

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CENTER FOR BIOLOGICAL DIVERSITY, :
et al., :
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Plaintiffs, :
 : 20-cv-6572 (JSR)
-v- :
 : OPINION
UNITED STATES ENVIRONMENTAL :
PROTECTION AGENCY, et al., :
 :
Defendants. :
 :
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JED S. RAKOFF, U.S.D.J.

This suit challenges the failure of the U.S. Environmental Protection Agency ("EPA") to consult with the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") in connection with a temporary nonenforcement policy (the "Policy") the EPA published in March 2020 in response to the pandemic. The Endangered Species Act ("ESA") and its implementing regulations require that an agency consult with the FWS and/or the NMFS before taking any action that may affect endangered or threatened species. In an emergency, the agency may informally notify the NMFS and/or the FWS, take the action, and engage in formal consultation with the FWS and/or the NMFS thereafter.

In March 2020, the EPA published the Policy, which announced that it "d[id] not expect to seek penalties for violations of" certain routine requirements, including sampling, testing,

training, and reporting, if the noncompliance was caused by COVID-19.¹ The EPA did not consult with the FWS or the NMFS regarding the Policy, including under the provision for emergency consultation. Plaintiff non-profit organizations sued. The Policy has now terminated, but plaintiffs seek to compel the EPA to engage in post-hoc consultation with the FWS and the NMFS.

Now before the Court are the parties' cross-motions for summary judgment. One of the principal disputed issues, and ultimately the dispositive issue, is standing. The EPA does not deny that if excess pollutants were to enter the habitat of the Atlantic and shortnose sturgeons -- endangered species studied by members of the plaintiff organizations -- then those members would suffer an injury sufficient to confer standing. However, the defendants maintain that the plaintiffs offer no evidence from which a jury could reasonably infer that the Policy caused a real risk of excess discharge into sturgeon habitat. The Court agrees. Therefore, by bottom-line order, ECF No. 40, the Court granted the defendants' motion and denied the plaintiffs' motion.

¹ Susan Parker Bodine, EPA, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (Mar. 26, 2020), <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>.

BACKGROUND

A. The Endangered Species Act

Congress enacted the ESA in 1973 to preserve endangered and threatened species. ESA Section 7 provides, in pertinent part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior, or the Secretary of Commerce with respect to certain marine life], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2). An implementing regulation provides, "Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, [with exceptions not relevant here]."

50 C.F.R. § 402.14(a). "Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . . , " including, inter alia, "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

When formal consultation is required, the pertinent agency must send the NMFS and/or the FWS certain information, id. 402.14(c), and "[f]ormal consultation concludes within 90 days after its initiation unless extended" by mutual agreement between

the agency and the NMFS and/or the FWS, id. 402.14(d). The regulations further provide that

where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that [NMFS or FWS] determines to be consistent with the requirements of sections 7(a)-(d) of the [ESA]. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc. Formal consultation shall be initiated as soon as practicable after the emergency is under control.

Id. 402.05 (lettering omitted).

B. The Temporary Nonenforcement Policy

On March 26, 2020, the EPA issued a memorandum entitled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program." SUF ¶ 1.² The Policy provides that the EPA generally "does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request." Policy 3. Despite this announcement of the EPA's general intention, the EPA continued to have enforcement discretion. SUF ¶ 67. The Policy further

² "SUF" refers to the parties' Rule 56.1 Statements of Undisputed Facts, which are numbered sequentially. SUF ¶¶ 1-63 refer to Defendants' Response to Plaintiffs' Rule 56.1 Statement, ECF No. 33. SUF ¶¶ 64 et seq. refer to Plaintiffs' Response to Defendants' Rule 56.1 Statement, ECF No. 38.

provides that, “[i]n general, absent exigent circumstances, the EPA does not plan to ask facilities to ‘catch-up’ with missed monitoring or reporting if the underlying requirement applies to intervals of less than three months.” Id.

The Policy contains exceptions; for example, it states that “the EPA has heightened expectations for public water systems. The EPA expects operators of such systems to continue normal operations and maintenance as well as required sampling to ensure the safety of our drinking water supplies.” Id. 6. The Policy declines to “relieve[] any entity from the responsibility to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants, as required by federal law,” and disclaims any “willingness to exercise enforcement discretion in the wake of such a release.” Id. at 7.

Permittees across the country submit certain reporting data to the EPA using the National Pollutant Discharge Elimination System (“NPDES”). On March 31, 2020, the EPA issued a memorandum advising permittees to use the code “Z” in the NPDES system if data was missing or incomplete because of COVID-19 and “the permittee believes the . . . Policy applies to their routine monitoring or sampling noncompliance.” David A. Hindin, EPA, Temporary Advisory for National Pollutant Discharge Elimination System (NPDES) Reporting in Response to COVID-19 Pandemic 2 (Mar.

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