

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 11 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THE COALITION TO PROTECT PUGET
SOUND HABITAT, a non-profit
corporation,

Plaintiff-Appellee,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, an agency of the United
States of America; et al.,

Defendants,

and

TAYLOR SHELLFISH COMPANY, INC.,

Intervenor-Defendant-
Appellant.

No. 20-35546

D.C. No. 2:16-cv-00950-RSL

MEMORANDUM*

CENTER FOR FOOD SAFETY, a non-
profit corporation,

Plaintiff-Appellee,

v.

UNITED STATES ARMY CORPS OF

No. 20-35547

D.C. No. 2:17-cv-01209-RSL

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

ENGINEERS, an agency of the United States of America; et al.,

Defendants,

NISBET OYSTER CO., INC.,

Intervenor-Defendant,

and

PACIFIC COAST SHELLFISH GROWERS ASSOCIATION,

Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted February 2, 2021
Seattle, Washington

Before: GRABER, McKEOWN, and PAEZ, Circuit Judges.

Intervenors Taylor Shellfish Company and Pacific Coast Shellfish Growers Association timely appeal (a) the summary judgment in favor of Plaintiffs Coalition to Protect Puget Sound Habitat and Center for Food Safety, following the district court's holding that the United States Army Corps of Engineers violated the Clean Water Act and the National Environmental Policy Act ("NEPA") in issuing the 2017 version of nationwide permit ("NWP") 48; and (b) the district

court's order remedying the legal errors by vacating the permit and the associated verifications and by staying the vacatur in some respects. We affirm.

1. We have appellate jurisdiction under 28 U.S.C. § 1291, even though only Intervenor, and not the agency, have appealed. The district court's order finally resolved all claims and did not require the agency to take any action at all. The order therefore was not a "remand order" in the sense described by Alsea Valley Alliance v. Department of Commerce, 358 F.3d 1181 (9th Cir. 2004), and Pit River Tribe v. U.S. Forest Service, 615 F.3d 1069 (9th Cir. 2010). See generally Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1175 (9th Cir. 2011) ("The requirement of finality is to be given a practical rather than a technical construction." (alteration and internal quotation marks omitted) (quoting Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964))).

2. The appeal is not moot. Although the Corps provisionally issued a 2021 version of NWP 48, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744 (Jan. 13, 2021), that permit has not taken effect and, even if it goes into effect on schedule in mid-March, will not necessarily grant Intervenor full relief.

3. The district court correctly held that the agency abused its discretion, 5 U.S.C. § 706(2), by failing to explain adequately its conclusions that the 2017 version of NWP 48 will have "no significant impact" pursuant to NEPA, and "will have only minimal cumulative adverse effect on the environment," 33 U.S.C.

§ 1344(e)(1). See Bair v. Cal. Dep't of Transp., 982 F.3d 569, 577 (9th Cir. 2020) (describing NEPA's requirements). The Corps expressly acknowledged the negative effects on the environment from aquaculture activities but did not explain adequately why those effects were insignificant or minimal.

Several of the Corps' reasons were illogical. For example, the Corps explained that many other sources caused even greater harm to the aquatic environment than aquaculture, which is a reason that suggests there is a cumulative impact. See 40 C.F.R. § 1508.7 (2017) (defining cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions." (emphasis added)). Similarly, the Corps responded to a concern about pesticides with the irrelevant explanation that the Corps does not regulate pesticides.

The Corps' citation to a limited scientific study of the effects of one type of shellfish on one natural resource, where the study did not consider a wide range of environmental stressors, does not suffice—without further explanation—to justify the Corps' much broader determination that at least five types of shellfish will have insignificant and minimal effects on the full aquatic environment. We also reject Intervenors' argument that certain programmatic documents (which were issued for a different purpose and which applied different legal standards) supply the

missing explanation. In issuing its national decision, which was the only document to make a finding under NEPA, the Corps indisputably did not cite or otherwise mention those documents. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("We may not supply a reasoned basis for the agency's action that the agency itself has not given." (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947))). Finally, Intervenors' lawyer conceded, during oral argument, that an agency may not rely exclusively on a tiered review to justify its nationwide environmental assessments. Accord Sierra Club, Inc. v. Bostick, 787 F.3d 1043 (10th Cir. 2015); Kentucky Riverkeeper, Inc. v. Rowlette, 714 F.3d 402 (6th Cir. 2013); Ohio Valley Env't Coal. v. Bulen, 429 F.3d 493 (4th Cir. 2005).

4. The district court did not abuse its discretion in crafting an equitable remedy. See, e.g., Teutscher v. Woodson, 835 F.3d 936, 942 (9th Cir. 2016) (holding that we review for abuse of discretion an equitable remedy). Full vacatur is the ordinary remedy when a rule violates the Administrative Procedure Act, and courts deviate "only when equity demands." Pollinator Stewardship Council v. U.S. EPA, 806 F.3d 520, 532 (9th Cir. 2015) (internal quotation marks omitted). Here, the court ordered briefing from the parties on the appropriate remedy and carefully crafted a hybrid remedy that reasonably balanced the competing risks of environmental and economic harms. The court allowed many aquaculture

activities to continue while applicants seek an individualized permit from the Corps, and the court permissibly accepted the good-faith compromise reached by some parties.

Before the district court and before us, Intervenors have not sought a nuanced adjustment to the court's arrangement. Instead, Intervenors assert that anything short of a vacatur only with respect to new applicants, allowing nearly 900 aquaculturists to continue their operations in full without any further review by the Corps, constituted an abuse of discretion. Particularly because vacatur is the presumptive remedy, and because aquaculturists may seek individualized permits, we are unpersuaded that the district court's discretion was so constrained.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED <i>(each column must be completed)</i>			
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Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
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