

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 07-2593 (MJD/SRN)

SIERRA CLUB NORTH STAR CHAPTER,)
)
) Plaintiff,)
)
) v.) **MEMORANDUM OF LAW**
) **IN SUPPORT OF**
) **MOTION TO DISMISS**
)
)
) MARY PETERS, Secretary of)
) Transportation, et al.,)
)
) Defendants.)

INTRODUCTION

Sierra Club Northstar Chapter ("Sierra Club") challenges actions by the Federal Highway Administration ("FHWA") and the National Park Service ("NPS") related to a proposed bridge project that would cross the Lower Saint Croix River near Oak Park Heights, Minnesota ("Saint Croix River Crossing Project"). Sierra Club seeks judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706, and asserts violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332; Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303; the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1284; the Organic Act, 16 U.S.C. §§ 1-18f-3; and the General Authorities Act, 16 U.S.C. §§ 1a-1, *et seq.* Defendants move for dismissal of Sierra Club's complaint for lack of subject matter

jurisdiction, because the complaint was not filed within the statutory 180 day limitations period and (2) as to the NPS, the complaint does not challenge a final agency action as required by the APA.

BACKGROUND

A. STATUTORY AND REGULATORY FRAMEWORK.

1. National Environmental Policy Act.

The purpose of the NEPA is to focus the attention of federal agencies and the public on a proposed action so that the environmental consequences of the action can be studied before a decision is made. See 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). NEPA is a procedural statute that "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA provides that federal agencies should prepare a detailed environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment" 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality's regulations implementing NEPA provide that an agency's EIS should "[r]igorously explore and objectively evaluate" all

reasonable alternatives, but need only "briefly discuss" the reasons why other alternatives were eliminated from more detailed study. 40 C.F.R. § 1502.14. In addition, an EIS should identify the direct, indirect, and cumulative impacts of each alternative that is studied and consider mitigation measures to reduce any impacts to the environment. 40 C.F.R. §§ 1502.14, 1502.16, 1508.7.

2. Section 4(f) of the Department of Transportation Act of 1966.

Section 4(f) prohibits the Secretary of Transportation from approving a transportation project or program "requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land from a historic site of national, State, or local significance," unless "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, historic site resulting from the use." 49 U.S.C. § 303(c). FHWA regulations require that, "[w]hen adequate support exists for a section 4(f) determination," the discussion in the final Environmental Impact Statement ("EIS"), Finding of No Significant Impact ("FONSI"), or

"separate section 4(f) evaluation shall specifically address: (1) The reasons why the alternatives to avoid a section 4(f) property are not feasible and prudent; and (2) All measures which will be taken to minimize harm to the section 4(f) property." 23 C.F.R. § 771.135(j). Additionally, FHWA regulations provide that a final EIS or FONSI should document compliance with applicable requirements including Section 4(f). 23 C.F.R. § 771.133.

3. Wild and Scenic Rivers Act.

In 1968, Congress passed the Wild and Scenic Rivers Act (WSRA) to preserve selected rivers of the United States in their free-flowing condition for the benefit and enjoyment of present and future generations. 16 U.S.C. § 1271. To qualify for inclusion in the National Wild and Scenic Rivers System (System), a river must possess an "outstandingly remarkable" value in at least one of the following categories: scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar attributes. *Id.* The WSRA identifies the rivers in the System, sets forth a procedure by which additional rivers may be added, and provides guidance on how the designated rivers should be managed. 16 U.S.C. §§ 1274-1284.

The location of a wild and scenic river segment determines whether it is administered by the Secretary of the Interior, including the NPS, or the Secretary of Agriculture. 16 U.S.C. § 1281(c), (d). The administering agency must manage each designated river segment "in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values." 16 U.S.C. § 1281(a). Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area. *Id.* Because designated rivers are typically administered by the Secretary of Agriculture through the United States Forest Service, implementation of WSRAs duties and requirements is governed by Department of Agriculture regulations at 36 C.F.R. § 297.1, *et seq.*

The Saint Croix River (the "St. Croix") is one of the rivers included in the System. 16 U.S.C. §§ 1274(a)(6), (8). The St. Croix, 164 miles long, extends from Solon Springs in northwest Wisconsin to its confluence with the Mississippi River in Prescott, Wisconsin, and serves as the border between

Minnesota and Wisconsin for a significant portion of its length. Complaint at ¶ 51. Congress designated the upper segment of the St. Croix between the dam near Taylors Falls, Minnesota, and the dam near Gordon, Wisconsin, as a Wild and Scenic River in 1968. 16 U.S.C. § 1274(a)(6). The lower segment of the St. Croix between the dam near Taylors Falls and its confluence with the Mississippi River ("Lower St. Croix") was added in stages subsequently. See Lower St. Croix River Act of 1972, 16 U.S.C. § 1274(a)(9).

Section 7 of the WSRA provides for the protection of the free-flowing, scenic, and natural values of designated rivers by prohibiting federal agencies from assisting in the construction of water resources projects that would have a "direct and adverse effect on the values" for which any such river was included in the System. 16 U.S.C. § 1278(a). Section 7 directs the appropriate Secretary, here the Secretary of the Interior, to determine whether a proposed water resources project will "have a direct and adverse effect on the values for which such river was established." *Id.*

A water resources project means "any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act (41 Stat. 1063) as amended,

or other construction of developments which would affect the free-flowing characteristics of a Wild and Scenic River or Study River." 36 C.F.R. § 297.3; see also, *Sierra Club North Star Chapter v. Pena et al.*, 1 F. Supp.2d 971, 979-80 (D. Minn. 1998) ("Pena"). In *Pena*, this Court upheld the NPS's determination that an earlier bridge construction proposal in the Lower St. Croix River fell within this definition of "water resources project." *Pena*, 1 F. Supp.2d at 979-80.

Federal assistance means "any assistance by an authorizing agency," including but not limited to, a "license, permit, or other authorization granted by the Corps of Engineers, Department of the Army, pursuant to the Rivers and Harbors Act of 1899 (33 U.S.C. § 401, et seq.), and Section 404 of the Clean Water Act (33 U.S.C. § 1344)."¹ 36 C.F.R. § 297.3; *Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499, 1505 (9th Cir. 1995). The issuance of dredge and fill permits by the Corps of Engineers (or "Corps") traditionally

¹ The Corps of Engineers acts as the primary authority under the Clean Water Act through a permit process. The Clean Water Act prohibits the discharge of any pollutant, including dredge and fill materials, into any waters of the United States without a permit. 33 U.S.C. § 1344. Section 10 of the Rivers and Harbors Act also authorizes the Corps to regulate construction of structures in navigable waters through the issuance of permits. 33 U.S.C. § 403.

has triggered WSRA Section 7 determinations when the permits pertain to water resources projects on designated rivers.

4. The Organic Act and General Authorities Act.

The National Park Service Organic Act of 1916, 16. U.S.C. §§ 1 - 18f-3, established the National Park Service (NPS) and created its authority over the maintenance of national parks. It grants broad discretion to the NPS to balance the often competing policy goals of conservation, access, and safety. The Organic Act provides that the Park Service is to "regulate the use" of national parks by means that conform to their "fundamental purpose," namely:

to conserve the scenery and natural historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. §1; see NPS Management Policies § 1.4 (2006).

A 1970 amendment to the Organic Act is known as the General Authorities Act, 16 U.S.C. §§ 1a-1, *et seq.*, as amended. The General Authorities Act confirmed the mandate of the Organic Act: "The authorization of activities shall be construed, and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not

be exercised in derogation of the values and purposes for which these various areas have been established," except as otherwise provided by Congress. 16 U.S.C. §§ 1a-1. The NPS has construed the "derogation" standard in the General Authorities Act as a reiteration of the non-impairment standard set forth in the Organic Act--that is, a duty to prohibit the impairment of the integrity of park resources and values. See NPS Management Policies § 1.4.2 (2006).

B. FACTUAL BACKGROUND

Ten bridges traverse the St. Croix to link the transportation systems of Wisconsin and Minnesota. One of the bridges across the Lower St. Croix is a two-lane lift bridge (the "Stillwater Bridge") between Stillwater, Minnesota, and Houlton, Wisconsin. The Stillwater Bridge, which is listed on the National Register of Historic Places, connects Minnesota Trunk Highway 36 (T.H. 36) to Wisconsin State Trunk Highway 64 (S.T.H. 64). In 1967, the Minnesota and Wisconsin Departments of Transportation ("MnDOT" and "WDOT") began studying alternatives for replacement of the Stillwater Bridge due to concerns about traffic congestion and safety. Other planning and funding priorities prevailed, however, until 1985 when MnDOT and WDOT agreed to a cooperative agreement for

preparation of various studies on replacement of the Stillwater Bridge. From this process, a Final Environmental Impact Statement required by the NEPA and a Section 4(f) Evaluation required by the Department of Transportation Act were published in April 1995 (the "1995 FEIS").

The 1995 FEIS identified a preferred alternative that involved upgrading T.H. 36 for a new bridge approach; construction of a new four-lane bridge over the Lower St. Croix south of Stillwater between Oak Park Heights, Minnesota, and Houlton, Wisconsin; and construction of a new bridge approach in Wisconsin (the "1995 Project"). The 1995 Project would have required construction of several piers in the bed of the Lower St. Croix and adjacent wetlands on the Minnesota side. Construction activities would have required extensive dredge and fill in the waterway.

Prior to any construction in the river, the Clean Water Act requires the transportation agencies to obtain a "dredge and fill" permit from the Corps of Engineers. See 33 U.S.C. § 1344. On December 27, 1996, the NPS issued a WSRA Section 7 determination concluding the 1995 Project would have a direct and adverse effect on the values for which the Lower St. Croix was designated as part of the System. This

determination prohibited other involved federal agencies from issuing permits, approvals, or authorizations for the 1995 Project. 16 U.S.C. § 1278(a).

This Court, on April 13, 1998, upheld that NPS determination. *Pena*, 1 F. Supp.2d at 983. The court held the NPS's interpretation of the term "water resources project" was a "reasonable and permissible" construction of that term pursuant to Congress's delegation of the authority to determine which projects fall within the meaning of the term and, thus, require preparation of a Section 7 evaluation. *Pena*, 1 F. Supp.2d at 979. The Court further held the 1996 Section 7 evaluation was reasonably supported by the evidence before the NPS at that time and therefore was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 981-983.

After the decision in *Pena*, FHWA, along with the other joint lead agencies for NEPA purposes,² continued to examine alternatives for alleviating the continuing traffic and safety concerns related to the Stillwater bridge. In August 2004,

² The joint lead agencies for NEPA purposes are FHWA, the Minnesota Department of Transportation, and the Wisconsin Department of Transportation. A "lead agency" is "the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement." 40 C.F.R. § 1508.16.

FHWA issued a supplemental draft EIS ("SDEIS") on the Saint Croix River Crossing Project.

Meanwhile, on March 5, 1998, the Midwest Region of the NPS issued a memorandum setting forth the "Policy for integrating National Park Service Section 7 evaluations with the National Environmental Policy Act compliance process of the project sponsor." Declaration of Kate Hanson, Ex. A. The NPS prepared this policy directive to facilitate coordination among project sponsors earlier in the project process concerning the issues likely to be raised during the Section 7 evaluation process. This policy allows for preparation of a draft Section 7 evaluation to be included, if possible, in the Draft EIS prepared by the project sponsor and/or the Final EIS: "To the extent practicable, impacts on Wild and Scenic River values will be considered in the context of other review procedures provided by law." 36 C.F.R. § 297.6. Preparation of a draft Section 7 evaluation at any stage, however, requires the provision of adequate information by the project sponsor.

In October 2005, the NPS prepared a Draft Section 7(a) Evaluation, Wild and Scenic Rivers Act, St. Croix River Crossing Project which the FWHA included as Appendix F of the

Final Supplemental EIS for the proposed bridge project ("Draft Section 7(a) Evaluation"). Hanson Declaration, Ex. B. The document provides an evaluation of the impact of the preferred alternative, Alternative B-1, for the St. Croix River Crossing Project on the values for which the Lower St. Croix National Scenic Riverway was established by Congress. Draft Section 7(a) Evaluation at 1.

The preferred crossing would be located between T.H. 36 in the cities of Stillwater and Oak Park Heights, Minnesota, and S.T.H. 64 in the Town of St. Joseph, Wisconsin, and would create a crossing in a new corridor. *Id.* at 1, 5. The preferred crossing was developed in consultation with a Stakeholders Group.³ *Id.* at 6. The Stakeholders Group

³ The Stakeholders Group includes the project sponsors (MDOT, WDOT, and the Federal Highway Administration (FHWA)), NPS, Corps of Engineers, U.S. Coast Guard, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Advisory Council on Historic Preservation, National Trust for Historic Preservation, Minnesota and Wisconsin State Historic Preservation Offices, Minnesota Department of Natural Resources, Wisconsin Department of Natural Resources, City of Stillwater, City of Oak Park Heights, Town of St. Joseph, Preservation Alliance of Minnesota, Stillwater Heritage Preservation Commission, St. Croix River Association, Friends of the St. Croix, Stillwater Area Chamber of Commerce, Sierra Club, St. Croix Alliance for an Interstate Bridge, St. Croix County Transportation Committee, Stillwater Lift Bridge Association, Western Wisconsin Realtors Association, New St. Croix Bridge Coalition, and the Minnesota Center for Environmental Advocacy.

prepared the mitigation package for the St. Croix River Crossing Project. *Id.* at 7.

The preferred crossing of the St. Croix River Crossing Project would require construction of piers in the river bed and construction activities would require dredge and fill in the waterway, necessitating a permit from the Corps under Section 404 of the Clean Water Act. *Id.* at 18. The preferred crossing is a water resources project subject to Section 7(a) of the WSRA. *See Sierra Club*, 1 F. Supp.2d at 980-81.

The purpose of the St. Croix River Crossing Project is to improve T.H. 36 and S.T.H. 64 between T.H. 5 in Stillwater, Minnesota, and 150th Avenue in the Town of St. Joseph, Wisconsin, to provide a safe, reliable, and efficient transportation corridor by reducing congestion, improving roadway safety, and providing an adequate level of service for forecasted 2030 traffic volumes. Draft Section 7(a) Evaluation at 5. The proposed bridge project will require Federal assistance in the form of funding from FHWA and permits from the Corps of Engineers and U.S. Coast Guard. *Id.* at 1. Several items included in the mitigation package for the preferred crossing are also water resources projects. *Id.*

The Draft Section 7(a) evaluation concludes with a draft

Section 7(a) determination. *Id.* at 49-52. The document clearly states the preliminary, tentative, and contingent nature of this determination:

Pursuant to Section 7(a) of the Act, the National Park Service has determined that the preferred crossing, when taken along with its mitigation package would not have a direct and adverse effect on the scenic and recreational values for which the Riverway was included in the System **provided** that the measures as identified [in] Section VII and IIX of this document are incorporated into the project to insure that the mitigation package remains intact in perpetuity. Therefore, in compliance with the Act, the NPS would not object to Federal Highway Administration funding of this project.

This Draft Section 7(a) Evaluation will be reexamined in light of the outcome of the Visual Quality Planning Process. The NPS will provide comments during the review period for the public notice that application has been made for Section 10/404 permits for the preferred crossing from the U.S. Army Corps of Engineers. If the scope of the project or mitigation package should change substantially, the NPS will need to reevaluate the project under Section 7(a). If there is no substantial change, the draft determination will stand. In addition, some of the mitigation items are not yet assured. If any of the identified Riverway mitigation items cannot be implemented, the transportation agencies should consult with the managing agencies to identify suitable replacement items.

Draft Section 7(a) Evaluation at 51-52 (bold emphasis in original; italics emphasis added).

In June 2006, FHWA issued the final supplemental EIS ("FSEIS") on the Saint Croix River Crossing Project. On

November 13, 2006, FHWA issued a Record of Decision ("ROD") on the Saint Croix River Crossing Project. On December 5, 2006, the FHWA published a notice in the Federal Register that announced that a number of federal agency actions related to the Saint Croix River Crossing Project were final.

_____Sierra Club filed its complaint on Tuesday, June 5, 2007.

ARGUMENT

A. STANDARD OF REVIEW.

This Court should dismiss an action whenever it appears it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), 12(h). Lack of subject matter jurisdiction cannot be waived and it may be raised at any time by a party to an action, or by the court *sua sponte*. *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993) (citing Fed. R. Civ. P. 12(h)(3)). A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). A district court has the authority to consider matters outside the pleadings when subject matter jurisdiction is challenged. *McNutt*, 298 U.S. at 184; *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir.

1993); *Osborn v. United States*, 918 F.2d at 728 n.4. When considering a motion to dismiss for lack of subject matter jurisdiction, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case...no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Osborn*, 918 F.2d at 730, quoting *Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

Defendants' motion raises the issue of sovereign immunity. Following established principles of sovereign immunity, the Supreme Court has held that "the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). See also, *United States v. Dalm*, 494 U.S. 596, 608 (1990) (the United States is immune from suit unless it consents and the terms of its consent circumscribe the court's jurisdiction). Congress must waive sovereign immunity explicitly. *United States v. Testan*, 424 U.S. 392, 399 (1976). This waiver must be "unequivocally expressed in statutory text" and will not be implied. *Lane v.*

Pena, 518 U.S. 187, 192 (1996). Moreover, "a waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Id. The waiver of sovereign immunity must not be enlarged beyond the language of the waiver itself. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983).

Here, the court lacks subject matter jurisdiction because the Sierra Club did not file its complaint within the 180 day statutory limitations period and with respect to the NPS the Sierra Club failed to challenge a final agency action.

B. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE SIERRA CLUB DID NOT FILE ITS COMPLAINT TIMELY.

Congress specifically provided that an action for judicial review of a decision authorizing a road construction project such as this one must be brought within 180 days of the publication of the notice of that final agency action. 23 U.S.C. § 139(1)(1). Sierra Club did not file its complaint within 180 days of the notice and, therefore, the time bar applies. This statutory limitations period is mandatory and jurisdictional and thus is not subject to any equitable modification such as waiver, estoppel, or equitable tolling. Even if it were subject to such equitable modification, none

applies. Therefore, the Court should dismiss this action for lack of subject matter jurisdiction.

1. 23 U.S.C. § 139(1)(1).

Sierra Club's complaint is untimely and barred by 23 U.S.C. § 139(1)(1), which provides:

Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Nothing in this subsection shall create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

23 U.S.C. § 139(1)(1). Under this statute, a plaintiff must file suit within 180 days of the publication of the notice. Here, the FWHA published the notice on December 5, 2006. This notice commenced the 180-day statute of limitations for challenging the actions of the FHWA. Complaint at ¶ 49. June 3, 2007 was the 180th day after the December 5, 2006 notice. However, since June 3, 2007 was a Sunday, the complaint had to be filed on or before Monday, June 4, 2007. See Fed. R. Civ. P. 6(a). Sierra Club filed its complaint on June 5, 2007--one

day late. Therefore, the statute mandates the Court dismiss the action. *Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997).

2. The limitations period is jurisdictional.

The Court should reject any claim for equitable relief from this statutory 180 deadline, because it mandatory and jurisdictional. The 180 day deadline is a statutorily prescribed condition of the Government's waiver of sovereign immunity. As such, the scope of the waiver must be construed strictly in favor of the Government and not enlarged beyond what the language of the waiver requires. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94 (1990).

The Supreme Court recently reaffirmed the rule that limitations periods contained in *statutes* implicate the subject matter jurisdiction of the court. *Bowles v. Russell*, ___ U.S. ___, 127 S. Ct. 2360, 2363-2366 (2007). In *Bowles*, the petitioner failed to file a timely notice of appeal from the district court's denial of habeas relief and filed a motion to reopen the filing period. The district court granted Bowles's motion and gave him 17 days to file his notice of appeal. Bowles filed within the 17 days allowed by

the district court, but after the 14-day period allowed by 28 U.S.C. §2107(c) and Federal Rule of Appellate Procedure 4(a)(6). The Sixth Circuit held the notice of appeal was untimely and dismissed the action for lack of jurisdiction. The Supreme Court affirmed and held that Bowles's failure to file his notice of appeal in accordance with the statute deprived the court of appeals of jurisdiction and, because Bowles's error was one of jurisdictional magnitude, he could not rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. *Bowles*, 127 S. Ct. at 2366. The Court reemphasized "the jurisdictional significance of the fact" the time limitation was set forth in a statute and stated "[j]urisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Id.* at 2365. The Court also specifically overruled the "unique circumstances" doctrine of *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964).

Applying *Bowles* to this case, the 180 day limitations period of 23 U.S.C. § 139(1)(1) is jurisdictional. It is found in a statute passed by Congress and clearly provides a

time bar for actions brought outside the 180 day period. Because the time requirement is jurisdictional, it is not subject to equitable modification.

Irwin is not to the contrary. In *Irwin*, the Court held "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 498 U.S. at 95-96. The predominant basis for its decision was the fact the Court previously had held equitable tolling applicable in Title VII suits against private employers. *Id.* at 95 and n. 2, citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349, n. 3 (1983). Sierra Club brought this action against the federal agencies under the APA for judicial review. No such cause of action exists among private litigants. The rationale underpinning *Irwin* does not apply in this case and there is no indication in Section 139(1)(1) that Congress intended otherwise.

Moreover, the continued viability of *Irwin* is uncertain. Seven years after *Irwin*, the Supreme Court refused to apply equitable tolling in connection with Section 6511 of the Internal Revenue Code of 1986 relating to tax refund claims.

United States v. Brockamp, 519 U.S. 347 (1997). In *Brockamp*, the Court assumed for argument sake only the existence of a private analog to a tax refund suit against the IRS (i.e., restitution) and asked "*Irwin's* negatively phrased question" of whether there was good reason to believe Congress did not want the equitable tolling to apply. *Id.* at 350. The Court then parsed the statute and concluded: "Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute it wrote." *Id.* Similarly, here, there is no private analog among private parties to a suit for judicial review of agency action and there is no indication in section 139(1)(1) that Congress intended Courts may read equitable exceptions into section 139(1)(1).

Federal courts, in other contexts, have ruled that, when a statute sets forth time limitations for asserting claims against the federal government, those time limits are jurisdictional. For example, even after *Irwin*, the Eighth Circuit held the general statute of limitations for suits

against the United States was jurisdictional. In the context of 28 U.S.C. § 2401(a),⁴ the court stated that “[f]iling within the applicable statute of limitations is treated as a condition precedent to the government's waiver of sovereign immunity, and cases in which the government has not waived its immunity are outside the subject-matter jurisdiction of the district courts.” *Loudner*, 108 F.3d at 900. The court in *Loudner* explained:

[t]he doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The applicable statute of limitations is a term of consent. The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action.

Loudner, 108 F.3d at 900 n.1, quoting *Sisseton-Wahpeton Sioux Tribe v. U.S.*, 895 F.2d 588, 592 (9th Cir. 1990). See also *Center for Biological Diversity v. Hamilton*, 385 F.Supp.2d

⁴ 28 U.S.C. § 2401(a) provides that “[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.” In the absence of a more specific statute, such as 23 U.S.C. § 139(1)(1), 28 U.S.C. § 2401(a) applies to claims filed under the APA asserting violations of NEPA.

1330, 1337 (N.D. Ga. 2005), *aff'd* 453 F.3d 1331, 1334 (11th Cir. 2006); *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997).

For another example, the Court of Appeals for the Eighth Circuit has resolved, in this circuit, the issue of whether the statute of limitations contained in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b),⁵ is a jurisdictional prerequisite or an affirmative defense. *T.L. ex rel. Ingram v. U.S.*, 443 F.3d 956, 960 (8th Cir. 2006). The Eighth Circuit had long held that it was jurisdictional, *see, e.g., Osborn*, 918 F.2d at 728, but after *Irwin*, there had been conflicting circuit precedent on this issue. Compare *Schmidt v. U.S.*, 933 F.2d 639 (8th Cir. 1991) (treating 28 U.S.C. § 2401(b) as an affirmative defense) with *McCoy v. United States*, 264 F.3d 792, 794 (8th Cir. 2001) (treating 28 U.S.C. § 2401(b) as a jurisdictional prerequisite). In *Ingram*, the court held that 28 U.S.C. § 2401(b) is jurisdictional:

⁵ 28 U.S.C. 2401(b) provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

"*Schmidt* was apparently premised on an understanding that *Irwin* announced an equitable power of the federal courts to toll a statute of limitations in all suits against the government. The existence of such an equitable power, the court [in *Schmidt*] thought, was inconsistent with holding that compliance with the statute of limitations in the [Federal Tort Claims Act] is a jurisdictional requirement." *Id.* at 961. The court in *Ingram*, however, held the Supreme Court's decision in *Brockamp* "calls for a return to our court's original view that the statute of limitations defines a court's jurisdiction." *Id.* at 961. In *Ingram*, the court of appeals read *Brockamp* as instructing that "the availability of equitable tolling depends on congressional intent, and is not necessarily available as a matter of general equitable power in all actions against the government." *Id.* The court in *Ingram* explained that "[t]here is no inconsistency between viewing compliance with the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling" and held that "considerations of equitable tolling simply make up part of the court's determination whether an action falls within the scope of the waiver of sovereign immunity granted by Congress, and thus within the jurisdiction

of the federal courts.” *Id.* at 961 (citations omitted). The Eighth Circuit held a plaintiff’s compliance with the limitations period is a prerequisite to the court’s jurisdiction over the suit against the United States under the FTCA and went on to resolve factual disputes under the Rule 12(b)(1) standard for motions to dismiss for lack of subject matter jurisdiction. *Id.* at 961-65.

In sum, after *Bowles*, *Brockamp*, *Loudner*, and *Ingram*, statutes of limitations in actions against the United States are part of the waiver of sovereign immunity and are of jurisdictional dimension. Courts should apply the time limits in those statutes and should not read or imply into those statutes any equitable modifications unless Congress has clearly manifested an intention that the courts are free to do so.

Here, Congress specifically limited the time within which a party may seek judicial review of final highway-related approvals, permits, and licenses. Congress provided in 23 U.S.C. § 139(1)(1) judicial review “shall be barred” unless review is sought within 180 days after a notice is published in the Federal Register announcing that a federal permit, license, or approval is final. Congress did not suggest that

this 180 day limitations period would be amenable to any equitable modification. On December 5, 2006, the FHWA published a notice in the Federal Register that announced the FWHA Section 4(f) evaluation decision in this case was final. This notice commenced the 180-day statute of limitations for challenging the actions of the FHWA. See Complaint at ¶ 49. The 180th day after December 5, 2006, was June 3, 2007. Since June 3, 2007 was a Sunday, Sierra Club's complaint was due on or before Monday, June 4, 2007. Fed. R. Civ. P. 6(a). Sierra Club filed its complaint on June 5, 2007. Because the complaint was filed late, this Court should dismiss the action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1) and 12(h).

The fact the notice stated a deadline of June 6, 2007 is not sufficient to invoke this Court's jurisdiction. As the Supreme Court stated in *Bowles*, because Sierra Club's error in failing to file its complaint timely was "one of jurisdictional magnitude, [Sierra Club] cannot rely on forfeiture or waiver to excuse [their] lack of compliance with the statute's time limitations." *Bowles*, 127 S.Ct. at 2366.

Sierra Club's failure to file its complaint timely bars this lawsuit. That error was jurisdictional and this Court is

not at liberty to apply any equitable modification to relieve Sierra Club of that error. Even if equitable doctrines were available, no such equitable doctrine is of any avail to Sierra Club.

3. No equitable modification applies.

Sierra Club's failure to file within the applicable limitations period bars this lawsuit unless it can establish the limitations are subject to some equitable modification such as waiver, estoppel, or tolling. See *Peanick v. Morris*, 96 F.3d 316, 321 (8th Cir. 1996); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1327 (8th Cir. 1995). However, no equitable modification of the limitations period would apply in this case.

a. *Waiver does not apply.* The Defendants raised the statute of limitations in its answer.

b. *Equitable tolling does not apply.* Application of equitable tolling is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of her claim. *Dring*, 58 F.3d at 1328. The rationale underlying equitable tolling has its roots in the discovery rule. *Dring*, 58 F.3d at 1328. An objective test is to be applied. *Id.* at 1328-29. The doctrine does not

require any misconduct on the part of the defendant. *Id.* Finally, equitable tolling is to be applied only in *exceptional* circumstances. *Id.* at 1330.

Here, Sierra Club cannot offer any evidence that would suggest equitable tolling might apply. Sierra Club was well aware of the existence of any claim and of the applicable statute of limitations, as it so admitted in its complaint. Complaint ¶ 49. Sierra Club's failure to file timely was the result of lack of due diligence on its part.

The fact that the December 5, 2006 notice contained the incorrect date (June 6 as opposed to June 4, 2006) does not bring equitable tolling into play. *Bowles* dealt with a similar fact pattern except there the error was made by a federal judge, not an agency; nevertheless, the Court rejected the argument that equitable principles relieved the plaintiff from following the statutory filing period. *Bowles*, 127 S. Ct. at 2365-2366. Like the plaintiff in *Bowles*, the Sierra Club here knew when the notice was published, knew of the 180 day limitations period, knew how to count, and knew Fed. R. Civ. P. 6, but nevertheless filed the complaint one day late. Sierra Club should not be allowed to claim relief from its mistake by pointing to the agency's mistake in the notice.

The untimely filing was caused solely by Sierra Club's own lack of diligence in counting 180 days from the notice and filing within that deadline.

c. *Equitable estoppel does not apply.* Equitable estoppel "comes into play when a defendant takes active steps to prevent a plaintiff from suing on time." *Dring*, 58 F.3d at 1329, quoting *Chakonas v. City of Chicago*, 42 F.3d 1132, 1136 (7th Cir. 1994). Equitable estoppel applies only when the plaintiff knew of the existence of his claim (i.e., his injury), but delayed filing due to defendant's affirmative misconduct. To establish equitable estoppel a plaintiff must establish the government committed affirmative misconduct as well as the traditional elements of equitable (false representation, intent, plaintiff's lack of knowledge, and detrimental reliance). *Rutten v. United States*, 299 F.3d 993, 995-996 (8th Cir. 2002). Here, equitable estoppel does not apply, because Sierra Club has neither alleged nor can it claim the Defendants did anything affirmatively that caused Sierra Club to delay filing the complaint. As in *Bowles*, placement of an inaccurate date in the notice simply is not enough. Nor are the other elements of equitable estoppel present. See *Bensman v. United States Forest Service*, 408 F.3d

945, 963-965 (7th Cir. 2005) (where Forest Service in its notice identified the correct 45 day limitation within which to appeal but provided the incorrect actual due date, appeal was properly dismissed and neither equitable tolling nor equitable estoppel applied).

In sum, Sierra Club filed its complaint outside the specific time period Congress prescribed. No equitable modification is available. Even were any equitable modification theoretically available, the facts would not support its application. This case involves garden variety neglect on the part of the Sierra Club.

C. SIERRA CLUB'S CLAIMS AGAINST THE NATIONAL PARK SERVICE SHOULD BE DISMISSED FOR WANT OF FINAL AGENCY ACTION.

1. Sierra Club has not challenged any final agency action of the NPS.

Sierra Club's claims against the NPS should be dismissed because it has not challenged any final NPS agency action. Only "final" agency action is subject to review under the APA. 5 U.S.C. § 704; see also, *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (when review is sought under the general review provisions of the APA, the "agency action" in question must be "final agency action"). The requirement of a final agency action is jurisdictional; if the agency action

is not final, the court "cannot reach the merits of the dispute." *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (D.C. Cir. 1996).

In determining when agency action is final, the "core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Final agency action exists if: (1) the action marks the consummation of the agency's decision-making process, meaning it is not "merely tentative or interlocutory in nature;" or (2) the action determines rights or obligations and has legal consequences. *Bennett v. Spear*, 520 U.S. 154, 177 (1997). The draft Section 7(a) evaluation challenged by the Sierra Club satisfies neither criterion for "final" agency action.

The Draft Section 7(a) Evaluation itself clearly states it is not final. Rather, it states that the draft evaluation will be "reexamined in light of the outcome of the Visual Quality Planning Process." Draft Section 7(a) Evaluation, at 51. The NPS explicitly provided that, "[i]f the scope of the project or mitigation package should change substantially, the NPS will need to reevaluate the project under Section 7(a)."

Id. at 51-52. Agency action lacks finality for purposes of judicial review while it remains "tentative, provisional, or contingent, subject to recall, revision, or reconsideration by the issuing agency." *National Treasury Employees Union v. FLRA*, 712 F.2d 669, 671 (D.C. Cir. 1983); see also, *Franklin*, 505 U.S. at 797 ("agency position is not final if it is only 'the ruling of a subordinate official,' or 'tentative.'").

Furthermore, the Draft Section 7(a) evaluation did not determine rights or obligations and has no legal consequences until it is finalized. A final Section 7 determination will be provided in the NPS's comments to the Corps on the project proposers' Section 404 permit application which has not been submitted yet. Only at that point will the NPS's determination regarding the project's "direct and adverse effect" on the river's wild and scenic values affect, legally and practically, whether or not the Corps may provide a Section 404 permit, allowing the project to move forward. 16 U.S.C. § 1278(a); 36 C.F.R. §§ 297.4(a), 297.5. As in *DRG Funding Corp.*, "[u]ntil that happens, any intermediate decision [of the NPS] is necessarily 'tentative, provisional, or contingent,' and therefore nonfinal." *DRG Funding Corp.*, 76 F.3d at 1215 (internal citation omitted). Because the

NPS's draft 7(a) evaluation was not a final agency action, the Court should dismiss the claims against the NPS.

2. Sierra Club's claims against the NPS are not ripe.

Because the NPS has not taken final agency action, the action against the NPS is not ripe for judicial review. In the absence of a final agency action, a claim in federal court challenging agency action is not ripe for review. *Lane v. United States Department of Agriculture*, 187 F.3d 793, 795 (8th cir. 1999). Where a case is not ripe, the Court should dismiss it without prejudice for lack of subject matter jurisdiction. See *Ohio Forestry Association*, 523 U.S. 726, 732 (1998) (case not justiciable where not ripe for review); *Public Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005). The Supreme Court has explained that the "basic rationale" of the ripeness doctrine applied to review of administrative action:

is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

The Supreme Court has set forth three factors for evaluating

the fitness of a case for judicial review: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

First, delayed review will not cause hardship to the Sierra Club, as the NPS's Section 7 determination will be subject to judicial review once the final determination has been made in the context of the evaluation by the Corps of Engineers of an application for the requisite Section 404 permit for the project. "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. In *Eastern Conn. Citizens Action Group v. Dole*, 638 F. Supp. 1297, 1299 (D. Conn. 1986), *aff'd*, 804 F.2d 804 (2nd Cir. 1986), the court held that plaintiffs' challenge to a proposed highway construction project was not ripe where, as here, although the Department of Transportation had approved a final EIS, the project proponent had yet to obtain permits from various state and federal agencies

required prior to beginning construction, including a Section 404 permit from Corps of Engineers. The court pointed out that the plaintiffs expected to take part in the Corps permit review process, including a public hearing. *Id.*; see, 33 C.F.R. § 320.4. Similarly, Sierra Club here will have an opportunity to "present their environmental concerns to [the permitting] agencies, which, unlike a reviewing court, can 'interject themselves within the area of discretion of the executive as to the choice of the action to be taken.'" *Eastern Conn. Citizens*, 638 F. Supp. at 1300. No hardship will befall the Sierra Club were the claims against the NPS dismissed now.

Second, judicial intervention at this stage would interfere with the NPS's on-going process because the "possibility that further consideration will actually occur before the [Section 7 determination] is implemented is not theoretical, but real." *Ohio Forestry*, 523 U.S. at 735-36; see, Draft Section 7(a) Evaluation, at 51-52. The fact that "significant agency action remains" before the proposed project may go forward is a strong indication that issues raised in a challenge to the project are not ripe. *Sierra*

Club v. United States Army Corps of Engineers, 446 F.3d 808, 815 (8th Cir. 2006).

Finally, this Court would benefit from awaiting the conclusion of the Section 7 process, including both the Corps's assessment of the project's effects on wild and scenic river values as part of its Section 404 permit evaluation and the NPS's final comments and determination on that evaluation pursuant to Section 7. See 33 C.F.R. § 320.4(e). Indeed, there can be no complete administrative record compiled for the Section 7 determination until after both the Corps's evaluation of a Section 404 permit and the NPS's final assessment thereof have been completed. "The focal point for judicial review of agency action should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) Accordingly, judicial review should await full factual development by the agencies involved and their final determinations based upon those facts. A decision by the Court at this stage would resolve a dispute about a hypothetical Section 7 determination on a hypothetical Section 404 permit. "Courts have no business adjudicating the

legality of non-events." *National Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2nd Cir. 1982).

CONCLUSION

Sierra Club failed to file the complaint timely. Sierra Club also challenged an NPS action that was not final. Therefore, this Court should dismiss the action without prejudice for lack of subject matter jurisdiction.

Date: December 20, 2007

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