Nos. 20-35412, 20-35414, and 20-35415

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' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

As to Nationwide Permit 12 (NWP 12) as a whole, Plaintiffs' Complaint expressly sought only *declaratory relief* and a *remand*. For the more drastic and disruptive remedies of vacatur and an injunction, the Complaint expressly sought relief only as to future NWP 12 verifications of the *Keystone XL project*. Plaintiffs initially represented that they "do not seek to vacate NWP 12, but rather seek vacatur and injunctive relief only as to Keystone XL approvals," and they made a similar representation during summary judgment briefing. At no point did Plaintiffs identify any other specific pipeline as a target. The district court accordingly recognized that "Plaintiffs do not ask the Court to vacate NWP 12," and it reassured oil and gas pipeline companies that they "could still prospectively rely on the permit . . . even if Plaintiffs prevail on the merits." Not surprisingly, therefore, neither Plaintiffs nor Federal Defendants even *briefed* the appropriateness of vacatur or broad injunctive relief at summary judgment.

The district court nonetheless issued a nationwide injunction against NWP 12, precluding the U.S. Army Corps of Engineers (Corps) and private parties from relying on NWP 12 for activities related to new oil and gas pipeline construction anywhere in the country. Crafted on the fly in response to Defendants' motion for a stay pending appeal, that order is an extraordinary overreach that cannot be reconciled with Plaintiffs' own request for more limited relief, principles of waiver

or fair notice, the court's own prior rulings, the rules governing summary judgment and reconsideration, or established remedial principles in an action under the Administrative Procedure Act (APA). Nothing in Plaintiffs' opposition to the motions for a stay pending appeal (Opposition) salvages the court's mishandling of this case or justifies leaving in place economically and environmentally disruptive remedies that Plaintiffs did not even pursue until two weeks ago.

For these reasons, Federal Defendants are likely to succeed in their challenge to the district court's nationwide injunction and partial vacatur. But in addition to these procedural errors, neither the record on summary judgment nor the post-decisional and conclusory declarations that Plaintiffs submitted two weeks ago justify the injunction. Putting aside that the Complaint sought only vacatur of the Corps' verifications as to Keystone XL, the broader vacatur ordered by the court is inconsistent with the law of this Circuit. In any event, there was no ESA violation in the first place: the Corps correctly concluded, based on (among other things) the environmental safeguards built into NWP 12, that consultation was not required.

The remaining stay factors tip lopsidedly in favor of a stay. As explained in the opening papers (Federal Stay Motion) and as documented in the examples provided by Intervenor-Defendants and amici, casting aside NWP 12 in a critical sector of the economy (thereby requiring resource-intensive individualized permit reviews) will introduce considerable delay, increased costs, and uncertainty in often

time-sensitive and seasonally restricted infrastructure projects throughout the country. By halting or delaying these projects, the order will cost project proponents billions of dollars, deprive state and local governments of associated tax revenue, and eliminate jobs supported by the projects. The order is also ambiguous in numerous respects, including as to both the projects and the specific activities to which it applies; the resulting regulatory doubt will create uncertainty both for the Corps and for project proponents across the country.

The order imposes those significant costs for little, if any, countervailing environmental benefits. Indeed, the order may well cause *additional* environmental harm by diverting economically essential activities both to less efficient modes of transportation and to older pipelines built under less-demanding safety standards.

Finally, Plaintiffs will not be harmed by a stay, which would simply restore the status quo since the Carter Administration. Plaintiffs cannot reasonably claim harm from staying relief they did not even *seek* in their Complaint or at summary judgment. Given the safeguards built into NWP 12 and the site-specific analysis that Keystone XL and the projects belatedly targeted by Plaintiff have undergone, there is no reason to think the programmatic consultation required by the district court would further inform project-specific ESA consultation triggered by General Condition 18. Nor is it likely to inform the development of specific measures to avoid, minimize, or offset effects to species or habitat in the project's vicinity.

The district court's handling of this case is flawed, and its order will cause widespread harm. Indeed, the enormous volume of evidence now before this Court highlights the number of entities who were blindsided by the district court's order. A stay pending appeal should be granted.

ARGUMENT

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 pipeline construction.

1. The court's remedies were procedurally improper.

The district court had no basis for enjoining and vacating NWP 12 as applied to all new oil and gas pipeline construction anywhere in the country. Plaintiffs' effort now to defend that sweeping remedy — which they had previously disclaimed — only underscores the errors in the decision below.

Initially, Plaintiffs do not dispute that their Complaint sought to vacate only "Corps verifications or other approval of Keystone XL under NWP 12" and likewise sought only an "injunction enjoining the Corps from using NWP 12 to authorize the construction of the Keystone XL pipeline." Appendix 409. Indeed, their Complaint mentions no other ongoing pipeline project. Plaintiffs insist that they "sought broad relief that went beyond Keystone XL," Opposition at 49, but that "broad relief" was concededly declaratory relief and a remand *without* vacatur, Appendix 408-09.

Likewise, neither Plaintiffs' summary judgment briefing nor their fourteen accompanying declarations so much as mentioned, let alone indicated an intent to challenge, any other specific ongoing or future project. Plaintiffs' summary judgment reply expressly reassured otherwise: "Plaintiffs, from the outset, have asked the Court to . . . 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 (emphasis added). Plaintiffs contend that they "again asked for broad relief as to NWP 12 itself" during summary judgment briefing, but they once again concede that the relief sought was declaratory relief and a remand without vacatur. Opposition at 50.

Plaintiffs also point out that their Complaint contained both "facial" claims challenging re-issuance of NWP 12 and two claims challenging the Corps' alleged authorization of Keystone XL using NWP 12, Opposition at 49, but this similarly misses the point. There is no dispute that Plaintiffs challenged the re-issuance of NWP 12 "on its face," i.e., that prior programmatic review was required without regard to how NWP 12 was later applied to Keystone XL or any other project. But there is also no dispute that Plaintiffs repeatedly made clear that they sought *only* declaratory relief and remand without vacatur as to those claims. The district court could not have said it better: "Plaintiffs do not ask the Court to vacate NWP 12." Appendix 303. Plaintiffs refer to Federal Defendants' argument that the facts of

Keystone XL were irrelevant to Plaintiffs' "facial" claims, Opposition at 50-51, but Federal Defendants were simply making the unremarkable point that the legal questions embedded in those claims had nothing to do with post-issuance application of NWP 12, *see* Plaintiffs' Appendix 139-40. That point does not change the fact that Plaintiffs' facial claims were expressly limited to remand and declaratory relief.

Plaintiffs also argue that "the nationwide implications of the case was the basis of NWP 12 Coalition's participation as intervenors." Opposition at 50 n.24. But in opposing that intervention, Plaintiffs stated: "As the Corps points out, *Plaintiffs do not seek to vacate NWP 12, but rather seek vacatur and injunctive relief only as to Keystone XL approvals*." ECF No. 52 at 3 (emphasis added). The district court then denied intervention as of right on that very basis. Appendix 303-04.

Given the foregoing, Plaintiffs waived any claim for injunctive relief or vacatur of NWP 12 extending beyond the Keystone XL project. Against this Court's holding 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), Plaintiffs argue that a litigant cannot "waive the default remedy for a claim for which it successfully argued the merits on summary judgment," Opposition at 54. That is not the law: even assuming that vacatur and a nationwide injunction are the "default" remedies for the procedural violation here — which they are not — they are neither jurisdictional nor even mandatory. *Cf.*

Kontrick v. Ryan, 540 U.S. 443, 456 (2004) (even mandatory protections can be forfeited). Indeed, as discussed below, these remedies would not have been appropriate even if they were properly presented, briefed, and considered. Here, of course, Plaintiffs did not merely fail to argue in favor of injunctive relief and vacatur beyond Keystone XL. They repeatedly and expressly *disavowed* any such relief, and both the district court and the other parties *relied on* those express disavowals.

That is waiver under any possible standard. Like the district court, Plaintiffs insist that Rule 54(c) nonetheless authorizes the district court's unilateral expansion of this case, *see* Opposition at 52, but there is "an exception [to Rule 54(c)] for explicit waivers," *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006); *see also Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 341 (5th Cir. 2015) ("Peterson's failure to seek injunctive relief until after the judgment was entered unduly prejudiced Bell and waived Peterson's claim, which cannot be salvaged by Rule 54(c)."); Federal Stay Motion at 23.

The district court also erred in granting relief contrary to its own prior rulings in this case. Relying once again on Plaintiffs' representations, the court could not have been clearer that "Plaintiffs do not ask the Court to vacate NWP 12," and that the NWP 12 Coalition "could still prospectively rely on the permit . . . even if Plaintiffs prevail on the merits." Appendix 303-04. Plaintiffs contend that "the district court made that observation early in the case," Opposition at 57, but this was

not merely an "observation"; it was the very basis of the court's decision to deny intervention as of right *to a group representing the interests of oil and gas pipeline companies*. Appendix 303-04. Plaintiffs cite nothing in the summary judgment record that justified the court's unexplained about face, and the court itself made no attempt to reconcile either its April 15 order or its amended order with these prior rulings, even after Federal Defendants brought those rulings to the court's attention.

The granting of relief that Plaintiffs never requested, without providing Federal Defendants or affected project proponents or the public a fair opportunity to contest the appropriateness of that relief, was also clear error. *See* Federal Stay Motion at 21; *Peterson*, 806 F.3d at 340 ("The discretion afforded by Rule 54(c) thus assumes that a plaintiff's entitlement to relief not specifically pled has been tested adversarially, tried by consent, *or at least developed with meaningful notice to the defendant*." (emphasis added)). Plaintiffs contend that "Defendants could have addressed the appropriate relief in their summary judgment briefs, but opted not to do so." Opposition at 61. But Federal Defendants (and Plaintiffs) did not address the propriety of nationwide injunctive relief or vacatur under the *Allied Signal* test because no party reasonably thought those remedies at issue. *See* ECF No. 93 at 31 n.7 (Coalition brief); ECF No. 110 at 20-21 (federal reply brief); ECF No. 124 at 65 (Mar. 6, 2020 hearing) (intervenor counsel's stating, without rejoinder from district court, that further briefing would be required for any remedy).

Contrary to Plaintiffs' Opposition, this lack of notice was not cured after the fact in the proceedings on Defendants' motion for a stay pending appeal. *See* Opposition at 58-61. Plaintiffs responded to that motion by seeking a brand new remedy (supported by fourteen new declarations targeting new projects), by attempting to revive waived claims, and by alleging wholly new injuries. The district court's acceptance of that entirely new proposal made the procedural irregularity of its injunction worse, not better.

Indeed, the district court had no basis for considering Plaintiffs' post-decisional submissions in response to Defendants' motions to stay — either their new requested relief or their fourteen new standing declarations. Neither the rules governing stays pending appeal or reconsideration (which no party sought) authorize a district court to entertain waived and forfeited claims or new evidence that could have been (but was not) presented previously. *See* Federal Defendants' Brief at 22; *Summers v. Earth Island Institute*, 555 U.S. 488, 495 n.*, 508 (2009); *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

* * * * *

The district court's failure to follow all of these rules is unfair to the Corps, to Intervenor-Defendants in general, and to the NWP 12 Coalition and Montana in particular. It is unfair to project proponents and to other affected members of the public across the country who had no notice or opportunity to object to the court's

far-reaching decision. These include the 18 amici States, all but one of which are outside this Circuit, who note that they "had no notice that the district court would go beyond Plaintiffs-Appellees' requested relief to issue an Order affecting States far afield of the Keystone XL route." *See* Brief of States of West Virginia, et al. at 2 (May 15, 2020) (States Brief). Because the district court acted without fair notice, it lacked the benefit of hearing from those affected third parties about the harms that its sweeping order would impose. This Court should stay that order pending appeal to preserve the status quo nationwide while expeditiously considering the merits of the decision below.

2. In any event, there was no basis for the district court's far-reaching remedies.

For the reasons stated above, Federal Defendants are likely to succeed in their challenge to the district court's grant of a nationwide injunction and concomitant vacatur. But these remedies would not have been appropriate even if the litigation had proceeded differently. Principles of equity 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), and this Court has thus repeatedly vacated or stayed the nationwide scope of injunctions where such broad relief is not necessary to provide the plaintiff with complete relief, *see* Federal Defendants' Brief at 24-25 (collecting cases). Similarly, "there is no presumption of irreparable injury where there has been a procedural violation in ESA

cases," *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1091 (9th Cir. 2015); rather, that injury must be proven.

Plaintiffs did not meet the standards for nationwide relief. Indeed, they did not even *allege* harm from any project other than Keystone XL. Plaintiffs may not sidestep these requirements simply by contending that the harms alleged from Keystone XL are "illustrative," or that Plaintiffs were impacted by other "major projects." Opposition at 41. Rather, "all injunctions . . . must be narrowly tailored to remedy *the specific harm shown*." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (emphasis added). Plaintiffs undoubtedly realized this point, which is why they submitted fourteen new declarations identifying new projects and new alleged injuries after the district court's initial decision. But putting aside that those declarations were not properly considered, they are completely conclusory and devoid of detail. *See* Federal Stay Motion at 26.

Plaintiffs do not seriously defend the district court's *injunction*. Rather, they insist that no defense is needed because *vacatur* is entirely exempt from both the ordinary rules concerning standing or the requirement that relief be the least burdensome available. *See* Opposition at 39. This is not correct on several levels.

In the first place, the district court has issued no final judgment. Therefore, to the extent that the court had any power to compel immediate obedience with its view that NWP 12 is unlawful, the court necessarily had to rely on its power to issue

preliminary injunctive relief. *Cf.* Opposition at 46 (purporting to distinguish "cases limiting the scope of nationwide injunction" because many "deal with preliminary injunctions, and thus are governed by different considerations").

Moreover, although the APA calls for a court to "set aside" unlawful agency action, 5 U.S.C. § 706(2), that is part of a provision setting forth the scope of review, not of relief; the latter is governed 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). This Court also has repeatedly pared back nationwide relief even when finding an action procedurally invalid under the APA. *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011).

In any event, vacatur would have been inappropriate under the *Allied Signal* test adopted in *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). As to the first factor (seriousness of the agency's error), the district court's order was grossly disproportionate to the purported procedural violation. Plaintiffs contend that failure to engage in consultation was "especially egregious." Opposition at 32. It was anything but: NWP 12 authorizes no activities that "may affect" a listed species or critical habitat, and General Condition 18 requires a pre-construction notice (PCN) based on an even lower "might affect" threshold. The

Corps, moreover, continued to implement protective measures within the scope of the Corps' authority from NMFS's 2014 "no jeopardy" BiOp. Plaintiffs offer no persuasive reason to believe that programmatic consultation would further inform project-specific ESA consultation triggered by General Condition 18.

As to the second factor (disruptive consequences of vacatur), the disruptions introduced by the district court's order are profound. *See infra* Part II (pp. 19-26). If delaying a single "much needed power plant" counsels against vacatur, *California Communities*, 688 F.3d at 993, the situation here — delaying and calling into question pipeline infrastructure projects *across the country* — certainly does as well. Again, this important issue was not even *briefed* at summary judgment below because Plaintiffs expressly disclaimed this highly disruptive remedy.

Federal Defendants are likely to succeed in their challenge to the district court's nationwide injunction and vacatur.

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

Though the Court need not reach this issue to grant a stay, the district court's merits ruling was also wrong: the Corps did not violate the ESA when it did not consult with the Services before re-issuing NWP 12. The ESA's consultation requirements are not triggered unless the agency determines that its proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Here, General Condition 18 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. 1860, 1999 (Jan. 6, 2017).

Thus, the critical feature of NWP 12 is that project proponents may not proceed with any project absent 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. In re-issuing NWP 12, the Corps 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.

General Condition 18 is far from the only safeguard. In addition to regional conditions, NWP 12 requires a PCN for any proposed project "result[ing] in the loss of greater than 1/10-acre of waters of the United States"; and the Corps estimated that more than 80 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. Federal Stay Motion at 33-34. Many other general conditions further narrow the availability of NWP 12 to avoid many of the alleged effects identified by the district court and Plaintiffs. *See* 82 Fed. Reg. at 1998-99 (General Condition 2: activity may not substantially disrupt the necessary life cycle movements of indigenous aquatic life; General Condition 3:

activity may not result in the physical destruction of important spawning areas; and General Condition 12: appropriate soil erosion and sediment controls are required).

The Corps determined based on the foregoing that NWP 12's mere re-issuance would have "no effect" on protected species and critical habitat. 82 Fed. Reg. at 1873. That conclusion was eminently reasonable; indeed, it follows almost tautologically from the terms of General Condition 18 itself. The district court's contrary determination was wrong, and Plaintiffs' defense thereof fares no better.

The district court's principal basis for discounting General Condition 18 — that it supposedly "delegates the Corps' initial effect determination to non-federal permittees," Appendix 57 — is plainly incorrect, and Plaintiffs accordingly relegate it to a footnote, Opposition at 23 n.9. The Corps itself makes the Section 7(a)(2) determination. *See* 82 Fed. Reg. at 1954-55, 1999-2000. 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"). Notably, the district court did not find that permittees will fail to abide by General Condition 18, there is no evidence to support such a finding, and Plaintiffs' Opposition makes no such argument. General Condition 18 is written in broad and objective terms, and permittees face serious civil and even possible criminal penalties for undertaking unauthorized activities. Federal Stay Motion at 33. Thus, Plaintiffs' argument is grounded in the paradoxical notion that an activity

"may affect" an ESA listed species even if it *may not legally proceed* if that is the case. That cannot be right.

Plaintiffs devote the bulk of their argument to a contention that programmatic review was needed to assess the *cumulative impact* of various activities, none of which individually may affect listed species or critical habitat. Opposition at 18-23. This argument also fails. First, regional conditions can address cumulative effects tailored to particular areas and watersheds. Indeed, the Corps' Omaha District imposed regional conditions on use of nationwide permits, including protections for pallid sturgeon and American burying beetle (the two species addressed in the declarations on which the district court relied). Federal Stay Motion at 34.

But more importantly, the PCN process addresses this concern. If a specific activity takes place in an area where a species is present or in designated critical habitat, or even where a species is in the vicinity, the activity triggers the "might affect" threshold. At that point, the Corps would assess whether further ESA review is needed, which should include an assessment of whether this authorization may affect listed species when added to the environmental baseline for a species. In any future consultation, the review performed by the applicable Service would *include* a cumulative effects analysis. *See* 50 C.F.R. §§ 402.14(c)(1)(iv), (g)(3), (g)(4).[1]

[1] Thus, Plaintiffs are wrong to rely on *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); and *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075

Plaintiffs also repeat the district court's contention that there was "resounding evidence" in the record that NWP 12 may affect listed species and their habitat. Opposition at 15. There was no such evidence. As to the Corps' statements on which the court relied, those general statements did not suggest that NWP 12 may affect listed species or critical habitat, nor did they discuss General Condition 18 or the other safeguards built into NWP 12. Federal Stay Motion at 36-37. Plaintiffs cite the court's purported findings based on two of their declarations, Opposition at 15-16, but this is a remarkably thin reed. Those declarations were submitted for standing purposes only, and they fail to discuss General Condition 18, regional conditions (including those conditions addressed to the two species about which the declarants express concern), or the other provisions of NWP 12 that trigger site-specific review. Federal Stay Motion at 37.

Plaintiffs also contend, echoing the district court, that "the Corps was well aware of its duty to consult." Opposition at 23. But whether consultation is required is a legal question governed by legal standards, not an issue as to which agency

(9th Cir. 2015). Whatever impacts the Court in *Kraayenbrink* believed the action at issue might have had on species, *see* 632 F.3d at 495-97, those impacts cannot occur here because NWP 12 does not apply where it might affect a listed species. Because *Conner* involved a situation in which FWS failed to prepare a BiOp despite its concession that the relevant lease sale could affect listed species, pursuant to a statute that provided "no checks and balances" following the lease sale, it is also unlike the situation here. 848 F.2d at 1452, 1455-56. In *Cottonwood*, there was likewise no dispute that the underlying agency action required consultation, and the issue was merely whether and under what circumstances an agency retained responsibility to reinitiate consultation when the underlying action was complete. 789 F.3d at 1086.

scienter is somehow pertinent. In any event, Plaintiffs are wrong here, too. The Corps has consistently taken the position that consultation was not required. Federal Stay Motion at 39; *see also National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (that an agency voluntarily consulted with FWS did not mean ESA consultation was required).

Finally, the Corps' determination that consultation was not required is entirely consistent with its previous interactions with the Services and with the OMB-led inter-agency process in the prior Administration. Plaintiffs acknowledge that NMFS issued a no-jeopardy determination in 2014, and they make no persuasive argument that there was any feature of the 2017 successor permit that would change that conclusion. Plaintiffs protest that "the Corps agreed to apply some, but not all of" NMFS's protective measures to the 2017 iteration of the nationwide permits, Opposition at 27, but the only measures *not* carried forward were three that NMFS determined were infeasible, Federal Stay Motion at 12. Plaintiffs also quibble with Federal Defendants' characterization that NMFS agreed with the Corps' no-effect determination, but the record reflects that the Services acknowledged that position, and Plaintiffs cite nothing in the record following the 2016 OMB-led process suggesting that either Service objected. Of course, neither of the Services requested formal consultation following the 2016 OMB-led discussions, though they could have done so. *See* 50 C.F.R. § 402.14(a).

The Corps correctly determined that the mere re-issuance of NWP 12 did not trigger ESA Section 7(a)(2) consultation requirements. For this reason too, the Corps is likely to succeed on the merits of its appeal.

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

The Corps and the public at large will be irreparably harmed absent a stay of the district court's legally flawed order. Federal Stay Motion at 40-43. The American economy is fueled by oil and gas pipelines, the construction of which contributes tens of billions of dollars to the Nation's GDP and stimulates hundreds of thousands of jobs each year. Brief of Chamber of Commerce et al. at 4, 7 (May 15, 2020) (Chamber Brief); *see also* States Brief at 5 (stating that more than 700,000 Americans worked in the oil and gas industry in 2018, earning average salaries over $100,000). In addition to these direct benefits, oil and gas pipelines reduce domestic energy costs, yielding downstream benefits for consumers. Chamber Brief at 6-7.[2]

Even modest changes to this longstanding legal regime can have significant economic effects and should be undertaken with great care. The district court's

[2] Plaintiffs fault Federal Defendants for purportedly focusing on harm to the public rather than to the agency specifically. Opposition at 64-65. But there is "inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Federal Defendants also cited other agency-specific irreparable harm, including strain on the Corps' resources. Federal Stay Motion at 30, 41-42. In any event, where 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 670, 704-05 (9th Cir. 2019).

order, however, was not issued with great care and, if left in place pending appeal, its effects will be anything but modest. Most immediately, the order halts reliance on NWP 12 for new oil and gas pipeline construction anywhere in the country, regardless of the pipeline's length, intended purposes, or potential impact to listed species or habitat. NWP 12 may not be used to authorize *any* of the numerous oil and gas pipeline projects awaiting verification from the Corps or in planning stages — including projects at an advanced stage of development — and those projects must instead start the individual permit process from scratch, unless another general permit is available. Federal Stay Motion at 40-41.

Intervenor-Defendants and amici provide numerous representative examples of such projects. For example, the American Petroleum Institute states that its members alone have approximately 75 pipelines in various stages of development, and that a one-year delay of just 11 of those projects would impose costs of $1.9 billion. DktEntry 34-2, ¶¶ 4-5. The Association of Oil Pipelines provides additional examples of pipeline projects at various stages of development as to which project proponents expected to receive Corps verifications shortly but for the district court's order. DktEntry 34-5, ¶¶ 6-9. Indeed, the breadth of that order — and the court's failure to subject that remedy to ordinary adversarial testing — forecloses reliance on NWP 12 for other activities that the court probably did not intend to disturb. For example, another amicus brief explains that the order threatens petrochemical and

petroleum supply chains and the response to the current public health crisis. *See* Brief of American Fuel & Petrochemical Manufacturers at 3 (May 15, 2020) (AFPM Brief); *see also id.* at 5, 8-9 (explaining that AFPM's members rely on oil and gas pipelines to manufacture petrochemicals used to produce personal protective equipment and sanitizers needed for the COVID-19 response, including N95 masks); *id.* at 6-7 (noting example of multi-phase pipeline project for a polypropylene production plant that supplies plastic products manufacturers, which was awaiting Corps verification but which is now blocked by the district court's order).

Plaintiffs do not seriously dispute the significance of a robust pipeline network to our economy. Nor do they deny that a profound disruption to oil and gas and pipeline construction across the country would cause serious harms. They instead largely insist that alternatives to NWP 12 are available. Opposition at 65-67. Those arguments are unconvincing. Plaintiffs offer a passing reference to other nationwide permits, *id.* at 65, but they offer no example of such a permit that would replace NWP 12, on which the Corps and industry have relied for decades. Plaintiffs' contention that project proponents could structure their projects to avoid discharges in U.S. waters altogether, *id.* at 66, is likewise entirely unsupported and unrealistic.

Thus, if NWP 12 is unavailable for these and other projects, many if not most will need to be channeled through the individual permit process. Individual permits require a resource-intensive, case-by-case review, including public notice and

comment and a formal determination. Federal Stay Motion at 41. Plaintiffs breezily contend that the "alleged burdens associated with the individual permitting process are overblown," citing a 13-year-old article in support. Opposition at 67-68. This is unpersuasive: the Corps' own data shows that, in 2018, individual permit reviews on average took 264 days, as compared to a 45-day average for verifications under NWP 12. Appendix 225.

As the amici States observe, even this six-fold increase vastly understates the likely delays if the district court's order remains in place. The Clean Water Act precludes applicants from obtaining an individual permit without a state water quality survey, *see* 33 U.S.C. § 1341, a process that currently takes an average of 130 days. States Brief at 8. This time period, as well as the time required for the Corps subsequently to process an individual permit application, will likely increase further under the new regime created by the district court's order — in which *all* new oil and gas pipeline construction must proceed through the individual permitting process, including NWP 12-authorized oil and gas pipeline activities that did not previously require any notification to the Corps at all. Federal Stay Motion at 41. These delays, while troublesome in their own right, will be exacerbated by the time-of-year restrictions imposed for many projects to protect sensitive species; if these projects miss their seasonal construction window, they may be precluded from proceeding until the next year *after* the project runs the time-consuming gauntlet of

individualized permit review. *See* Motion of American Gas Association et al. for Stay Pending Appeal at 14 (May 15, 2020) (NWP 12 Coalition Brief).

By channeling necessary infrastructure development into a far more time-consuming process, the district court's order raises the specter of inflicting significant harm on the national economy during a time of unprecedented economic vulnerability. Oil and gas pipeline activities authorized by NWP 12 support jobs and revenue for employers, and they benefit other businesses not directly involved in construction but that provide needed supplies and services. Federal Stay Motion at 42; *see also* Appendix 227-28; Chamber Brief at 4 (citing study suggesting that expenditures for new oil and gas infrastructure will support 658,000 jobs annually through 2035); *id.* at 5-6 (citing studies indicating that Keystone XL alone will create approximately 42,100 manufacturing and construction jobs; Atlantic Coast Pipeline's construction will create approximately 17,240 construction jobs; and PennEast Pipeline's design and construction will create more than 12,000 jobs).[3]

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[3] The Corps emphasizes that it is neither a proponent nor an opponent of any proposed activity, *see* 33 C.F.R. § 320.1(a)(4), and so it cannot prejudge whether it will (or will not) approve any particular future activity under NWP 12, including the representative projects discussed by amici and Intervenor-Defendants. Nor can the Corps vouch for the particular studies and related statistics discussed above. But the Corps has no reason to doubt the accuracy of these examples or the others offered by amici and Intervenor-Defendants. Plaintiffs may quibble with the specifics, but the basic impact of the district court's order is not subject to serious question: if left in place, at least some pipeline projects will be significantly delayed, jobs may be lost or unrealized, and project proponents and governments deprived of significant revenue at a time when that revenue is especially needed.

All of this would be disruptive enough if the district court's order could be easily understood and predictably applied. But as the NWP 12 Coalition points out, because the district court bypassed traditional rules of litigation, the court's amended order is vague or ambiguous in critical respects. NWP 12 Coalition Brief at 9-11.

First, as to pipeline construction, regulated parties need guess how the order applies to mid-construction projects, as it alternates among "construction of new . . . pipelines," Appendix 6, 15, 36, 38; "new . . . pipeline construction," Appendix 15, 17, 18, 29; and "new construction of . . . pipelines," Appendix 22. Second, although the order carves out "routine" maintenance on "existing NWP 12 projects," it does not define such projects: are they projects that have already been completed? projects that have started the NWP 12 verification process? any project that complies with the existing NWP 12? or something else entirely? Third, the order does not delineate which maintenance and repair projects will be considered "routine": those that relocate or replace an existing pipeline? those that replace fill?

The district court entirely failed to consider these issues. As a result of the limited nature of Plaintiffs' challenge and the manner in which this case was litigated, the court simply had before it no evidence concerning the universe of potential pipeline activities or the consequences of eliminating NWP 12 as a source of authorization for them. But that is precisely why the court should have refrained from issuing such far-reaching relief.

Absent a stay, the district court's order will logically cause *environmental* harm as well. Blocking or delaying new pipeline construction will prevent some economically beneficial activities but, given the importance of those activities to the national economy, it will also incentivize transportation of oil and gas through less modern methods. Federal Stay Motion at 42-43; *cf. California Communities*, 688 F.3d at 993-94 (noting that if the construction of the power plant at issue was stopped, the subsequent blackouts caused by a lack of power would "necessitate the use of diesel generators that pollute the air"). Plaintiffs suggest that this premise is unsupported by the record, Opposition at 75, but the *reason* that the record does not include discussion of this issue is entirely that Plaintiffs *never sought* these invasive remedies until two weeks ago.

In any event, it is simply common sense that, if firms are prevented from utilizing an expanded modern pipeline network, at least some will attempt to compensate by resorting to other methods. One such method is transportation by rail. Federal Stay Motion at 43. Another method is trucks. AFPM Brief at 5 n.2 (citing Department of Transportation data explaining that it "would take a constant line of tanker trucks, about 750 per day, loading up and moving out every two minutes, 24 hours a day, seven days a week, to move the volume of even a modest pipeline"). It is hard to see how thousands of individual truck deliveries are safer to waterbodies — or to species — than a more contained system of modern pipelines

operating at the highest level of safety standards. As a matter of simple logic, stymying new oil and gas pipeline construction will increase reliance (and strain) on *older* pipelines, which were built under less-demanding standards.

The irreparable harm to the Corps and to the public supports a stay.

III. A stay will not harm Plaintiffs' legitimate interests.

Finally, a stay of the district court's order will not substantially injure Plaintiffs. In marked contrast to the disruption associated with leaving that order in place, a stay would have the exceedingly modest effect of simply restoring the status quo as it has essentially existed since 1977, when the Corps first issued a nationwide utility line general permit. *See* 42 Fed. Reg. 37,122, 37,146 (July 19, 1977). Plaintiffs provide no evidence that this longstanding legal regime — maintained by Presidents of both parties — has led to widespread environmental harm.

Indeed, the programmatic review upon which Plaintiffs insist here was in fact conducted for the prior version of NWP 12, and it resulted in a no-jeopardy BiOp. Plaintiffs point to no material differences between the current version of NWP 12 and its predecessor. The current version, moreover, was in place for more than three years before the district court's ruling. Indeed, it was in place for two-and-a-half years before Plaintiffs even *filed* this lawsuit. Until two weeks ago, Plaintiffs did not even seek much of the relief that is at issue in this motion and in fact expressly disclaimed it. Accordingly, Plaintiffs' suggestion that they "would suffer substantial

harm if Keystone XL and other new oil and gas pipelines were allowed to rely on NWP 12 during the pendency of the appeal," Opposition at 72, should be rejected.

As to the pipeline projects belatedly identified by Plaintiffs, they do not dispute that many if not all of the projects have been subject to site-specific review and even litigation. Federal Stay Motion at 44-45. Plaintiffs insist that this makes no difference because "litigation over the adequacy of those project-level reviews is irrelevant to the question of whether the Corps should have conducted programmatic consultation before reissuing NWP 12." Opposition at 74. But even if Plaintiffs are correct that programmatic review was required, it does not follow that they will be irreparably harmed by the absence of this highly general review — which would not even address particular projects — as to pipelines that have already been subject or will be subject to *far more probing and specific review*, including a cumulative impacts analysis. As to Keystone XL in particular, an extensive consultation process under Section 7 of the ESA has already been conducted to analyze it. Federal Stay Motion at 45. In any event, the Corps has not yet verified the PCNs submitted by TC Energy for that project; if and when the Corps does so, Plaintiffs are free to revive their two remaining claims directed at those PCNs. *Id.* at 45-46.

Finally, the fundamental point remains: NWP 12 contains a number of safeguards; by its terms does not authorize any activities that "may affect" listed species absent consultation; and requires a PCN for any activities that meet an even

broader "might affect" threshold. The district court did not dispute that permittees would comply with this requirement, and Plaintiffs do not suggest otherwise. *See supra* p. 15. Plaintiffs will not be irreparably harmed by leaving this longstanding regime in place during the pendency of this appeal.

CONCLUSION

For the foregoing reasons, this Court should grant a stay pending appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am the attorney for Federal Appellants.

This motion contains 6,961 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 22, 2020