The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COALITION TO PROTECT PUGET SOUND HABITAT, *et al.*, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*, Defendants.	Case No. 2:21-cv-1685-JCC-DWC THE CORPS' MOTION TO DISMISS THE FIFTH CLAIM FOR RELIEF IN PLAINTIFFS' SECOND AMENDED COMPLAINT DATE ON MOTION CALENDAR: August 19, 2022

In their fifth claim for relief, Plaintiffs assert a programmatic "pattern and practice" challenge under the Administrative Procedure Act that seeks to vacate and enjoin *en masse* the past and future use of letters of permission ("LOPs") -- a type of individual permit issued by the Seattle District of the U.S. Army Corps of Engineers ("Corps") under the Rivers and Harbors Act -- to authorize work by individual mariculture facilities in Washington State. These mariculture facilities raise various types of shellfish such as oysters and clams at various locations in Puget Sound and other regulated waters in Washington State.

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Plaintiffs' fifth claim for relief must be dismissed because the Administrative Procedure Act ("APA") does not authorize the type of broad programmatic challenge Plaintiffs assert here. Rather, under the APA, plaintiffs may only challenge specific final agency actions that aggrieve them. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-883 (1990), the Supreme Court held that this required case-by-case approach to challenging only specific agency action is embedded in the APA and mandated by limits imposed by Article III of the U.S. Constitution. The Court therefore should dismiss count five of Plaintiffs' Second Amended Complaint, because it fails to state a claim for relief under the APA and the Court lacks subject matter jurisdiction over this claim.

BACKGROUND

I. Statutory and Regulatory Background

Section 10 of the Rivers and Harbors Act ("RHA") requires a permit issued by the Corps to authorize certain work or structures constructed in navigable waters of the United States. 33 U.S.C. § 403; *see also* 33 C.F.R. § 320.2(b). Under the RHA, the Corps may issue individual Section 10 permits to authorize certain activities on a case-by-case basis. 33 C.F.R. § 322.3(a). The Corps may also issue general permits on a regional or nationwide basis where appropriate. *Id.* §§ 322.3(a), 330.1(g). In their fifth claim for relief, Plaintiffs do not challenge any general permits issued by the Corps. The Corps' nationwide general permit program, including the 2021 nationwide general permit 48 ("2021 NWP 48") for mariculture, is not at issue in this motion to dismiss.

Under the RHA and its implementing regulations, the Corps may, where appropriate based on the circumstances of each regulated activity, issue either of two types of individual permits; namely, a standard individual permit or a letter of permission ("LOP"). 33 C.F.R. § 325.5(b). The Corps' regulations provide that LOPs may be used on a case-by-case basis to

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authorize proposed work or structures "[i]n those cases subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the [Corps'] district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition." 33 C.F.R. § 325.2(e)(1)(i).

Proposed activities by mariculture operations may also require authorization under a permit issued by the Corps under the Clean Water Act, where those activities involve the discharge of dredged or fill material into waters of the United States. *See* 33 U.S.C. §§ 1311(a), 1344(a). Under Clean Water Act Section 404, 33 U.S.C. § 1344, the Corps authorizes discharges into waters of the United States through either individual or general permits, which includes the nationwide general permit challenged in this case. As detailed below, five of the six claims for relief in this case challenge the 2021 NWP 48 under the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act. These claims are not at issue in the Corps' instant motion to dismiss.

II. Plaintiffs' Second Amended Complaint

A. Plaintiffs' challenges to the 2021 NWP 48 in claims one, two, three, four and six

Plaintiffs' Second Amended Complaint contains six claims for relief, five of which are directed towards challenging the Corps' 2021 NWP 48 as it applies in Washington State. In their first and second claims for relief, Plaintiffs challenge NWP 48 under the APA as it applies in Washington State, alleging that this general permit does not comply with certain CWA requirements, and is arbitrary and capricious, because it allegedly will cause more than minimal cumulative adverse impacts. 2d Am. Compl. ¶¶ 141-142 (Dkt. No. 22). Plaintiffs' related second claim alleges that the Corps also failed to adequately document and support its factual findings regarding the impacts from NWP 48. *Id.* ¶¶ 145-146. Plaintiffs' third and fourth claims for relief

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also challenge NWP 48, alleging that it fails to comply with certain requirements of the National Environmental Policy Act ("NEPA"). *Id.* ¶¶ 148-164. Plaintiffs' sixth claim for relief alleges that the Corps failed to comply with the Endangered Species Act upon issuing NWP 48. *Id.* ¶¶ 178-179. The Corps in its instant motion does not seek to dismiss any of these claims for relief.

B. Plaintiffs' fifth claim for relief

In their fifth claim for relief, Plaintiffs challenge an alleged unlawful "pattern and practice" of the Corps in issuing individual LOPs under the RHA to mariculture facilities in Washington State. *Id.* ¶ 172. According to Plaintiffs, the Corps has issued over 400 LOPs to over 400 individual operations in Washington State, *id.* ¶¶ 126 & 167, and will continue to issue LOPs to such facilities in the future, *id.* ¶ 172. Plaintiffs allege that this "pattern and practice" violates the RHA because, among other things, (1) it provides authorization without adequately considering the impacts of such facilities, and (2) an LOP is not a permissible regulatory tool available to the Corps because the Corps should have known that the issuance of such LOPs would likely encounter appreciable opposition by Plaintiffs, *id.* ¶¶ 168-170. Plaintiffs' Second Amended Complaint does not identify or explain how each particular LOP allegedly violates the RHA or the Corps regulations but asserts generally that all such LOPs are unlawful for various reasons. *Id.* ¶¶ 168-172. By way of example of the Corps alleged illegal "pattern and practice," Exhibit A to Plaintiffs' Second Amended Complaint lists 424 LOPs issued by the Corps as of the date of that Complaint. *Id.* ¶ 172; *id.* ¶ 126 & Exhibit A (Dkt. No. 17-1). As relief, Plaintiffs broadly request that the Court "[v]acate or set aside the LOPs already issued in violation of the RHA and APA and enjoin the Corps from continuing its unlawful pattern and practice of granting LOPs for work in jurisdictional waters . . . ." 2d Am. Compl. at p. 56 (¶ 7) (Dkt. No. 22).

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ARGUMENT

Plaintiffs' Fifth Claim Should be Dismissed for Failure to State a Claim and Lack of Subject Matter Jurisdiction Because the APA Does Not Authorize Plaintiffs' Programmatic "Pattern and Practice" Claim.

Plaintiffs' fifth claim for relief broadly challenges the Corps' past and future alleged "pattern and practice" of issuing LOPs for individual mariculture facilities throughout Washington, and they seek to vacate and enjoin *en masse* this alleged past and future practice" in the State. Such a programmatic claim, however, and the broad relief Plaintiffs seek, are not available under the APA. Rather, Plaintiffs may only challenge specific final agency actions that cause them actual or imminent harm. Plaintiffs may find it frustrating that they must pursue the case-by-case approach required under the APA and mandated by Article III of the Constitution, but in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891-94 (1990), the Supreme Court made clear that the APA does not provide for such "programmatic" challenges.

"In order to seek judicial review under the APA, the plaintiff or petitioner must have suffered a 'legal wrong' or been 'adversely affected or aggrieved' by a 'final agency action.'" *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas,* 5 F.4th 997, 1007 (9th Cir. 2021) (quoting 5 U.S.C. §§ 702, 704), *cert denied,* 142 S. Ct. 713 (2021). As part of this inquiry, it is "axiomatic that Plaintiffs must identify an 'agency action' to obtain review under the APA." *Id.* at 1010 (citing *Norton v. S. Utah Wilderness All*. ("*SUWA*"), 542 U.S. 55, 61–62 (2004)). "[A]n agency action is 'circumscribed' and 'discrete,' such as 'a rule, order, license, sanction [or] relief.'" *Id.* (quoting *SUWA*, 542 U.S. at 62) (citing 5 U.S.C. § 551(13)). Moreover, because this "agency action" requirement is part of the APA's limit on a court's subject matter jurisdiction,

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restricting judicial review to "final agency action," 5 U.S.C. § 704,[1] courts also lack jurisdiction where this threshold issue cannot be satisfied.

Reviewing the APA's "agency action" requirement, the Supreme Court explained in *National Wildlife Federation* that "[e]xcept where Congress explicitly provides for our correction of the administrative process at a higher level of generality," courts may only intervene "in the administration of the laws" when "a specific 'final agency action' has an actual or immediately threatened effect." 497 U.S. at 894. The Supreme Court found that because "the 'land withdrawal review program"' plaintiffs had challenged in that case was "not an identifiable action or event," those plaintiffs could not "demand a general judicial review of the [federal agency's] day-to-day operations." *Id.* at 899; *see also SUWA*, 542 at 64 (the APA's limitation of judicial review to "discrete agency action precludes [a] . . . "broad programmatic attack"). The Supreme Court *in National Wildlife Federation* further acknowledged that "[t]he case-by-case approach that this requires is understandably frustrating to an organization such as respondent . . . . But this is the traditional, and remains the normal, mode of operation of the courts." 497 U.S. at 894.

Following *National Wildlife Federation,* the Ninth Circuit has rejected programmatic challenges because only specific final agency actions that have an actual or immediately threatened effect on plaintiffs are actionable. *See, e.g., Mayorkas,*5 F.4th at 1011-13 (relying on *National Wildlife Federation* to conclude that environmental plaintiffs' challenges to seven programs of the Department of Homeland Security fail to challenge a specific agency action and

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[1] *See*, e.g., *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104-05 (9th Cir. 2007) ("The APA applies to waive sovereign immunity only after final agency action. 5 U.S.C. § 704. Before final agency action has occurred . . . a federal court lacks subject matter jurisdiction to hear the claim.")

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thus are not actionable under the APA); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1067 (9th Cir. 2002) ("in order to win scrutiny of the Forest Service's forest-wide management practices, Neighbors must challenge a specific, final agency action, the lawfulness of which hinges on these practices"); *see also Ecology Ctr. v. U.S. Forest Serv*., 192 F.3d 922, 925-26 (9th Cir. 1999) (dismissing claim that Forest Service failed to properly monitor properly condition of forest, "[b]ecause the Center fails to identify any 'concrete action . . . that harms or threatens to harm' it," (quoting, *National Wildlife Federation,* 497 U.S. at 891)); *Defs. of Wildlife v. Flowers*, Case No. CIV02195TUCCKJ, 2003 WL 22143270, at *1 (D. Ariz. Aug 18, 2003) (applying *National Wildlife Federation*, concluding that plaintiff's challenge to the Corps' alleged "pattern, practice and policy" is not actionable under the APA and the court therefore lacks jurisdiction over that claim), *aff'd on other grounds,* 414 F.3d 1066 (9th Cir. 2005).

Here, Plaintiffs "pattern and practice" claim is precisely the type of programmatic challenge that the Supreme Court in *National Wildlife Federation* and the Ninth Circuit in *Mayorkas* found impermissible under the APA and inconsistent with Article III requirements. The fact that Plaintiffs also cite in their Second Amended Complaint numerous instances in which the Corps has issued LOPs to particular mariculture facilities, to illustrate their "pattern and practice" programmatic challenge, does not overcome the flaw of their claim, and it cannot evade the bar identified by *National Wildlife Federation.* The Ninth Circuit recently addressed this very issue in *Mayorkas*, as follows:

> That Plaintiffs attach a list of eighty plus actions taken by [the agency] over the past 40 years to implement these "programs" only weakens their case. Plaintiffs cannot obtain review of all of [the agency's] individual actions pertaining to, say, "employment-based immigration" in one fell swoop by simply labeling them a "program." Plaintiffs either must identify a particular action by [the agency] that they wish to challenge under the APA, or they must pursue their remedies before the agency or in Congress.

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5 F.4th at 1012 (footnote omitted); *see also Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) (en banc) (concluding that, although plaintiffs identified 12 allegedly improper timber sales, they could not "challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program. . . ."); *Donelson v. United States*, Case No. 14-CV-315-JHP-FHM, 2016 WL 1301169, at *5 (N.D. Okla. Mar. 31, 2016) ("Even if Plaintiffs were to provide examples of specific leases in the pleading that might themselves constitute final agency action, Plaintiffs could not challenge an entire leasing program by identifying specific allegedly-improper final agency actions within that program and using those examples as evidence to support a sweeping argument that the BIA's entire leasing program dating back to 1979 violates NEPA."), *aff'd* 730 F. App'x 597 (10th Cir. 2018); *Defs. of Wildlife v. Flowers*, *supra,* 2003 WL 22143270, at *1 ("the mere recitation of specific permits, which Defenders claim evidence the alleged pattern, practice, and policy, does not allow Defenders to bypass the final agency action requirement of the APA in order to challenge the Corps' administration of its CWA authorities").

In addition, allowing Plaintiffs to pursue their programmatic "pattern and practice" claim under the APA would be inconsistent with Article III of the U.S. Constitution and its requirement that Plaintiffs establish standing – something Plaintiffs cannot do as a matter of law for such a programmatic claim. Indeed, the Supreme Court explained in *National Wildlife Federation* that Article III and its constitutional requirements underlie in part its conclusion that the APA does not authorize judicial review of such programmatic claims. 497 U.S. at 892–93 ("But it is at least entirely certain that the flaws in the entire 'program' -- consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well -- cannot be laid before the courts for wholesale correction under the APA, simply

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because one of them that is ripe for review adversely affects one of respondent's members."); *accord Mayorkas*, 5 F.4th at 1011–12 (discussing Article III bases for *National Wildlife Federatio*n's holding that the APA does not permit programmatic challenges).

The requirements of Article III standing apply equally in environmental cases: a "generalized harm to . . . the environment will not alone support standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009); *see National Wildlife Federation,* 497 U.S. at 889 (holding that requirements of standing are not met when plaintiff alleges harm in an "immense tract of territory"). Courts have thus rejected the theory that an environmental organization may act as "a roving environmental ombudsman seeking to right environmental wrongs wherever [it] might find them." *Friends of the Earth v. Gaston Copper Recycling Corp.* 204 F.3d 149, 157 (4th Cir. 2000). Rather, an environmental plaintiff has no standing to sue "apart from any concrete application that threatens imminent harm to his interests." *Summers*, 555 U.S. at 494; *accord Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."). Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), a cognizable interest at one location will not establish standing in another absent the required showing at that location. *See Summers*, 555 U.S. at 494-96. Is it not enough for plaintiffs to allege that their interests are part of the same ecosystem. *Lujan v. Defenders of Wildlife ("Defenders")*, 504 U.S. 555, 565 (1992); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Rather, to establish injury, plaintiffs "must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Defenders*, 504 U.S. at 566.

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Thus, in *National Wildlife Federation,* the Supreme Court explained that the prohibition on programmatic challenges under the APA flows in part from Article III prohibition on such "wholesale improvement . . . by court decree" of matters that should instead be pursued in the "offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made." *National Wildlife Federation*, 497 U.S. at 891. Examining *National Wildlife Federation,* the Ninth Circuit in *Mayorkas* affirmed that Article III supports the APA bar on programmatic claims, 5 F.4th at 1011-12, and that the APA limits plaintiffs to "'case-by-case'" challenges of specific final agency action that poses actual or imminent harm to a plaintiff's interests. *Mayorkas*, 5 F.4th at 1011 (quoting *National Wildlife Federation,* 497 U.S. at 894); *id.*at 1012 ("Plaintiffs either must identify a particular action by [the agency] that they wish to challenge under the APA, or they must pursue their remedies before the agency or in Congress.")

Finally, in an effort to evade the United States' motion to dismiss, Plaintiffs may contend that they do not intend that their fifth count raise a programmatic "pattern and practice" claim at all, but rather that Plaintiffs instead challenge as distinct final agency actions each of the separate 424 LOPs they list in Exhibit A (Dkt. 17-1) to their Amended Complaint. The problem with that argument, however, is that the Second Amended Complaint says otherwise. *See supra* at 4. Moreover, such an argument by Plaintiffs would expand count five to include 424 separate causes of action, each under the APA, each challenging a separate LOP, and Plaintiffs would need to demonstrate standing for each and every one of those separate causes of action. But those issues re not before the Court, since that is not what Plaintiffs have pled. And in the end, Plaintiffs cannot avoid *National Wildlife Federation* and its progeny, and the arguments in the

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Corps' instant motion to dismiss, by effectively amending their Complaint in their opposition brief. *See Amaker v. King County*, 479 F. Supp. 2d 1151, 1157 (W.D. Wash. 2007).

CONCLUSION

For the reasons set out above, the Corps requests that the Court dismiss Plaintiffs' fifth claim for relief (Second Amended Complaint ¶¶ 165-173).

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