

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**COLUMBIA RIVERKEEPER and
1000 FRIENDS OF OREGON,**

Plaintiffs,

v.

**COL. LARRY “DALE” CASWELL, JR., in
his official capacity as Commander and
District Engineer of the U.S. Army Corps of
Engineers’ Portland District; and the U.S.
ARMY CORPS OF ENGINEERS,**

Defendants.

Case No.: 3:24-cv-00868-AN

UNOPPOSED MOTION TO STAY LITIGATION

Introduction

This case challenges an April 2022 letter by the U.S. Army Corps of Engineers regarding whether NXTClean Fuels required permission from the Corps to make use of an existing road on a levee. The Corps is undertaking to reconsider its conclusion in that letter. Because judicial economy counsels against litigating a decision actively under reconsideration, the Court should stay this case pending any new Corps action. The Corps anticipates that its reconsideration process (assuming continued government funding) will be complete by mid-November. Defendants will, if this motion is granted, provide the Court a status report on October 31.

Background

On April 7, 2022, the U.S. Army Corps of Engineers (“Corps”) sent a letter to NXTClean Fuels (“NEXT”), informing NEXT of the Corps’ “determination” that a planned refinery “will not alter, occupy, or use a . . . federally authorized [flood control] project and therefore does not

require permission from the [Corps] under" Section 14 of the Rivers and Harbors Act (Section 408). Dkt. No. 1-1 (2022 letter). Plaintiffs' Complaint alleges that the 2022 letter violates Section 408 and the Administrative Procedure Act. Dkt. No. 1 ¶¶ 62-69. In its OPINION AND ORDER dated August 7, this Court rejected Defendants' motion to dismiss, partly on the basis that, "by determining that Section 408 does not apply to the Proposed Refinery, the Corps has stated that NEXT can use the Road as a haul road without needing the Corps' permission pursuant to Section 408." Dkt. No. 24 at 21.

The Corps has now determined that it will reassess the conclusions reported in the 2022 letter. *See* Decl. of Sally A. Bird-Gauvin in Supp. of Def.'s Mot. To Stay Litig., (Exhibit A) (Bird-Gauvin Decl.) ¶ 3. The Corps does not know whether its reconsideration process will lead to a different conclusion than that expressed in the 2022 letter, but the Corps wishes to reconsider the conclusion and the information considered in reaching that conclusion. *Id.* As part of its reconsideration process, the Corps will also assess whether to proceed independently with its Section 408 decision-making, to the extent the reassessment supports a conclusion that the proposal will not result in an alteration to a Corps' project, or to incorporate that process with the ongoing permitting proceedings under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. *Id.* *See also* Dkt. No. 24 at 16 (noting that the Corps is meant to coordinate any Section 408 review with the Section 404 permit process) (citing 33 U.S.C. § 408(b)(2)(A)).

Defendants therefore respectfully request that all further proceedings in this Court be stayed, including Defendants' answer to the Complaint and lodging of an administrative record, now due October 2, 2025. The undersigned is authorized to inform the Court that Plaintiffs do not oppose this motion.

Argument

Allowing the Corps to reconsider the 2022 letter, and a stay of litigation pending completion of that reconsideration, will best serve justice and the convenience of the Court and the parties. The Corps anticipates that its reconsideration process will (assuming the government remains funded) be complete by mid-November. Defendants will provide to the Court a status report on October 31. All of this will be completed well before the anticipated completion of the Section 404/NEPA process in late Spring, 2026.

1. A Stay is Appropriate

The Court has “broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). The “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 842 (9th Cir. 2023). “The decision to grant or deny a continuance is in the sound discretion of the judge and will not be overturned except on a showing of clear abuse.” *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (citations omitted). “When the question for the trial court is a scheduling decision, such as whether a continuance should be granted, the judgment range is exceedingly wide . . .”. *Streber v. Hunter*, 221 F.3d 701, 736 (5th Cir. 2000) (citations and internal quotation marks omitted).

The Ninth Circuit has “identified three non-exclusive factors courts must weigh when deciding whether to issue a docket management stay: (1) ‘the possible damage which may result from the granting of a stay’; (2) ‘the hardship or inequity which a party may suffer in being required to go forward’; and (3) ‘the orderly course of justice measured in terms of the

simplifying or complicating of issues, proof, and questions of law.”” *Ernest Bock*, 76 F.4th at 842 (quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)). *See also Trees v. Serv. Emps. Int'l Union Loc.* 503, 574 F. Supp. 3d 856, 862 (D. Or. 2021); *Confederated Tribes & Bands of Yakama Nation v. Airgas USA, LLC*, 435 F. Supp. 3d 1103, 1127–28 (D. Or. 2019). A stay pending completion of administrative proceedings is common. *See, e.g., Amalgamated Transit Union, Int'l v. U.S. Dep't of Lab.*, No. 2:20-CV-00953-KJM-DB, 2021 WL 2003104, at *2 (E.D. Cal. May 19, 2021).

All three *Lockyer* factors support a stay. First, no damage can result. Plaintiffs are concerned about physical damage to the levee, and environmental harms from the proposed refinery. Dkt. No. 24 at 6-7. Neither harm can occur before the 404/NEPA process is completed, and reconsideration of the 2022 letter will be finished before then. Bird-Gauvin Decl. ¶ 2.

Second, the absence of potential “damage” shows that there is no “hardship or inequity” to Plaintiffs. On the other hand, there is potential hardship to Defendants from going forward. At a minimum the Corps will have to devote resources to litigation that may prove moot.

Finally, the “orderly course of justice” also supports a stay. If the Corps decides to reverse its decision on Section 408, the Corps will be able, to some extent, to coordinate its Section 408 review with its Section 404/NEPA process, as the regulations require. And, if Plaintiffs still wish to challenge the project, a unified challenge will be possible. If, on the other hand, the Corps reconfirms its conclusion about the applicability of Section 408, the interests served by the primary jurisdiction doctrine will have been served and the Court may have a fuller record on which to evaluate Plaintiffs’ challenge.

2. Remand Jurisprudence Illustrates the Appropriateness of a Stay

The relief we are seeking (a stay pending agency reconsideration) is analogous to a remand where the Court retains jurisdiction. And where a federal agency requests that a case be remanded to the agency, “[c]ourts generally grant [the] agency’s request for voluntary remand unless the request is frivolous or made in bad faith.”” *Bent v. Garland*, 115 F.4th 934, 940 (9th Cir. 2024) (quoting *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 60 (9th Cir. 2022) (citing *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (*per curiam*))). Courts retain “broad discretion” in deciding whether to grant a voluntarily requested remand but generally do so. *In re Clean Water Act Rulemaking*, 60 F.4th 583, 593 (9th Cir. 2023) (citations omitted).

The typical situation where voluntary remand is granted is where ““the agency intends to take further action with respect to the original agency decision on review.”” *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 60 (9th Cir. 2022) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *Limnia, Inc. v. U.S. Dep’t of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017))). In this situation, remand (or, here, a simple stay) avoids wasted effort. *In re Clean Water Act Rulemaking*, 60 F.4th at 593 (“Voluntary remands conserve judicial resources by allowing agencies to correct their errors before courts reach merits determinations requiring them to do so” (citation omitted)). *See also Nat. Res. Def. Council*, 38 F.4th at 60 (“We . . . prefer[] to allow agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete” (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993))).

It is not necessary that the agency seeking remand (or, as here, a stay) confess error or prejudge the outcome of the reconsideration process it intends to conduct. *Limnia*, 857 F.3d at 387 (“That is not to say that an agency need confess error or impropriety in order to obtain a

voluntary remand. But the agency ordinarily does at least need to profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.”) *Accord, Nat. Res. Def. Council*, 38 F.4th at 60; *In re Clean Water Act Rulemaking*, 60 F.4th at 594; *Duwamish Tribe v. Haaland*, 764 F. Supp. 3d 1068, 1075 (W.D. Wash. 2025). That standard is here met. Bird-Gauvin Decl. ¶ 3.

As in cases where a defendant seeks a stay, remand motions can be denied where they would ‘unduly prejudice the non-moving party.’” *Duwamish Tribe*, 764 F. Supp. 3d at 1077 (quoting *Rahman v. United States*, 149 Fed. Cl. 685, 689 (2020) (quoting *Util. Solid Waste Activities Grp.*, 901 F.3d at 431)). A stay here will cause Plaintiffs no prejudice. Reconsideration of the 2022 letter will, if it leads to a different decision, accomplish Plaintiffs’ goals, and the road usage that Plaintiffs are worried about will not happen until construction begins. Dkt. No. 1 ¶ 2 (road usage to occur “[d]uring the construction of [NEXT’s] refinery”). Because NEXT will need a Section 404 permit (among other things) before undertaking construction, and because the permitting process will not be completed before late Spring, 2026 (Bird-Gauvin Decl. ¶ 2), the present motion is timely and threatens no prejudice.

A stay is appropriate here. The Corps intends to undertake a good faith reconsideration of its prior conclusion, including a reassessment of the available factual information. *Id.* ¶ 3. Our request threatens no prejudice. Because the Corps’ Section 404 review is ongoing, it might prove particularly inefficient to pursue Plaintiffs’ Section 408 issues here. As the Court has noted, if the Corps reaches a different conclusion regarding the applicability of Section 408, its subsequent analysis of NEXT’s Section 408 compliance must be coordinated with its Section 404 analysis and, “to the maximum extent practicable,” carried out concurrently. 33 U.S.C. § 408(b)(2)(A). And, because the Complaint in this case is wholly focused upon the 2022 letter, a

decision by the Corps reversing the decision reported in that letter will moot this litigation entirely.

Conclusion

For the foregoing reasons Defendants respectfully request that the Court stay this matter pending reconsideration by the Corps.

Dated this 29th day of September 2025.

Respectfully submitted,

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