No. 20-35412

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, et al.,
Plaintiffs/Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,
Defendants/Appellants,

and

TC ENERGY CORPORATION, et al.,
Intervenor-Defendants/Appellants.

Appeal from the United States District Court for the District of Montana
No. 4:19-cv-00044 (Hon. Brian Morris)

FEDERAL APPELLANTS' MOTION FOR STAY PENDING APPEAL, INCLUDING REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 (RELIEF NEEDED BY MAY 29, 2020)

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CIRCUIT RULE 27-3 CERTIFICATE

1. The relief requested in the emergency motion that accompanies this certificate is a stay pending appeal of Paragraphs 5 and 6 of the district court's order dated April 15, 2020 in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044 (D. Mont.), as amended by the court's subsequent order dated May 11, 2020. Collectively, those orders vacate and enjoin the use of Nationwide Permit 12 as it relates to the construction of oil and gas pipelines across the country.

2. Relief is needed no later than May 29, 2020. Defendants/Appellants U.S. Army Corps of Engineers, et al. (Federal Defendants) also request an immediate administrative stay while the Court considers this motion. Emergency relief is needed because, as explained in the accompanying motion, the district court barred the use of Nationwide Permit 12 — variations of which have been in place for more than four decades — to approve the discharge of any dredge or fill activities, or structures or work in navigable waters, associated with the construction of oil and gas pipelines anywhere in the country.

3. The district court's initial order, dated April 15, 2020, vacated and enjoined the use of Nationwide Permit 12 for any purpose. On April 27, Federal Defendants moved the court for a stay pending appeal of that order. That same day, they also moved for an immediate administrative stay and moved to expedite

briefing and consideration of the motion to stay. Federal Defendants asked the district court to rule on the motion to stay by no later than May 11, 2020 and informed the court of their intent to seek relief in this Court as soon as the following day if a stay were denied. On May 11, the district court amended its order such that it now vacates Nationwide Permit 12 if its use relates to the construction of oil and gas pipelines and enjoins the Corps from authorizing any dredge or fill activities for the construction of such pipelines under Nationwide Permit 12. The court also denied any stay.

4. As the foregoing chronology makes clear, Federal Defendants could not have filed this motion earlier while affording the district court an opportunity to rule on the motion for a stay pending appeal. *See* Fed. R. App. 8(a)(1)(A).

5. Federal Defendants notified the Emergency Motions Department that they would potentially be filing this motion initially by e-mail on May 8; counsel for all parties, including counsel for Intervenor-Defendants, were copied on that e-mail. After the district court issued its revised order amending its previous order and denying any stay, Federal Defendants notified the Emergency Motions Department by e-mail that they would be filing this motion as soon as yesterday; counsel for all parties, including counsel for Intervenor-Defendants, were copied on that e-mail.

6. On May 13, 2020, following the district court's ruling, counsel for Federal Defendants notified counsel for all other parties, including counsel for

Intervenor-Defendants, of the filing of this motion. Plaintiffs have indicated that they will oppose this motion, while Intervenor-Defendants have indicated that they will support the motion.

7. The names and best contact information for each party is as follows:

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INTRODUCTION AND RELIEF SOUGHT

The Clean Water Act (CWA) prohibits the discharge of pollutants into navigable waters without a permit from the U.S. Army Corps of Engineers (Corps). In 1977, Congress expressly authorized the Corps to issue general permits for certain kinds of activities. Ever since, the Corps has issued a nationwide utility-line general permit, known as Nationwide Permit 12 (NWP 12) since 1982, which also applies to oil and gas pipelines.

As this Court has recognized, the "nationwide permit system is designed to streamline the permitting process," *Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers*, 683 F.3d 1155, 1164 (9th Cir. 2012) (per curiam), serving the important function of enabling the Corps to focus individual permitting review on activities with greater anticipated environmental effects. Thus, individual permits are *not* a substitute for general permits like NWP 12. Nor are they environmentally suspect, as recognized by no less an environmentalist than Senator Edward Muskie, who pioneered the Clean Water Act. *See* 123 Cong. Rec. 26,708 (Aug. 4, 1977).

In the order under review, the district court partially "vacated" NWP 12 and "enjoined" its use for certain projects on a nationwide basis. Plaintiffs brought this lawsuit under the Endangered Species Act (ESA) to enjoin the Corps from authorizing the construction of the Keystone XL pipeline under NWP 12. Plaintiffs' operative Complaint expressly sought declaratory relief against NWP 12 but sought

injunctive relief against its use *only* as to Keystone XL; indeed, the Complaint did not even identify any other utility line, let alone any other pipeline. Consistent with their Complaint, Plaintiffs repeatedly represented throughout this litigation that they were seeking injunctive relief only as to the Keystone XL project. Indeed, the district court itself observed at an earlier stage of this case that "Plaintiffs do not ask the Court to vacate NWP 12." And the court denied a motion for intervention as of right filed by a coalition of five national energy organizations, including those representing the interest of oil and gas pipeline companies, *precisely because* "the Coalition could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits."

On April 15, 2020, the district court issued an opinion and order granting Plaintiffs summary judgment on their ESA claim. But contrary to Plaintiffs' Complaint, their subsequent representations, and the district court's own statements, the court universally enjoined and vacated NWP 12. If this order had remained in place, it would have ground to a halt or significantly delayed thousands of routine utility line projects across the country — precisely the kinds of activities that general permits are designed to authorize. The court imposed these remedies with no analysis whatsoever.

Given the practical harms such a sweeping injunction would impose, Federal Defendants filed a motion in the district court for an immediate administrative stay

and for a stay pending appeal. In response, Plaintiffs did not seriously dispute that the relief ordered was unlikely to survive appellate review. They instead asked the court to modify its order to preclude the use of NWP 12 for the construction of *all* oil and gas pipelines (not just Keystone XL), and they submitted *fourteen new declarations* identifying newly targeted projects and setting forth newly alleged (though wholly insufficient) injuries — a dramatic, on-the-fly amendment of their complaint without comporting with Federal Rule of Civil Procedure 15. The district court amended its order more or less as Plaintiffs proposed, prohibiting the use of NWP 12 for construction of new oil and gas pipelines across the country. The district court then denied Federal Defendants' motion for a stay pending appeal.

The district court's decision is deeply flawed in multiple respects. Initially, there was no ESA violation here because NWP 12 provides for ESA review at the project level where listed species or critical habitat are present. But even if there had been a violation, the court's nationwide prohibition of NWP 12's use for any new oil or gas pipeline construction was wholly improper. The district court's revised order awards Plaintiffs remedies that they did not request in moving for summary judgment and in fact waived; credits alleged injuries that Plaintiffs did not assert in their complaint or on summary judgment; calls into question projects for which no party, project proponent, or interested member of the public had any notice or opportunity to object; and contradicts without explanation the district court's own

reassurances at the outset of the litigation about the limited relief at issue in the case. The district court drastically and impermissibly ignored basic principles of party presentation, fair notice, and procedural regularity. In any event, the new submissions introduced by Plaintiffs in response to Defendants' motion to stay fall well short of justifying the district court's nationwide injunction and vacatur.

Federal Defendants respectfully move this Court to stay pending appeal the district court's partial injunction against, and vacatur of, NWP 12. Federal Defendants also request an administrative stay of these remedies while the Court considers the motion to stay. Absent a stay, the district court's highly disruptive order prevents the Corps or private parties from relying on NWP 12 for proposed activities related to the construction of oil and gas pipelines anywhere in the country — not only large pipelines like Keystone XL but also small intra-state pipelines or even smaller regional projects.

By contrast, Plaintiffs will not be harmed by a stay. For one, with the exception of remedies specific to the Keystone XL project, Plaintiffs did not even *seek* any of the relief that the district court declined to stay, and the court erred in finding an ESA violation. Many if not all of the additional projects that Plaintiffs belatedly identified, moreover, have already received site-specific environmental analysis and are already the subject of environmental challenges in other courts. There was no basis for the district court to expand this case to supersede all of that

separate litigation in the first place, proceeding much like it had received a (nonexistent) referral from the Judicial Panel on Multidistrict Litigation.

A stay pending appeal, including an administrative stay, is warranted.

STATEMENT OF JURISDICTION

(a) The district court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under a variety of federal statutes including, as relevant to the district court's order, the Administrative Procedure Act, 5 U.S.C. §§ 701-706; and the ESA, 16 U.S.C. §§ 1531-1544. Appendix 329.[1]

(b) The district court's Order of April 15, 2020, as amended by its Order of May 11, 2020, is appealable because it is an interlocutory order granting an injunction. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

(c) The district court's initial order was entered on April 15, 2020, Appendix 39, and amended on May 11, 2020, Appendix 1. Federal Appellants filed their notice of appeal on May 13, 2020. Appendix 65. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this motion.

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[1] The cited Appendix is filed concurrently herewith in a separate document that is consecutively paginated beginning with Page 1.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Clean Water Act

The Clean Water Act prohibits the discharge of any "pollutant," including dredged or fill material, into "navigable waters" without a permit from the Corps. 33 U.S.C. §§ 1311(a), 1344(a). The term "navigable waters" means "the waters of the United States," which include (by regulation) certain tributaries and wetlands. *Id.* § 1362(7); 33 C.F.R. § 328.3(a). The Corps authorizes discharges of dredged or fill material into waters of the United States through individual and general permits. 33 U.S.C. §§ 1344(a), (e). Individual permits require a resource-intensive, case-by-case review, including extensive site-specific documentation, public comment, and a formal determination. Appendix 223.

In 1977, Congress amended the CWA to authorize the Corps to issue "general" permits for discharges associated with certain categories of activities. *See* 33 U.S.C. § 1344(e). As amended, the CWA authorizes general permits "for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." *Id.* § 1344(e)(1). Nationwide permits — the type of general permit at issue here — are "designed to

regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). They may be in force for as long as five years, after which the Corps may re-issue them through notice-and-comment rulemaking. 33 U.S.C. § 1344(e)(1), (2). The Corps regulates the parameters and application of nationwide permits at the national, regional, and project-specific levels.

At the national level, the Chief of Engineers determines whether the individual and cumulative adverse environmental impacts of the category of activities authorized by each nationwide permit are no more than "minimal." *Id.* § 1344(e). The Corps ensures minimal impact, in part, through "General Conditions," with which permittees must comply in order to conduct activities under the nationwide permit. *See* 33 C.F.R. § 330.1(c).

At the regional level, each division engineer is empowered "to modify, suspend, or revoke [nationwide permit] authorizations for any specific geographic area, class of activities, or class of waters within his division." *Id.* § 330.5(c)(1). This authority may be exercised whenever the division engineer "determines sufficient concerns for the environment under [40 C.F.R. Part 230] or any other factor of the public interest so requires, or if [the division engineer] otherwise determines that the [nationwide permit] would result in more than minimal adverse environmental effects either individually or cumulatively." *Id.* § 330.4(e)(1). Before a division engineer may take such action within a specific geographical

boundary, the proposed changes likewise must undergo public notice and comment. *See id.* § 330.5(b)(2)(ii), (c)(1).

Finally, at the project-specific level, certain circumstances require prospective permittees to submit a pre-construction notice (PCN) seeking verification that a proposed activity complies with the nationwide permit. The district engineer must evaluate the project on a case-by-case basis and, if he or she finds that "the adverse effects are more than minimal," the district engineer "will notify the prospective permittee that an individual permit is required." *Id.* § 330.1(e)(3).

2. Endangered Species Act

Section 7(a)(2) of the ESA requires each federal agency, "in consultation with" the National Marine Fisheries Service (NMFS) of the Commerce Department and the U.S. Fish and Wildlife Service (FWS) of the Interior Department (collectively, the Services), to "insure that any action authorized, funded, or carried out" by the 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 designated critical habitat. 16 U.S.C. § 1536(a)(2). Under the ESA's implementing regulations, if the action agency (here, the Corps) determines that its action "may affect" listed species, it must pursue either informal or formal consultation with the appropriate Service. 50 C.F.R. §§ 402.13, 402.14(b)(1).

If the action agency determines that the proposed action is "likely to adversely affect" listed species or designated critical habitat, the agency must engage in formal consultation. 50 C.F.R. §§ 402.13(a), 402.14(a)-(b). If the action agency determines that its action will have "no effect" on a listed species or designated critical habitat, "the consultation requirements are not triggered." *Friends of the Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 913 (9th Cir. 2018).

B. Factual background

1. Nationwide Permit 12

NWP 12 has existed in some form or other since 1977. *See* 42 Fed. Reg. 37,122, 37,146 (July 19, 1977). After a three-year review, the latest issuance of NWP 12 came on January 6, 2017. *See* 82 Fed. Reg. 1860 (Jan. 6, 2017). In 2015, the Tenth Circuit upheld the prior version of NWP 12. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043 (10th Cir. 2015).

The current version of NWP 12, like the version upheld by the Tenth Circuit, applies to "the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States." 82 Fed. Reg. at 1985. "Utility line" is defined to include electric, telephone, internet, radio, and television cables, lines, and wires, as well as oil or gas pipelines. *Id.* NWP 12 applies, however, only if "the activity does [1] not result in the loss of greater than 1/2-acre of waters of the United States for [2] each single and complete project." *Id.* There also "must be no

change in pre-construction contours of waters of the United States." *Id.* NWP 12 requires a PCN "prior to commencing the activity" if, among other reasons, the "discharges [will] result in the loss of greater than 1/10-acre of waters of the United States." *Id.* at 1986.

NWP 12 is also subject to thirty-two General Conditions. Those include General Condition 18, which expressly provides that "[n]o activity is authorized under any [nationwide permit] which 'may affect' a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed." 82 Fed. Reg. at 1999. Condition 18 expressly excludes from its authorization any activity which is likely to jeopardize the continued existence of an ESA listed species or destroy or adversely modify designated critical habitat, and it advises that no nationwide permit constitutes a take authorization for ESA purposes. *Id.* at 1999-2000. Finally, Condition 18 requires a PCN "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." *Id.* at 1999.

Regional conditions further restrict use of nationwide permits, including NWP 12. In March 2017, for example, the Corps' Omaha District imposed regional conditions on the use of nationwide permits, many of them to provide additional layer of protection for listed species or habitat present in that particular region. *See infra* p. 34.

In re-issuing NWP 12 in 2017, the Corps estimated that the permit would be relied upon 14,000 times per year throughout the nation. Appendix 221. Of those 14,000 uses, the Corps estimated that approximately 11,500 (around 82 percent) would be submitted to the Corps as part of a written request for NWP 12 authorization. *Id.* This estimate is consistent with subsequent historical data. Since NWP 12 went into effect on March 19, 2017 and through the district court's Order on April 15, 2020 — a little more than three years — the Corps had verified more than 38,000 NWP 12 PCNs. *Id.* Approximately 3,400 of those PCNs were triggered wholly or in part by General Condition 18. *Id.*

As required by the CWA, the Corps' re-issuance of NWP was preceded by public notice and comment. The Corps received more than 54,000 comment letters, and it reviewed and fully considered all of them. 82 Fed. Reg. at 1863.

Prior to the 2007 and 2012 issuances of the nationwide permits (including NWP 12), the Corps had engaged in voluntary consultation with the Services. As to the 2012 re-issuance, FWS did not conclude the consultation, and NMFS issued a biological opinion (BiOp) in 2014 concluding that the nationwide permits were *not* likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Appendix 430.

Prior to the proposed rule re-issuing the nationwide permits, the Corps informed NMFS that it would not initiate formal consultation, but the Corps offered

to voluntarily engage in consultation and to continue implementing most of the protective measures from NMFS's 2014 BiOp. During the spring of 2016, the Office of Management and Budget (OMB) in the prior Administration hosted a series of meetings that included the Corps, NMFS, and FWS. Appendix 425-29. The record reflects that NMFS agreed with the Corps' conclusion that re-issuance of the nationwide permits would have no effect on listed species or critical habitat, and that the Corps agreed to continue the protective measures from NMFS's 2014 BiOp (except for three measures that NMFS determined were infeasible). Appendix 429-31. The record does not reflect that FWS raised any concerns about the Corps' no-effect determination.

2. Keystone XL and TC Energy

TC Energy is the project proponent for the proposed Keystone XL pipeline, a major pipeline for the importation of petroleum from Canada to the United States. As proposed, Keystone XL would cross the U.S. border near Morgan, Montana and continue for approximately 882 miles to Steele City, Nebraska, where it would connect to the existing Keystone pipeline system. The environmental effects of Keystone XL were analyzed in a 2013 ESA consultation with FWS and in a Final Supplemental Environmental Impact Statement issued by the Department of State in 2014; supplemental NEPA and ESA analysis has since been issued, addressing the revised route and issues identified by the District of Montana in *Indigenous*

Environmental Network v. U.S. Department of State, 347 F. Supp. 3d 561 (D. Mont. 2018).[2] In 2017 and again in 2020, TC Energy submitted to the Corps PCNs that included all of Keystone XL's proposed crossings of covered waters for the proposed project. Appendix 381. TC Energy withdrew its 2017 PCNs, and the Corps suspended its 2017 verifications of those notices. Appendix 393-94. TC Energy's 2020 PCNs remain pending before the Corps.

C. Proceedings in the district court

1. Plaintiffs' allegations and requests for Keystone-specific relief

Plaintiffs filed this suit in July 2019 and filed the operative amended complaint on September 10, 2019. *See* Appendix 322 (Complaint). The five-count Complaint challenges the Corps' issuance of NWP 12 as violating the National Environmental Policy Act (NEPA) (Count One), the CWA (Count Two), and the ESA (Count Four). *See* Appendix 394-98, 402-05. The Complaint also challenges purported Corps PCN verifications under NWP 12 for crossings in the construction of the Keystone XL pipeline (Counts Three and Five). *See* Appendix 399-402, 406-08. Those latter two counts are stayed by court order pending further action by the Corps. Appendix 308.

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[2] *See* U.S. Department of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project (Dec. 2019), https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=286595.

Crucially, the Complaint did not seek vacatur of NWP 12 or broad — let alone nationwide — injunctive relief. Instead, the Complaint sought relief limited to the Keystone XL pipeline. In addition to declaratory relief and a remand of NWP 12 to the Corps, Plaintiffs asked the Court to vacate only the alleged "Corps verifications or other approval of *Keystone XL* under NWP 12." Appendix 409 (emphasis added). The Complaint's request for injunctive relief sought only an "injunction enjoining the Corps from using NWP 12 to authorize the construction of the *Keystone XL pipeline* in waterbodies or wetlands, or otherwise verifying or approving the *Keystone XL pipeline* under NWP 12, and [a request to] enjoin any activities in furtherance of pipeline construction." *Id.* (emphasis added).

Plaintiffs reiterated this Keystone-specific request for relief as the case proceeded. In opposing intervention sought by the State of the Montana, Plaintiffs explicitly stated that they "*have not sought to have NWP 12 broadly enjoined*; rather, they seek narrowly tailored relief to ensure adequate environmental review of oil pipelines, especially Keystone XL." Appendix 313 (emphasis added). Recognizing the limited and narrow nature of Plaintiffs' requested relief, the district court denied intervention as of right to Montana and a coalition of business-related groups, expressly noting that "Plaintiffs do not ask the Court to vacate NWP 12. Plaintiffs seek instead declaratory relief as to NWP 12's legality." Appendix 303-04 (citations omitted). Indeed, the court assured that "Montana and the Coalition could still

prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits." Appendix 304.

The parties then filed cross-motions for summary judgment on Counts One, Two, and Four. During summary judgment briefing, Plaintiffs again emphasized that they were seeking only Keystone-specific relief:

> Montana argues that Plaintiffs' request for relief has been "everchanging" and "ambiguous" throughout this litigation, and suggests Plaintiffs are seeking broad relief that might impact other uses of NWP 12. Not so. Plaintiffs, from the outset, have asked the Court to declare that the Corps' issuance of NWP 12 violated the CWA, NEPA, and the ESA; remand NWP 12 to the Corps for compliance with these laws; declare unlawful and vacate the Corps' use of NWP 12 *to approve Keystone XL*; and enjoin activities *in furtherance of Keystone XL's construction*.

Appendix 293-94 (citations omitted and emphasis added).

2. The district court's April 15 decision

On April 15, 2020, the district court resolved the Parties' cross-motions for summary judgment on Counts One, Two, and Four. Appendix 39 (Order). The court granted Plaintiffs summary judgment on their ESA claim, ruling that NWP 12 "may affect" listed species or critical habitat and therefore formal consultation with the Services was required. Appendix 47-59. As discussed further below, the district court based this conclusion primarily on general statements from the Corps about minor environmental effects, and on two short declarations submitted by Plaintiffs that did not discuss either General Condition 18 or the other safeguards built into

NWP 12. The court denied without prejudice all parties' motions for summary judgment on the remaining two claims. Appendix 60.

After finding a violation of the ESA, the district court "remanded" NWP 12 to the Corps "for compliance with the ESA." Appendix 64. But despite Plaintiffs' clear and repeated statements that they sought only narrowly tailored relief, the court "vacated" NWP 12 and "enjoined" the Corps "from author[izing] any dredge or fill activities under NWP 12" until completion of the remand. *Id.* The court neither addressed its own prior statements nor explained why it was granting relief — vacatur and a universal injunction — that Plaintiffs had not sought and had expressly disclaimed. Indeed, the district court undertook no analysis supporting the issuance of either remedy.

3. Subsequent district court proceedings

On April 27, 2020, Federal Defendants moved in the district court for a stay pending appeal and sought an immediate administrative stay of the court's order vacating NWP 12 and enjoining its use. Appendix 214. Federal Defendants also suggested that the district court's broad remedial holding may have been unintentional and explained that they would delay filing a notice of appeal to ensure that the court retained authority to revise its remedy. The district court summarily denied Federal Defendants' motion for an administrative stay. Appendix 212.

Plaintiffs' defense of the relief ordered by the district court consisted of a one-page section reciting legal boilerplate. Appendix 84-85. The remainder of Plaintiffs' opposition, however, proposed and defended a remedy that Plaintiffs had not previously sought and the district court had not issued: vacatur of NWP 12 as applied to the construction of *all* new oil and gas pipelines. Appendix 85-117.

In support of this new proposal, Plaintiffs filed fourteen new declarations identifying a handful of additional oil and gas pipelines that the declarants allege will cause individual members various harms. Appendix 121-211. As discussed further below, many if not all of these newly identified pipelines are the subject of separate environmental challenges in other courts and, in any event, have been subject to site-level environmental review far more specific than the general programmatic review that the district court faulted the Corps for failing to conduct prior to re-issuing NWP 12.

On May 11, 2020, the district court amended its order essentially along the lines Plaintiff proposed, vacating NWP 12 "as it relates to the construction of new oil and gas pipelines" and enjoining its use to authorize "any dredge or fill activities for the construction of new oil and gas pipelines" pending completion of the consultation process and compliance with all environmental statutes and regulations. Appendix 38 (Amended Order); *see also* Appendix 15, 17, 18, 29 (referring to "new oil and gas pipeline construction"); Appendix 22 (referring to "new construction of

other oil and gas pipelines"). The court did not specifically acknowledge or address Plaintiffs' multiple representations expressly disclaiming broader relief, let alone the court's own assurances to the same effect. Rather, the district court simply cited the general principle that courts may grant relief broader than that requested in the pleadings. Appendix 3-4.

ARGUMENT

In evaluating motions for stay pending appeal, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

A stay is plainly warranted here. First, Federal Defendants are likely to succeed in their challenge to the district court's vacatur and injunctive relief. The court's order granted relief that Plaintiffs did not seek and in fact expressly disclaimed; imposed remedies the court itself essentially ruled out at an earlier stage of the case; did so without reasonable notice to the Corps, project proponents, or interested members of the public; and, without any legal justification, allowed Plaintiffs to seek new relief and submit additional evidence. As explained below, there was no ESA violation here in the first place, and Defendants are likely to

succeed on that basis as well. But even if the district court had correctly identified an ESA violation, its order would be legally and procedurally indefensible.

The remaining factors also strongly support a stay. The district court's order is disruptive to the Corps, regulated entities, state and local governments, and the public. Plaintiffs, by contrast, will not be harmed by a stay. Plaintiffs certainly have no basis for claiming harm from a stay of the district court's vacatur and universal injunction as to any projects other than Keystone XL because, among other reasons, Plaintiffs sought no relief extending beyond Keystone XL.

I. Federal Defendants have a strong likelihood of success on appeal.

A. The district court erred in vacating NWP 12 and enjoining its use for new oil and gas pipelines.

1. The relief ordered by the district court was procedurally improper.

The district court's Amended Order — vacating and enjoining use of NWP 12 for construction of oil and gas pipelines anywhere in the country — violates every conceivable principle of party presentation and fair notice. The court did not dispute that Plaintiffs' Complaint sought only injunctive relief and vacatur directed at the Keystone XL project; indeed, the Complaint identifies no other pipeline project. Throughout this litigation, Plaintiffs have denied seeking broader relief. *See supra* pp. 13-15. Consistent with all of this, the district court itself previously explained that "Plaintiffs do not ask the Court to vacate NWP 12," and that "Montana and the

Coalition could still prospectively rely on the permit until it expires," even if Plaintiffs prevailed. Appendix 304.

The district court nonetheless initially enjoined NWP 12's use for *any purpose* and vacated it in its entirety. Plaintiffs did not seriously defend that order. Indeed, instead of asking the district court to conform its order to the relief that they had sought and injuries that they had alleged, Plaintiffs sought a new remedy based on new and untested allegations of harm: partial vacatur with respect to all new oil and gas pipelines nationwide, none of which except Keystone XL was previously raised in this case and many of which are the subject of litigation elsewhere. The district court erred in granting that extraordinary request.

First, Plaintiffs plainly waived any claim for injunctive relief or vacatur of NWP 12 extending beyond the Keystone XL project. This Court has made clear that a "plaintiff may waive a claim for injunctive relief by failing to argue its merits at summary judgment." *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 864 (9th Cir. 2017). As explained above, that is unquestionably what happened here.

Second, Plaintiffs' waiver aside, the district court abused its discretion in granting relief contrary to its own prior rulings in this case. The court granted TC Energy's unopposed motion to intervene as of right. Appendix 412. By contrast, the district court *denied* intervention as of right by the State of Montana and by a coalition of five national energy organizations, reasoning that "Plaintiffs do not ask

the Court to vacate NWP 12. Plaintiffs seek instead declaratory relief as to NWP 12's legality." Appendix 303-04 (citations omitted). Indeed, the court assured the intervenors "Montana and the Coalition could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits." Appendix 304. The court did not attempt to reconcile its April 15 Order with these prior rulings and, although Federal Defendants reminded the district court of these statements in moving for a stay, the court failed even to acknowledge them. Orderly federal litigation does not proceed by way of bait-and-switch.

Third, and at the very least, the granting of relief that Plaintiffs never requested at the summary judgment stage, without providing Federal Defendants a fair opportunity to contest the appropriateness of that relief, was clear error. *Cf.* Fed. R. Civ. P. 65(a)(1) (even preliminary injunction may not issue without notice to the adverse party).[3] Indeed, Plaintiffs' post-decision efforts — submitting fourteen new declarations identifying new projects and new alleged injuries — only underscores that both this new remedy and the purported evidence supporting it were wholly absent from the case prior to the Court's April 15 Order.

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[3] Plaintiffs suggested below that this concern about lack of notice was moot because they presented evidence in response to Federal Defendants' stay motion. But presenting this novel remedial request for the first time in opposition to a motion to stay — as to which Federal Defendants had only *two days* to respond — was neither procedurally proper nor a meaningful substitute for presentation in the ordinary course of litigation. For instance, the standards of Federal Rule 15 were never applied to the Plaintiffs' last-minute *de facto* amendment of their complaint.

Fourth and finally, the district court likewise had no basis for considering Plaintiffs' post-decisional submissions — either their new requested relief or the fourteen new standing declarations submitted in response to Defendants' motion to stay. *See Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1035-56 (D.C. Cir. 1988) ("[T]he obligation of this Court is to look at the record before the District Court at the time it granted the motion [for summary judgment], not at some later point."); *Summers v. Earth Island Institute*, 555 U.S. 488, 495 n.*, 508 (2009) (declining to consider standing affidavits submitted after decision as part of opposition to a motion to stay). Even if Plaintiffs had sought reconsideration of the district court's order, it is well-established that such motions "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). The district court's handling of this case flagrantly transgressed these limits. Indeed, the court essentially permitted Plaintiffs to institute a brand new lawsuit — with new purported evidence, new targeted projects, new alleged injuries, and new requested relief — masquerading as an opposition to a motion for stay pending appeal. That was error.

The district court stated that it could award these broad remedies because Plaintiffs' Complaint included an umbrella request for "such other relief as the Court deems just and appropriate," and because Federal Rule of Civil Procedure 54(c)

provides that a court "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Appendix 3. The district court missed the point. Rule 54(c) sets forth a narrow principle that a court is not strictly bound by the language of the pleadings in fashioning relief. It is not a license to otherwise disregard the basic rules governing litigation. A party is not "entitled" to relief that was not properly sought and that it repeatedly and expressly disclaimed. Rule 54(c) does not license a court to grant relief without proper notice and even if that relief has been waived. *See Powell v. National Board of Medical Examiners*, 364 F.3d 79, 86 (2d Cir. 2004) (although a court may grant relief not expressly sought in the complaint if the plaintiff is entitled to that relief, there is an "exception to this rule . . . when a court grants relief not requested and of which the opposing party has no notice, thereby prejudicing that party"); *Versatile Helicopters, Inc. v. City of Columbus*, 548 Fed. Appx. 337, 343 (6th Cir. 2013) (similar). Nor does the rule allow district courts to ignore the rules and procedures governing amendments, summary judgment, reconsideration, and motions for stay pending appeal.[4]

[4] In support of its decision, the district court invoked *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016), in which the Supreme Court held that a district court did not err in facially invalidating a statute held to be unconstitutional notwithstanding that the plaintiffs had expressly sought only as-applied relief. But again, the issue here is not simply that the relief sought is broader than what Plaintiffs sought in a single pleading; the problem with the district court's decision is that it grants relief that Plaintiffs repeatedly and expressly disclaimed throughout this case and that the court itself ruled out.

The Supreme Court recently emphasized that in "our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, No. 19-67, 2020 WL 2200834, at *3 (U.S. May 7, 2020). The district court's handling of this case ignores that principle. Although "a court is not hidebound by the precise arguments of counsel," the district court's "radical transformation of this case goes well beyond the pale." *Id.* at *6. For the foregoing reasons alone, Federal Defendants are likely to succeed in their challenge to the district court's imposition of the remedies in its Amended Order.

But even if Plaintiffs had actually sought these remedies, as we explain below, neither the district court's vacatur nor its nationwide injunction would have been legally permissible or appropriate remedies.

2. The district court's injunction was unwarranted.

As to the nationwide injunction, Article III requires a plaintiff to "demonstrate standing . . . for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Equitable principles require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994). Accordingly, this Court has repeatedly vacated or stayed the nationwide scope of injunctions where such broad relief is not necessary to provide the plaintiff with complete relief. *See, e.g.*, *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026,

1029 (9th Cir. 2019) ("Under our case law . . . all injunctions — even ones involving national policies — must be narrowly tailored to remedy the specific harm shown."); *see also California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (collecting cases).

Under those standards, this is an easy case. Prior to its response to Federal Defendants' motion to stay, Plaintiffs alleged only harms emanating from the Keystone XL pipeline — no surprise, given that Plaintiffs *sought relief* related only to Keystone XL. For example, Plaintiffs submitted fourteen declarations with their motion for summary judgment. With one *de minimis* exception — a declaration discussing *past* use of NWP 12 on the Flanagan South, Dakota Access and Gulf Coast pipelines — none of those declarations even *identified* a specific project besides Keystone XL.

Nor do Plaintiffs' post-decisional declarations justify the district court's injunction. Those declarations identified only a handful of selected pipeline projects, which categorically cannot justify an injunction against every oil and gas pipeline project all over the country. Plaintiffs cannot possibly be said to have met the standard for obtaining injunctive relief against all new pipeline construction when they have not plausibly alleged concrete, particularized and certainly impending injuries that are caused by every impacted pipeline. As to the identified projects, the district court acknowledged that Plaintiffs must demonstrate irreparable injury to obtain injunctive relief, and that "there is no presumption of irreparable

injury where there has been a procedural violation in ESA cases." Appendix 20 (quoting *Cottonwood Environmental Law Center v. U.S Forest Service*, 89 F.3d 1075, 1091 (9th Cir. 2015)).[5]

Additionally, Plaintiffs' belated declarations do not even attempt to establish that the identified pipeline projects will potentially harm endangered species or critical habitat, let alone that such harms would impact the declarants' stated interests. Indeed, many of the declarations do not discuss endangered species at all; in those that do, the discussion is entirely conclusory. *See, e.g.*, Appendix 160 (asserting without elaboration that the Double E Pipeline "will potentially impact Endangered Species Act listed species, such as the Pecos bluntnose shiner, northern aplomado falcon, western snowy plover, and southwestern willow flycatcher"). On this record, the district court's issuance of a nationwide injunction was clearly improper. *See City & County of San Francisco v. Trump*, 897 F.3d 1231, 1244-45 (9th Cir. 2018) (holding that the district court abused its discretion in issuing a nationwide injunction because plaintiffs' "tendered evidence is limited to the effect of the Order on their governments and the State of California").

[5] This Court has curtailed the traditional four-factor injunctive inquiry somewhat in cases involving the Endangered Species Act. *See National Wildlife Federation v. National Marine Fisheries Service*, 886 F.3d 803, 817-18 (9th Cir. 2018). Federal Defendants reserve their rights to seek further review of that decision's holding in that regard, as may prove necessary.

3. Vacatur was likewise unwarranted.

As to vacatur, the record similarly would not have supported vacatur (partial or otherwise) of NWP 12 even if the district court had provided notice of this possible remedy and performed the requisite analysis. Initially, the Administrative Procedure Act (APA) provides for a reviewing court to "set aside" unlawful agency action, 5 U.S.C. § 706(2), but that is part of a provision setting forth the scope of review — not the scope of relief, which is governed under 5 U.S.C. §§ 702-703 by established equitable principles in an APA suit for injunctive or declaratory relief. Thus, "[n]othing in the language of the APA" requires an unlawful regulation to be enjoined or vacated "for the entire country." *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001).

Similarly, in *California v. Azar*, this Court held that the district court abused its discretion in issuing a nationwide injunction even as it affirmed the conclusion that the regulation at issue was procedurally invalid under the APA. 911 F.3d at 584; *accord L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011) (same). Likewise here, any vacatur should apply only to particular crossings for Keystone XL where Plaintiffs demonstrated injury, or should extend at most to the PCNs related to the Keystone XL project — which, again, is the only vacatur for which Plaintiffs even asked. *See* Appendix 409 (asking the district court to vacate only the "Corps verifications or other approval of Keystone XL under NWP 12").

But again, even putting aside Plaintiffs' limited request for relief, vacatur is not an appropriate remedy here under this Court's decisions. It is "well established" that the APA does not compel vacatur upon the finding of a legal violation or procedural flaw. *United States v. Afshari*, 426 F.3d 1150, 1156 (9th Cir. 2005). In deciding whether to vacate a concededly flawed agency action, this Court looks to the two factors described in *Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). *See California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). The Court considers, first, the seriousness of the agency's errors and, second, the disruptive consequences that would result from vacatur. *Id.* These factors do not support vacatur here.

As to the first factor, the district court concluded that the Corps violated the ESA because its re-issuance of NWP 12 was an action that "may affect" listed species or habitat, thus requiring consultation with the Services. 50 C.F.R. § 402.14. Even if the court were correct that formal consultation was required, this would simply not be a serious ESA violation. First of all, NWP 12 itself includes regional protective conditions and is structured to ensure additional consultation when a project at a particular crossing might impact listed species or habitat. *See supra* pp. 9-10. Moreover, in determining that the re-issuance of NWP 12 would not itself have an effect on protected species, the Corps was neither proceeding on a blank slate nor without the benefit of the Services' views.

When the Corps re-issued NWP 12 in 2017, NMFS had issued a biological opinion just three years earlier finding that the Corps' 2012 re-issuance of the nationwide permits would result in no jeopardy to listed species or critical habitat; the Corps agreed to carry forward the feasible protective measures from that opinion to the 2017 nationwide permits; and NMFS *agreed* with the Corps' no-effect determination for the 2017 permits following 2016 OMB-led meetings. *See supra* pp. 11-12. FWS was part of these discussions and raised no concerns about the Corps' no-effect determination. As set out in the next section, these and other considerations demonstrate that there was no ESA violation at all. But at the very least, they show that the Corps' determination that NWP 12 did not trigger the programmatic consultation requirements was not the sort of serious error warranting vacatur.

Indeed, given NWP 12's built-in protections and the input from the Services' prior to its re-issuance, it is difficult to understand what formal programmatic consultation would meaningfully add. The Keystone XL project — the only project that Plaintiffs have plausibly established constitutional standing to challenge — and the other projects belatedly identified by Plaintiffs illustrate the point. As explained above (pp. 12-13), Keystone XL has already undergone extensive and site-specific environmental analysis. The other pipelines that Plaintiffs purported to challenge for the first time in response to Federal Defendants' motion for a stay pending appeal have also been subject to similarly specific review, and many are the subject of

pending or past litigation. *See infra* pp. 44-45. The programmatic review for which the district court placed all of these projects and others on hold will add nothing to these analyses and would not even address their particular environmental effects.

As to the second factor, the disruptive consequences flowing from vacatur of NWP 12 will be severe, as we outline at length in Part II. The district court's order halts NWP 12's use for all new oil and gas pipeline construction anywhere in the country. Under that order, all proposed activities associated with these projects — regardless of size, impact, or even whether they are in the vicinity of protected species — must now be channeled into the time-consuming and resource-intensive individualized permit process, which will increase strain on the Corps' resources and result in delays and increased costs for projects across the nation. *See infra* pp. 41-42. This frustrates Congress's very purpose in having established the more efficient mechanism of nationwide general permits. *See supra* p. 1. The disruptions at issue here are no less pervasive and severe than those that counseled against vacatur in *California Communities*. *See* 688 F.3d at 993 (noting that vacatur "could well delay a much needed power plant," threatening blackouts and economic disruption).[6]

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[6] The district court suggested that, under the second *Allied Signal* factor, a "court largely should focus on potential environmental disruption, as opposed to economic disruption." Appendix 11. This distinction has no basis in law or common sense. *See California Communities*, 688 F.3d at 994 (citing power outages and noting that "stopping construction would also be economically disastrous"); *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (reiterating that vacatur analysis properly considers "the social and economic costs of delay" (quoting *NRDC v. U.S. NRC*, 606 F.2d 1261, 1272 (D.C. Cir. 1979))).

For these reasons, Federal Defendants are likely to succeed in their challenge to the district court's nationwide injunction and partial vacatur of NWP 12 — even if the district court had correctly held that the Corps violated the ESA by failing to formally consult with the Services before re-issuing NWP 12.

B. The Corps was not required to formally consult with the Services before re-issuing NWP 12.

Federal Defendants are likely to succeed on appeal for an additional reason: there was no ESA violation here.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations do not require an agency to engage in formal or informal consultation unless the agency determines that its proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Here, the Corps determined that NWP 12's re-issuance would have "no effect" on protected species and critical habitat. 82 Fed. Reg. at 1873. That determination was eminently reasonable for multiple reasons.

Most prominently, General Condition 18 requires a PCN "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." 82 Fed. Reg. at 1999. The Corps has explained that the "might affect" threshold of General Condition 18 was intended to be "more stringent than the 'may affect' threshold for [ESA] section 7 consultation" with the Services. *Id.* at 1873. Although most General Conditions allow permittees to begin construction if the Corps does not respond to a PCN within

45 days, *see id.* at 1861, General Condition 18 is structured differently: prospective permittees may not begin work under authority of NWP 12 unless and until the district engineer notifies them that the ESA's requirements have been satisfied, and that the activity is authorized. *Id.* at 1999; 33 C.F.R. § 330.4(f)(2).

The district court did not dispute that NWP 12 simply does not authorize any activity that might implicate the ESA until the Corps either makes a "no effect" determination or completes a site-specific ESA Section 7 consultation. Nor did the court question the effectiveness of General Condition 18 in ensuring site-specific consultation where appropriate. To the contrary, the court stated that it "certainly presumes that the Corps, the Services, and permittees will comply with all applicable statutes and regulations." Appendix 57.

The district court nonetheless rejected reliance on this Condition, reasoning that it "fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees." Appendix 57. But this characterization is inaccurate: the Corps itself makes the Section 7(a)(2) determination. *See* 82 Fed. Reg. at 1954-55, 1999-2000. As the Corps noted, the General Condition "is written so that prospective permittees do not decide whether ESA section 7 consultation is required." *Id.* at 1954; *see also id.* at 1955 ("that is the Corps' responsibility"). Although General Condition 18 does indeed rely on prospective permittees to identify those activities for which such a

determination might be necessary, all PCN conditions require permittees to evaluate whether a given activity triggers the relevant condition. Indeed, this basic feature applies in *any* situation in which a private party must obtain a federal permit or authorization: a permittee who moves forward with its action without providing the appropriate information or making the required notification does so at its own peril.

General Condition 18, moreover, sets a threshold that is both broad and objective. It applies not only when listed species or critical habitat "might be affected," but also when listed species are "in the vicinity of the activity" or when the activity is "located in designated critical habitat." 82 Fed. Reg. at 1999. And permittees who proceed without submitting a PCN where General Condition 18 applies are subject to Corps enforcement action, 33 C.F.R. § 330.1(c), and may even be subject to civil or criminal penalties under the ESA, 16 U.S.C. §§ 1540(a)(1), (b)(1). The district court gave no reason why General Condition 18 would not be effective to ensure site-specific consultation for projects warranting consultation; indeed, as noted above, the court presumed that permittees would comply with it.

General Condition 18 is also far from the only safeguard built into NWP 12. More generally, NWP 12 requires a PCN if discharges from a proposed project will "result in the loss of greater than 1/10-acre of waters of the United States" (roughly the size of a basketball court). The Corps estimated based on historical data that 82 percent of NWP 12 authorizations would likely require a PCN, thus providing the

Corps with notice of the project and an opportunity to make a determination about whether consultations are required. *See supra* p. 11. Regional conditions further restrict use of nationwide permits, including NWP 12. In March 2017, for example, the Corps' Omaha District imposed regional conditions on the use of nationwide permits, many of them to protect listed species or habitat, including requiring PCNs for activities in Nebraska habitat for protected species including the whooping crane, pallid sturgeon, and American burying beetle. Appendix 414-23. The district court discussed none of this.

The Corps' no-effect determination is even more reasonable considering the input that the Corps received from the Services following the issuance of NWP 12 in 2012 and preceding the re-issuance in 2017. The Corps engaged in voluntary consultation with the Services related to the 2012 issuance, and NMFS responded by issuing the 2014 BiOp finding "no jeopardy" from the nationwide permits. *See supra* p. 11. The Corps agreed to carry forward the feasible protective measures from NMFS's 2014 BiOp. Following an interagency process led by OMB in the prior Administration, a process that included both Services, NMFS agreed with the Corps' no-effect determination for the 2017 nationwide permits (and the record does not reflect any objection from FWS). And neither of the Services requested formal consultation, even though they could have done so. *See* 50 C.F.R. § 402.14(a). Thus, although the decision whether to engage in formal consultation was for the Corps to

make, there is no reason to believe the Services would have a different view. *Cf.* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (Services' long-standing recognition that the action agency, here the Corps, "makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision").

The Corps' determination that programmatic consultation was not triggered is particularly appropriate in the context of CWA general permits — which, given the breadth of activities that they authorize, necessarily involve a fair amount of guesswork. As the Fourth Circuit observed in rejecting a challenge to a different nationwide permit, "Congress anticipated that the Corps would make its initial minimal-impact determinations under conditions of uncertainty and that those determinations would therefore sometimes be inaccurate, resulting in general permits that authorize activities with more-than-minimal impacts." *Ohio Valley Environmental Coalition v. Bulen*, 429 F.3d 493, 500 (4th Cir. 2005). The Tenth Circuit made similar points in rejecting a challenge to NWP 12.[7] To be sure, neither *Bulen* nor *Bostick* involved an ESA claim, but the basic principle is the same: it

[7] *See Bostick*, 787 F.3d at 1058 ("Nationwide Permit 12, like all nationwide permits, governs a broad range of activities that can be undertaken anywhere in the country under a wide variety of circumstances."); *id.* at 1057 ("The environmental groups argue the Corps violated § 404(e) [of the CWA] by partially deferring the minimal-impact determination. We disagree. The Corps permissibly interpreted § 404(e) to allow establishment of additional safeguards through the use of project-level personnel."); *id.* at 1059 (noting that the "Corps need not conduct a new NEPA analysis every time someone conceives a new use for a national permit").

makes little sense to insist upon programmatic consultations that, given the nature of the nationwide permit system, would rely greatly on speculation about the impacts of unknown future activities.

Against all of these considerations, the district court's analysis to the contrary does not withstand scrutiny. In support of its holding that the Corps was required to formally consult with the Services, the court opined that there was " 'resounding evidence' in this case that the Corps' reissuance of NWP 12 may affect listed species and their habitat." Appendix 49 (some internal quotation marks omitted) (quoting *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011)). The court purported to identify such "resounding evidence" from two categories of sources, neither of which supports its conclusion.

First, the district court pointed to the Corps' general acknowledgment that discharges authorized by NWP would have certain environmental effects. *See, e.g.*, Appendix 50 (quoting Corps' acknowledgments that authorized activities, among other things, "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources," and "will fragment terrestrial and aquatic ecosystems"); *see also id.* (court's observing that "Human activities alter ecosystem structure and function"). But the Corps did not suggest that any of these minor and highly general environmental effects may affect listed species or critical habitat, and the court did not contend otherwise. In any event, the Corps reasonably concluded that the

safeguards built into NWP 12 — including General Condition 18, other General Conditions, regional restrictions, and additional site-specific circumstances triggering PCN requirements — ensure that NWP 12 itself would have no effect on endangered species or critical habitat. The general statements identified by the district court are not in tension with that conclusion.

Second, the district court pointed to two declarations submitted by Plaintiffs only to establish standing, which contended that the Corps' issuance of NWP 12 authorizes discharges that may affect endangered species and their habitats. Appendix 52-53. But putting aside that neither declaration mentions a project other than Keystone XL, the declarations do not discuss General Condition 18, regional conditions, or the other provisions of NWP 12 that trigger site-specific review; and they certainly do not engage with the Corps' reasoned conclusion that, given these safeguards, the issuance of NWP 12 itself does not have any effect on endangered species or critical habitat. For example, although the two declarants express concern about the potential status of the pallid sturgeon and American burying beetle species in particular, they fail to discuss or acknowledge regional conditions requiring PCNs for activities in Nebraska habitat for these two species. These sorts of conclusory and almost entirely unresponsive submissions outside the administrative record are no basis for disturbing the Corps' reasoned determination that the mere re-issuance of NWP 12 would have no effect on listed species or critical habitat.

The district court also suggested that programmatic consultation is required "when an agency's proposed action provides a framework for future proposed action," and that the Services "have listed the Corps' nationwide permit program as an example of the type of federal program that provides a national-scale framework and that would be subject to programmatic consultation." Appendix 48. The court simply misunderstood the Services' guidance (which would not be binding on the Corps in any event, *see supra* p. 35). The Services have recognized that "framework programmatic actions" *may* require ESA section 7 consultation, and that "the U.S. Army Corps of Engineers' Nationwide Permit Program" is an example of such a framework action. *See* 80 Fed. Reg. 26,832, 26,835 (May 11, 2015). But the Services could not have been clearer that "this regulatory change does not imply that section 7 consultation is required for a framework programmatic action that has no effect on listed species or critical habitat," *id.* at 26,835, as the Corps determined was the case for the 2017 version of NWP 12.

Finally, the district court suggested that the Corps was "well aware that its reauthorization of NWP 12 required Section 7(a)(2) consultation," because the Corps consulted with the Services prior to re-issuing NWP 12 in 2007 and 2012, and because NMFS initially issued a biological opinion in 2012 that the Corps' implementation of the nationwide permit program had "more than minimal adverse environmental effects on the aquatic environment when performed separately or cumulatively." Appendix 58. The court's analysis of this history is flawed.

For one, although the Corps engaged in consultation in 2007 and 2012, the Corps did so *voluntarily* and made clear that it did not believe that consultation was legally required. *See* 82 Fed. Reg. at 1,873. The Corps was not bound by the prior, voluntary consultation process, and it was entitled to re-evaluate its programs and authorities to determine whether they trigger the ESA's consultation duty. As previously explained, notwithstanding NMFS's 2012 opinion, NMFS subsequently issued a 2014 "no jeopardy" BiOp; the Corps agreed to carry forward all the feasible protective measures from that BiOp into the re-issued nationwide permits; and NMFS itself agreed with the Corps' no-effect determination for the 2017 nationwide permits following the 2016 OMB-led inter-agency process. *See supra* pp. 11-12. This history powerfully *supports* the Corps' no-effect determination and certainly does not undermine it.[8]

As the district court conceded, the Corps' no-effect determination is entitled to deference. Appendix 47-48. The determination was eminently reasonable, and the court's contrary analysis is entirely unpersuasive. For this reason too, Federal Defendants are likely to prevail in their appeal of the district court's order.

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[8] The district court also noted that a federal district court ruled in 2005 that issuance of NWP 12 should have been preceded by consultation with the Services. Appendix 44 (citing *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1, 3 (D.D.C. 2005)). But in *Brownlee*, the court evaluated the 2002 version of NWP 12, three iterations before the permit here. In any event, *Brownlee* is not binding on this Court and to the extent that it suggests more broadly that re-issuance of nationwide permits requires formal consultation, it is not persuasive and should not be followed here.

II. The Corps and the public will be irreparably harmed absent a stay.

The Supreme Court held in *Nken v. Holder* that the third and fourth factors — whether issuance of a stay will substantially injure other parties and where the public interest lies — "merge when the Government is the opposing party." 556 U.S. at 435. This Court has further explained that where, as here, the government is the party seeking the stay, the public interest inquiry merges with consideration of the irreparable harm to the movant. *Sierra Club v. Trump*, 929 F.3d at 704-05. Because both the Corps and the public at large will be irreparably harmed absent a stay for overlapping reasons, we address both irreparable harm to the Corps and the public interest together here.

The effect of the district court's order is stark. Both current and prior Administrations have recognized the paramount importance of expanding the nation's pipeline capacity to meet the country's economic needs and ensure its energy security.[9] The order halts use of NWP 12 for new oil and gas pipeline construction anywhere in the country. The injunction applies regardless of the

[9] *See* 82 Fed. Reg. 8657, 8657 (Jan. 30, 2017) ("it is the policy of the executive branch to streamline and expedite . . . approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as . . . repairing and upgrading critical . . . pipelines"); 77 Fed. Reg. 18,891, 18,891 (Mar. 28, 2012) ("expanding and modernizing our Nation's pipeline infrastructure . . . is a vital part of a sustained strategy to continue to reduce our reliance on foreign oil and enhance our Nation's energy security"). As a result of the district court's order, all of these proposed activities may now require an individual permit from the Corps.

length of the pipeline, its intended purposes (e.g., distribution of gas to communities for heating), or any potential impacts to listed species or habitat. The district court has prohibited even a small resource development company from installing a short gas gathering line that would impact a total of less than 1/10 an acre of waters of the United States. Any fill associated with new oil and gas pipeline construction will now potentially require an individual permit from the Corps.

Initially, the effect of the district court's order will be to place on hold any pipeline projects that were anticipating NWP 12 verifications in the near future. Going forward, this major change in how oil and gas pipeline projects obtain necessary Corps authorization will potentially result in massive delays for projects across the country. Individual permits require a resource-intensive, case-by-case review, including public notice and comment and a formal determination. Appendix 223. In 2018, the average time to receive a standard individual permit from the Corps was 264 days, while the average time to receive an NWP verification from the Corps was only 45 days. Appendix 225. This disparity does not even account for NWP 12-authorized oil and gas pipeline activities that did not previously require any notification to the Corps (because they are not even "in the vicinity" of protected species or habitat) and that now must proceed through a time-consuming and resource-intensive individual permit process.

The district court's order will also have profound economic costs. Most directly, it will significantly increase the cost to proponents of obtaining authorization for their projects — costs that will inevitably be passed on to the public. The Corps estimates that a project proponent's average cost of obtaining an NWP 12 verification is approximately $9,000, whereas the average cost of obtaining a standard individual permit is approximately $26,000, nearly triple. Appendix 225. Again, this stark gap does not even account for the many other activities that did not previously require a PCN under NWP 12 but now may require individual permits.

The major delays and increased permitting costs for NWP 12-authorized activities will also have second-order economic costs. The oil and pipeline construction activities permitted by NWP 12, like utility line projects generally, have positive local, regional, and national economic impacts; they support jobs and revenue for employers; and they benefit other businesses that are not directly involved in construction but provide needed supplies and services. Appendix 227-28. The benefits of the streamlined authorization afforded by NWP 12 for such infrastructure projects is particularly important in the current economic climate because of the financial impacts from the COVID-19 epidemic. *Id.* All of these positive effects will be immensely frustrated absent a stay.

The disruptiveness of the district court's decision, moreover, will almost certainly not be even partially offset by any environmental benefits to the public. As

explained above, NWP 12 already contains a number of safeguards to ensure that environmentally sensitive projects receive additional review, including a General Condition prohibiting activities that might affect endangered species or critical habitat — a Condition with which the district court *presumed* permittees would comply. *See supra* p. 32. Indeed, by halting NWP 12's use to authorize new oil pipeline construction, the district court's order may incentivize transportation of oil by rail, which is subject to less stringent environmental and safety regulation than pipelines. *See generally* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 Iowa L. Rev. 947, 1019-25 (2015) (chronicling rapid rise of rail use to transport oil in recent years, and discussing safety and environmental challenges).

Consequently, the irreparable-harm and public-interest factors likewise strongly support a stay of the district court's order.

III. A stay will not harm Plaintiffs' interests.

Finally, a stay of the district court's order will not substantially injure Plaintiffs. As to this factor, we reiterate that the district court's order forecloses *any* potential use of NWP 12 to authorize proposed activities associated with new oil and gas pipeline construction —anywhere in the country — while Plaintiffs sought relief only related to (and alleged harm only from) the Keystone XL project. *See supra* pp. 13-15. Thus, Plaintiffs cannot reasonably claim that they would be harmed by a

stay of the district court's vacatur and injunction as it relates to any project other than the Keystone XL pipeline.

In any event, and as previously explained, the projects that Plaintiffs belatedly purported to challenge have hardly escaped notice and will not proceed in violation of environmental statutes if this Court grants the requested stay. For example, Plaintiffs' new declarations made repeated reference to the Mountain Valley Pipeline and the Atlantic Coast Pipeline. The environmental effects of each of those pipelines was studied in Environmental Impact Statements (EIS) prepared by the Federal Energy Regulatory Commission, and the EIS for the Mountain Valley Pipeline has been upheld by the D.C. Circuit. *See Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019). The Fourth Circuit, by contrast, held that Nationwide Permit 12 did not cover the proposed Mountain Valley Pipeline construction and vacated the Corps' authorization, *see Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 655 (4th Cir. 2018), and the Corps thereafter withdrew its authorization of the Atlantic Coast Pipeline on the same grounds. Even if NWP 12 were to remain in effect pending appeal, therefore, it would not presently authorize construction of these two pipelines.

The Permian Highway Pipeline referenced by several of Plaintiffs' declarants is also subject to *ongoing* litigation. *See City of Austin v. Kinder Morgan Texas Pipeline, LLC*, No. 1:20-cv-00138-RP (W.D. Tex.); *Sierra Club v. U.S. Army Corps*

of Engineers, No. 1:20-cv-00460 (W.D. Tex.). So is the Dakota Access Pipeline. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01534, 2020 WL 1441923 (D.D.C. Mar. 25, 2020). Other pipeline projects identified by Plaintiffs have been subject to similarly extensive environmental review. *See, e.g.*, Appendix 176 (discussing the Southgate Project and noting the preparation of an EIS in support of that project).

In short, if and when these and other projects are permitted to go forward or have already gone forward, it will be because other Article III courts determined — based on an actual site-specific record — that they comply with applicable law. Permitting the district court's nationwide injunction to remain in place serves no additional environmental purpose and, indeed, is contrary to the comity that should be accorded the litigation being conducted in those courts. The District of Montana has no statutory or other warrant to assume the role of a centralized court conducting environmental reviews for projects across the entire country.

Nor would Plaintiffs be harmed by a stay of the vacatur and injunction with respect to the Keystone XL pipeline. An extensive consultation process under Section 7 of the ESA has already been conducted to analyze Keystone XL's impacts on protected species and habitat. *See supra* pp. 12-13. TC Energy has submitted to the Corps PCNs that include all of Keystone XL's proposed crossings, and those PCNs remain pending before the Corps. *See id.* To the extent that the district court

was concerned that, absent programmatic consultation, the Corps might not conduct site-specific review when warranted, that concern is unfounded; but, in any event, that concern simply *does not apply* to Keystone XL. And stay or no stay, Plaintiffs are free to revive their two claims challenging any purported verifications of TC Energy's PCNs if and when the Corps actually verifies them.

CONCLUSION

For the foregoing reasons, this Court should grant a stay pending appeal and grant an immediate administrative stay while the Court considers the motion to stay.

Federal Defendants propose a briefing schedule on the following page.

Dated: May 13, 2020.

Respectfully submitted,

s/ *Eric Grant*
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PROPOSED BRIEFING SCHEDULE

Wednesday, May 13	Federal Defendants filed stay motion
Friday, May 15	Related stay motions and amicus briefs in support
Wednesday, May 20	Opposition to stay motion(s)
Friday, May 22	Reply(ies) in support of stay motion(s) and amicus briefs in opposition
Friday, May 29	Requested action by the Court

If the Court were to grant the requested administrative stay, Federal Defendants have no objection to extending the briefing schedule.

CERTIFICATE OF COMPLIANCE

I am the attorney for Federal Appellants.

This motion contains 11,198 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The motion's type size and typeface comply with Appellate Rule 32(a)(5) and (6).

I certify that this motion is accompanied by a motion to file a longer motion pursuant to Circuit Rule 32-2(a).

Signature s/ Eric Grant

Date May 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

I certify that I served the foregoing document via e-mail to the individuals listed below.

s/ *Eric Grant*
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ADDENDUM

Endangered Species Act
16 U.S.C. § 1536(a)(2)

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

. . . .

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Clean Water Act
33 U.S.C. § 1344(e)

§ 1344. Permits for dredged or fill material

. . . .

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

ESA Regulations
50 C.F.R. § 402.14

§ 402.14 Formal consultation.

(a) Requirement for formal consultation. 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, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.