THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION; OGEECHEE RIVERKEEPER; and SAVANNAH RIVERKEEPER; Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS; LT. GENERAL THOMAS BOSTICK, U.S. Army Corps of Engineers; COLONEL MARVIN L GRIFFIN, U.S. Army Corps of Engineers, Savannah District, Defendants.	)	Case No. 1:14-cv-01701-JDB

PLAINTIFFS' COMBINED MOTIONS TO ALTER OR AMEND JUDGMENT (RULE 59(E)) AND AMEND PLEADING (RULE 15(A))

In its dismissal of the conservation groups' challenge of NWP 13 for lack of standing, the Court raised an issue of redressability that had not been briefed by either party.[1] Had this issue arisen prior to the Court addressing it *sua sponte*, the conservation groups would have been able to clarify how their actual and procedural injuries are redressible. Although the Court dismissed the case without prejudice, the conservation groups ask that the Court consider and grant these motions so that the conservation groups, the Corps of Engineers (Corps), and this Court can avoid expending significant additional resources in a new challenge. In the following the conservation groups seek to have the judgment in this case vacated and request leave to amend the conservation groups' complaint. By amending the complaint, the conservation groups can clarify the redressability of their injuries.

[1] *See* Defendant's Cross Mot. for Summ. J. at 13 (addressing only injury-in-fact prong of standing argument); Transcript 40:2-4 ("The Court: That's all your standing argument really is, is injury in fact, right? / Mr. Swanson: That's correct. Right.")

MOTION TO ALTER OR AMEND JUDGMENT

A. Standard of review for motion to alter or amend judgment.

A motion to alter or amend judgment under Fed. R. Civ. P. 59(e) should be granted if the court "finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal citations and quotations omitted).

B. Before dismissing the case for lack of standing, the Court should have allowed the parties to brief the redressability issue.

If a plaintiff lacks standing, the court lacks subject matter jurisdiction and the court must dismiss the case. And if the court discovers on its own that the court lacks subject matter jurisdiction, it should dismiss the case *sua sponte*. *See Potomac Passengers Ass'n v. Chesapeake & O. Ry.*, 520 F.2d 91 (D.C.Cir.1975). Before doing so, however, the court should first give the parties a full opportunity to speak to the issue.

Here, although the Court alluded to the issue at oral argument, the Court should have given the conservation groups the opportunity to fully brief and be heard on the specific issue of redressability before dismissing the case. As the Court of Appeals for the D.C. Circuit has explained: "The court has considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction, and normally it may rely upon either written or oral evidence. The court must, however, afford the nonmoving party 'an ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Prakash v. Am. Univ.*, 727 F.2d 1174, 1179-80 (D.C. Cir. 1984) (citations omitted); *see also Joyce v. Joyce*, 975 F.2d 379, 386 (7th Cir. 1992) ("*[S]ua sponte* dismissals without prior notice or opportunity to be heard are 'hazardous.' Thus, 'unless the defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the

opportunity to discover the facts necessary to establish jurisdiction.'"); *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 559 F. Supp. 2d 634, 647-48 (E.D. Pa. 2008); *Orthopedic Specialists of New Jersey PA v. Horizon Blue Cross/Blue Shield of New Jersey*, 518 F. Supp. 2d 128, 131 (D.N.J. 2007); *cf. Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981) ("[The] court must give notice of its *sua sponte* intention to invoke Rule 12(b)(6) and afford plaintiffs 'an opportunity to at least submit a written memorandum in opposition to such motion.'").

Although the above cases recognize that a court does not have to provide notice of a *sua sponte* dismissal if a plaintiff's pleading contains a defect that is "clearly incurable," *Joyce*, 975 F.2d at 386, the conservation groups' pleadings contain no such defect. As discussed in detail in Section C(iii) below, although the conservation groups did not request in their complaint that the court order the removal of the bulkhead, they did request that the authorization for the Bull River bulkhead be vacated and that NWP 13 be vacated. If the Court vacated either, the Corps would then be required to reanalyze the existing, unpermitted bulkhead under the individual permit criteria. At that time, the Corps would have the option to permit the bulkhead after-the-fact, require additional mitigation, or order removal of the bulkhead.

In other words, even though the Bull River bulkhead has already been constructed, the injury tied to that bulkhead is still redressible – and would be even if the Corps were to allow the bulkhead to remain. For example, Ms. Wanda Scott's actual injuries include her desire not to see bulkheads lining the banks of Bull River or other waters in the areas where she recreates. In particular, she objects to the bulkhead at issue in this case. Even if, on consideration of an individual permit, the Corps did not ultimately demand the removal of the existing bulkhead, Ms. Scott's injuries could, at least in part, be addressed by the Corps requiring additional mitigation for the bulkhead. *See Mobile Baykeeper, Inc. v. U.S. Army Corps of Engineers*, No. CIV.A. 14-

0032-WS-M, 2014 WL 5307850, at *6 (S.D. Ala. Oct. 16, 2014) ("That the Alabama portion of the pipeline has been completed and is now operational does not render Baykeeper's alleged injury incapable of redress. . . . [T]o the contrary, it appears that some form of effective relief could be fashioned (whether by this Court or by the Corps on remand) to reduce aesthetic injuries to Baykeeper members, to mitigate risk of leakage, and so on."); *Ogeechee-Canoochee Riverkeeper, Inc. v. T.C. Logging, Inc.*, No. 608CV064, 2009 WL 2390851, at *8 (S.D. Ga. Aug. 4, 2009) (in mootness context, noting that the Riverkeeper's decision not to seek removal of a road did "not affect the ability of the Court to provide the remedies of remediation and mitigation"). It does not appear from its order that the Court considered this form of redressability – an issue that the conservation groups would have clarified in briefing had they been given the opportunity.

The instant case is similar to *Marriott Senior Living Servs., Inc. v. Springfield Twp.*, in which the District Court for the Eastern District of Pennsylvania overlooked an Equal Protection count that the parties had discussed in their summary judgment briefs. No. CIV. A. 97-3660, 2000 WL 1781937, at *2 (E.D. Pa. Nov. 20, 2000). In its review of the case, the Court of Appeals for the Third Circuit held the following, "[i]t is clear from the briefs that the Court was mistaken when it disregarded this claim without consideration. As a result, defendant's Motion for Reconsideration of the Equal Protection Summary Judgment Motion is entitled to reconsideration by this Court." *Id.*

In a similar manner, the Court in the instant case does not appear to have considered the role mitigation could play in establishing redressability. While the Corps typically requires mitigation for wetlands impacts even under NWP 13, it often ignores the adverse impacts bulkheads can have on shoreline ecosystems and recreational interests. If the Corps were to

reexamine the bulkhead under the individual permit process, the public and the resource agencies would likely highlight these impacts.

C. In the alternative, the Court should have given the conservation groups leave to amend to cure the standing defect before dismissing the case.

i. The Court should have granted leave to amend the standing defect before dismissing the case because the Court raised the redressibility question *sua sponte*.

In the alternative, the Court should have given the conservation groups leave to amend their complaint to cure any standing defects when it dismissed the case. The Court of Appeals for the D.C. Circuit has consistently held in the face of *sua sponte* dismissals in the analogous Rule 12(b)(6) context that the court must provide leave to amend unless the plaintiff cannot possibly cure the pleading defect. *Plummer v. Mayor*, D.C., 371 F. App'x 106, 107 (D.C. Cir. 2010) ("Circuit precedent holds that a *sua sponte* dismissal of a complaint for failure to state a claim without leave to amend is error unless 'the claimant cannot possibly win relief.'"); *Xia v. Kerry*, 73 F. Supp. 3d 33, 41 (D.D.C. 2014).

The dismissals in those cases are analogous to the Rule 12(b)(1) dismissal in the instant case. In both circumstances the Court is addressing a situation in which the parties have not had the opportunity to discuss an issue identified by the Court. Thus, this approach is just as apt in the context of a Rule 12(b)(1) dismissal on standing grounds as it is in the 12(b)(6) context. The goal of the Court should be to ensure that plaintiffs are given the opportunity to address concerns with the pleadings identified solely by the court. In light of this policy, the Court should have provided the conservation groups leave to amend their complaint when dismissing the case on redressability grounds.

ii. Had the Court allowed the conservation groups to amend their complaint, the redressibility issue could have been easily resolved.

In its order, this Court stated the following: "An order directing the Corps to remedy procedural failing in its issuance of NWP 13 could in no way help Scott [one of the standing witnesses], who suffers an ongoing aesthetic harm caused by an existing NWP 13 bulkhead." Order at 13. Had the conservation groups better explained how its injuries could be redressed both in its complaint and at oral argument, however, the Court could have found that the conservation groups have standing.

Part of the difficultly surrounding the redressability issue stems from the fact that this case involves a challenge to a general permit instead of an individual permit. If the conservation groups were challenging an individual permit, in deciding the case, the Court would have had the power to vacate the permit and instruct the Corps to order the removal of the bulkhead. But that is not the situation here. Instead, if the Court were to vacate the NWP 13 authorization of the existing Bull River Bulkhead, the proper relief with respect to the existing bulkhead would be for the Corps to reanalyze the bulkhead under the individual permit criteria. Specifically, Corps' regulations allow a party to legitimize pre-existing, unauthorized activities by applying for an after-the fact permit. 33 CFR § 326.3(e). After-the-fact permits are processed in accordance with the same standards as a § 404 permit. *Id*. Under this process, the Corps would have the option to 1) permit the existing bulkhead as is, 2) require additional mitigation, or 3) order the removal of the bulkhead.

Without better explaining the general permit context of its challenge, the conservation groups sought the following relief as to the Bull River Bulkhead:

> F. Declare that the Corps' Savannah District violated the CWA, RHA, and APA in authorizing the Bull River Bulkhead and vacate the Corps' authorization of that bulkhead[.]

In retrospect, the conservation groups should have clarified this statement of relief by explaining, as discussed above, that the ultimate decision concerning the fate of the bulkhead would be left to the Corps. Were the Court to allow the conservation groups to amend their complaint, the conservation groups would amend the relief provision quoted above to read as follows:

> F. Declare that the Corps' Savannah District violated the CWA, RHA, and APA in authorizing the Bull River Bulkhead and vacate the Corps' authorization of that bulkhead and require the Corps to process the bulkhead using the individual permit criteria to determine whether the bulkhead would have to be removed or could be permitted after-the-fact as is or with additional mitigation.

What this amendment would do is make it clear that what the conservation groups are seeking from the Court is an order that would require that the Corps reexamine the bulkhead under the individual permit criteria instead of under the flawed NWP 13.

This measure of relief is more than sufficient to satisfy the redressability prong of the standing test even though the bulkhead has already been built. *See Ouachita Riverkeeper, Inc. v. Bostick*, 938 F. Supp. 2d 32, 43 (D.D.C. 2013) (holding that plaintiff in nationwide permit challenge met redressability prong of standing because "[a]n agency action that is taken without following the proper environmental review procedures can be set aside by this Court and remanded to the agency for completion of the review process."); *Jones v. Thorne*, No. CIV. 97-1674-ST, 1999 WL 672222, at *11 (D. Or. Aug. 28, 1999) (noting that plaintiff's injury was redressible because the Corps may require additional mitigation if the court remanded the issue to the Corps to consider an after-the-fact permit application).

This amendment would also clarify the incomplete statement that the conservation groups' counsel made during oral argument. When the Court asked him whether "the relief the conservation groups sought in the complaint wouldn't require tearing out the [existing Bull River] bulkhead]," Transcript at 33:3-9, counsel should have stated that the

conservation groups certainly want that end result. Instead counsel focused on what relief it believed was proper – for the Court to vacate NWP 13 and remand the matter to the Corps. And, as explained above, the Corps would then determine the outcome of the bulkhead.

Finally, in the same vein that a court should not ignore relief that a plaintiff failed to request in its pleadings if the plaintiff would otherwise be entitled to it, *see* Fed. R. Civ. P. 54(c), this Court should not ignore the fact that if it were to vacate NWP 13, the Corps could order the bulkhead to be removed whether or not the conservation groups specifically requested this relief. The same result would be achieved with more clarity, however, if the Court were to allow the conservation groups to amend their complaint in the manner set forth above.

iii. Short of demanding the removal of the bulkhead, the Corps could redress the conservation groups' injuries by requiring that additional mitigation be provided to lessen the impacts of the bulkhead.

As discussed above, even if the Court were to hold the conservation groups to the answer provided by its counsel in oral argument, namely that the conservation groups were not seeking to have the bulkhead removed, the conservation groups still have standing based on the fact that short of ordering the removal of the bulkhead, the Corps could require additional mitigation to lessen the impacts of the bulkhead.

Such mitigation for the bulkhead could include reducing the height of the bulkhead and sloping back the bank behind the bulkhead to mimic a more natural shoreline. It could also include planting vegetation both behind and in front of the bulkhead to screen the structure. Or rock could be placed at the foot of the bulkhead to curb scouring. Because the standing witnesses' actual injuries are tied to the aesthetic impacts of having another bulkhead on the Bull River, and because mitigation measures could still be taken to address those injuries, the conservation groups have actual standing to bring this action based on the fact that the Corps

could require additional mitigation during the individual permit process. *See Mobile Baykeeper, Inc. v. U.S. Army Corps of Engineers*, No. CIV.A. 14-0032-WS-M, 2014 WL 5307850, at *6 *Ogeechee-Canoochee Riverkeeper, Inc. v. T.C. Logging, Inc.*, No. 608CV064, 2009 WL 2390851, at *8.

iv. The conservation groups' procedural injuries could be redressed as well if the Court were to vacate NWP 13.

As the discussion above reveals, if the Corps were to reexamine the Bull River bulkhead under the individual permit criteria, the Corps could order the removal of the bulkhead or the Corps could have demanded additional mitigation of the type described above. In light of the stringency of the individual permit criteria, either one of these results is well within the realm of possibility.

The individual permit criteria impose a series of requirements that would have to applied on a case-by-case basis to the Bull River Bulkhead. First, the Corps would have to consider the cumulative impacts associated with having another bulkhead on the Bull River. 40 C.F.R. §230.11(g). Under the flawed NWP 13 authorization, the Corps ignored an existing bulkhead nearby that was about 400 feet in length. *See* SAS0044; SAS0014. Second, the Corps would have to determine whether there are any practicable alternatives (40 C.F.R. §230.10(a)) to the bulkhead such as the construction of a bioengineered shoreline.[2] Third, the Corps would have to determine whether the impacts of the bulkhead could be minimized or mitigated. *See* 40 C.F.R. § 230.12 (a)(2). Finally, the Corps would have to solicit public comment on the bulkhead. 33 U.S.C.A. § 1344(a).

[2] In the preamble to the Corps' nationwide permit regulations, the Corps describes bioengineered shorelines as follows: "[G]enerally bioengineering involves the use of a combination of vegetation and hard materials instead of only hard materials such as rip-rap for bank stabilization." 77 Fed. Reg. 10184, 10198 (Feb. 21, 2012).

Since the Corps did not require the bulkhead go through the individual permit process, the conservation groups suffered a procedural injury that could be redressed had the Corps applied that process to the bulkhead. Furthermore, in cases of procedural injury, the threshold for showing redressability is low. *WildEarth Guardians v. Bureau of Land Mgmt*., 8 F. Supp. 3d 17, 29 (D.D.C. 2014). All that is required is "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). And even though the Corps authorized the bulkhead under NWP 13, that does not mean that it would reach the same result under the individual permit process. As the D.C. Circuit pointed out in *WildEarth Guardians v. Jewell*, "Vacatur of [an agency] order would redress the Appellants' members' injuries because, if the [agency] is required to adequately consider each environmental concern, it could change its mind about authorizing the [proposed activity]." 738 F.3d 298, 306 (D.C. Cir. 2013).

MOTION FOR LEAVE TO AMEND COMPLAINT

If the Court grants the conservation groups' motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), the conservation groups also request leave to amend the complaint in the manner addressed above in order to clarify the relief requested and amend any pleading defects.

As the Court of Appeals for the D.C. Circuit explained in *Hill v. Fed. Judicial Ctr.*, "the district court may . . . allow post-dismissal amendment of a complaint in response to the plaintiff's motion to reopen the judgment pursuant to Rules 59 or 60." 238 F. App'x 622, 622 (D.C. Cir. 2007). And as provided in 28 U.S.C. § 1653, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

Thus, consistent with these cases, and for the reasons addressed above, the conservation groups respectfully request leave to amend their complaint to clarify the relief sought and

remedy the standing issue identified in the Court's Order. A proposed Amended Complaint is attached to this Motion.

CONCLUSION

For all the reasons stated above, the Court should grant the Conservation Groups' Combined Motions to Alter or Amend Judgment (Rule 59(e)) and Amend Complaint (Rule 15(a)).

Respectfully submitted this 8th day of April, 2016,

/s/ Megan L. Hinkle
WILLIAM W. SAPP
Admitted Pro Hac Vice
Ga. Bar No. 626435
MEGAN L. HINKLE
Ga. Bar No. 877345
APRIL S. LIPSCOMB
Ga. Bar No. 884175
Southern Environmental Law Center
Ten 10th Street, NW, Suite 1050
Atlanta, Georgia 30309
Phone: (404) 521-9900
Email: bsapp@selcga.org

JAN GOLDMAN-CARTER
D.C. Bar No. 415773
National Wildlife Federation
1990 K St. NW, Suite 430
Washington, DC 20006
Phone: (202) 797-6894
Email: goldmancarterj@nwf.org

CERTIFICATE OF SERVICE

I certify that on this 8th day of April, 2016, I electronically transmitted this **PLAINTIFFS' COMBINED MOTIONS TO ALTER OR AMEND JUDGMENT (RULE 59(E)) AND AMEND PLEADING (RULE 15(A))** to the Clerk of Court using the CM/ECF system for filing, which caused all ECF registrants to be served by electronic means as reflected on the CM/ECF Notice of Electronic Filing.

/s/ Megan L. Hinkle