No. 19A-1053

IN THE SUPREME COURT OF THE UNITED STATES

U.S. ARMY CORPS OF ENGINEERS, et al.,

Applicants,

v.

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Respondents.

BRIEF OF RESPONDENTS AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF U.S. ARMY CORPS OF ENGINEERS' APPLICATION FOR A STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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Dated: June 17, 2020

Corporate Disclosure Statement

Pursuant to Rule 29.6, Respondents make the following disclosures:

The American Gas Association (AGA) is a trade association, has not issued shares or debt securities to the public, has no parent company, and no publicly held company has a 10 percent or greater ownership interest in AGA.

The American Petroleum Institute (API) is a not for profit corporation and no publicly owned company owns any stock in API.

The Association of Oil Pipe Lines (AOPL) is an incorporated, non-profit trade association, has no parent companies, and no publicly held company owns a ten percent or greater interest in AOPL.

The Interstate Natural Gas Association of America (INGAA) is an incorporated, not-for-profit trade association, has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock.

The National Rural Electric Cooperative Association (NRECA) is the nonprofit national trade association for electric cooperatives. On behalf of its members, NRECA participates in administrative and judicial proceedings involving or affecting its members' interests. NRECA has no parent company. No publicly held company has a 10 percent or greater ownership interest in NRECA. NRECA is an incorporated entity.

Table of Contents

Table of Authorities

Page(s)

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, Respondents, AGA, API, AOPL, INGAA, and NRECA (collectively, the "NWP 12 Coalition" or "Coalition"), respectfully file this brief in support of the U.S. Army Corps of Engineers' (Corps) application for a stay of the April 15, 2020, order issued by the United States District Court for the District of Montana, as amended May 11, 2020, pending the consideration and disposition of the consolidated appeals from that order to the United States Court of Appeals for the Ninth Circuit and, if necessary, pending the filing of and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

A stay of the District Court's order is warranted for the reasons the Corps has identified. The order transgresses legal and statutory authority and imposes massive harms on the Coalition, its members, the public, and the environment. The Court should grant the Corps' Application.

I. Introduction.

Just last month, this Court, in a unanimous decision, reminded lower courts that "[i]n 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). Courts are "essentially passive instruments of government." *Id.* (internal quotations omitted). They must adhere to "the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.* (internal quotations and brackets omitted). Except in "extraordinary circumstances," courts must take a case as "shaped by the parties." *Id.* at *3, 5.

The District Court did not get the message. After reaching an erroneous decision on the merits, it granted a nationwide injunction and vacatur of Nationwide Permit 12 (NWP 12), even though the Northern Plains Plaintiffs below[1] expressly disclaimed that relief, and the District Court accepted that disclaimer in ruling on the NWP 12 Coalition's intervention. The record is clear. In three separate filings, Plaintiffs said they "do not seek to vacate NWP 12," or have it "broadly enjoined."[2]

When confronted with this clear error, in a motion for stay pending appeal, the District Court doubled down, modifying its nationwide injunction and vacatur of NWP 12 to apply to a nationwide class of projects over which it has no jurisdiction in a blatant, but ill-conceived, attempt to shore it up for appeal. That was error twice over, and it should be reversed by the Court of Appeals.

Unsurprisingly, this decision-by-judicial-ambush resulted in an ill-considered and excessively broad ruling that exceeded the District Court's jurisdiction by purporting to vacate and enjoin the use of NWP 12 for interstate natural gas pipeline projects covered by the Natural Gas Act (NGA). In addition, the order causes widespread and immediate harms, many of which flow from its ambiguity. Having twice short-circuited the litigation process, the District Court's revised

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[1] Plaintiffs below are Northern Plains Resource Council, Bold Alliance, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, and Friends of the Earth (collectively, "Northern Plains").

[2] Plaintiffs' Opposition to Motion to Intervene by American Gas Association et al. at 3, No. 4:19-cv-00044-BMM (D. Mont. Oct. 29, 2019) (Doc. 52) ("Pls. Opp'n to Mot. To Intervene"); C.A. App. 313, 294. Court of Appeals Appendix (C.A. App.) cites are to the Appendix in Support of the Federal Appellants' Emergency Motion for Stay Pending Appeal, No. 20-35412 (9th Cir. May 13, 2020) (Dkt. 12).

remedy was never subject to the adversarial pressure-testing that might have fleshed out its potential impact and breadth and avoided its multiple infirmities. In effect, the District Court stepped into the Corps' shoes and unilaterally rewrote NWP 12 in its own terms, without notice and public comment, and offering little guidance as to how to apply it.

The order will cause tremendous harms. Requiring new oil and gas pipelines of any size to go through individual Clean Water Act (CWA) permitting will have wide-reaching and significant economic and environmental harms. Northern Plains, the District Court, and the Court of Appeals dismissed the burdens of individual permitting as inconsequential. If that were so, however, Congress would not have amended the CWA specifically to authorize general permits.

But that is just the tip of the iceberg. Lurking beneath the surface are a whole host of questions regarding the scope of this new judicially-written permit that the Corps must now administer and courts must now decipher, all of which create uncertainty that will cause even more economic and environmental harm. Entities that require NWP 12 authorizations, including members of the NWP 12 Coalition, find themselves in limbo for a vast number of activities that the Corps or a court may or may not determine to be subject to the order. And until the order is reversed, many who require 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 and ambiguous order.

For example, where does the line fall between "construction of new oil and gas pipelines," for which NWP 12 is vacated, and construction associated with "routine maintenance, inspection, and repair activities on existing NWP 12 projects," for which NWP 12 remains available? Whatever the Corps determines, Plaintiffs have strongly intimated they will sue to enforce their own broader reading of the order. The inevitable end result is increased risk, costs, and delay—whether due to court challenges, or because regulated entities choose to err in favor of seeking an individual permit. And those risks, costs, and delay harm not only those who need NWP 12 to complete projects, but the many businesses, governments, and individuals who rely on those projects, as well as the public and the environment more broadly. Indeed, the Corps estimates it will take eleven months to process the new individual permit applications it anticipates receiving as a result of the order, if Corps regulatory personnel focus solely on these applications and nothing else. Moyer Decl. ¶ 16.

The Court's intervention is urgently needed to stay this order pending appeal. The District Court's order is deeply flawed—legally, procedurally, and practically. It will not survive appellate review. And no matter how narrow the District Court might have intended it, or Northern Plains promises to read it, the order will wreak widespread harm through its ambiguity alone. The District Court's order should be stayed pending appeal and, if necessary, further proceedings in this Court. All of the relevant factors support a stay.

II. Order Below.

The Ninth Circuit's order denying the Coalition's, Corps', and TC Energy's motions for a stay of the District Court order is unpublished and may be found at App. 1a-4a of the Corps' Application.[3] The District Court's April 15 order is found at App. 43a-68a, and the District Court's May 11 order is found at App. 5a-42a.

III. Background.

A. Congress Amended the CWA in 1977 to Authorize the Corps to Issue General Permits for Minor Discharges with Only Minimal Adverse Environmental Effects.

CWA § 404 authorizes the Corps to issue permits for discharges of dredged or fill material into "the waters of the United States" (WOTUS). Fearing that lengthy reviews of relatively minor activities would undermine environmental protection by diverting the Corps from more significant activities, Congress amended § 404 in 1977 to authorize the Corps to issue general permits for categories of discharges that (1) "are similar in nature"; (2) will cause only minimal adverse effects; and (3) will have only minimal cumulative adverse effects. 33 U.S.C. § 1344(e).

For over four decades, the Corps has viewed utility line activities as an appropriate category for an NWP. The selection of utility lines in 1977 as one of the first NWPs reflects the Corps' longstanding determination that utility line activities have relatively minor, and often temporary, impacts on WOTUS. 42 Fed. Reg. 37,122, 37,146, 37,131 (July 19, 1977). Indeed, the Corps' original 1977 Utility Line Permit, the ancestor of NWP 12, was before Congress when it amended the CWA to

[3] Appendix (App.) cites are to the Appendix in Support of the Corps' Appl. for a Stay Pending Appeal, June 15, 2020.

provide for general permits. The House and Senate recognized with approval the Corps' 1977 NWPs, and, thus, in amending the CWA, Congress specifically approved of the utility line general permit that was already in effect. *See, e.g.*, 47 Fed. Reg. 31,794, 31,798 (July 22, 1982).

B. Based on its Technical Experience, the Corps Has Developed and Refined NWP 12 to Ensure the Statutory Minimal Effects Standard Is Met.

The 2017 NWP 12, like prior iterations, authorizes minor discharges of dredged or fill material into WOTUS for "construction, maintenance, repair, and removal of utility lines and associated features," provided the activity meets NWP 12's strict terms and conditions. Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1985, 1998-2004 (Jan. 6, 2017). Since 1977, NWP 12 has defined "utility line" "as any pipe or pipeline for the transportation of gaseous, liquid, liquescent, or slurry substance, for any purpose," as well as "any cable, line, or wire" for electric or communication transmission. *Id.* at 1985.[4]

Over the years, based on its technical experience, the Corps developed and refined NWP 12 to include numerous terms and restrictions, pre-construction notification (PCN) requirements, and General Conditions, which collectively ensure the statutory CWA § 404(e) minimal effects standard is met. Courts have consistently upheld the structure and substance of NWP 12 and confirmed it meets

[4] *See also* 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012) (2012 NWP 12); 72 Fed. Reg. 11,091, 11,182 (Mar. 12, 2007) (2007 NWP 12); 67 Fed. Reg. 2019, 2080 (Jan. 15, 2002) (2002 NWP 12) (replacing "liquefiable" with "liquescent"); 61 Fed. Reg. 65,874, 65,914 (Dec. 13, 1996) (1997 NWP 12); 56 Fed. Reg. 59,110, 59,141 (Nov. 22, 1991) (1992 NWP 12); 51 Fed. Reg. 41,206, 41,255 (Nov. 13, 1986) (1987 NWP 12); 47 Fed. Reg. 31,794, 31,833 (July 22, 1982) (1982 NWP 12); 42 Fed. Reg. 37,122, 37,131 (July 19, 1977) (1977 NWP 12).

the statutory standard. For example, in *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), the same Plaintiffs raised facial and as-applied challenges to NWP 12, under the National Environmental Policy Act (NEPA) and the CWA. The district court confirmed the Corps made the necessary minimal effects determination when it reissued NWP 12, *id.* at *22-23, and rejected Plaintiffs' NEPA claim. *Id.* at *9. The Tenth Circuit affirmed. *Bostick*, 787 F.3d at 1051, 1055. The D.C. Circuit reached the same conclusion, rejecting Plaintiffs' challenge to NWP 12 verifications for the Flanagan South oil pipeline, and upholding the Corps' NEPA and cumulative effects analyses. *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015).

The NWPs require project proponents to provide PCN in at least seven distinct circumstances, thereby ensuring project-specific review where appropriate. When PCN is required, the project proponent must await verification from the District Engineer that the activity complies with NWP 12 before proceeding. 82 Fed. Reg. at 1986. In the Coalition's experience, most (if not all) linear infrastructure projects relying on NWP 12 will involve at least one crossing that triggers PCN.

For example, NWP 12 (like all NWPs) is subject to General Condition 18 (GC 18), which addresses the potential impact of activities on listed species and designated critical habitat. As the Corps has explained, reissuance of the 2017 NWPs has "no effect" on listed species or designated critical habitat because the regulatory scheme and permits are designed to ensure any necessary consultation

occurs on a project-specific basis. *Id.* at 1873. In particular, GC 18 requires applicants provide the Corps with PCN if any listed species "might be affected" or "is in the vicinity of the activity." *Id.* at 1999. GC 18's "might be affected" and "in the vicinity of" standards are more conservative than the "may affect" standard under the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's Endangered Species Act (ESA) regulations, and are protectively designed to ensure that any action even potentially triggering consultation is reviewed.[5] *Id.* at 1873 (explaining "the word 'might' is defined as having 'less probability or possibility' than the word 'may.'").

When the Corps receives a PCN, it confirms, through consultation, that project-specific use of NWP 12 does not jeopardize listed species, or lead to destruction or adverse modification of critical habitat, and "[n]o activity is authorized under any NWP which 'may affect' a listed species or critical habitat" until consultation has been completed. *Id.* at 1999. These provisions, taken together, ensure that all activities authorized by the 2017 NWPs, including the utility line activities authorized by NWP 12, comply with the ESA.

C. NWP 12 Is Essential to Supplying the Nation with Safe and Reliable Energy.

The NWP 12 Coalition and its members represent a broad range of energy organizations, including not-for-profit rural electric cooperatives, local energy companies that deliver and distribute natural gas and electricity, refiners, marine

[5] The appropriate time for ESA consultation is when an activity is authorized that "may affect" listed species. 50 C.F.R. § 402.14(a).

businesses, service and supply firms, owners and operators of oil pipelines, and interstate natural gas pipeline companies.

Coalition members have historically relied, currently rely, and have concrete plans to rely in the future on NWP 12 for the timely authorization of utility line activities that have minimal environmental effects, but are essential to the reliable, safe, and affordable delivery of increasingly cleaner energy to U.S. consumers, including rural customers, schools, hospitals, and businesses.[6] Coalition members utilize NWP 12 thousands of times a year.[7] But for the District Court's order vacating use of NWP 12 for certain activities, the 2017 NWP 12 would remain in effect until March 18, 2022.

D. The District Court Provided Relief Northern Plains Expressly Disclaimed.

Northern Plains did not seek vacatur of NWP 12. From the outset, Northern Plains repeatedly confirmed it sought only remand of NWP 12 to the Corps for compliance. C.A. App. 293-94 (stating it did not seek to "have NWP 12 broadly enjoined").

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[6] *See* 82 Fed. Reg. at 1884 ("Activities authorized by NWP 12 are currently playing, and will continue to play, an[] important role in helping the nation achieve goals regarding the increased reliance on clean energy projects to meet the energy needs of its populace, to help reduce emissions of greenhouse gases that contribute to climate change.")

[7] *See, e.g.*, Aff. of Joan Dreskin, INGAA, in Supp. of Mot. of NWP 12 Coalition to Intervene in Supp. of Defs. ¶ 10, No. 4:19-cv-00044-BMM (D. Mont. Oct. 15, 2019) (Doc. 49) ("Dreskin Aff."); Aff. of Michael L. Murray, AGA, in Supp. of Mot. of NWP 12 Coalition to Intervene in Supp. of Defs. ¶ 15, No. 4:19-cv-00044-BMM (D. Mont. Oct. 15, 2019) (Doc. 49) ("Murray Aff."); Aff. of Robin Rorick, API, in Supp. of Mot. of NWP 12 Coalition to Intervene in Supp. of Defs. ¶ 10, No. 4:19-cv-00044-BMM (D. Mont. Oct. 15, 2019) ¶ 7 (Doc. 49) ("Rorick Aff.").

Indeed, Northern Plains affirmatively disclaimed any nationwide relief from NWP 12. In opposing the Coalition's motion to intervene, Northern Plains argued that its case would not harm the Coalition because Plaintiffs did not seek *any* vacatur of NWP 12, but only "declaratory relief and a remand as to NWP 12." Pls.' Opp'n to Mot. to Intervene at 2. The District Court adopted that disclaimer in granting permissive intervention, explaining that intervention as of right was not warranted because "*Plaintiffs do not ask the Court to vacate NWP 12. Plaintiffs seek instead declaratory relief as to NWP 12's legality*." App. 72a-73a (emphasis added; internal citations omitted).

Northern Plains' choices shaped the proceedings. The parties briefed partial motions for summary judgment in reliance on Northern Plains' judicially-endorsed assertions. And the District Court denied multiple requests by the Coalition for remedy briefing.[8]

But then, as if none of that had happened, the District Court entered a sweeping order vacating NWP 12 nationwide and enjoining the Corps from authorizing discharges of dredged or fill material under NWP 12 anywhere. App. 43a-68a. On April 27, 2020, Defendants moved for a stay pending appeal. In response, Northern Plains essentially conceded the remedy was overbroad. To help shore up the order before appeal, Northern Plains asked the District Court to modify the order to preclude the use of NWP 12 for construction of new oil and gas

[8] Mem. of the NWP 12 Coalition in Supp. of the Fed. Defs.' Cross-Motion for Partial Summ. J. at 31 n.7, No. 4:19-cv-00044-BMM (D. Mont. Dec. 30, 2019) (Doc. 93) ("NWP 12 Coalition's Mem. in Supp. of Fed. Defs.' Cross-Motion for Partial Summ. J."); Transcript of Motion Hearing at 65, *N. Plains Res. Council* v. *U.S. Army Corps of Eng'rs*, No. CV-19-44-GF-BMM (D. Mont. Mar. 6, 2020).

pipelines, and submitted over a dozen new declarations identifying projects not subject to the lawsuit and setting forth new alleged injuries to support the nationwide injunction Northern Plains had specifically disclaimed. On May 11, 2020, the District Court adopted Northern Plains' request, amended its order, narrowing the relief, but still granting Northern Plains a remedy it affirmatively disavowed. App. 5a-42a. The District Court denied any stay.

The Corps, NWP 12 Coalition, Montana, and TC Energy promptly filed notices of appeal on May 13, 2020, and each (with the exception of Montana) sought a stay of the order pending appeal from the Ninth Circuit. Eighteen States and a variety of national business groups supported the stay as *amici curiae*. Judges Silverman and Nguyen denied the motions for stay, without analysis, merely stating, "Appellants have not demonstrated a likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal." App. 3a.

IV. A Stay Is Warranted.

The NWP 12 Coalition respectfully requests that the Court grant the Corps' Application and stay the District Court's order pending appeal and, if necessary, further proceedings before this Court.

A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Conkright*

v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (brackets, citation, and internal quotation marks omitted).

All of the requirements are met here. The order is legally flawed, and it will cause immediate and irreparable harms. The order applies to a wide range of activities and might be improperly read to apply to even more. For each of those activities, the unavailability or potential unavailability of NWP 12 will cause significant cost and delay—whether from the need to seek an individual CWA § 404 permit, Corps indecision, or litigation over an authorization the District Court's order does not unambiguously prohibit. These costs and delays will harm members of the NWP 12 Coalition and cause harms to the public interest, including, but not limited to, the environment, public safety and health, and energy security.

A. A Reasonable Probability Exists That This Court Would Grant Certiorari if the Court of Appeals Were to Uphold the Order, and There Is a Fair Prospect the Court Would Vacate the Order.

If the Court of Appeals ultimately upholds the District Court's order, there is, at the very least, a reasonable probability this Court will grant certiorari. This Court is also likely to vacate the District Court's order because it cannot be squared with the Court's precedents regarding party presentation and the scope of nationwide injunctions. *See* Corps' Appl. for a Stay Pending Appeal, at 21, June 15, 2020) ("Corps' Appl. for Stay").

As the Corps explains, the District Court's order is legally flawed. It is wrong on the merits and on the remedy, too. The Coalition agrees with the Corps' analysis and expands below on a few points.

1. The District Court flouted the principle of party presentation recently reiterated by this Court.

In granting a nationwide vacatur and injunction of NWP 12, the District Court committed a quintessential violation of party presentation unlikely to survive appeal. In *Sineneng-Smith*, the Court unanimously reminded lower courts that "[i]n our adversarial system of adjudication, we follow the principle of party presentation." 2020 WL 2200834, at *3. The rule tends to be relaxed where *pro se* litigants are involved. But "parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.* (internal quotations and brackets omitted). 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"); *Bayer* v. *Neiman Marcus Group*, *Inc.*, 861 F.3d 853, 864 (9th Cir. 2017) ("plaintiff may waive a claim for injunctive relief by failing to argue its merits at summary judgment.").

Here, Northern Plains determined that "what is best for them" was to affirmatively *disclaim* any relief beyond "the Corps' use of NWP to approve Keystone XL." C.A. App. 293. In opposing intervention by the NWP 12 Coalition, Northern Plains 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." Pls. Opp'n to Mot. to Intervene 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." C.A. App. 294.

These choices, which Northern Plains expressly made and repeatedly affirmed, bound the District Court. But the District Court twice ignored them, later explaining that it granted this relief not because Northern Plains requested it, but because the court believed Northern Plains was "entitled" to it.[9] App. 7a. The District Court appeared to rely on Federal Rule of Civil Procedure 54 to justify its rulings, *id.*, but nothing in that rule authorizes the District Court's "takeover" of this case. *Sineneng-Smith*, 2020 WL 2200834, at *5.

Though courts can grant relief to which a party is entitled even if the party has not demanded it, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2307 (2016), *as revised* (June 27, 2016), that does not allow the court to grant relief that a party has affirmatively waived. *See Powell* v. *Nat'l Bd. of Medical Exam'rs*, 364 F.3d 79, 86 (2d Cir. 2004) (although 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

[9] That Northern Plains changed its tune after the District Court first awarded nationwide relief does not save the revised remedy either. As this Court explained in *Sineneng-Smith*, a party's acquiescence to a court's takeover of its case does not ratify the failure to heed party presentation. It is irrelevant that Northern Plains took the "[u]nderstandabl[e]" course and "rode with an argument suggested by the [court]." 2020 WL 2200834, at *5.

has no notice, thereby prejudicing that party"); *Versatile Helicopters, Inc.* v. *City of Columbus*, 548 Fed. Appx. 337, 343 (6th Cir. 2013) (similar).

In opposing Defendants' motions to stay the order pending appeal before the Ninth Circuit, Northern Plains argued that, regardless of its express disclaimer of the remedy, Defendants "had a full and fair opportunity to brief" a nationwide injunction or vacatur of NWP 12. Pls.' Opp'n to Fed. Appellants' & Intervenor Appellants' Mots. for Stay Pending Appeal at 57, No. 20-35412, et al. (9th Cir. May 20, 2020) (Dkt. 45-1) ("Northern Plains et al.'s Opp'n to Stay"). 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 and risks becoming a third advocate.").

Second, that never happened. The District Court never indicated it intended to grant relief Northern Plains affirmatively disclaimed. As Northern Plains admitted, the District Court acknowledged early that "Plaintiffs do not ask the Court to vacate NWP 12." App. 72a. The Coalition thus had no reason to brief that remedy, though the Coalition nevertheless twice reserved the right to do so. NWP 12 Coalition's Mem. in Supp. of Fed. Defs.' Cross-Motion for Partial Summ. J. at 31 n.7; Transcript of Motion Hearing at 65. But the District Court did not provide that opportunity and simply issued its order granting nationwide vacatur and injunctive relief.

The District Court continued to thwart any meaningful opportunity to address nationwide relief when Defendants sought a stay pending appeal. In opposing that motion, Plaintiffs moved the goalposts, reneging on their prior disavowals, crafting a proposed remedy to vacate certain activities authorized by NWP 12 out of whole cloth (which was then adopted by the District Court), and submitting more than a dozen new declarations as a post-hoc justification for a nationwide remedy they had specifically and repeatedly disclaimed. Over Defendants' objections, the District Court allowed it. That is not full and fair briefing, and it is made worse by the inaccuracies in Northern Plains' last-minute declarations.[10]

2. The District Court's revised remedy is legally flawed.

The District Court's procedural errors unsurprisingly led to legal errors. Because Northern Plains disclaimed nationwide relief through almost the entire case, the parties did not properly brief the propriety and legality of that remedy. *Cf.* *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008) ("principle of party presentation … rel[ies] on the parties to frame the issues for decision"). That flawed process led to a flawed result.

[10] For example, one declaration incorrectly claimed that construction of the Atlantic Coast Pipeline cut trees in the Ramsey Draft Wilderness. C.A. App. 135 ¶ 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.").

a. The District Court's failure to heed the principle of party presentation resulted in a remedy that exceeded the court's jurisdiction.

The District Court's remedy purports to vacate and enjoin NWP 12 nationwide "as it relates to the construction of new oil and gas pipelines." But under the NGA, 15 U.S.C. § 717r(d)(1), the District Court lacks jurisdiction to review any federally required permit authorizing a construction project for an interstate natural gas pipeline.[11] Had the District Court respected Northern Plains' express waiver of a broad remedy, it would not have come close to this jurisdictional line, since no interstate natural gas pipelines were specifically at issue. But by overlooking the limits of party presentation and making itself a *de facto* regulator subject not even to notice and comment, the District Court blindly transgressed the NGA's jurisdictional limit. Though this error only speaks to interstate natural gas pipeline projects, it is an error that supports a stay and requires ultimate reversal by the Ninth Circuit.

Since 2005, the NGA has reserved to the federal courts of appeals "original and exclusive jurisdiction" over challenges to federally required permits authorizing a construction project for an interstate natural gas pipeline. The NGA grants to the federal court of appeals "for the circuit in which a facility *subject to … section 717f* of this title is proposed to be constructed, expanded, or operated":

> *original and exclusive jurisdiction* over any civil action for the review of an order or action of a Federal agency (other than the [Federal Energy Regulatory] Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license,

[11] The NGA's judicial review provision excludes Coastal Zone Management Act consistency determinations, which are to be appealed to the Secretary of Commerce. 16 U.S.C. § 1456(c)(3)(A).

> concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law.

15 U.S.C. § 717r(d)(1) (emphasis added).[12]

By its terms, the NGA covers challenges to an "order or action of a Federal agency … acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval … required under Federal law." 15 U.S.C. § 717r(d)(1). This broad language has been interpreted to include challenges to an ESA Incidental Take Statement, *Sierra Club* v. *U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018), and various federal agency records of decision, *Sierra Club, Inc.* v. *U.S. Forest Serv.*, 897 F.3d 582, 588 (4th Cir. 2018), *reh'g granted in part*, 739 F. App'x 185 (4th Cir. 2018).[13]

NWP 12 is plainly an "order or action of a Federal agency" within the meaning of the NGA. It is an action by a Federal agency (the Corps) pursuant to Federal law (33 U.S.C. § 1344(e)). And it is, by definition, a federally required permit for a certain category of activities that "will cause only minimal adverse environmental effects…." 33 U.S.C. § 1344(e). NWP 12 literally "authorize[s] the discharge of dredged or fill material in the construction, maintenance, and repair of

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[12] Section 717f covers the construction, extension, or abandonment of "interstate facilit[ies] for the transportation of natural gas." *Minisink Residents for Envtl. Pres. & Safety* v. *F.E.R.C.*, 762 F.3d 97, 101 (D.C. Cir. 2014); *see also Del. Riverkeeper Network* v. *Sec'y of Pa. Dep't of Envtl. Prot.*, 870 F.3d 171, 175 (3d Cir. 2017) (exercising jurisdiction over state permit for "an interstate pipeline project").

[13] *See also Islander East Pipeline Co.* v. *Conn. Dep't of Envtl. Prot.*, 482 F.3d 79 (2d Cir. 2006) (finding subject matter jurisdiction over challenge to state denial of water quality certificate preventing construction of "FERC-approved natural gas pipeline project"); *Town of Weymouth* v. *Mass. Dep't of Envtl. Prot.*, 2020 U.S. App. LEXIS 17457 (1st Cir. 2020) (invoking original jurisdiction over challenge to state issuance of air quality permit for interstate natural gas pipeline's compressor station).

a wide variety of utility lines, including lines to transmit gas, cable, electricity, telephone calls, radio transmissions, sewage, and oil." *Bostick*, 787 F.3d at 1049.

Thus, the NGA has been construed to grant federal courts of appeals exclusive jurisdiction over cases challenging the Corps' approval of an NWP 12 verification. *See Sierra Club* v. *U.S. Army Corps of Eng'rs*, 905 F.3d 285 (4th Cir. 2018); *Palm Beach Cty. Envtl. Coal.* v. *Fla.*, 651 F. Supp. 2d 1328 (S.D. Fla. 2009). In *Palm Beach County*, for example, the plaintiffs challenged the Corps' authorization of work on a natural gas pipeline under NWP 12 in federal district court. 651 F. Supp. 2d at 1333. The court explained that "[t]he substance of the claims is the quest for judicial review of the Corps' issuance of permits for a natural gas pipeline, and the substance of these claims compels appellate jurisdiction under the NGA." *Id.* at 1345-46.

Congress's limitation of district court jurisdiction precluded the District Court's remedy here. That remedy purports, among other things, to categorically prohibit the use of NWP 12 for interstate natural gas pipeline projects covered under 15 U.S.C. § 717f. But the NGA reserves "original and exclusive jurisdiction" over the propriety of those uses of NWP 12, on a case-by-case basis, to the federal appellate court that geographically includes the project in question. So on top of its other errors, the District Court's remedy is too broad because it speaks to certain applications of NWP 12 over which the court has no power to rule.

The NGA's jurisdictional limit is not particularly unusual. While "a federal court may review a facial challenge to a regulation promulgated by an agency under

its broad federal-question jurisdiction," Congress may "provide[] for a 'special statutory review proceeding'" in one or more specific courts where "challenges to the administrative action must take place." *Preminger* v. *Principi*, 422 F.3d 815, 821 (9th Cir. 2005) (concluding that Congress permits facial challenges to Veterans' Affairs regulations only in the Federal Circuit, leaving the other courts of appeals jurisdiction only to review as-applied challenges).

Here, the Administrative Procedure Act (APA) generally authorizes federal district courts to review most applications of NWP 12, but Congress has granted to the federal appellate courts exclusive authority over any applications of NWP 12 for interstate natural gas pipeline projects. This means that a facial challenge to NWP 12—which asks the reviewing court to invalidate *all applications*[14]—cannot be brought. And that is hardly remarkable—Congress has broad authority to limit federal court jurisdiction, *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943),[15] and facial challenges are generally disfavored. *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

Northern Plains may contend that this argument is not yet ripe because use of NWP 12 sometimes requires PCN and verification by the Corps. But this

[14] *See Reno* v. *Flores*, 507 U.S. 292, 300 (1993) (applying *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), to facial challenge to regulation on constitutional and statutory grounds); *Scherer* v. *U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011) ("To prevail in [a] facial challenge to an agency's regulation, the plaintiff[ ] must show that there is 'no set of circumstances' in which the challenged regulation might be applied consistent with the agency's statutory authority.").

[15] "The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Id.*

argument lacks merit for at least three reasons. *First*, it is indisputable that some interstate natural gas pipeline activities covered by the District Court's remedy would not require PCN. The mere existence of NWP 12 authorizes those activities, provided they meet NWP 12's terms and conditions. Those uses of NWP 12 for interstate natural gas pipeline activities are plainly ripe.

Second, the NGA confers exclusive jurisdiction on the federal courts of appeals to review challenges to any *final* "order or action of a Federal agency … acting pursuant to Federal law to issue, condition, or deny any permit … or approval … required under Federal law." *Columbia Riverkeeper* v. *U.S. Coast Guard*, 761 F.3d 1084, 1092 (9th Cir. 2014) (reading § 717r(d)(1) "as limiting judicial review to final agency decisions"). Even where verification is needed, NWP 12 is a final agency action that meets this Court's finality criteria in *Bennett* v. *Spear*, 520 U.S. 154 (1997).[16]

Third, to the extent the need for project-specific verification renders some applications of NWP 12 unripe for review, that simply raises a further error with the District Court's remedy. Like federal appellate court authority under the NGA, the District Court's power under the APA is also limited to reviewing "final" agency action. 5 U.S.C. § 704. So if some applications of NWP 12 are non-final, because the Corps has yet to be presented with PCNs for verification, it was error in any event for the District Court to issue a remedy reaching those applications.

[16] Northern Plains acknowledges that the issuance of NWP 12 is an agency "action" because "it constitutes both a 'permit' and a 'program.'" Northern Plains et al.'s Opp'n to Stay at 14.

b. The District Court's revised remedy is arbitrary and unsupported by the record.

The District Court justified its revised remedy as "a reasonable balance," distinguishing "the construction of new oil and gas pipelines" from other utility line construction projects authorized by NWP 12. App. 19a. The court reasoned that threats to species "would be particularly severe when constructing large-scale oil and gas pipelines" because such pipelines "may extend many hundreds of miles across dozens, or even hundreds, of waterways and require the creation of permanent rights-of-way." *Id.* at 19a-20a.

Even assuming the District Court had authority to order a *partial* nationwide vacatur of NWP 12, its reasoning does not withstand scrutiny. There is no basis in the record for the District Court's distinction between "the construction of new oil and gas pipelines" and other construction projects. The District Court cites to evidence of Keystone XL's footprint and a lone quotation about "'hundreds of miles'" of oil and gas pipelines. *Id.* at 20a. But the court cites no evidence showing that all, or even most, oil and gas pipelines are hundreds of miles long. Nor does it cite any evidence about the length or footprint of non-oil and gas construction projects. And the District Court's arbitrary conclusion does not bear out in the real world: Many new pipelines that utilize NWP 12 are relatively small, 10-20 miles, not hundreds.[17]

The District Court likewise failed to explain or provide record support for the distinction it drew between oil and gas construction projects and non-oil and gas

[17] *See* Suppl. Decl. of Pamela A. Lacey for AGA in Supp. of Intervenor-Def.-Appellants' Mot. for Stay Pending Appeal ¶ 7, No. 20-35412, et al. (9th Cir. May 15, 2020) (Dkt. 34-4) ("Lacey Suppl. Decl.").

construction projects and potential risks to species. *See* App. 19a (claiming that oil and gas pipeline use of NWP 12 poses a particularly "severe risk to species."). Similar drilling methods are used for pipeline construction and other utility line projects, including water and communication lines. The nature of pipeline construction authorized by NWP 12 does not change by virtue of the substance the project transports or transmits. And the District Court cited no evidence to distinguish between oil and gas pipelines covered by the order and the dozens of other types of projects encompassed in NWP 12's definition of "utility line," such as electric, communications, sewer, or water lines, not covered by the order. This arbitrary distinction is unlikely to withstand appellate review.

c. The District Court erred in its *Allied-Signal* analysis.

In partially vacating NWP 12 under *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), the District Court was led astray in part by its erroneous view that a court should focus its analysis largely on potential environmental, rather than economic, disruption. That is not the law. Like the D.C. Circuit, the Ninth Circuit employs a flexible approach that considers all types of disruption. *Cal. Cmtys. Against Toxics* v. *EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (declining to vacate where the main consideration was "saving the power supply.").[18]

[18] *See also Am. Water Works Ass'n* v. *EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994) (declining to vacate rule in part because "vacatur would be unnecessarily disruptive to the [affected] industries"); *Sierra Club* v. *U.S. Dep't of Agric., Rural Utils. Serv.*, 841 F. Supp. 2d 349, 363 (D.D.C. 2012) (considering, in a NEPA case, the potential "substantial financial loss if the Court were to vacate"); *Friends of the Capital Crescent Trail* v. *Fed. Transit Admin.*, 218 F. Supp. 3d 53, 60 (D.D.C. 2016) (recognizing that "delay in the [agency] project could impose significant financial costs"); *Standing*

A proper vacatur analysis considers "the social and economic costs of delay." *Pub. Empls. for Envtl. Responsibility* v. *Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (internal quotations omitted). In *California Communities Against Toxics*, 688 F.3d at 993–94, for example, the Ninth Circuit declined to vacate because stopping "a billion-dollar venture employing 350 workers" would be "economically disastrous." *Id.* at 994 ("if saving a snail warrants judicial restraint, … so does saving the power supply."). Remand without vacatur is appropriate "'when equity demands,'" as it plainly does here, where Defendants showed *both* economic and environmental harms from vacatur. *Pollinator Stewardship Council* v. *EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (observing, in considering "rulings by the [U.S. Environmental Protection Agency (EPA)]"—not the agency here—it had on some occasions declined to vacate "when vacating would risk" "environmental harm.").

B. Absent a Stay, the NWP 12 Coalition and Its Members Will Suffer Immediate and Irreparable Harm from Vacatur of NWP 12.

A stay is warranted because "irreparable harm will result from the denial of a stay." *Conkright*, 556 U.S. at 1402. As explained, the District Court's disregard for party presentation accounts significantly for the order's substantial harms to the NWP 12 Coalition, the government, and the public interest, which plainly favor a stay. The order applies to many activities and might be read to apply to even more. The ambiguity alone will cause widespread harm.

Rock Sioux Tribe v. *U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017) (rejecting argument that the court "should wholly disregard the potential for financial disruption" and explaining that courts "have repeatedly considered the economic implications of vacatur—including in cases addressing environmental harms.").

1. Numerous activities are impacted or potentially impacted by the order.

The District Court's new judicially-created permit purports to categorically distinguish between "construction of new oil and gas pipelines," for which NWP 12 is vacated, and "routine maintenance, inspection, and repair activities on existing NWP 12 projects," which can continue. App. 42a. But that distinction is less than certain in practice. While the Coalition believes the District Court intended many of the necessary, time-sensitive, and minimally-impactful activities its members conduct in reliance on NWP 12 to go forward, the order's less-than-precise language can be read to sweep in quite a lot. And Northern Plains can be expected to raise many questions about this purported dichotomy and the host of activities not covered by either category in future litigation.

a. New oil and gas pipeline construction cannot make use of NWP 12.

The government has made one category of precluded activities clear: "[t]he district court's order eliminates the ability of the Corps, State and local governments, and private parties to rely on NWP 12 for the 'construction of new oil and gas pipelines' anywhere in the country." Corps' Appl. for Stay at 34. Before the Ninth Circuit, the Corps further explained "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…." Fed. Appellants' Mot. for Stay Pending Appeal at 30, No. 20-35412 (9th Cir. May 13, 2020) (Dkt. 11-1). So, at a minimum, the order will impact many Coalition members' projects under review or

in planning stages.[19] For example, an API member has three NWP 12 PCNs the Corps was ready to approve, but halted because of the order. *See* Rorick Suppl. Decl. ¶ 14.

But the Corps may not be the last word. Though the order vacates NWP 12 only "as it relates to the construction of new oil and gas pipelines," App. 42a, the court's order already has invited litigation on projects under construction. Corps' Appl. for Stay at 39. Plaintiffs philosophically opposed to oil and gas projects—projects that were singled out in the order without record evidence or reasonable justification—are asserting that the order means that pipelines relying on NWP 12 no longer have valid permits. *See id.* This interpretation creates additional, immediate harm to the industry in terms of time, money, and wasted resources.

b. Routine maintenance, repair, and inspection activities without existing NWP 12 authorizations could be impeded.

The District Court's description of "routine maintenance, inspection, and repair activities on *existing* NWP 12 projects" could be read to allow any such projects, with or without verifications, which meet the "existing" terms and conditions of NWP 12. But it also could be construed—though we do not believe this is the correct or intended reading—as limiting NWP 12 to only those maintenance

[19] *See* Aff. of Robin Rorick, API, ¶¶ 9, 10, No. 4:19-cv-00044-BMM (D. Mont. Apr. 29, 2020) (Doc. 138-5) ("Rorick Aff. II"); Suppl. Decl. of Robin Rorick for API in Supp. of Intervenor-Def.-Appellants' Mot. for Stay Pending Appeal ¶¶ 3-5, No. 20-35412, et al. (9th Cir. May 15, 2020) (Dkt. 34-2) ("Rorick Suppl. Decl.") (75 pipelines in various stages of development with capital costs of $32.3 billion); Aff. of Joan Dreskin, INGAA, ¶ 29, No. 4:19-cv-00044-BMM (D. Mont. Apr. 29, 2020) (Doc. 138-3) ("Dreskin Aff. II"); Aff. of Michael L. Murray, AGA, ¶ 12, No. 4:19-cv-00044-BMM (D. Mont. Apr. 29, 2020) (Doc. 138-2) ("Murray Aff. II"); Aff. of Andrew Black, AOPL, ¶ 13, No. 4:19-cv-00044-BMM (D. Mont. Apr. 29, 2020) (Doc. 138-1 ("Black Aff.").

and repair projects with "existing" NWP 12 verifications or those that have started the NWP process by submitting a PCN. The court's recognition of the importance of repair, maintenance, and inspection militates against this narrow reading, but does not foreclose it.[20]

Unfortunately, the District Court's last-minute blue-penciling of the remedy did not definitively reduce the affected activities, as it hoped. The revised order simply created vast uncertainty, which is no better than its original improperly broad remedy. A large category of routine, necessary, and time-sensitive activities, which all parties recognized are critical to the environment and public safety, are effectively in the same boat they were in before—paralyzed until the Corps or a court blesses it, or the Coalition member protectively seeks alternative CWA authorization.

c. A vast array of other activities could be barred or effectively barred due to ambiguity in the order.

What constitutes routine maintenance, modernization, and repair work is also ambiguous. Does the order allow the relocation and/or replacement of existing pipe? Neither the Corps nor the District Court has said it would not. But the order might be read to preclude reliance on NWP 12 by an INGAA member that has been directed by the Corps to remove or relocate existing pipeline as part of a congressionally-authorized deepening and widening of a ship channel to provide

[20] Since many pipelines were constructed prior to the implementation of NWP 12 in 1977, limiting the court's order to such a narrow interpretation would severely curtail the activities that are allowed to proceed under NWP 12.

deep water access to important port facilities.[21] Indeed, the Corps acknowledges this ambiguity, but does not provide any clarity as to interpretation: "The order *could* also apply to activities where a new pipeline segment is needed to relocate only a portion of an existing pipeline because that pipeline portion is in the way of construction of other projects." Moyer Decl. ¶ 7 (emphasis added).

What about depth of cover projects, which add protection on top of a pipeline by placing material or adding rip rap over a pipeline buried underneath a waterway?[22] *See* Rorick Suppl. Decl. ¶ 16. Although these activities should be considered maintenance, depending on the size of the project, or the amount of fill or additional material required to protect the pipeline, it is possible an overly broad interpretation of the order could prohibit such projects from relying on NWP 12, thereby delaying vital maintenance. *Id.* And the same goes for pipeline slip repairs, which involve some form of construction, and must be completed in a timely manner to mitigate potential safety risks. *See* Dreskin Suppl. Decl. ¶ 7; *see also* Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Earth Movement and Other Geological Hazards, 84 Fed. Reg. 18,919, 18,920 (May 2, 2019)

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[21] *See* Suppl. Decl. of Joan Dreskin for INGAA in Supp. of Intervenor-Def.-Appellants' Mot. for Stay Pending Appeal ¶¶ 3-5, No. 20-35412, et al. (9th Cir. May 15, 2020) (Dkt. 34-3) ("Dreskin Suppl. Decl."); Rorick Suppl. Decl. ¶¶ 8-9.

[22] The Pipeline and Hazardous Materials Safety Administration (PHMSA) has issued advisory bulletins to pipeline operators that emphasize the importance of timely depth of cover projects to ensure the safety of pipeline waterway crossings and compliance with federal pipeline safety regulations. *See* Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour, and River Channel Migration, 84 Fed. Reg. 14,715, 14,716 (Apr. 11, 2019) (noting that loss of pipeline cover in waterway crossings "may damage a pipeline as a result of additional stresses imposed on the pipe . . . if those threats are not mitigated"); *see also* 81 Fed. Reg. 2,943 (Jan. 19, 2016); 76 Fed. Reg. 44,985 (July 27, 2011).

(PHMSA advisory bulletin noting that "earth movement . . . can pose a threat to the integrity of a pipeline if those threats are not mitigated"). For that matter, what is "routine"? The fact an activity may occur infrequently does not make it non-routine.

Northern Plains suggested below that this uncertainty is "exaggerated." Northern Plains et al.'s Opp'n to Stay at 70. But Northern Plains offers nothing beyond the unsupported assertion that the language is clear. And Plaintiffs' actions tell a different story. Northern Plains already attempts to exploit ambiguity to downplay the order's reach, referring throughout its brief before the Ninth Circuit 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. As the Corps notes,

> [b]y its terms, the injunction applies regardless of the length or diameter of the pipeline or its intended purpose. The order thus operates to prevent authorization under NWP 12 even of the construction of new small-scale pipelines that may impact less than 1/10 an acre of [WOTUS], such as the installation of a new community gas line for residential heating.

Corps' Appl. for Stay at 35. In fact, many NWP 12 pipeline projects are relatively small, 10-20 miles long, and allow for intrastate delivery of energy to rural customers. *See* Intervenor-Defs.-Appellants American Gas Ass'n, et al.'s Mot. for Stay Pending Appeal at 23, No. 20-35412, et al. (9th Cir. May 15, 2020) (Dkt. 34-1).

Most tellingly, Northern Plains has strongly intimated it will sue to enforce its own broader reading of the order. Nor does it contest that litigation involving parties not before the court is sure to commence almost immediately. Quite the opposite. Northern Plains is quick to say the District Court may conduct

proceedings over the order's scope during the appeal. Northern Plains et al.'s Opp'n to Stay at 71.

2. The Coalition will suffer a wide range of irreparable harms.

For every activity for which NWP 12 is now unavailable, the Coalition's members will have to seek alternative § 404 permits at great delay and financial cost. *See* Dreskin Aff. II ¶ 23. And that delay harms not only the Coalition's members, but the public at large, the environment, and our nation's economy. *See* Black Aff. ¶ 12, Dreskin Aff. II ¶¶ 14, 15, Murray Aff. II ¶ 9. "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). The District Court's failure to do so is reversible error.

a. The individual permit process will cause increased delays and costs.

If an individual permit is determined to be the only viable option, the Coalition member's project may face up to two years of delay and significant increases in costs. *See* Murray Aff. II ¶ 9; Dreskin Suppl. Decl. ¶ 6; Dreskin Aff. II ¶¶ 14-16, 24 (at least double permitting expenses); Black Aff. ¶¶ 12, 16 (obtaining individual permits will stretch over multiple years); Rorick Aff. II ¶¶ 11, 20 (obtaining individual permits could cause years of delay and significantly increase the costs of a project). A one-year delay of these projects would raise the cost of a project by 5.9 percent. Rorick Suppl. Decl. ¶ 5.

Moreover, the vast uptick in individual permit applications will exacerbate that delay, as the finite staff at the Corps and coordinating agencies add those

applications to their already existing workload. Moyer Decl. ¶ 15; *see also* Rorick Aff. II ¶ 13; Murray Aff. II ¶ 9; Dreskin Aff. II ¶¶ 18-19; Dreskin Suppl. Decl. ¶ 6. The Corps estimates it will take 11 months to process all of the new applications it anticipates receiving—if the Corps regulatory personnel familiar with NWP 12 focus solely on "new oil and gas pipeline permit applications and nothing else." Moyer Decl. ¶ 16.

The District Court's order creates a real and immediate likelihood that pipeline projects, and their environmental benefits, will be delayed, halted, or stopped as a result of the need to obtain an individual permit in lieu of the streamlining authorization provided by NWP 12. Northern Plains attempted to downplay the harm caused by the delays and costs of the individual permit process, but in so doing exposed their true complaint.

On the one hand, Northern Plains acknowledged that legitimate economic harms result from costs and delays associated with obtaining individual permits. That is why Northern Plains argued before the District Court that a narrowing of the remedy was necessary. C.A. App. 90-93. On the other hand, Northern Plains later claimed before the Ninth Circuit that those same economic harms are somehow illegitimate if associated with new oil and gas pipeline construction. *See* Northern Plains et al.'s Opp'n to Stay at 68-69. The inconsistency is revealing. Northern Plains does not really believe there are no "harms" from individual permitting; it simply dislikes certain activities.

At the same time, even in purportedly disputing the harms from being forced into the individual permit process, Northern Plains' complaint is just one of degree. Plaintiffs claim the difference between streamlined authorization provided by NWPs and individual permitting is not *sufficiently* stark to be harmful. But Northern Plains has no answer for the fact that Congress and the courts have recognized a material difference between individual and general permits. As the Ninth Circuit has recognized, the "nationwide permit system is designed to streamline the permitting process," *Snoqualmie Valley Pres. Alliance* v. *U.S. Army Corps of Eng'rs,* 683 F.3d 1155, 1164 (9th Cir. 2012) (per curiam), serving the important function of allowing the Corps to focus on individual permit review for projects with greater anticipated environmental effects. *Accord Crutchfield* v. *Cnty. of Hanover, Va.*, 325 F.3d 211, 215 (4th Cir. 2003).

Indeed, Congress specifically amended the CWA to provide for § 404 general permits for projects with minimal impacts because it viewed streamlined permitting as critical to the efficiency and usefulness of the § 404 program, and environmental protection generally.[23] H.R. Rep. No. 95-139 (1977), *reprinted in* 4 A Legislative

[23] Northern Plains repeatedly asserts that the Corps began using NWP 12 for interstate oil and gas pipeline construction in 2012. This is patently false; 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").

History of the Clean Water Act of 1977, at 1217 (1978). "The legislative history clearly show[s] Congress' intent to endorse the [general permit] program" then in existence "and to encourage its expansion." 47 Fed. Reg. at 31,798. And that is why courts, including this Court, have repeatedly recognized that general permits make compliance with the CWA more manageable, for both the regulated public and the regulators alike. *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).[24]

Individual permits are not a substitute for general permits. Without NWP 12, the Coalition's members will be thrust into the lengthier, more expensive individual permit process, which will overwhelm the Corps with thousands of permit applications it lacks the resources to process as individual permits. *See* Moyer Decl. ¶ 16 (estimating that the Corps will have to process around 1,624 additional individual permits per year to cover what would have been 16,240 uses of NWP 12 for activities related to the construction of oil or gas pipelines). This result is contrary to Congressional intent in establishing the nationwide permit program.

[24] *See also Cty. of Maui, Hawaii* v. *Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020) (explaining that EPA and the States have tools to mitigate harms from requiring additional permits, such as "developing general permits for recurring situations" and "the States or EPA could control regulatory costs by issuing general permits …."); *S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004) ("General permits greatly reduce [the] administrative burden [associated with an individual permit.]").

b. Significant harms result from litigation risk, Corps indecision, and uncertainty.

What activities can proceed under NWP 12? How will the Corps interpret the order? How will the District Court interpret the order? The answers to these questions are uncertain. That uncertainty and the future litigation it surely will spawn further harm the Coalition's members. If the District Court's order is not stayed, litigation involving parties not before the court is sure to commence almost immediately. And this litigation-inducing ambiguity is not one the District Court can resolve itself on a case-by-case basis. Exclusive jurisdiction for review of authorizations for interstate natural gas pipelines resides in the geographically-appropriate court of appeals pursuant to 15 U.S.C. § 717r(d). The uncomfortable task of parsing what the District Court meant will fall to those courts.

c. Delays may push activities outside construction windows designed to protect resources.

These harms are made worse by time-of-year restrictions designed to protect wildlife resources. *See* Rorick Aff. II ¶¶ 18, 19. Utility line activities are planned and scheduled well in advance to commence construction during the limited construction windows allowed by the Federal Energy Regulatory Commission, FWS, state agencies, and others, which are designed to protect species. *See* Dreskin Suppl. Decl. ¶ 9; Rorick Aff. II ¶ 18. But if activities cannot occur during these windows, because projects cannot rely on NWP 12 or are delayed by the backed up individual permitting process, they will have to be postponed until the next construction season, transforming an even minor delay into a substantial one. *See* Dreskin Aff. II ¶ 27; Rorick Aff. II ¶¶ 18, 19.

d. The individual permit process threatens Coalition member projects.

These delays and uncertainty create problems with securing and maintaining financing, construction contracts, and supply deals. *See* Dreskin Aff. II ¶¶ 16-17, 19-20; Rorick Aff. II ¶¶ 13, 15-16, 20; Murray Aff. II ¶ 8; Black Aff. ¶¶ 12, 16. If contract terms cannot be met, project developers may lose necessary funding and abandon the projects. *See* Rorick Aff. II ¶ 16. Projects may also be cancelled if an applicant cannot commit to a completion date due to permitting uncertainties. *See* Black Aff. ¶ 12 (noting that project delays and cancellations could affect pipeline customers' supply and costs); Dreskin Aff. II ¶ 20.

C. The District Court Order is Contrary to the Public Interest and Could Negatively Impact the Environment.

Coalition members routinely rely on NWP 12 to upgrade, repair, and maintain their pipelines to ensure the continued safety and reliability of their facilities, as well as work to protect the environment. The District Court order impedes these actions and may also negatively impact the energy supply and local economies.

1. The order impedes environmental benefits.

Coalition members working on replacement projects may no longer be able to rely on NWP 12 for environmentally protective projects.[25] For example, AGA

[25] Certain environmental risks and impacts could also result from any halt in pipeline construction due to litigation. *See* Dreskin Suppl. Decl. ¶ 12. Pipeline construction is specifically designed to minimize the duration of ground disturbance to reduce the risk of erosion and sedimentation. *Id.* In addition, landowners enter into easements with pipeline companies with an expectation that construction will be completed, and the right-of way (ROW) restored, in a timely manner. *Id.* Any delays in restoration impact agricultural, recreational, and other uses of the ROW by the landowner. *Id.*

members are working to replace older cast iron and unprotected steel pipe with modern, low- or zero-emitting pipe to improve safety and reliability and to reduce methane emissions consistent with commitments to state utility commissions and the EPA Natural Gas Methane Challenge.[26] *See* Murray Aff. II ¶ 11; Lacey Suppl. Decl. ¶ 3. This work will be delayed if an individual permit is required, jeopardizing safety, reliability, and planned greenhouse gas emission reductions. *See* Murray Aff. II ¶¶ 11, 12; Lacey Suppl. Decl. ¶¶ 3, 4.

Another AGA member plans to install a farm tap on an intrastate natural gas distribution main to install half a mile of new rural service lines. *See* Lacey Suppl. Decl. ¶ 8. This project is designed to help residential customers switch to cleaner natural gas, in lieu of energy sources with higher lifecycle emissions of greenhouse gases and other pollutants, and with higher costs. *See id.* Delaying this work would cause higher emissions in the interim. *See id.*

An AOPL member is in the process of voluntarily improving its pipeline assets, including replacing portions of existing pipe to enhance safety and long-term reliability, particularly in environmentally sensitive areas. *See* Suppl. Decl. of Andrew Black for AOPL in Supp. of Intervenor-Def.-Appellants' Mot. for Stay Pending Appeal ¶ 5, No. 20-35412, et al. (9th Cir. May 15, 2020) (Dkt. 34-5) ("Black

[26] Each natural gas distribution utility company participating in EPA's Natural Gas Methane Challenge commits to remove a percentage of its remaining inventory of older pipe per year and construct and install modern new pipe in its place to help reduce methane emissions and improve safety and reliability. *See* Lacey Suppl. Dec. ¶ 3; EPA, Natural Gas STAR Methane Challenge Program BMP Commitment Option Technical Document at 18 (updated Oct. 1, 2018), https://www.epa.gov/sites/production/files/2018-08/documents/mc-bmp-technical-document_2018-08-15.pdf.

Suppl. Decl."). INGAA members planned to rely on NWP 12 to construct pipelines that will supply natural gas to state of the art natural gas-fired electric generating plants already under construction, one of which will replace an existing coal-fired generating plant, significantly reducing greenhouse gas emissions. *See* Dreskin Suppl. Decl. ¶ 11. The District Court order frustrates this important work.

Further, the inability to make timely repairs to pipelines pursuant to PHMSA regulations could require the pipeline operator to reduce the pressure in the pipeline or take the pipeline out of service, leading to reduced throughput in the nation's natural gas infrastructure system. These harms are not theoretical; constrained pipeline capacity recently caused local distribution companies in New York and New England to impose moratoriums on new natural gas connections. During a recent cold snap, there was insufficient natural gas for electric generation, causing ISO New England to dispatch generating facilities that used costlier, higher-emitting fuels. The then-Secretary of Energy and Environmental Affairs for Massachusetts called the events an economic and environmental disaster.[27]

2. The unavailability of NWP 12 could lead to unnecessary safety risks.

The additional time required to obtain individual permits for these pipeline projects could create unnecessary safety risks by delaying critical maintenance and repair work, threatening the safety and reliability of the natural gas and oil pipeline networks, restricting consumers' access to supplies, and potentially raising

[27] *See* Colin A. Young, *Massive oil burn during cold snap a 'disaster,' says Beaton,* Telegram.com (Jan. 24, 2018, 4:54 PM), https://www.telegram.com/news/20180124/massive-oil-burn-during-cold-snap-disaster-says-beaton.

costs for consumers. *See* Dreskin Aff. II ¶ 14; Rorick Aff. II ¶ 9; Rorick Suppl. Decl. ¶¶ 7, 9-13; Black Aff. ¶ 20 (describing seawall repair work expected to begin this summer; delay would impede safety improvements, increase costs, and impact pipeline operations, and, if regulatory deadlines are not met, the pipeline must be de-rated; delays into 2021 could require a shut-down, with potentially severe environmental and economic consequences).

3. Loss of streamlined permitting could threaten public access to affordable and safe energy.

The loss of streamlined NWP 12 authorization for pipeline projects with minimal environmental effects will impair the ability of Coalition members to provide safe and reliable energy, which is essential to our security, public health and safety, economic viability, and way of life.[28] Courts have consistently recognized the public's interest in dependable access to power, including natural gas. *See, e.g., Texas* v. *EPA*, 829 F.3d 405, 435 (5th Cir. 2016); *Sierra Club* v. *Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999); *Cal. Cmtys. Against Toxics* v. *EPA*, 688 F.3d at 993-94 (declining to vacate approval of power plant in part due to public interest in steady power supply); *Caballo Coal Co.* v. *Ind. Mich. Power Co.*, 305 F.3d 796, 801-02 (8th Cir. 2002); *Cent. Me. Power Co.* v. *FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (declining to vacate because "the public interest in assuring power is decisive.").

[28] *See* U.S. Dep't of Homeland Sec., *National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience* (undated), https://www.cisa.gov/sites/default/files/publications/national-infrastructure-protection-plan-2013-508.pdf.

Coalition members rely on NWP 12 to undertake projects to meet customer demands in growing markets, including rural areas. *See* Murray Aff. II ¶ 16; Lacey Suppl. Dec. ¶ 9. As areas expand with new residential, commercial, and industrial developments, including hospitals and COVID-19 essential businesses, the demand for natural gas has increased. *See id.* Several AGA member companies also have U.S. military bases within their service territories that require natural gas system infrastructure upgrades to serve their mission readiness. *See* Murray Aff. ¶ 16. For example, existing pipelines need to be replaced with larger diameter pipelines or new pipelines need to be installed to increase capacity to serve customers. *See* Murray Aff. II ¶ 16; Lacey Suppl. Dec. ¶ 9.

If NWP 12 is unavailable for new construction and upgrade work, these projects will be subject to potential delays—where individual permits are required—and energy service to these civilian and military customers, hospitals, and rural areas may be undermined. *See* Murray Aff. ¶ 16. As a result, capacity will be stretched for growing communities and economic growth will be stalled. *See* Lacey Suppl. Dec. ¶ 9.

These risks to energy supply are heightened during the current pandemic. Coalition members are facing field restrictions and associated construction delays as a result of the COVID-19 pandemic. *See* Murray Aff. II ¶ 8; Rorick Aff. II ¶ 14. Further delay piled on to those challenges could threaten Coalition members' ability to continue numerous energy and infrastructure projects, resulting in serious consequences to the public at large. *See* Murray Aff. II ¶ 8; Rorick Aff. II ¶ 14.

4. The order could create severe downstream economic impacts.

The order could have significant and negative downstream economic impacts for employment and local tax revenue, among other things. On average, about 14.8 jobs are supported per million dollars of capital spending. *See* Rorick Suppl. Decl. ¶ 6. The $32.3 billion in investment at stake for eleven API member projects, for example, could support nearly 480,000 direct, indirect and other induced jobs, with over 150,000 jobs being directly supported by these projects. *See id.; see also id.* ¶ 15 (describing economic benefits to undeveloped, rural areas and local communities through job creation and influx of workers that patronize local businesses).

Similarly, an AOPL member was one month away from receiving NWP 12 verification to commence a project across multiple states, which was expected to generate approximately 2,500 construction jobs and $25 million in local property tax revenue to local communities. *See* Black Suppl. Decl. ¶ 6.

V. Conclusion.

The NWP 12 Coalition respectfully requests the Court grant the Corps' Application for Stay.

Date: June 17, 2020

Respectfully submitted,

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