

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)
 et. al.)
 Plaintiff,)
 v.)
 UNITED STATES ARMY CORPS OF ENGINEERS,)
 THOMAS E. WHITE, Secretary of the Army,)
 and LT. GENERAL ROBERT B. FLOWERS, Chief of)
 Engineers, United States Army Corps of Engineers,)
 Defendants.)

Case No. 1:00CV00379 RJL
 and consolidated cases
 Judge Leon

**SUPPLEMENTAL REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION
 FOR SUMMARY JUDGMENT AND IN OPPOSITION
 TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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Defendants (collectively, the "Corps") file this consolidated Reply to Plaintiffs' memoranda filed in opposition to the Corps' Supplemental Memorandum supporting the Corps' cross-motion for summary judgment.¹ Plaintiffs have again filed three separate briefs. NFIB's "reply" addresses arguments that the Corps did not advance.² NAHB recycles its general complaint that the general permits are unduly protective of the environment and then "relies on and incorporates its filings to date." NSA devotes several pages to reiterating its previously advanced contention that the Supreme Court's SWANCC decision is "highly relevant" to this matter, an assertion already debunked by the Corps in previous briefing. Corps' Supp. Mem. at 12-14; Corps' Summ. J. Mem. at 30-37. The remainder of NSA's supplemental reply responds to the Corps' discussion of the flaws in NSA's NEPA claim. This brief replies only to those NEPA arguments. The Corps refers the Court to its previous discussions of all other issues.

I. PLAINTIFFS' NEPA CHALLENGE SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH STANDING

A. Defendants Challenged the Standing of All the Plaintiffs

Plaintiffs contend that the jurisdictional standing argument should be rejected by the Court because Defendants have challenged the standing of only one of the three Plaintiffs named in the

¹ Each Plaintiff filed a separate supplemental memorandum. Together, their briefs comprised 33 pages. The Corps' or group of plaintiffs, consolidated response was 32 pages long. Plaintiffs' assertion that the Corps' brief was "overlong" is without merit.

² The Corps' supplemental memorandum did not include any substantive discussion of NFIB's Regulatory Flexibility Act claims, other than a single sentence (Corps' Supp. Mem. at 5) noting NFIB's own statement that the recently issued permits did not alter or affect NFIB's prior claims or arguments.

NSA Supplemental Complaint,³ and, thus, have tacitly admitted that the other two plaintiffs have standing. This contention is incorrect.³

In general, we first note that throughout the briefing of this case the Defendants have utilized the acronym of the first named plaintiff in a complaint as representative of all the plaintiffs, and that Defendants have indicated that the acronym NSA² refers to all three plaintiffs in the case.⁶ These facts, by themselves, are sufficient to show that Plaintiffs' contention is incorrect. Further, a review of the NSA Complaint and of Defendants' standing argument makes evident that Plaintiffs' contention has no merit.

³ See, Plaintiffs' Supplemental Complaint for Declaratory and Injunctive Relief ("Pls.' Complaint") (No. CV 00-379), filed on or about March 7, 2002. The three named plaintiffs are: (1) the National Stone, Sand and Gravel Association, previously the National Stone Association ("NSA"); (2) the American Road and Transportation Builders Association ("ARBT"); and (3) the Nationwide Public Projects Coalition ("NPPC").

⁴ Plaintiffs also state that they "will strongly object" (Defs.' Reply p. 4 n. 6) "if the Corps were to expand its standing argument in its final brief" to apply to the other two plaintiffs (*id.* at p. 4). Plaintiffs' factual premise is incorrect. As we show *infra*, Defendants challenged the standing of all the Plaintiffs. In any event, Plaintiffs, being the parties invoking federal jurisdiction bear the burden of supporting each element of standing "in the same way as any other matter on which the plaintiff bears the burden of proof . . ." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citations omitted). This is because the elements of standing "are not mere pleading requirements but rather [are] an indispensable part of the plaintiff's case . . ." *Id.* Neither Plaintiffs' Complaint nor the Tonsing Declaration filed on behalf of NCCP establish the elements of standing as to any of the Plaintiffs. Further, since standing is a jurisdictional element, a motion based on lack of standing can be raised at any time.

⁵ Plaintiffs also note that, as reflected by a 2/20/01 Motion for Substitution of Name of Party, the National Stone Association ("NSA") changed its name to National Stone, Sand and Gravel Association ("NSSGA"), and that Defendants utilize the acronym "NSA" instead of "NSSGA." Plaintiffs' clarification does not add anything to their argument, since they have understood that NSA refers to the now named National Stone, Sand and Gravel Association.

⁶ See, Memorandum of Points and Authorities in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, p. 1 n. 2 which states in relevant part that "[a]ll three Plaintiffs in these consolidated cases- National Association of Home Builders ("NAHB"), National Stone Association ***et al.*** ("NSA")".... (Bold emphasis added.)

First, we note that the allegations in the NSA Complaint are made as applicable to all three Plaintiffs and did not ascribe particular injury claims to particular plaintiffs. Second, Plaintiffs do not dispute that Defendants addressed all the injuries alleged in the complaint including the environmental injuries which are now specifically ascribed to NPPC. Specifically, Defendants noted that paragraph 26 of the Supplemental Complaint alleges “that the delays and costs associated with the processing of permits through the statutory individual permit provision and/or the RPs will also have a detrimental effect on Plaintiffs’ unspecified environmentally beneficial activities such as flood control protection, clearing of sediment basins, providing drinking water, enhancing flood storage capacity, and creating wetland mitigation banks.” (internal quotation marks and citations omitted) Corps’ Supp. Mem. at 22. We then submitted that the alleged environmental injuries including, but not limited to the injuries now ascribed exclusively to NPPC, do not fulfill the injury standard for Constitutional standing or prudential standing. *Id.* at pp. 22-25. Defendants have challenged the injury allegations of all three plaintiffs.

B. Plaintiffs Have Failed to Establish Constitutional Standing.

We have submitted that NSA’s allegations of injury all emanate from comparing the processing of permit requests through the expired NWP 26 with the processing of permits through the current NWPs or the standard individual permit system. *See*, Corps’ Supp. Mem. at 22 (citing Pls.’ Complaint, ¶ 24-29). Specifically, we noted that NSA alleges that in cases that would have qualified under the expired NWP 26, its members will have to try to fulfill the requirements of the NWPs or to apply for individual permits. *Id.* We further noted that NSA laments that in either case the processing of future unspecified permit requests will be more costly and will take more time than under NWP 26, and that such delays and costs “will also have a detrimental effect” on Plaintiffs’ unspecified environmentally beneficial activities “such as flood control protection, clearing of sediment basins, providing drinking water, enhancing flood storage capacity, and

creating wetland mitigation banks.” Id. (Citing Pls.’ Complaint, ¶ 26.) These injuries, we submitted, fail to allege facts to establish the injury-in-fact requirement under Article III and, in any event, cannot establish the causation and redressability elements of Constitutional standing. Id. at 23.

In response, NSA submits that NPCC members “will suffer considerable economic injury” because they will be forced to use the individual permit process that will result in “significant costs and delays.” Pls.’ Reply Mem. at 5. NSA then argues that the delays allegedly inherent in the processing of individual permits will ultimately “translate[] into a substantial increase in flood risk for the communities that NPPC members serve, posing a significant threat to people and property.” Id. at 6.

NSA’s new allegations of injury are no more specific than the ones alleged in the Complaint. They are all very general and hypothetical and fail to show “palpable and particularized injury on the part of the plaintiff [which] is a sine qua non of standing in federal courts.” (Emphasis in original) (citations omitted) Foundation of Economic Trends v. Watkins, 794 F.Supp 395, 397 (D.D.C. 1992). It is well established that “[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact.” (Internal quotations omitted) Whitmore v. Arkansas, 495 U.S. 149, 158 (1990); accord Lujan, 504 U.S. at 560 (holding that Article III requires allegation of injury that is “actual or imminent, not conjectural or hypothetical”)(internal quotations omitted). “The injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” O’Shea v. Littleton, 414 U.S. 488, 494 (1974) (citations omitted). NSA’s claim of an “increase in flood risk” that would pose “a significant threat to people and property,” although evoking colorful images of disasters, is still conjectural and hypothetical and does not set forth an injury that is “at least

imminent." Lujan, 504 U.S. at 564 n.2. NSA's new statements of injury do not establish Constitutional injury-in-fact.

NSA's quote from Mountain States Legal Foundation v. Glickman, 92 F.3d 1228, 1232 (D.C. Cir. 1996) that "even a small probability of injury is sufficient to create a case or controversy" (Pls.' Reply Mem. at 6-7) does not support NSA's contention that the claimed injuries establish Constitutional injury. The full sentence, which is originally from Village of Elk Grove Village v. Evans, 997 F.2d 328 (7th Cir. 1993) reads "[t]he injury is of course probabilistic, but even a small probability of injury is sufficient . . . to take a suit out of the category of the hypothetical --provided of course that the relief sought would, if granted, reduce the probability." Id. at 329. In that case, different from this case, the plaintiffs had provided affidavits which established the probability of a specified injury.⁷ In any event, the relief that this Court can grant cannot reduce the probability of the occurrence of the disasters which NSA alleges as potential injuries. We have already established that NWP 26 has expired and, thus, if this Court were to remand the NWPs there would not be any NWP in place and all persons who are eligible for the NWPs would have to process their projects through individual permits-- which is the alleged cause of NSA's death and destruction disaster scenarios.

NSA has failed to establish injury-in-fact and, in any event, cannot establish the elements of causality and redressability.

⁷ In Elk Grove, plaintiffs were opposing the construction of a radio tower. Elk Grove, 997 F. 2d at 329. Plaintiffs presented an affidavit which explained "that Elk Grove is flood-prone, that when there is a flood the municipality incurs expense for sandbags, overtime salaries for rescue workers, and such, and that the construction of the radio tower, by plopping down a huge slab of concrete near the creek and thus limiting the creek's drainage area, will increase the risk of flooding." Id. It was in the context of this affidavit that the Court made the statement relied upon by NSA. The affidavit in Elk Grove established a palpable injury based on experience which did have a probability of occurring. In this case, the Tonsing Declaration states hypothetical disaster scenarios which have no basis in fact or previous experience.

C. Plaintiffs Have Failed to Establish the Elements of Prudential Standing.

We have submitted that NSA's claims of injuries to "environmentally beneficial activities of Plaintiff's members" (Complaint, ¶ 29) cannot establish prudential standing. Defs.' Supp. Mem. at p. 25. This is partly because, as we also submitted, NSA's objections to changes which further the objectives of NEPA and the primary objective of resurrecting the defunct NWP 26 indicate that Plaintiffs' interests are "more likely to frustrate than to further the [NEPA's] objectives." *Id.* (citing, California Forestry Ass'n v. Thomas, 936 F. Supp. 13, 21 (D.C. Cir. 1996)). NSA does not even attempt to dispute this contention and the underlying facts, which, thus, stand un rebutted. Nevertheless, NSA contends that it has established prudential standing because the NCPP's projects prevent environmental injuries such as "[a]n increased risk in flooding."⁸ Defs.' Supp. Reply at p. 9. NSA's contention has no merit.

It is evident and cannot be contested that the NPPC' primary interest is to provide public services in a timely and cost effective manner ("public service interest").⁹ The fact that in implementing the public service interest, the NPPC may engage in actions that may prevent damage to the environment does not transform the public service interest into an "environmental interest." The public service interest would be within NEPA's zone of protecting the environment if it is "so congruent with" the environmental protection interest "as to make [NPPC] suitable

⁸ NSA also contends that "[a]n increased risk of flooding is but one example of the type of environmental injury [that] will result from the decision to indefinitely delay the PEIS while continuing to modify the NWPs." Pls.' Supp. Reply at p. 9. There is no factual basis for this extraordinary contention which should be disregarded by the Court as an unsupported inflammatory hypothetical construct. In any event, this contention is irrelevant to the issue of whether the NPPC's interests are within the zone of interest of NEPA.

⁹ This is evident from the Tonsing Declaration which states, inter alia, that "NPPC fundamentally represents the interests of the public in ensuring that vital public infrastructure services such as municipal and agricultural water supply, flood control, irrigation, waste water treatment, stormwater management, and transportation systems are provided in a safe, timely and environmentally beneficial fashion. NPPC's members predominantly consist of government agencies and firms that serve public sector needs." (emphasis added) Tonsing Declaration at ¶ 1.

challenger[s]" of the Corps' exercise of its authority to issue NWP. Grand Council of the Crees v. FERC, 198 F.3d 950, 957 (D.C. Cir. 2000). It is not.

The NPPC's interest in implementing its public service interest projects solely under NWP 26 conflicts with the environmental interest of protecting the aquatic environment, which the Corps has the duty to protect under the CWA. The challenged NWP were issued because, by being tailored to specific activities as opposed to one standard for all activities in the expired NWP 26, they "substantially increase protection of the aquatic environment." 65 Fed. Reg. 12818 (March 9, 2000). Nevertheless, the NPPC prefers the revival of NWP 26 because it can process its public interest projects "in a timely manner without unnecessary delay and paperwork." Tonsing Declaration at ¶ 2. Consistent with this view, one of NPPC's members is concerned that the more environmentally protective NWP "will make it very difficult to construct and maintain new water and sewer facilities in a timely manner and could severely impact the Authority's ability to provide vital public services, particularly when emergencies arise."¹⁰ Id. at ¶ 3. NPPC is also concerned that "in some parts of the Country, such as the arid West," the "one-half acre cap" is too low and "that a higher acreage threshold is justified due to the low functional value of many ephemeral waters and the fact that impacts to those areas are outweighed by the need to implement public work projects in a timely and cost effective fashion." (Emphasis added) Tonsing Declaration, ¶ 6. NPPC's contentions make clear that in implementing the public service interest, NPPC is primarily concerned in expediency and cost cutting, and any interest in protecting the environment is

¹⁰ Plaintiffs' claim of injury in emergency situations is hypothetical and vague. Indeed, it is unlikely that injury would result in emergency situations since the Corps' regulations specifically provide in relevant part that "Division engineers are authorized to approve special processing procedures in emergency situations. An 'emergency' is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. ***" 33 C.F.R. § 325.2(e)(4).

subordinate to the public service interests. The public service interest of NPPC of limiting the cost and paper work of processing public service projects, although commendable, conflicts with the NEPA's zone of interest of protecting the environment. In view of this fact, NPPC is not one of "those who in practice can be expected to police the [environmental protection] interests that [NEPA] protects." Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1075 (D.C. Cir. 1998). NPPC's public service interest, laudable as it may be, is not within NEPA's environmental protection zone of interest.

II. THE CORPS DOES NOT HAVE A MANDATORY DUTY TO PREPARE A PEIS FOR THE NWP's

We have submitted that NSA's contention that NEPA imposes on the Corps a mandatory duty to prepare an EIS for the challenged NWP's should be rejected because: (1) the Corps has issued a FONSI as to the NWP program; and (2) NSA has not even tried to identify the elements which would establish that the NWP program is a "major federal action[]" significantly affecting the quality of the human environment." Corps' Supp. Mem. at 30-31 (citing 42 U.S.C. § 4332(2)(C)). We also established that letters from both the EPA and the FWS recognize the voluntary nature of the ongoing PEIS. Id. at 31. In addition we quoted language from a letter from the EPA which specifically recognizes that "the Corps is undertaking this EIS on a voluntary basis..." Id. (citing EPA's June 29, 2001 letter). In the Reply, NSA does not dispute any of the above factual assertions or the assertion that the NHAB urged the Corps "to stand firm in defending its determination of minimal impacts for the NWP program and its compliance with NEPA." Defs.' Supp. Mem. at 30 n. 26. More important, the NSA plaintiffs have not even attempted to argue that the NWP's are a "major federal action." Their reiteration of the conclusory statement that the PEIS is mandatory and their reliance on an out-of-context sentence from the EPA's June 29, 2001 letter, which when read in context establish that the EPA recognizes that the Corps' preparation of the PEIS is voluntary are factually and legally insufficient to establish that the PEIS is required by

NEPA. Plaintiffs' contention that NEPA requires the Corps to issue a PEIS as to the NWPs should be rejected by the Court.

CONCLUSION

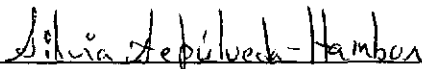
For all of the above reasons and the reasons set forth in our previous briefs, this Court should grant dismiss the NEPA claims for lack of standing and grant summary judgment as to all other claims.

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Respectfully submitted,

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