No. 20-35412
(consolidated with Nos. 20-35414 and 20-35415)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, et al.,
Plaintiff-Appellees,
v.
U.S. ARMY CORPS OF ENGINEERS, et al.,
Defendant-Appellants,
and
TC ENERGY CORPORATION, et al.,
Intervenor-Defendant-Appellants,
STATE OF MONTANA,
Intervenor-Defendant-Appellant,
and
AMERICAN GAS ASSOCIATION, et al.,
Intervenor-Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
No. CV-19-44-GF-BMM, THE HONORABLE BRIAN MORRIS

INTERVENOR-DEFENDANT-APPELLANTS AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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Table of Contents

Table of Authorities

Federal Cases

Legislative History

Federal Register

Miscellaneous

I. Introduction

Plaintiffs cannot escape these facts: The District Court granted relief they affirmatively disavowed. The remedy under review was therefore not subject to the ordinary rigors of the adversarial process. And until the order is reversed, many who require Nationwide Permit ("NWP") 12 to conduct time-sensitive activities of public importance are, at a minimum, stymied by unanswered questions created by the District Court's flawed process.

Like the District Court, Plaintiffs pretend they never disclaimed any remedies. But the record is clear. In three separate filings, Plaintiffs said they "do not seek to vacate NWP 12" (Doc. 52 at 3), "have not sought to have NWP 12 broadly enjoined" (Doc. 50 at 3), and, again, "have not sought to have NWP 12 broadly enjoined" (Doc. 107 at 57).

The District Court's grant of that relief is a textbook violation of the principle of party presentation and has, unsurprisingly, led to vast uncertainty even Plaintiffs cannot deny. By effectively becoming a rogue regulator and issuing its own NWP without notice and comment, the District Court crafted a remedy rife with ambiguity and a wide-range of possibly unintended consequences. And Plaintiffs all but admit they "may sue to enforce their own broader reading" of the order. Dkt. 34-1 at 3.

The District Court's order has many flaws, but these reasons alone warrant a stay.

II. Argument

A. Defendants Are Likely To Prevail on Appeal.

Though the District Court erred as to merits and remedy, the NWP 12 Coalition will again focus only on remedy, as the merits are covered well by others.

1. The District Court exceeded the limits of party presentation.

In granting a nationwide vacatur and injunction of NWP 12, the District Court committed a quintessential violation of party presentation unlikely to survive appeal. Dkt. 34-1 at 1-2, 21-22.

Plaintiffs respond primarily with misdirection. They contend that they challenged NWP 12 "on its face" and "as a whole." Dkt. 45-1 at 49-50. And they argue that "courts can grant broad facial relief even if it exceeds the as-applied relief plaintiffs requested," and even if they "fail[ed] to argue" for certain relief. *Id.* at 53-54.

But Plaintiffs miss the point. They *affirmatively disclaimed* nationwide relief—clearly and repeatedly. Thus, it does not help Plaintiffs that "the nationwide implications of the case was the basis of NWP 12 Coalition's participation as intervenors," *id.* at 50 n.24, as they then opposed intervention by

disavowing nationwide relief. They argued that the Coalition lacked "a protectable interest" because "Plaintiffs do not seek to vacate NWP 12, but rather seek vacatur and injunctive relief only as to Keystone XL approvals." Doc. 52 at 3. Similarly, during summary judgment briefing, Plaintiffs reaffirmed that they "have not sought to have NWP 12 broadly enjoined," but asked only that the District Court "declare unlawful and vacate the Corps' use of NWP 12 to approve Keystone XL" and "enjoin activities in furtherance of Keystone XL." Doc. 107 at 57.

Those choices *bound* the District Court. The principle of party presentation extends to a party's express disclaimer of certain remedies. *See, e.g.*, *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) (plaintiffs' "waiver eliminates the possibility of their obtaining those remedies in this action"); *Shinault v. Hawks*, 782 F.3d 1053, 1060 n.7 (9th Cir. 2015) (dismissing claim because plaintiff "disclaimed an injunctive remedy during oral argument"); *Petrello v. Prucka*, 484 F. App'x 939, 942 (5th Cir. 2012) (plaintiff "disclaims money damages and is thus precluded from seeking punitive damages or attorneys' fees").

Plaintiffs contend that the District Court accepted their disavowal "early in the case," and thus this "did not preclude the court." Dkt. 45-1 at 57. But party presentation binds the District Court to *Plaintiffs'* statements. And Plaintiffs made clear early and late in the case that they declined nationwide relief.

Plaintiffs also argue that Defendants "had a full and fair opportunity to brief" a nationwide injunction or vacatur of NWP 12. *Id.* That is wrong for two reasons. *First*, even if true, a court cannot circumvent party presentation simply by affording an opportunity to brief a disclaimed remedy. *See United States v. Oliver*, 878 F.3d 120, 127 (4th Cir. 2017) ("When the court raises a forfeited issue sua sponte, it undermines the principle of party presentation…."). *Second*, that never happened.

The District Court never indicated it intended to grant relief Plaintiffs affirmatively disclaimed. As Plaintiffs admit, the District Court acknowledged early that "Plaintiffs do not ask the Court to vacate NWP 12." Doc. 59 at 4-5. The Coalition thus had no reason to brief that remedy, though it nevertheless twice reserved the right to brief the appropriate remedy. Doc. 93 at 31 n.7; Transcript of Motion Hearing at 65. But the District Court simply issued its order granting nationwide vacatur and injunctive relief.

Then when Defendants attempted to address the nationwide relief in seeking a stay, we still did not get a fair opportunity to be heard. In opposing the stay, Plaintiffs moved the goalposts, reneging on their prior disavowals, and submitted more than a dozen new declarations. And over Defendants' vehement objections,

the District Court allowed it. That is not full and fair briefing, and it is made worse by the inaccuracies in Plaintiffs' last-minute declarations.[1]

2. The District Court's procedural errors led to substantive errors with the remedy.

By taking matters into its own hands, the District Court unsurprisingly made several substantive mistakes, too.

a. The revised remedy is arbitrary and unsupported by evidence.

There is no record basis for the District Court's distinction between "the construction of new oil and gas pipelines" and other construction projects. Dkt. 34-1 at 23. Plaintiffs respond that "the court tailored its remedy to vacate NWP 12 … based on the parties' submissions," but they point to nothing specific in the record. Dkt. 45-1 at 35 n.14. Nor could they. The nature of pipeline construction authorized by NWP 12, with typically temporary and only minor impacts, does not change by virtue of the substance the project transports or transmits.

[1] For example, one declaration incorrectly claimed that construction of the Atlantic Coast Pipeline cut trees in the Ramsey Draft Wilderness. Doc. 144-2 ¶ 23. *But see* Federal Energy Regulatory Commission, *Atlantic Coast Pipeline and Supply Header Project, Final Environmental Impact Statement, Volume I* at 4-382 (July 2017), https://www.ferc.gov/industries/gas/enviro/eis/2017/07-21-17-FEIS/volume-I.pdf ("No National Parks, designated Wilderness Areas, National Natural Landmarks, recreation recovery areas, or designated wild and scenic rivers were identified within 0.25 mile of the projects.").

b. The order's *Allied-Signal* analysis is wrong.

The District Court also erred in focusing only on environmental disruption under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). Consistent with the D.C. Circuit—the genesis of *Allied-Signal*—this Court employs a flexible approach, declining to vacate even where the main consideration was "saving the power supply." *California Communities Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012).

Pollinator Stewardship Council v. EPA, 806 F.3d 520 (9th Cir. 2015), does not establish a different "general[]" rule. Dkt. 45-1 at 36 n.15. This Court observed that in considering "rulings by the EPA"—not the agency here—it had on some occasions declined to vacate "when vacating would risk" "environmental harm." *Pollinator*, 806 F.3d at 532. But it did not change the case-by-case principle that remand without vacatur is appropriate "'when equity demands,'" as here, where Defendants showed *both* economic and environmental harms from vacatur. *Id.*

B. The Order Will Cause Immediate and Irreparable Harm to the Coalition, Its Members, and the Public Interest.

The District Court's disregard for party presentation also accounts significantly for the order's substantial harms. The order applies to many activities and, due to the failure to follow the adversarial process, might be read to apply to

even more. The ambiguity alone will wreak widespread harm. Dkt. 34-1 at 8-9, 11.

1. The order causes significant harm and uncertainty.

The order purports to divide NWP 12 activities into two categories: (1) "the construction of new oil and gas pipelines," for which NWP 12 is barred; and (2) "non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects," for which NWP 12 remains available. Doc. 151 at 38. But Plaintiffs can be expected to raise many questions about this purported dichotomy and the host of activities not covered by either category. While we do not agree the order should be broadly construed, Plaintiffs will surely seek to blur the line between "construction" and "maintenance" or "repair," for example.

Plaintiffs suggest this uncertainty is "exaggerated." Dkt. 45-1 at 70. But they offer nothing beyond the unsupported assertion that the language is clear. Moreover, Plaintiffs already attempt to exploit ambiguity to downplay the order's reach, referring throughout their brief to "major" and "large" interstate pipelines. *See, e.g., id.* at 7, 8, 41, 52 n.25, 68. Of course, the order is not so limited. In fact, many NWP 12 pipeline projects are relatively small, 10-20 miles long, and allow for intrastate delivery of energy to rural customers. Dkt. 34-1 at 16; Lacey Suppl. Decl. ¶ 8, Dkt. 34-4.

Most tellingly, Plaintiffs do not dispute that they "may sue to enforce their own broader reading" of the order. Dkt. 34-1 at 3. Nor do they contest that "litigation involving parties not before the court is sure to commence almost immediately." *Id.* at 13. Quite the opposite. Plaintiffs are quick to say the District Court may conduct proceedings over the order's scope during this appeal. Dkt. 45-1 at 71.

2. The Coalition will suffer harm from delay and costs.

Plaintiffs also fail to offer persuasive answers to the significant and immediate harms documented in the Coalition's declarations. The order creates a real and immediate likelihood that projects, and their environmental benefits, will be delayed, halted, or stopped. Dkt. 34-1 at 9-10, 12-15.

First, Plaintiffs offer internally inconsistent responses. On the one hand, they acknowledge here and below that legitimate economic harms result from costs and delays associated with obtaining individual permits. That is why they argued below to narrow the remedy. Doc. 144 at 14-17. On the other hand, Plaintiffs now claim those same harms are somehow illegitimate if associated with new oil and gas pipeline construction. Dkt. 45-1 at 68-69. The inconsistency is revealing. Plaintiffs do not really believe there are no "harms" from individual permitting; they simply dislike certain activities.

Second, even in purportedly disputing the harms from being forced into the individual permit process, Plaintiffs' complaint is just one of degree—they claim the difference between streamlined authorization provided by NWPs and individual permitting is not *sufficiently* stark to be harmful. *Id.* at 66-69.

But Plaintiffs have no answer for the fact that Congress and the courts have recognized a material difference between individual and general permits. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016) (distinguishing between costs and time associated with obtaining an individual permit and a general permit). Congress authorized general permits specifically because it viewed streamlined permitting as critical to the efficiency and usefulness of the Clean Water Act ("CWA") § 404 program, and environmental protection generally.[2] H.R. Rep. No. 95-139 (1977), *reprinted in* 4 A Legislative History of the Clean Water Act of 1977, at 1217 (1978). "The legislative history clearly

[2] Contrary to Plaintiffs' repeated and unsubstantiated assertions, Dkt. 45-1 at 7, NWP 12 was used for interstate oil and gas pipeline construction well before 2012. *See, e.g.,* Affidavit of Lisa Beal ¶ 5 (describing INGAA member reliance on NWP 12 for new interstate pipelines), Ex. 2 to Mem. in Supp. of INGAA, et al.'s, Motion to Intervene as Defs., *Sierra Club v. Bostick*, No. 5:12-cv-00742-R (W.D. Okla. July 30, 2012), Doc. No. 38-2; Ltr. from Michael McNair, Corps, Vicksburg District, to Orland Pylant, Centerpoint Energy Gas Transmission (Sept. 22, 2006) (NWP 12 authorization for construction of 172-mile-long interstate pipeline); Corps, Huntington District, NWP No. 2007-646-SCR (July 11, 2008) (NWP 12 authorization for construction of 194 mile 42-inch diameter natural gas pipeline); Ltr. from Gene Walsh, Corps, Rock Island District, to Ryan Childs, Rockies Express Pipeline – East Project (June 20, 2008) (NWP 12 verification for "construction and operation of 87 miles of 42-inch natural gas pipeline").

show[] Congress' intent to endorse the [general permit] program" then in existence "and to encourage its expansion." *See* 47 Fed. Reg. 31,794, 31,798 (July 22, 1982).

Third, Plaintiffs argue that the Coalition's harms are illusory because they "cannot outweigh the need to safeguard imperiled species." Dkt. 45-1 at 69. But this conflates two different questions. Whether there is harm to species (and there are *none*, as the Federal Defendants explain, Dkt. 11 at 29) is distinct from whether costs and delays impose real and irreparable harm on the Coalition's members.

3. Harms to the public interest weigh in favor of a stay.

Absent a stay, the order will have wide-reaching downstream consequences on the public interest, given the Coalition's often mission-critical work. Those second-order societal impacts include, among others: job losses, decreased tax revenue, benefits to businesses in local communities, and harms to public safety and health, energy reliability, and national security.

Plaintiffs respond with a blinkered view of reality. They scoff, for example, at *amici*'s emphasis on electrical power, arguing that these claims are "overblown" and "misplaced" because the order keeps NWP 12 in place for electric utility projects. Dkt. 45-1 at 66 n.31. But where does that electricity—for our nation's

communities, hospitals, schools, and military facilities—come from? In 2019, 38.4% was generated from natural gas.[3]

Plaintiffs also contend that the Coalition has not said any projects would be completed during the appeal. *Id.* at 75-76. That is similarly myopic. Harms will obviously be *worse* if a project could not be completed at all. But it is not difficult to see how those relying on a project to be finished in 2021, for example, could be prejudiced if the order delays completion to 2022. Dkt. 34-1 at 20 ($32.3 billion in investment at stake for 11 projects in various stages of development); *see also* Dkt. 11 at 40 n.9 (emphasizing Executive Branch policy to streamline and expedite approval of infrastructure projects to sustain nation's energy security).

Plaintiffs are also wrong that environmental harms tip the public interest toward them. *First*, they say little in response to the environmental harms or loss of environmental benefits that may be caused by the unavailability of NWP 12 for Coalition members' projects. Dkt. 34-1 at 15-17 (describing projects designed to reduce greenhouse gas emissions). Plaintiffs' only attempted rebuttal is that the Coalition "failed to indicate when any of these projects were expected to be completed and, thus, when their benefits would … accrue." Dkt. 45-1 at 76 n.36.

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[3] U.S. Energy Information Administration, What is U.S. electricity generation by energy source?, https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (last visited May 22, 2020).

But, again, these harms and benefits do not occur only when a project is completed.

Second, Plaintiffs overstate the alleged harms to species by ignoring that NWP 12, by definition, is protective of the environment and that authorized activities are required to have minimal impact. As multiple courts have recognized in rejecting challenges by these same Plaintiffs, NWP 12 complies with the § 404(e) minimal effects standard. *See, e.g., Sierra Club, Inc. v. Bostick*, No. CIV-12-742-R, 2013 WL 6858685 (W.D. Okla. Dec. 30, 2013), *aff'd*, 787 F.3d 1043 (10th Cir. 2015) (confirming NWP 12 complies with the National Environmental Policy Act and the CWA); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015) (upholding NWP 12 verifications for pipeline).

III. Conclusion

The Court should grant a stay pending appeal.

Date: May 22, 2020

Respectfully submitted,

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Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing reply contains 2,599 words, excluding the material exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f). This complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) and Circuit Rules 27-1(d) and 32-3(2). The reply complies with the typeface requirements of Federal Rule of Appellate 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

/s/ Elbert Lin

Certificate of Service

I hereby certify that on May 22, 2020, I filed the above pleading with the Court's electronic case management system, which caused notice to be sent to counsel for all parties.

/s/ Elbert Lin