention in the Keystone XL process, or that the Corps had prior knowledge of the issue by virtue of the Keystone XL EIS. In addition, Appellants showed, and the Corps and the panel did not dispute, that the Corps was aware of these risks and impacts based on numerous other oil leaks and spills into jurisdictional waters from other pipelines. *See, e.g.*, Appellants' Opening Br. at 20-26. Nonetheless, the panel

violated *Public Citizen* and *Forest Guardians* by refusing to apply the exceptions to the waiver doctrine.

Instead, Judges Bacharach and Baldock held that even if the risks of oil spills are obvious and the Corps knew about them, no party informed the Corps in their comments that *the Corps* (as opposed to another agency such as the Pipeline and Hazardous Material Safety Administration ("PHMSA")) was required to analyze oil spills. Thus, the EA's *legal deficiency* supposedly was not obvious to the Corps, nor was it brought to the Corps' attention.[2] *Bostick*, 787 F.3d at 1049-51. Notably, Judge McHugh did not concur with that reasoning, and found that the "failure to consider any environmental impacts beyond those associated with the discharge of dredged and fill material would have been, and in fact was, obvious to the Corps during the reissuance process so that no party was required to bring the defect to the Corps' attention." *Id.* at 1065.

Thus, the panel opinion attempts to distinguish between the obviousness/ independent knowledge of an impact; and the obviousness/ independent knowledge of the NEPA deficiency. This is a false distinction. If an environmental impact resulting from an agency action is obvious, and the agency has actual knowledge of that impact, it necessarily follows that the agency's failure to address that

[2] The panel opinion discusses the "otherwise brought to the agency's attention" exception and the "independent knowledge" exception together and treats them as one. *See Bostick*, 787 F.3d at 1051. As such, they are discussed together here.

impact in its EA is an obvious deficiency that violates NEPA. The panel opinion is essentially allowing the Corps to feign ignorance of its NEPA obligations.

In fact, the Corps' NEPA obligations *are* obvious, and those obligations have been brought to the Corps' attention repeatedly (*i.e.*, the Corps has long known what NEPA requires in its §404 actions). CEQ regulations require federal agencies to evaluate all reasonably foreseeable direct, indirect, and cumulative effects of an agency's action. 40 C.F.R. §§1508.7, 1508.8; *Public Citizen*, 541 U.S. at 764. Indirect effects are those that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. §1508.8(b). Cumulative effects are "impact[s] on the environment which result[ ] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7.

Thus, the Corps must analyze *all impacts* of projects it permits under §404, including potential oil spills into jurisdictional waters (whether they occur during construction, maintenance, repair, or operation), and cannot limit its NEPA analyses to considering only discharges of fill material into waterways during project construction. Judge McHugh's concurring opinion discusses numerous cases from this and other circuits demonstrating that courts have "universally adopted" this rule. *Bostick*, 787 F.3d at 1063-65; *see, e.g.*, *Hillsdale Environmental*

Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs, 702 F.3d 1156, 1162–64 (10th Cir. 2012) (Corps' EA for a truck/rail facility was required to analyze operational impacts, including "impacts to land use, air quality, noise, traffic, water quality, threatened and endangered species, and cultural resources," in addition to impacts to jurisdictional waters during project construction); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122-25 (9th Cir. 2005) (Corps' EA for a housing development cannot be limited to jurisdictional waters); *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 232–34 (5th Cir. 2007) (Corps' EA for a subdivision failed to analyze non-aquatic impacts such as increased vehicle traffic).

As Judge McHugh recognized, courts have applied this rule to the Corps' issuance of general §404(e) permits in addition to individual §404 permits. *Bostick*, 787 F.3d at 1064 n.1 (citing *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1276 (11th Cir. 2015)); *see also Wyoming Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1242 (D. Wyo. 2005) (holding the Corps must analyze cumulative impacts on non-wetland areas in issuing a general permit for dredge and fill).

Furthermore, the Corps' specific obligation to analyze oil spills in issuing §404 permits is well-recognized (*i.e.*, it is obvious). In *Ocean Advocates*, the Ninth Circuit held that the Corps was required to analyze the "obvious potential impact" of tanker oil spills before issuing a §404 permit for a dock extension. 402 F.3d at

866-67 (finding "a 'reasonably close causal relationship' exists between the Corps' issuance of the permit…and the attendant increased risk of oil spills.") (quoting *Public Citizen*, 541 U.S. at 767)*; see also Sierra Club v. Sigler*, 695 F.2d 957, 962 (5th Cir. 1983) (striking down a Corps EIS for a dredging project for failing to adequately analyze the potential impacts from an oil tanker spill that could occur as a result of the project); *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 967 (S.D. Ohio 2002) (Corps was required to analyze oil spills in issuing a §404 permit for an oil pipeline).

The Corps cannot claim that it is ignorant of these NEPA obligations. In fact, the Corps' NWP 12 EA acknowledges that "NEPA requires consideration of all environmental impacts, not only those to aquatic resources, so there may well be situations where aquatic impacts are minimal even though environmental impacts more generally are not." 77 Fed. Reg. 10184, 10197 (Feb. 21, 2012). As Judge McHugh noted: "Given this explicit acknowledgement, the Corps cannot now take the contrary position that it satisfied its NEPA obligations when it focused exclusively on the aquatic impacts…" *Bostick*, 787 F.3d at 1065.

The panel opinion does not dispute this expansive view of the Corps' NEPA responsibilities, nor does it suggest the Corps may restrict its analysis to discharges of fill in waterways. Instead, it reasons that the EA's deficiency was not obvious to the Corps because it chose to narrowly limit its EA to analyzing discharges of

fill material during pipeline construction, maintenance, and repair, and ignore operational impacts such as oil spills altogether, assuming (rightly or wrongly) that PHMSA or some other agency would analyze those impacts. *Id.* at 1050.

However, while PHMSA does regulate pipeline safety, it does not issue any permit, prepare any NEPA analysis, or analyze the risks of oil spills prior to pipeline operation. *See* 33 U.S.C. §1321(j)(5)(G); 49 C.F.R. Part 149. Regardless, NEPA regulations require an analysis of all impacts, "regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7. An agency cannot escape its obligations to evaluate a certain impact by claiming the impact is regulated by another agency. *See, e.g., Calvert Cliffs, Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (agency cannot avoid analyzing impacts under NEPA by relying on another agencies water quality certification); *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (argument that impacts analysis is not required where a facility operates pursuant to the Clean Air Act permit was without merit); *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193 (D. Colo. 2011) (NEPA requires consideration of impacts of related activities that another federal agency is in charge of approving) (citing *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1176-77 (10th Cir. 1999)). The panel opinion essentially creates conflicting law holding

an agency can refuse to analyze impacts if it believes, however erroneously, that some other agency (*e.g.*, PHMSA) would analyze them.

In fact, the Corps' experience analyzing oil spill impacts of §404 permits illustrates that it was well aware that it, rather than PHMSA, was responsible for analyzing oil spill impacts. *See, e.g.*, *Stop the Pipeline*, 233 F. Supp. 2d at 967; *Ocean Advocates*, 402 F.3d at 867; *Sigler*, 695 F.2d at 962. The Corps cannot now claim that, while it had *actual knowledge of the obvious problem* of oil spills from pipelines into the Corps' jurisdictional waters, PHMSA's oversight of pipeline safety relieved the Corps of its NEPA obligations.

Therefore, as Judge McHugh correctly concluded: "the failure to consider any environmental impacts beyond those associated with the discharge of dredged and fill material would have been, *and in fact was*, obvious to the Corps during the reissue process so that no party was required to bring the defect to the Corps' attention." *Bostick*, 787 F.3d at 1065 (emphasis added).

2. The panel opinion violates Supreme Court and 10th Circuit precedent holding that agencies bear the primary responsibility for NEPA compliance.

This Court has "emphasize[d] …that the responsibility for complying with NEPA rests with the department or service… [and NEPA] contemplates that the agency shall take the initiative in considering environmental values…. [Therefore, the] court is not supposed to cooperate in avoidance of the provisions of this Act of

Congress by putting great emphasis upon exhaustion of remedies…" *Jette v. Bergland*, 579 F.2d 59, 63-64 (10th Cir. 1978) *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *see also Cnty. of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977) (waiver "is a disfavored doctrine in the NEPA context").

Indeed, "the agency bears the primary responsibility to ensure that it complies with NEPA…" *Public Citizen*, 541 U.S. at 765; *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) ("NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action…"); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1528 n.18 (10th Cir. 1992) (an agency *always* has the duty to consider alternatives, regardless of public comment); *Calvert Cliffs*, 449 F.2d at 1119 (the agency's NEPA responsibility "is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.").

The panel opinion conflicts with this well-settled principle and sets dire precedent, as it shifts the burden of NEPA compliance from the agency to the public, and requires the public to bring to the agency's attention every conceivable

legal and factual issue, no matter how clear. It would allow agencies to avoid analyzing impacts resulting from its action unless the public points them out in comments, regardless if the impacts are obvious or if the agency knows of them.

In short, the panel opinion eliminates the waiver exceptions in *Public Citizen* and *Forest Guardians*. If the agency must have actual knowledge of the *deficiency* through public comment, that renders the exceptions to the commenting requirement meaningless because it requires commenting in all situations. Under the panel's interpretation, there would never be any circumstances in which the waiver exceptions apply.

IV. The Proceeding Involves Issues of Exceptional Importance

The proceeding involves issues of exceptional importance, as the holding allows other crude oil pipelines to be built with no consideration of oil spills or other impacts as required by NEPA. Prior to this case, the Corps had never before used NWP 12 to approve massive crude oil pipelines in this manner. Now, the Corps is approving other pipelines using NWP 12 without any project-specific NEPA analysis. For example, the Corps approved the 600-mile Flanagan South oil pipeline in 2013 using NWP 12, again without any analysis of potential spills into nearly 2,000 water crossings. *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 27 (D.D.C. 2013). In the ongoing appeal of that decision in the D.C. Circuit, the Corps relies on the panel opinion to escape its NEPA obligations. *See*

also Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs, 2014 WL 5307850 (S.D. Ala. Oct. 16, 2014) (Corps approved an oil pipeline under NWP 12 in Alabama without any project-specific NEPA analysis).

Second, the panel opinion would set new precedent allowing agencies to avoid NEPA by feigning ignorance of the law. Even where an agency has actual knowledge of obvious impacts resulting from its action, it would not be required to address them unless the public reminds it of its NEPA obligations. Thus, the panel opinion would shift the primary responsibility of NEPA compliance from the agency to the public, requiring public comment in all situations.

Third, the panel opinion conflicts with decisions of other circuits. *See*, *e.g.*, *Ocean Advocates*, 402 F.3d 866-68 (oil spills are an "obvious" impact that the Corps must consider); *Calvert Cliffs*, 449 F.2d at 1123 (agency must analyze impact under NEPA despite another agency's regulation of the impact); *S. Fork Band Council Of W. Shoshone Of Nevada*, 588 F.3d at 726 (same); *Save Our Sonoran*, 408 F.3d at 1122-25 (Corps cannot limit its NEPA analysis to evaluating discharges of fill into jurisdictional waters); *O'Reilly*, 477 F.3d at 232–34 (same).

Respectfully submitted, this 16th day of July, 2015.

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CERTIFICATE OF DIGITAL SUBMISSION

I, Douglas P. Hayes, hereby certify that with respect to the foregoing:

(1) all required privacy redactions, if any, have been made per 10th Cir.R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the ECF submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec™ Endpoint Protection, Version 11.0.6100.645, updated July 15, 2015) and, according to the program, are free of viruses.

Date: July 16, 2015

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CERTIFICATE OF SERVICE

I, Douglas P. Hayes, hereby certify that on July 16, 2015, I electronically filed the foregoing using the court's CM/ECF system, which will generate a Notice of Filing and Service on all counsel of record.

Date: July 16, 2015

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