Consolidated Case Nos. 20-35412, 20-35414, 20-35415, and 20-35432

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.,
Plaintiffs/Appellees,
v.
U.S. ARMY CORPS OF ENGINEERS, ET AL.,
Defendants/Appellants,

TC ENERGY CORPORATION, ET AL.,

STATE OF MONTANA, and

AMERICAN GAS ASSOCIATION, ET AL.,
Intervenors-Defendants/Appellants.

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

OPENING BRIEF OF APPELLANTS AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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Dated: September 16, 2020

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants 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 non-profit 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.

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APA	Administrative Procedure Act
BLM	Bureau of Land Management
CWA	Clean Water Act
ESA	Endangered Species Act
FS	U.S. Forest Service
FWS	U.S. Fish and Wildlife Service
GC	General Condition
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NMFS	National Marine Fisheries Service
NWP 12	Nationwide Permit 12
PCN	Pre-construction Notification
Services	U.S. Fish and Wildlife Service and National Marine Fisheries Service
WOTUS	Waters of the United States

INTRODUCTION

In enjoining and vacating Nationwide Permit (NWP) 12 across the country on Endangered Species Act (ESA) grounds, the District Court lost sight of its part in the judicial review process in two significant ways. First, it effectively disregarded the U.S. Army Corps of Engineers' (Corps') role under the ESA in determining, as a threshold matter, whether consultation is required. Second, the court ignored the parties' role—particularly that of Northern Plains, the plaintiffs here[1]—in deciding which remedies to seek and which to give up. The Supreme Court impliedly recognized these mistakes in granting a stay. This Court should now reverse.

The ESA charges the action agency—and only the action agency (here, the Corps)—with determining the scope of the action it authorizes and whether that authorized action has "effects" on listed species or designated critical habitat. ESA § 7, 16 U.S.C. § 1536(a)(2). Based on the action agency's review of its authorized action, it may be required to consult. But where the action agency determines that the proposed authorization has "no effect" on listed species or designated critical habitat, its obligations under § 7 of the ESA are complete.

[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").

In holding that consultation was required, the District Court improperly second-guessed the Corps' "no effect" determination. The Corps' "no effect" determination was supported by the record and based on the numerous limitations incorporated in the NWPs that confine the scope of actions actually authorized by the 2017 reissuance of NWP 12. Among other things, the District Court wrongly disregarded the Corps' reliance on General Condition (GC) 18, which limits the scope of activities actually authorized under the reissuance by requiring pre-construction notification (PCN) for any NWP 12 activities that "might affect" listed species or habitat. Through GC 18, the Corps exercised its discretion to decide which activities to authorize now and which to defer for future authorization, subject then to ESA review and consultation, if appropriate.

Independent of its flawed ruling on the merits, the District Court also entered a remedy that was both procedurally and substantively incorrect. In granting a nationwide injunction and vacatur of NWP 12, the District Court ignored Plaintiffs' express disclaimer of that remedy, flouting the principle of party presentation recently reiterated by the U.S. Supreme Court in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). And by adopting a remedy specifically disclaimed by Plaintiffs—and therefore not briefed by the parties—the District Court unsurprisingly committed numerous substantive errors, as well. For example, the remedy exceeds the District Court's jurisdiction under the Natural

Gas Act (NGA) and contravenes the Corps' forty-year history and administrative record for NWP 12.

In sum, the District Court's order is wrong on the merits and the remedy, and this Court should reverse on either or both grounds.

STATEMENT OF JURISDICTION

The NWP 12 Coalition[2] adopts by reference the Federal Appellants' statement of jurisdiction. Dkt. 70 at 3-4. The NWP 12 Coalition filed a notice of appeal on May 13, 2020. NWP 12 Coalition's Notice of Appeal, *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-00044-BMM (D. Mont. May 13, 2020) (Doc. 154); No. 20-35414 (9th Cir. May 13, 2020) (Dkt. 1).

STATEMENT OF THE ISSUES

The NWP 12 Coalition adopts by reference the Federal Appellants' statement of the issues. Dkt. 70 at 4.

PERTINENT STATUTES AND REGULATIONS

The NWP 12 Coalition adopts by reference the Federal Appellants' Addendum. Dkt. 70 at 58, 1a-3a. Additional pertinent statutes and regulations are set forth in the Addendum following this brief.

[2] The NWP 12 Coalition is comprised of AGA, API, AOPL, INGAA, and NRECA.

STATEMENT OF THE CASE

I. The Clean Water Act and Nationwide Permit 12

A. Congress amended the CWA in 1977 to authorize the Corps to issue general permits for minor discharges with only minimal adverse environmental effects.

Shortly after the enactment of the Clean Water Act (CWA) in 1972, both the Corps and Congress realized the need for a streamlined permit process for activities with only minor environmental effects. Initially, the Corps was authorized under § 404 to issue only individual permits for discharges of dredged or fill material into "the waters of the United States" (WOTUS), 33 U.S.C. § 1344, and the Corps took a limited view of the extent to which wetlands and streams fell under CWA jurisdiction. But in 1975, *NRDC v. Callaway* held that the Corps was required to regulate "navigable waters" under the CWA "to the maximum extent permissible under the Commerce Clause of the Constitution."[3] 392 F. Supp. 685, 686 (D.D.C. 1975). It soon became clear that the Corps needed an alternative to the resource-intensive, case-by-case process required for individual § 404 permits. 33 C.F.R. pt. 325.

Fearing that lengthy reviews of relatively minor discharge activities would actually undermine environmental protection by diverting the Corps from more

[3] The *Callaway* holding has subsequently been limited. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

significant activities, Congress gave the Corps an alternative to individual permits. In 1977, Congress enacted § 404(e) 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). This "nationwide permit system is designed to streamline the permitting process," *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs,* 683 F.3d 1155, 1164 (9th Cir. 2012) (per curiam), thus allowing the Corps to focus individual permit review on projects with greater anticipated environmental effects. H.R. Rep. No. 95-139 (1977), *reprinted in* 4 A Legislative History of the Clean Water Act of 1977, at 1217 (1978); *accord Crutchfield v. Cty. of Hanover*, 325 F.3d 211, 215 (4th Cir. 2003).

From the start, the Corps and Congress have viewed utility line activities as an appropriate category for an NWP. Utility lines tend to be narrow and follow the contours of the land, and frequently are buried below or span above the waters they cross. As the Corps recognized in 1977 (and has continued to recognize to this day), utility line activities have relatively minor, and often temporary, impacts on WOTUS.[4] 42 Fed. Reg. 37,122, 37,131, 37,146 (July 19, 1977). And Congress

[4] The 1977 Utility Line NWP authorized the discharge of "[d]redged or fill material placed as backfill or bedding for utility line crossings provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area)." 42 Fed. Reg. at 37,146. The Corps explained that the NWP set no acreage limit and required no PCN because the terms of the NWP, such as

agreed. The Corps' original 1977 Utility Line Permit, the ancestor of NWP 12, was before Congress when that body amended § 404 to provide for general permits. "The legislative history clearly shows Congress' intent to endorse the [general permit] program" then in existence "and to encourage its expansion." 47 Fed. Reg. 31,794, 31,798 (July 22, 1982).

Indeed, the streamlined authorization provided by NWP 12 is essential to the provision of reliable, safe, and affordable delivery of increasingly cleaner energy to U.S. consumers, including rural customers, schools, hospitals, military installations, and businesses.[5] 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 businesses, service and supply firms, owners and operators of oil pipelines, and interstate natural gas pipeline companies. Coalition members rely on NWP 12 for the timely authorization of minor discharges associated with construction, maintenance, and repair of utility lines. These

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preservation of contours, "limit any sedimentation or disruption of water flow in streams as a result of these activities." *Id.* at 37,131.

[5] *See* 82 Fed. Reg. 1860, 1884 (Jan. 6, 2017) ("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.").

activities have been determined to have only minimal adverse environmental effects and are critical to ensure the safety, security, and reliability of linear infrastructure.

B. The Corps has developed and refined the utility line NWP for over four decades.

Over the years, the Corps has refined NWP 12 to include numerous terms and restrictions that tightly circumscribe the scope of activities that may proceed under the permit without further review and approval through a pre-construction review notice (PCN). The original utility line permit, unlike today's NWP 12, imposed no limit on the acreage of authorized discharges and required no PCN. 42 Fed. Reg. at 37,146. But now, a host of General Conditions (GCs) and other requirements either exclude certain activities from proceeding under NWP 12 at all, or require filing a PCN with the Corps for review and authorization. These PCN requirements and GCs collectively ensure activities authorized by NWP 12 meet the CWA's statutory minimal effects standard.

As the Federal Appellants explain, the Corps carefully addresses NWP activities at three levels—Headquarters, Division, and District—with each review providing additional analysis and conditioning to authorize only certain activities. Dkt. 70 at 6-8. The 2017 NWP 12 reissuance at issue here was completed by Corps Headquarters. And like prior Headquarters-level iterations, the 2017 NWP 12 authorizes only minor, and typically temporary, discharges of dredged or fill

material into WOTUS for "construction, maintenance, repair, and removal of utility lines and associated facilities." 82 Fed. Reg. at 1985. The reissuance of NWP 12 authorizes discharge activity *only* if "the activity does [1] not result in the loss of greater than ½-acre of waters of the United States for [2] each single and complete project," and [3] also meets NWP 12's strict terms and conditions, including 32 GCs.[6] *Id*. at 1985, 1998-2004.

At the next level, which is not under review here, Division Engineers have responsibility to establish more restrictive regional conditions on the use of NWPs on a watershed, regional, or other geographic basis, or even suspend or revoke NWPs for a specific geographic area or class of waters. 33 C.F.R. §§ 330.1(d); 330.4(e)(1). By sweeping more broadly, these regional conditions help ensure compliance with the already-restricted Headquarters-level NWPs within certain Corps Districts and States.

The Headquarters- and Division-level conditioning mean that in the vast majority of circumstances, specific proposed projects are not authorized to simply

[6] In fact, many projects authorized by NWP 12 do not result in any *actual* "loss" of waters because the authorized discharge activities are minimal and temporary, and the terms and conditions of NWP 12 minimize sedimentation and other impacts of the activity. Affidavit of Michael L. Murray for AGA ¶ 6, *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-00044-BMM (D. Mont. Apr. 29, 2020), (Doc. 138-2). NWP 12 requires that natural, pre-construction contours are restored after crossings are completed and the revegetation of areas affected by temporary fills. *Id.*

proceed under NWP 12. Instead, they must proceed, if at all, to the third level of review by providing PCN to the Corps District "prior to commencing the activity" for further review and authorization. 82 Fed. Reg. at 1986. As noted above, they must do so if, for example, the "discharges [will] result in the loss of greater than 1/10-acre of waters of the United States." *Id.* In addition, GC 18 requires submission of a PCN by a non-federal permittee if any listed species "might be affected or is in the vicinity of the activity." *Id.* at 1999. And there are numerous other PCN triggers.

In all circumstances where PCN is required pursuant to GC 18, the project proponent must await verification from the District Engineer that the activity complies with NWP 12's terms and conditions before proceeding. *Id.* at 2003. The District Engineer may add project-specific conditions, or conclude the project does not qualify for NWP 12 and require an individual permit, *id.* at 1862; 33 C.F.R. § 330.6, and retains discretion to suspend, modify, or revoke any verification. 33 C.F.R. § 330.1(d). Moreover, for NWP 12 activities that require PCN, the PCN must include a description of all crossings authorized by any NWP, including any non-PCN crossings, ensuring the Corps will examine the cumulative impacts of the proposed project. 82 Fed. Reg. at 1986.

As conditioned, the 2017 NWP 12 reissuance thus closely restricts its scope of authorized activity—*i.e.*, activity that may proceed without additional Corps

review and approval. In the Coalition's experience, most infrastructure projects relying on NWP 12 will involve at least one crossing that triggers PCN, and thus must go through the additional step of submitting a PCN before actually receiving authorization from the Corps to proceed.[7] Indeed, as the Federal Appellants explain, Dkt. 70 at 12, the Corps estimated that of the 14,000 uses of NWP 12 per year, 82% (or 11,480) would require PCN, and approximately 3,400 of those PCNs were triggered wholly or in part by GC 18.

These multi-layered terms and conditions governing use of NWP 12 ensure the CWA's statutory minimal-effects standard is met. Accordingly, courts have routinely confirmed that NWP 12 complies with the CWA and the National Environmental Policy Act (NEPA). 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 as those here raised facial and as-applied challenges to the 2012 version of NWP 12, under 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 the NEPA claim, holding that the Corps properly considered the cumulative impacts of discharges of dredged or fill material, and reasonably studied the impacts of NWP

[7] *See, e.g.,* Affidavit of Joan Dreskin for INGAA, ¶¶ 5, 7-13, *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-00044-BMM (D. Mont. Apr. 29, 2020), (Doc. 138-3) (Dreskin Aff.).

12. *Id.* at *9. The Tenth Circuit affirmed. *Bostick*, 787 F.3d at 1051, 1055. The D.C. Circuit reached the same conclusion, rejecting these plaintiffs' challenge to NWP 12 verifications for the Flanagan South oil pipeline, and upholding the Corps' NEPA and cumulative effects analyses for NWP 12 undertaken at the time of reissuance. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015).

Likewise, these terms and conditions are relevant to and ensure compliance with the ESA, as explained below.

II. The Endangered Species Act

A. The ESA charges the action agency with determining whether it must consult with the Services before authorizing an action.

ESA § 7(a)(2) requires every federal agency to ensure that "any action authorized, funded, or carried out" by that agency is "not likely to jeopardize" the continued existence of listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). By its terms, this mandate covers only "affirmative actions." *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006). An "'action' will implicate section 7(a)(2) only if it legitimately authorizes [private] activity." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511 (9th Cir. 1995) (concluding that the Bureau of Land Management's (BLM) issuance of an "approval" letter for a road right-of-way could not be construed as an "authorization" triggering a duty to consult).

The focus is on what the action agency itself has chosen to approve. The § 7 regulations promulgated by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the Services) specify that an action agency must ensure that the action "*it* authorizes," including authorization by permit, "is not likely to jeopardize" listed species or "result in the destruction or adverse modification" of designated critical habitat. 50 C.F.R. §§ 402.01(a), 402.02 (emphasis added). For purposes of applying § 7, "[w]hen an agency action has clearly defined boundaries, we must respect those boundaries." *WildEarth Guardians v. U.S. EPA*, 759 F.3d 1196, 1209 (10th Cir. 2014). *See also* 50 C.F.R. § 402.14(c) (looking to action agency's "description of the proposed action" to be considered).

Based on an action agency's review of the potential effect of its authorized actions on listed species or designated critical habitat, it *may* be required to consult with the Services before finalizing the action. By regulation, the action agency must review its authorized action "at the earliest possible time" to determine whether an action "may affect" listed species or designated critical habitat. *Id*. at § 402.14(a). The action agency is required to engage in formal or informal consultation *if* it determines that its proposed authorization "may affect listed species or critical habitat." *Id.* But where the action agency determines that its authorization will have "no effect" on listed species or designated critical habitat,

"consultation requirements are not triggered." *See Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 913 (9th Cir. 2018) (internal quotation marks and citation omitted). An agency's "no effect" determination does not require any concurrence from the Service. U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Endangered Species Act Consultation Handbook; Procedures for Conducting Section 7 Consultations and Conferences* at xvi (Mar. 1998), https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

In short, the responsibility for defining the action, reviewing the action, and making the initial "effect" determination is vested exclusively with the action agency—here, the Corps.

B. The Corps found "no effect" with respect to the Headquarters reissuance of NWP 12.

For purposes of ESA § 7, the Corps determined that the tightly circumscribed set of activities authorized by the Headquarters 2017 reissuance of NWP 12 will have "no effect" on listed species or designated critical habitat. 82 Fed. Reg. at 1873. This is due mainly to the fact that GC 18 excludes from authorization (and requires submission of a PCN) if any listed species or designated critical habitat "might be affected or is in the vicinity of the activity." *Id.* at 1999. These standards are much broader and more conservative than the "may affect" standard under the Services' ESA regulations. They are thus

protectively designed to ensure that any proposed action even possibly triggering consultation requires, before authorization, review and verification by the District Engineer. *Id.* at 1873 (explaining "[t]he word 'might' is defined as having 'less probability or possibility' than the word 'may.'").

As the Corps explained, each PCN submitted to the District Engineer under GC 18 represents a new potential authorized activity. To comply with ESA § 7, the Corps must evaluate for each the effect of the proposed NWP activity—whether "no effect" or "may effect"—on listed species or designated critical habitat. *Id.* at 1874, 1999. And if the Corps determines that the proposed activity "may affect" listed species or critical habitat if authorized, it will engage in consultation, consistent with the Services' regulations, 50 C.F.R. §§ 402.13, 402.14. Thus, "[n]o activity is authorized under any NWP which 'may affect' a listed species or critical habitat" until § 7 "consultation … has been completed," and the applicant "shall not begin work … until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized." 82 Fed. Reg. at 1999.

III. Proceedings Below.

The NWP 12 Coalition adopts by reference the Federal Appellants' statement regarding the proceedings below. Dkt. 70 at 15-21.

SUMMARY OF ARGUMENT

The District Court entered an order that erred both on the merits and in terms of the remedy awarded. In granting the extraordinary relief of a stay pending appellate review, the Supreme Court implicitly acknowledged the breadth of the District Court's errors. This Court should reverse.

I.A. As to the merits, the Corps met its obligations under the ESA in determining that the action it authorized – the Headquarters-level reissuance of NWP 12 – has "no effect" on listed species or designated critical habitat. Because the Corps determined that its authorized action has "no effect," its ESA obligations were complete. Consultation is required only if the action agency determines that its authorized action "may effect" species or habitat.

B. The District Court was wrong to reject the Corps' "no effect" determination and hold that consultation was required. A "no effect" determination should be upheld unless it falls within the narrow circumstances that make it arbitrary and capricious. None of the District Court's reasons show that the Corps' "no effect" determination here was unreasonable.

First, the District Court wrongly concluded that the record requires a "may effect" finding. The record here differs significantly and meaningfully from that in *Western Watersheds Project v. Kraayenbrink,* 632 F.3d 472 (9th Cir. 2011), on which the District Court relied. Primarily, the court erred by selectively parsing

limited statements from the Corps' NEPA analysis (which did *not* address species) to conclude there was "resounding evidence" suggesting that reissuance of the NWPs "may affect" listed species or habitat.

Second, the District Court erroneously held that the Corps improperly narrowed the authorized action to reach a "no effect" determination. The Headquarters reissuance of NWP 12 is cabined by GC 18, which prohibits any activities that "might effect" listed species or habitat. Uses of NWP 12 that come within GC 18 are new proposed actions that must be submitted by PCN for their own ESA "effects" determination and cannot be authorized until consultation, if required, is complete.

The District Court's conclusion that GC 18 improperly delegated the ESA "effects" review to potential permittees was mistaken. The court confused the issue of applicant compliance with the Corps' responsibility to assess actually authorized activity. Just as traffic lights dictate the scope of authorized activity on a road but place the burden of compliance on each individual driver, GC 18 confines the scope of authorized activity under NWP 12 but puts the burden of compliance on the potential permittee. Whether the driver or permittee complies, however, says nothing about what activity is actually authorized or the impact of that authorized activity on the environment.

Third, the court seemed to believe that because the NWPs are a "program," programmatic consultation is required despite the Corps' "no effect" determination. But this has matters backwards. As confirmed by the Services' regulations, consultation—whether programmatic or otherwise—is not required if the action agency reached a reasonable finding of "no effect," as here.

And *fourth*, the District Court suggested that because the Corps has previously engaged in voluntary consultation on NWP reissuances, it was required to do so here. That is simply not the law.

C. Further illustrating the District Court's flawed understanding of the ESA, nearly every case cited by the court is entirely irrelevant to the legal question here. Outside of *Western Watersheds*, none addressed the question whether an action agency's determination of "no effect" was reasonable.

II.A. As to remedy, the District Court granted a nationwide injunction and vacatur of NWP 12 that contravenes fundamental principles of party presentation recently reiterated by the Supreme Court. Except in "extraordinary circumstances," courts must take a case as "shaped by the parties." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578, 1581 (2020). But that is not what happened here. Northern Plains expressly disclaimed vacatur of NWP 12 in three

separate filings, stating they "do not seek to vacate NWP 12," or have NWP 12 "broadly enjoined."[8] And yet the District Court did so anyway.

B. Unsurprisingly, this procedurally flawed approach resulted in a substantively flawed remedy, as well. Having short-circuited the litigation process, the District Court's remedy was never subject to the adversarial pressure-testing that might have fleshed out its potential impact and breadth and thereby avoided several substantive mistakes. Instead, the order 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), which specifically provides for judicial review in the courts of appeals. The District Court's rewriting of NWP 12 includes arbitrary distinctions that contravene the Corps' administrative record. And the order's use of ambiguous and undefined terms fails the "basic principle" that "those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1047 (9th Cir. 2013) (internal quotation marks and citations omitted).

STANDARD OF REVIEW

Judicial review of decisions involving the ESA, whether brought under the ESA's citizen suit provision or the Administrative Procedure Act (APA), is

[8] 3 Excerpts of Record (E.R.) 464, 477.

governed by the APA's arbitrary and capricious standard. 5 U.S.C. § 706; *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy,* 898 F.2d 1410, 1414 (9th Cir. 1990). The Corps' decision should be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Pyramid Lake Paiute Tribe of Indians,* 898 F.2d at 1414.

The arbitrary and capricious standard requires deference to agency factfinding. *See Abbott Labs. v. Gardner,* 387 U.S. 136 (1967). A court asks primarily whether the agency "'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *Pyramid Lake Paiute Tribe of Indians,* 898 F.2d at 1414 (citing *Friends of Endangered Species, Inc. v. Jantzen,* 760 F.2d 976, 982 (9th Cir. 1985)). The court may not substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). So long as the Corps' decision was based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency's action. *Am. Hosp. Ass'n v. NLRB,* 499 U.S. 606 (1991); *Citizens to Preserve Overton Park,* 401 U.S. at 416.

This Court reviews *de novo* a district court's application of the arbitrary and capricious standard, as well as its legal conclusions under the ESA. *See Animal Def. Council v. Hodel*, 840 F.2d 1432, 1435-36 (9th Cir. 1988).

ARGUMENT

I. The District Court Erred in Second-Guessing the Corps' Finding of "No Effect"

As the Federal Appellants explain, the District Court was wrong in holding that the Corps was required to programmatically consult with the Services before reissuing NWP 12. The court effectively disregarded the Corps' statutory responsibility as the action agency to determine, in the first instance, the effect of the action it has chosen to authorize. ESA § 7 charges the action agency—and only the action agency—with the exclusive responsibility to define and assess the authorized action. Here, that means the Corps—not the Services or the court—must assess whether "any action" the Corps authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). As this Court has explained, "the 'no effect' determination was a decision for the Corps to make, not the USFWS." *Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1069 (9th Cir. 2005). And if the Corps properly finds "no effect" from its action, as it did here, that is the end of the analysis. It need not consult with the Services.

A. The Corps satisfied ESA § 7 when it determined that the action it authorized has "no effect" on listed species or designated critical habitat.

The Corps satisfied ESA § 7 when it determined that the 2017 reissuance of NWP 12 at the Headquarters level has "no effect" on listed species or critical

habitat. 82 Fed. Reg. at 1973-74. Consistent with the ESA's statutory command, the Corps assessed only the action actually authorized by the agency. 16 U.S.C. § 1536(a)(2). The "no effect" determination was thus based on the numerous Headquarters-level limitations incorporated in the NWPs that confine the scope of actions authorized by the reissuance alone. Primary among these terms and conditions is GC 18, which makes clear that no activity is authorized under any NWP that "might affect" listed species or critical habitat, unless a PCN is submitted and further authorization obtained. 82 Fed. Reg. at 1999.

The Corps' ESA § 7 obligations were complete once it reached the "no effect" determination. Nothing was or is required from the Services under these circumstances. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc). "If the agency determines that its action will not affect any listed species or critical habitat, ... then it is not required to consult with NMFS or Fish and Wildlife." *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 475 (D.C. Cir. 2009); *accord Defs. of Wildlife v. Flowers,* No. CIV02195TUCCKJ, 2003 WL 22143266, at *1 (D. Ariz. Aug. 18, 2003) (citing *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994)) ("If the agency determines that its action will have 'no effect' on an endangered or threatened species, it need not engage in 'formal consultation,' and the USFWS need not concur in this determination.").

B. There are only narrow circumstances in which a "no effect" determination can be second-guessed, and none exist here.

The Corps' "no effect" determination is entitled to deference, meaning there are limited circumstances in which a court may find a "no effect" determination legally erroneous. Specifically, a "no effect" determination

> may only be called arbitrary and capricious if: "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1448 (9th Cir. 1996) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (upholding Forest Service's "no effect" determination despite "gaps and imperfections" in analysis because they did not rise to the level of an arbitrary and capricious decision).

Because these circumstances do not exist here, the District Court erred in refusing to accept the Corps' "no effect" determination, and reversal is required.[9]

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[9] *Defs. of Wildlife v. Zinke*, 849 F.3d 1077, 1079 (D.C. Cir. 2017) (reversing district court decision to vacate the Service's delisting of the gray wolf, in part, because "the district court erred by failing to defer to the Service's reasonable interpretation'"); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1093-94 (9th Cir. 2005) (reversing district court order, in part, because the court did not give proper deference to the agency in determining that the final rule was arbitrary and capricious under the APA; "[r]ather than evaluating the Final Rule to determine if USDA had a basis

The District Court rested its decision on four different reasons, but as described further below, all four fail scrutiny.

1. The District Court's conclusion that the record requires a "may affect" determination was erroneous.

Relying on *Western Watersheds Project v. Kraayenbrink*, the District Court concluded the Corps' "no effect" determination was arbitrary and capricious. 1 E.R. 49. But that case is significantly different from the one at hand. In *Western Watersheds,* this Court held that BLM erred in finding that amendments to grazing regulations had "no effect" on listed species or critical habitat, citing "resounding evidence from agency experts"—BLM scientists and FWS—that the amendments at issue "'may affect' listed species and their habitat." 632 F.3d at 498. According to the Court, BLM failed to consider its own identification of hundreds of species present on the affected lands, statements from FWS that the regulations "*would* affect status species and their habitat," and conclusions from BLM's scientists advising that § 7 consultation was necessary. *Id.* at 497-98. Notwithstanding this record, BLM maintained that the regulatory changes were "purely administrative" and would not affect species or habitat. *Id.* at 498. Recognizing that its review "under the arbitrary and capricious standard is deferential," this Court held that BLM failed to "consider relevant expert analysis or articulate a rational connection

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for its conclusions, the district court repeatedly substituted its judgment for the agency's.").

between the facts found and the choice made." *Id.* (internal quotation marks and citation omitted).

The type and quantity of "resounding evidence" BLM ignored in *Western Watersheds* does not exist here. *First*, as the Federal Appellants explain, Dkt. 70 at 31-33, the administrative record statements cited by the District Court did not address impacts to species. Rather, the District Court selectively parsed various statements in the Corps' NEPA analysis. 1 E.R. 49-51.

Second, the so-called "expert" declarations are qualitatively different from the agency expert statements made by BLM wildlife staff and FWS in *Western Watersheds* regarding impacts that *would* occur. Submitted by Northern Plains to establish standing as to their Keystone XL allegations, *id.* at 52-53, the declarations include only conclusory statements by retained Northern Plains' experts regarding potential impacts to listed species that *could* result. And they only speculate as to hypothetical impacts from *construction of Keystone XL*. Northern Plains' experts did not address potential impacts to species resulting from the Headquarters reissuance of NWP 12. Dkt. 70 at 33.

Unlike in *Western Watersheds*, the Services expressed *no concern* here about the Corps' "no effect" determination. The record reflects that, though not required, the Corps coordinated with FWS and NMFS on the Headquarters reissuance of the NWPs. 3 E.R. 602-03. The Corps explained its no-effect

determination to the Services and made certain edits in response to NMFS's input. Dkt. 70 at 14 (citing 3 E.R. 597). Moreover, neither Service requested formal consultation, although they could have done so. 50 C.F.R. § 402.14(a).

2. The Corps did not improperly narrow the scope of the action authorized by reissuance of NWP 12.

The District Court's second objection to the Corps' "no effect" determination was to the Corps' decision to evaluate the Headquarters reissuance of NWP 12 as the only relevant "action." The court stated that "[t]he Corps cannot circumvent ESA Section 7(a)(2) consultation requirements by relying on project-level review of General Condition 18." 1 E.R. 54. Rather, the court suggested, the Corps should have considered all NWP 12 activities that *could* be authorized, at some point in the future, following submission of a PCN pursuant to GC 18 and any required reviews.

a. The Headquarters reissuance of NWP 12 is properly bounded in scope by GC 18.

This analysis disregards that it is the Corps' role to determine the authorized "action" and the boundaries of that defined action. As the Tenth Circuit has explained, "the duty to consult is bounded by the agency action." *WildEarth Guardians*, 759 F.3d at 1208. And "[w]hen an agency action has clearly defined boundaries, we must respect those boundaries and not describe inaction outside those boundaries as merely a component of the agency action." *Id.* at 1209. ESA

consultation "cannot be invoked by trying to piggyback nonaction on an agency action by claiming that the nonaction is really part of some broader action." *Id.* Indeed, were that allowed, "[t]he agency would have to set forth everything it might do." *Id.*

Here, GC 18 makes clear that no activity is "authorized" by the Headquarters reissuance that even "might effect" listed species or critical habitat absent appropriate review. It requires submission of a PCN by a non-federal permittee if any listed species or designated critical habitat "might be affected or is in the vicinity of the activity." 82 Fed. Reg. at 1999. Moreover, GC 18 expressly prohibits authorization under any NWP of any activity that is likely to jeopardize the continued existence of a threatened or endangered species, or adversely modify the critical habitat of such species. *Id.* Thus, the *entire* authorized action under the Headquarters reissuance of NWP 12 was bounded in scope to those NWP activities that have "no effect" on listed species or habitat.

Each submission of a PCN under GC 18 is a *new* potential authorization that the Corps must evaluate, at that time, for its "effect" on listed species or critical habitat for purposes of ESA § 7 consultation. *Id.* at 1874. Proposed NWP activities that require PCN are not "authorized" until the Corps conducts an activity-specific evaluation whether consultation is required and, if so, completes consultation. *Id.* at 1873. Critically, where consultation is required at the project

level, the Corps will analyze cumulative effects to species, pursuant to applicable ESA regulations. 50 C.F.R. § 402.02. Work may not commence until the permittee is notified by the District Engineer that the requirements of the ESA have been satisfied, and the activity is authorized. 82 Fed. Reg. at 1999. And the District Engineer may add species-specific permit conditions. *Id.* at 2000.

In sum, the Corps properly evaluated only the actions authorized by the reissuance of NWP 12 at the Headquarters level in making its no-effect determination. GC 18 tightly circumscribes actions actually authorized to proceed under the Headquarters reissuance of NWP 12. Any actions that trigger PCN under GC 18 are not yet authorized and will require ESA § 7 analysis and consultation, if appropriate, before they are authorized.

This is consistent with ESA analyses upheld by other courts. In *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009), for example, the plaintiffs challenged the Department of Interior's decision to expand leasing on the Outer Continental Shelf for off-shore oil-and-gas development, arguing that the agency had failed to consult under ESA § 7. *Id.* at 482. The D.C. Circuit held that the plaintiffs' ESA challenge was unripe due to the "multi-stage nature of [the] leasing programs" at issue. *Id.* at 483. The court explained that "the first stage of a leasing program does not cause any harm to anything because it does not require any action or infringe on the welfare of

animals," which "is, by design, only implicated at later stages of the program, each of which requires ESA consultation." *Id.*

Similarly, the Central District of California deferred to the Navy's "substantial discretion to determine whether [its naval warfare] 'program' … or its component elements are the more appropriate object of ESA consultation. *NRDC v. U.S. Dep't of the Navy*, No. CV-01-07781 CAS (RZX), 2002 WL 32095131, at *24 (C.D. Cal. Sept. 17, 2002). The court concluded that the program was not subject to programmatic ESA review. *Id.* The record did not "suggest that the Navy decided to consult with NMFS on a sea-test-by-sea-test rather than comprehensive basis in an attempt to avoid environmental review." *Id.* Rather, the Navy "determined that programmatic consultation was not necessary or worthwhile in light of the Navy's pursuit of consultations in connection with individual sea tests," the "determination was not arbitrary and capricious." *Id.*

The same is true here. The Corps' determination that reissuance of NWP 12 has "no effect" was not an attempt to evade activity-specific review. Rather, through GC 18, the Corps has properly ensured that consultation will occur at the appropriate juncture—when project-level activity that is not yet authorized under the reissuance is proposed for review and authorization by the District Engineer.

b. GC 18 does not unlawfully delegate the initial effects determination to the applicant.

As justification for disregarding the Corps' discretion to cabin the scope of its authorized action, the District Court reasoned that GC 18 "fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination" to the applicant. 1 E.R. 57. In the District Court's view, "General Condition 18 turns the ESA's initial effect determination over to non-federal permittees, even though the Corps must make that initial determination." *Id.* at 57-58.

But that conflates after-the-fact compliance with a permitting regime with the scope of authorized activity under that regime. In all permitting regimes, it is incumbent on the prospective permittee to make an initial determination whether it meets the required conditions or exceptions (or even intends to comply with those conditions or exceptions). That question of compliance does not change the scope of the activities that the permitting agency has authorized, or will authorize, to occur. And it is only the authorized activities that must be assessed under ESA § 7 for potential effect on species and habitat.

For example, traffic lights dictate the scope of authorized activity on a road. It is incumbent on each individual driver to ensure that he or she stops at a red light. But whether a driver complies does not change the scope of activity the

government has chosen to authorize. Nor is it relevant that the government places that initial burden of compliance on private citizens.

Here, GC 18 and the other limitations—such as the exclusion of "discharges [that will] result in the loss of greater than 1/10-acre of waters of the United States"—are like traffic lights. 82 Fed. Reg. at 1986. They dictate the scope of activities authorized to proceed under the NWPs without further approval by the Corps, and thus the scope of activities that must be assessed for purposes of ESA § 7. The NWPs do *not* authorize any activity where GC 18 is triggered unless and until an applicant submits a PCN, and the District Engineer notifies the applicant that the ESA's requirements are met and the work may commence. The submission of a PCN creates a new proposed activity, which the Corps reviews pursuant to ESA § 7 to determine whether "the proposed activity 'may affect' or will have 'no effect' to listed species and designated critical habitat." 82 Fed. Reg. at 1999.

Compliance with GC 18—or any other permit condition—is a separate issue from what that condition does or does not authorize. A project proponent theoretically might flout GC 18, at its peril, and move forward with a project in violation of that condition. But that says nothing about whether the project is *authorized* by GC 18 specifically or the reissuance of NWP 12 more generally. It is similarly the case that a person might run a red light, or hunt without a license

where one is required, but those after-the-fact compliance concerns do not say anything about what is authorized activity in the first place.

Compliance is a serious and important concern, and there are numerous mechanisms in place to ensure it. To begin with, a prospective permittee has many tools available to make an initial assessment whether its proposed project "might affect" or be "in the vicinity of" listed species. For example, for listed species under the jurisdiction of FWS, information on listed species is available through the Information Planning and Consultation (IPaC) system, an on-line project planning tool developed and maintained by FWS. Moreover, the NWPs include regional conditions that help ensure compliance with Headquarters-level conditions. For example, the Corps' Omaha District imposed regional conditions on the use of the NWPs, including requiring PCNs for activities in Nebraska habitat for listed species such as the whooping crane, pallid sturgeon, and American burying beetle. 3 E.R. 576-85. Although GC 18 requires a PCN for any activities that "might effect" these species, these regional conditions sweep even broader, creating an extra layer of protections.

In addition to these measures, the Corps monitors and enforces—just as the police watch for those who run red lights and game wardens patrol for unlicensed hunters. And the ESA includes a citizen suit provision, as well as civil and criminal liability for violations of the Act. It is no surprise, therefore, that the

record includes no evidence of unauthorized conduct or noncompliance with GC 18 that might raise any plausible concerns about jeopardy or destruction or adverse modification of critical habitat at a threshold level.

As a logical and practical matter, however, any assessment of the effect of *only* authorized activity requires presuming compliance. The District Court acknowledged that it must "presume[] that the Corps, the Services, and permittees will comply with all applicable statutes and regulations." 1 E.R. 57. But it did not actually do so, confusing the issue of applicant compliance with the Corps' responsibility to assess actually authorized activity.

c. Cumulative effects are properly reviewed.

Beyond its misplaced concern about GC 18, the District Court also suggested that, by defining the authorized action narrowly, the Corps failed to consider cumulative impacts of possible projects in the future. 1 E.R. 56. But this does not allege any error in the Corps' definition of the scope of authorized action; it merely identifies a consequence of that definition. If the Corps properly defined the authorized action as reissuance of NWP 12, as explained above, it was not required to consider any effects of future, yet-to-be-approved projects.

In any event, as the Federal Appellants explain, the District Court failed to recognize that the Corps *will* analyze cumulative effects to species each time it reviews a project-specific PCN, pursuant to GC 18 and the applicable ESA

regulations. The cumulative effects analysis obligates an agency to consider effects "that are reasonably certain to occur within the action area," which includes "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.

3. There is no requirement to programmatically consult for a program with "no effect."

The District Court's third reason for rejecting the "no effect" determination was that reissuance of the NWPs is simply the type of broad program that must be subject to programmatic consultation either prior to, or irrespective of, the action agency's determination of "no effect." 1 E.R. 48. The District Court appeared to fault the Corps for neglecting a supposed "duty to consult on the issuance of nationwide permits at the programmatic level." *Id.* at 54.

This has matters backwards. The mere existence of programmatic consultation as a concept does not displace or supersede the action agency's threshold effects assessment under ESA § 7. Nothing in the ESA, Services' regulations, or case law requires an action agency to undertake programmatic consultation, where, as here, the action agency has appropriately determined the action has "no effect" on listed species or habitat. Consultation, whether programmatic or otherwise, need occur *if and only if* the action agency finds that its authorized action "may effect" species or habitat. Here, the Corps properly

determined that reissuance of the NWPs has "no effect" on species or habitat and, unless that finding is in error (which it is not), nothing further is required.

Though not binding on the Corps, the Services' regulations confirm that § 7 consultation is *not* required for programmatic action that has "no effect" on listed species or habitat. 80 Fed. Reg. 26,832 (May 11, 2015). The Services' final rule amending the incidental take statement provisions of the § 7 implementing regulations defines framework programmatic action as "a collection of activities of a similar nature, … or an action adopting a framework for the development of future actions." *Id.* at 26,835. Such frameworks for future actions "may be developed at the local, statewide, or national scale, and are authorized, funded or carried out and *subject to section 7 consultation requirements at a later time as appropriate*." *Id.* (emphasis added).

Though the rule cites the NWPs as an example of a federal program that provides a framework programmatic action, "this [rule] does not imply that section 7 consultation is required for a framework programmatic action that has *no effect* on listed species or critical habitat." *Id.* In short, the programmatic-level biological opinion elements referenced by the District Court, 1 E.R. 48, would only apply for a proposed action that "may affect" listed species or critical habitat. They have no applicability here because the Corps properly reached a "no effect" determination.

4. The Corps' prior "voluntary" consultations do not establish any error in the Corps' "no effect" determination.

Finally, the District Court also pointed to the Corps' prior voluntary consultations in connection with the 2007 and 2012 NWPs as a reason for second-guessing the finding of "no effect." 1 E.R. 58. But the Corps is not now somehow estopped by its previous voluntary behavior. Dkt. 70 at 13; *see also* 82 Fed. Reg. at 1873 (recognizing that, although Corps engaged in consultation during 2012 reissuance, it did so *voluntarily* and did not believe consultation was legally required). Moreover, as the Federal Appellants explain, the Corps' prior voluntary consultations were fully consistent with its "no effect" determination. Dkt. 70 at 36-38.

C. The cases cited by the District Court are irrelevant.

Further illustrating the District Court's flawed understanding of the ESA, nearly every case cited by the court—outside of *Western Watersheds*—is entirely irrelevant to the legal question here. Most of the cases involved a "may effect" determination by the action agency and address specific issues regarding the consultation undertaken for those discrete agency actions. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015) (*Cottonwood*); *Conner v. Burford*, 848 F.2d 1441, 1442 (9th Cir. 1988) (*Conner*); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Servs.*, 482 F. Supp. 2d 1248 (W.D. Wash. 2007) (*Pacific Coast Federation*). These cases have no bearing, therefore,

on whether the Corps correctly reached its "no effect" determination. The remaining two cases—*Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005) (*Brownlee*), and *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992) (*Lane County*)—are irrelevant for other reasons.

For starters, the issue in *Pacific Coast Federation* was with the biological opinion issued during the consultation process following a "may effect" finding. The FS and BLM determined that amendments to a habitat conservation strategy within a specific geographic range "may affect" listed species and initiated § 7 consultation with the Services. 482 F. Supp. 2d. at 1257-58. The consultation resulted in a no-jeopardy biological opinion, which relied on compliance with a "discretionary" analytical process for future site-specific consultations. The biological opinion, however, failed to address what would happen if projects proceeded without applying the discretionary process. *Id.* at 1270. This is not the issue here. The Corps' determination of "no effect" did not require consultation, and there is no biological opinion.

The same is true of *Conner*, which involved the issuance of federal oil and gas leases on 1,350,000 acres of forest land. The leases granted exclusive rights to undertake oil and gas investigation, exploration, development, production, and abandonment activities. 848 F.2d at 1444 n.5. The Forest Service (FS) determined that issuance of the leases "might affect" listed species or critical habitat and, thus,

initiated § 7 consultation with FWS. *Id.* at 1452. The FWS, however, limited the consultation to *the leasing stage*, and did not address potential impacts from *post-leasing* oil and gas activities, which were inevitable. *Id.* at 1456 n.37. Because the *entire* agency action authorized by the leases necessarily included those later oil and gas activities, this Court deemed the FWS's limitation of the consultation to be inadequate and a violation of the ESA. Again, the case is inapposite because the issue here is the action agency's threshold effects assessment and not whether the Services properly fulfilled their role in the consultation process.

Cottonwood addressed the triggers for reinitiation of consultation, a completely distinct issue. There was no dispute in *Cottonwood* that the underlying agency action, a land management document, known as the Lynx Amendments, required consultation because it "may affect" the lynx. 789 F.3d at 1085. The issue was simply whether and under what circumstances the FS retained responsibility to reinitiate consultation when the underlying action was complete. *Id.*

In sum, each of the above cases involved a "may affect" determination by the action agency and addressed specific issues regarding the ensuing consultation. That is not the issue here, which is instead whether the Corps' threshold determination of "no effect" should stand.

The challenge brought in *Brownlee*—the only case cited by the District Court that involved a challenge to NWPs—was very different from the one here. That case focused narrowly on whether sufficient consultation had occurred for future actions under the challenged NWPs with respect to one species, the Florida panther. The district court there held that sufficient consultation on regional conditions adopted by the Corps' Jacksonville District to protect the panther had not occurred, and it ordered the Corps to obtain FWS's sign-off on the various regional panther conditions incorporated in the four challenged NWPs. 402 F. Supp. 2d at 11. That is not the issue here, where the question is whether consultation was required as to the Headquarters-level reissuance.

The last case—*Lane County*—is even farther afield, as the action agency there made no effects assessment at all. That matter involved the "Jamison Strategy," a BLM land and timber harvest management document that established specific criteria for timber sales in Washington, Oregon, and California, with a focus on approximately 1,149,954 acres of old growth forest suitable for spotted owl habitat in western Oregon. 958 F.2d at 291. *Lane County* is inapposite because BLM contended that the Jamison Strategy was not an "'action'" requiring an effects assessment, but rather "a voluntarily created 'policy statement.'" *Id.* at 293. There is no dispute here that the Corps was required to make an effects assessment, and it did so.

II. The District Court's Remedy Should Be Reversed.

Independent of the District Court's flawed reasoning on the merits, the remedy awarded is both procedurally and substantively erroneous. Thus, regardless of this Court's view of the merits, the District Court's order must at least be reversed as to the remedy.

A. The District Court erred in awarding relief Northern Plains specifically disclaimed.

As the Coalition explained to the Supreme Court in obtaining a stay of the District Court's nationwide vacatur and injunction of NWP 12, the District Court committed a textbook violation of party presentation in determining the relief due to Northern Plains. In *Sineneng-Smith*, the Supreme Court recently and unanimously reminded lower courts that "[i]n our adversarial system of adjudication, we follow the principle of party presentation." 140 S. Ct. at 1579. The District Court's order must be reversed because, in providing relief that Northern Plains specifically disclaimed, the remedy cannot be squared with the Supreme Court's precedents regarding party presentation.[10]

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[10] For similar reasons, the order runs afoul of case law on the scope of nationwide injunctions. For example, the Fourth Circuit recently confirmed that nationwide injunctions should be restricted "to the most exceptional circumstances," *CASA de Maryland, Inc. v. Trump*, No. 19-2222, 2020 WL 4664820, at *26, 27 (4th Cir. Aug. 5, 2020), a principle recognized by the U.S. District Court for the Western District of Virginia in declining to enjoin recently promulgated NEPA rules. *Wild Virginia v. Council on Envtl. Quality*, No. 3:20-cv-00045-JPJ-PMS, 2020 WL 5494519, at *4 (W.D. Va. Sept. 11, 2020). The NWP

1. Northern Plains sought relief tailored to its purported injuries.

"[P]arties 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 quotation marks, brackets, and citation omitted). Here, Northern Plains determined that what is best for them was to affirmatively *disclaim* any relief beyond "the Corps' use of NWP 12 to approve Keystone XL." 2 E.R. 275. From the outset, Northern Plains repeatedly confirmed it sought only remand of NWP 12 to the Corps for compliance, focusing on the use of NWP 12 for a single, oil pipeline project. *Id.* at 274-275 (stating it did not seek to "have NWP 12 broadly enjoined"). Then, during the course of the litigation, Northern Plains affirmatively disclaimed any nationwide relief from NWP 12.

Specifically, in opposing the Coalition's motion to intervene, Northern Plains argued 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." 3 E.R. 464. *See also id.* at 463 (confirming that Northern Plains did not seek *any* vacatur of NWP 12, but only "declaratory relief and a remand as to NWP 12."). The District Court adopted that disclaimer in granting permissive intervention, explaining that intervention as of right was not

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12 Coalition joins the Federal Appellants' argument regarding Northern Plains' lack of standing to support a nationwide injunction of NWP 12. Dkt. 70 at 48-51.

warranted because "*Plaintiffs do not ask the Court to vacate NWP 12. Plaintiffs seek instead declaratory relief as to NWP 12's legality*." *Id*. at 456-457 (emphasis added; internal citations omitted).

These choices, which Northern Plains expressly made and repeatedly affirmed, bound the District Court and shaped the proceedings. The parties briefed partial motions for summary judgment in reliance on Northern Plains' judicially-endorsed assertions. Northern Plains reaffirmed in its summary judgment briefing that it had "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[]." 2 E.R. 275.

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. 1 E.R. 39-64. In response to Appellants' motion for a stay pending appeal, Northern Plains essentially conceded the remedy was overbroad and asked the District Court to modify the order to preclude the use of NWP 12 only for construction of new oil and gas pipelines around the country. Because Northern Plains had never asked for this nationwide relief either, and indeed had affirmatively disclaimed it, it submitted over a dozen new declarations, alleging various harms from projects not

raised in its complaint and not subject to the District Court's jurisdiction, in support of its new request.

The District Court did just what Northern Plains asked. The court issued an amended order, narrowing the relief along the specific lines recommended by Northern Plains, but still granting Northern Plains a remedy it affirmatively disavowed. *Id.* at 37-38. The District Court later explained that it granted this relief not because Northern Plains requested it, but because the court believed Northern Plains was "entitled" to it. *Id.* at 3.

2. The District Court thwarted the principle of party presentation.

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), that does not allow the court to grant relief that a party has affirmatively waived. *See Powell v. Nat'l Bd. of Med. 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 has no notice, thereby prejudicing that party"); *Versatile Helicopters, Inc. v. City of Columbus*, 548 F. App'x 337, 343 (6th Cir. 2013) (similar).

In opposing Appellants' motions to stay the order pending appeal before this Court, 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).

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."). 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").

Second, it is not true that Defendants were given an opportunity to brief Northern Plains' disclaimed relief. 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." 3 E.R. 456. And though the Coalition nevertheless twice reserved the right to brief that remedy, *see* 2 E.R. 278; *id.* at 269, the District Court did not provide that opportunity, but rather simply issued its order granting nationwide vacatur and injunctive relief.

The District Court then continued to thwart any meaningful opportunity to address nationwide relief when Appellants sought a stay pending appeal. In opposing that motion, Northern Plains moved the goalposts. They ignored their prior disavowals and crafted out of whole cloth a proposed remedy to vacate certain activities authorized by NWP 12. And as a post-hoc justification for that nationwide remedy they had specifically and repeatedly disclaimed, they submitted more than a dozen new declarations, identifying projects not subject to the lawsuit and setting forth new alleged injuries. Despite Appellants' objections, the District Court allowed it all. That is not full and fair briefing.

That Northern Plains changed its tune after the District Court first awarded nationwide relief does not save the revised remedy either. As the Supreme 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]." 140 S. Ct. at 1581.

B. The District Court's revised remedy also is substantively flawed and exceeds the Court's jurisdiction.

The District Court's failure to heed the principle of party presentation is alone sufficient to warrant vacating and reversing the remedy. But that serious procedural error unsurprisingly led to substantive errors that each independently require reversal, as well. In short, the flawed process led to a flawed result. *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").

1. 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." 1 E.R. 38. 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

[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).

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 infects the entirety of the remedy and requires reversal by this Court.

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, 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." *Id.* This broad

[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. Fed. Energy Regulatory Comm'n*, 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").

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.), *reh'g granted in part*, 739 F. App'x 185 (4th Cir. 2018).[13]

The Headquarters reissuance of 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)(1). NWP 12 literally "authorize[s] the discharge of dredged or fill material in the construction, maintenance, and repair of 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

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[13] *See also Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 88 (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.*, 961 F.3d 34 (1st Cir. 2020) (invoking original jurisdiction over challenge to state issuance of air quality permit for interstate natural gas pipeline's compressor station).

verification. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 905 F.3d 285 (4th Cir. 2018) (per curiam); *Palm Beach Cty. Envtl. Coal. v. Florida*, 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. 15 U.S.C. § 717r(d)(1). 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 had 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 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*, including application of NWP 12 to interstate natural gas pipeline projects[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

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[14] *See Reno v. Flores*, 507 U.S. 292, 300-01 (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." *Phillips*, 319 U.S. at 187 (internal quotation marks and citation omitted).

generally disfavored. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

2. The District Court's revised remedy is arbitrary and contravenes the Corps' forty-year administrative record.

The District Court also erred by stepping into the Corps' shoes and rewriting NWP 12, without notice and public comment. The Supreme Court has emphasized that while a reviewing court has the power "to affirm, modify, or set aside" an order, it lacks the "power to exercise an essentially administrative function." *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) (internal quotation marks omitted). Thus, the Supreme Court reversed a judgment from the D.C. Circuit modifying an administrative agency's issuance of a license, because, in so doing, the court "usurped an administrative function." *Id.* at 20*; see also N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) ("[w]hen a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency…."); *Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 327 (D.C. Cir. 2006) (same). Here, the District Court "usurped" the Corps' role by creating a new NWP.

But even assuming the District Court had authority to order a *partial* nationwide vacatur of NWP 12 and thus create a new NWP, its reasoning does not withstand scrutiny and requires reversal. The 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. 1 E.R. 15. It further 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 15-16. This reasoning is arbitrary and capricious.

There is no basis in the Corps' administrative record for NWP 12 for the District Court's distinction between "the construction of new oil and gas pipelines" and other construction projects. The District Court cited to evidence of Keystone XL's footprint and a lone quotation about "hundreds of miles" of oil and gas pipelines. *Id.* at 16. 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 (or smaller), not hundreds of miles.[16]

[16] *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.).

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 construction projects and potential risks to species. *See id.* at 15 (claiming that oil and gas pipeline use of NWP 12 poses a particularly "severe risk to species."). Similar trenching and drilling methods are used for pipeline construction and other utility line projects, including water and communication lines. *See, e.g.,* 82 Fed. Reg. at 1883-84. As the Corps found when reissuing NWP 12, the nature of pipeline construction authorized by NWP 12 does not change by virtue of the substance the project transports or transmits. *See id.*

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. Nor could it. Contrary to the District Court's arbitrarily drawn distinctions, for over four decades, supported by a robust administrative record and upheld by two courts of appeals, the Corps has determined that the "utility line" activities authorized by NWP 12, which include water, gas, oil or sewer pipelines and electric or communication lines are "similar in nature."[17] *Sierra Club, Inc. v. Bostick*, 787

[17] 82 Fed. Reg. at 1985. *See also* 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012) (2012 NWP 12); 72 Fed. Reg. 11,092, 11,182 (Mar. 12, 2007) (2007 NWP 12); 67 Fed. Reg. 2020, 2080 (Jan. 15, 2002) (2002 NWP 12) (replacing

F.3d 1043 (10th Cir. 2015); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015). During the 2017 reissuance, the Corps confirmed that the utility line activities authorized by NWP 12 "*are similar in nature* because they involve linear pipes, cables, or wires to transport physical substances or electromagnetic energy from a point of origin to a terminal point." 82 Fed. Reg. at 1883 (emphasis added). The Corps, thus, does not distinguish between utility lines that convey oil and gas, and those that transmit electricity or telecommunications. Indeed, this position is consistent with the scope of the Corps' jurisdiction, which is limited to regulation of discharges of dredged or fill material into WOTUS. *See id.* at 1883-84; *see also Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1296 (11th Cir. 2019).

The arbitrary distinctions drawn by the District Court between various types of "utility line" projects, which conflict with the Corps' reasoned decision-making for the past four decades, have no basis in the record, and should not survive this Court's review.

"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).

3. The revised remedy fails to give reasonable notice as to what activities are authorized or prohibited under NWP 12.

Because the District Court acted without fair notice and contrary to the principles of party presentation and waiver, it entered a remedy with significant ambiguity that fails to provide reasonable notice as to what activities are permitted and which are not. "One basic principle built into Rule 65 [of the Federal Rules of Civil Procedure] is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Fung*, 710 F.3d at 1047 (internal quotation marks, brackets, and citations omitted). "Generally speaking, 'an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.'" *Id*. at 1047–48 (quoting 11A Charles A. Wright et al., *Federal Practice & Procedure* § 2955 (2d ed.)). That is not true here.

For example, 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 "non-pipeline construction activities and routine maintenance, inspection, and repair activities on *existing* NWP 12 projects," which can continue. 1 E.R. 38 (emphasis added). But that distinction is less than certain in practice. It could be read to allow any "routine maintenance, inspection, and repair activities," 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 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.[18]

Likewise, what constitutes "routine maintenance … and repair" work is also ambiguous. 1 E.R. 38. Is the relocation and/or replacement of existing pipe within this scope? Neither the Corps nor the District Court has said it would not be. But the order, should it be upheld, 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 deep water access to important port facilities.[19] For that matter, what is "routine"? That an activity may occur infrequently does not make it non-routine.

And what did the District Court mean by "pipeline"? Did the court intend to prohibit the use of NWP 12 only for oil and FERC-regulated *interstate* natural gas

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[18] 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.

[19] *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).

transmission pipelines of a certain number of miles? Or does the order sweep in state-regulated intra-state transmission pipelines operated by local natural gas utilities, and natural gas utility-operated local mains and customer service lines?

These questions and others remain unanswered, but could create widespread issues for the thousands of routine uses of NWP 12 nationwide, should this Court not reverse the District Court's order.

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

In partially vacating NWP 12, the District Court failed to properly apply *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). As explained by the Federal Appellants, the District Court erred in its application of the first factor of the *Allied-Signal* test—the seriousness of the agency's errors. Dkt. 70 at 53.

As to the second factor of the *Allied-Signal* test—the disruptive consequences that would result from vacatur—the court erred in focusing its analysis largely on potential environmental, rather than economic, disruption. That is not the law. Like the D.C. Circuit, this Circuit employs a flexible approach that considers all types of disruption. *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (per curiam) (declining to vacate where the main consideration was "saving the power supply.").

The District Court failed to appropriately analyze the significant and severe impacts vacatur of NWP 12 would have, not only on those entities that need NWP 12 to complete critical and time-sensitive projects, but the many businesses and individuals who rely on those projects, as well as the public and the environment, more broadly. Dkt. 70 at 55. For every activity for which NWP 12 is no longer available, there will be significant delays, uncertainties, and financial costs. *See* Affidavit of Andrew Black for AOPL ¶ 12, *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-00044-BMM (D. Mont. Apr. 29, 2020), (Doc. 138-1) (noting that project delays and cancellations could affect pipeline customers' supply and costs); Lacey Suppl. Decl. ¶¶ 3, 4, 5 (detailing the environmental benefits, including reductions of greenhouse gas and sulfur dioxide emissions, that would be delayed if NWP 12 is unavailable); Suppl. Decl. of Robin Rorick for API in Supp. of Intervenor-Def-Appellants' Mot. for Stay Pending Appeal ¶¶ 5, 6, No. 20-35412, et al. (9th Cir. May 15, 2020), (Dkt. 34-2) (calculating that capital costs for 11 of 75 API member projects in various stages of development total $32.3 billion, and a one year delay of those projects would raise the cost by about 5.9% and threaten hundreds of thousands of jobs); Dreskin Aff. ¶¶ 14, 15 (describing safety risks, harms, delays, and costs that would result if NWP 12 is unavailable).

Remand without vacatur is appropriate "'when equity demands,'" as it plainly does here, where Appellants showed *both* economic and environmental

harms from vacatur. *Pollinator Stewardship Council v. U.S. 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."). The District Court failed to properly apply the *Allied-Signal* test and its vacatur of NWP 12 was improper.

CONCLUSION

This Court should reverse the District Court's order.

Date: September 16, 2020

Respectfully submitted,

/s/ Elbert Lin

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): 20-35412, 20-35414, 20-35415, and 20-35432

I am the attorney or self-represented party.

This brief contains 13,700 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Elbert Lin **Date** September 16, 2020

STATUTORY AND REGULATORY ADDENDUM

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STATUTE:

REGULATIONS:

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section

of the waterbody used or potentially capable of use in interstate commerce:
(5) Authorized projects:
(i) Nature, condition and location of any improvements made under projects authorized by Congress:
(ii) Description of projects authorized but not constructed:
(iii) List of known survey documents or reports describing the waterbody:
(6) Past or present interstate commerce:
(i) General types, extent, and period in time:
(ii) Documentation if necessary:
(7) Potential use for interstate commerce, if applicable:
(i) If in natural condition:
(ii) If improved:
(8) Nature of jurisdiction known to have been exercised by Federal agencies if any:
(9) State or Federal court decisions relating to navigability of the waterbody, if any:
(10) Remarks:
(11) Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

(a) Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an energency determination, district engineers may act in reliance on a finding prepared as in section 329.14 of this part. The report of findings should then be forwarded to the division engineer on an expedited basis.

(b) Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that _____ (River) (Bay) (Lake, etc.) is a navigable water of the United States from _____ to _____. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or

(2) If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

PART 330—NATIONWIDE PERMIT PROGRAM

Sec.

AUTHORITY: 33 U.S.C. 401 *et seq.;* 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 56 FR 59134, Nov. 22, 1991, unless otherwise noted.

§ 330.1 Purpose and policy.

(a) *Purpose.* This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

(b) *Nationwide permits.* Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.

(c) *Terms and conditions.* An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general permit. After considering whether a violation was knowing or intentional, and other indications of the need for a penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact authorization under an NWP, if all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

(d) *Discretionary authority.* District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP. This discretionary authority may be used by district and division engineers only to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest. Because of the nature of most activities authorized by NWP, district and division engineers will not have to review every such activity to decide whether to exercise discretionary authority. The terms and conditions of certain NWPs require the DE to review the proposed activity before the NWP authorizes its construction. However, the DE has the discretionary authority to review any activity authorized by NWP to determine whether the activity complies with the NWP. If the DE finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit. Discretionary authority is also discussed at 33 CFR 330.4(e) and 330.5.

(e) *Notifications.* (1) In most cases, permittees may proceed with activities authorized by NWPs without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 45-day period. The 45-day period

States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. (section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the DE had not asserted jurisdiction at the time the activity occurred, provided in both instances, there is no interference with navigation. Activities completed shoreward of applicable Federal Harbor lines before May 27, 1970 do not require specific authorization. (section 10)

§ 330.4 Conditions, limitations, and restrictions.

(a) *General.* A prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur. Some conditions identify a ''threshold'' that, if met, requires additional procedures or provisions contained in other paragraphs in this section. It is important to remember that the NWPs only authorize activities from the perspective of the Corps regulatory authorities and that other Federal, state, and local permits, approvals, or authorizations may also be required.

(b) *Further information.* (1) DEs have authority to determine if an activity complies with the terms and conditions of an NWP.

(2) NWPs do not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law.

(3) NWPs do not grant any property rights or exclusive privileges.

(4) NWPs do not authorize any injury to the property or rights of others.

(5) NWPs do not authorize interference with any existing or proposed Federal project.

(c) *State 401 water quality certification.* (1) State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.

(2) If, prior to the issuance or reissuance of such NWPs, a state issues a 401 water quality certification which includes special conditions, the division engineer will make these special conditions regional conditions of the NWP for activities which may result in a discharge into waters of United States in that state, unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case, the conditioned 401 water quality certification will be considered a denial of the certification (see paragraph (c)(3) of this section).

(3) If a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification or waives its right to do so. State denial of 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. That NWP continues to authorize activities which could not reasonably be expected to result in discharges into waters of the United States.[1]

(4) DEs will take appropriate measures to inform the public of which activities, waterbodies, or regions require an individual 401 water quality certification before authorization by NWP.

(5) The DE will not require or process an individual permit application for an

[1] NWPs numbered 1, 2, 8, 9, 10, 11, 19, 24, 28, and 35, do not require 401 water quality certification since they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge and in the case of NWP 8 is seaward of the territorial seas. NWPs numbered 3, 4, 5, 6, 7, 13, 14, 18, 20, 21, 22, 23, 27, 32, 36, 37, and 38, involve various activities, some of which may result in a discharge and require 401 water quality certification, and others of which do not. State denial of 401 water quality certification for any specific NWP in this category affects only those activities which may result in a discharge. For those activities not involving discharges, the NWP remains in effect. NWPs numbered 12, 15, 16, 17, 25, 26, and 40 involve activities which would result in discharges and therefore 401 water quality certification is required.

waterbodies, or regions require prospective permittees to make an individual consistency determination and seek concurrence from the state.

(5) DEs will not require or process an individual permit application for an activity otherwise qualifying for an NWP solely on the basis that the activity has not received CZMA consistency agreement from the state. However, the district or division engineer may consider that factor, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit application.

(6) In instances where a state has disagreed with the Corps consistency determination for activities under a particular NWP, permittees must furnish the DE with an individual consistency concurrence or a copy of the consistency certification provided to the state for concurrence. If a state fails to act on a permittee's consistency certification within six months after receipt by the state, concurrence will be presumed. Upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP. For NWPs requiring a 45-day pre-construction notification the DE will immediately begin, and may complete, his review prior to the state action on the individual consistency certification. If a state indicates that individual conditions are necessary for consistency with the state's Federally-approved coastal management program for that individual activity, the DE will include those conditions as activity-specific conditions of the NWP unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case the DE will consider the conditioned concurrence as a nonconcurrence unless the permittee chooses to comply voluntarily with all the conditions in the conditioned concurrence.

(7) Where a state, after agreeing with the Corps consistency determination, subsequently attempts to reverse it's agreement for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation as outlined in 33 CFR 330.5. Otherwise, such attempted reversal is not effective and the Corps will consider the state CZMA consistency agreement to be valid for the NWP authorization until such time as the NWP is modified or reissued.

(8) Federal activities must be consistent with a state's Federally-approved coastal management program to the maximum extent practicable. Federal agencies should follow their own procedures and the Department of Commerce regulations appearing at 15 CFR part 930 to meet the requirements of the CZMA. Therefore, the provisions of 33 CFR 330.4(d)(1)–(7) do not apply to Federal activities. Indian tribes doing work on Indian Reservation lands shall be treated in the same manner as Federal applicants.

(e) *Discretionary authority*. The Corps reserves the right (*i.e.*, discretion) to modify, suspend, or revoke NWP authorizations. Modification means the imposition of additional or revised terms or conditions on the authorization. Suspension means the temporary cancellation of the authorization while a decision is made to either modify, revoke, or reinstate the authorization. Revocation means the cancellation of the authorization. The procedures for modifying, suspending, or revoking NWP authorizations are detailed in §330.5.

(1) A division engineer may assert discretionary authority by modifying, suspending, or revoking NWP authorizations for a specific geographic area, class of activity, or class of waters within his division, including on a statewide basis, whenever he determines sufficient concerns for the environment under the section 404(b)(1) Guidelines or any other factor of the public interest so requires, or if he otherwise determines that the NWP would result in more than minimal adverse environmental effects either individually or cumulatively.

(2) A DE may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public

the NWP may be modified by mutual agreement. The permittee will also be advised that within 10 days of receipt of the notice of suspension, he may request a meeting with the DE, or his designated representative, to present information in this matter. After completion of the meeting (or within a reasonable period of time after suspending the authorization if no meeting is requested), the DE will take action to reinstate, modify, or revoke the authorization.

(iii) Following completion of the suspension procedures, if the DE determines that sufficient concerns for the environment, including the aquatic environment under the section 404(b)(1) Guidelines, or other relevant factors of the public interest so require, he will revoke authorization under the NWP. The DE will provide the permittee a written final decision and instruct him on the procedures to seek authorization under a regional general permit or an individual permit.

(3) The DE need not issue a public notice when asserting discretionary authority over a specific activity. The modification, suspension, or revocation will become effective by notification to the prospective permittee.

§ 330.6 Authorization by nationwide permit.

(a) *Nationwide permit verification.* (1) Nationwide permittees may, and in some cases must, request from a DE confirmation that an activity complies with the terms and conditions of an NWP. DEs should respond as promptly as practicable to such requests.

(2) If the DE decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.

(3) If the DE decides that an activity does comply with the terms and conditions of an NWP, he will notify the nationwide permittee.

(i) The DE may add conditions on a case-by-case basis to clarify compliance with the terms and conditions of an NWP or to ensure that the activity will have only minimal individual and cumulative adverse effects on the environment, and will not be contrary to the public interest.

(ii) The DE's response will state that the verification is valid for a specific period of time (generally until the expiration date of the NWP) unless the NWP authorization is modified, suspended, or revoked. The response should also include a statement that the verification will remain valid for the specified period of time, if during that time period, the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, the response should include a statement that the provisions of § 330.6(b) will apply, if during that period of time, the NWP authorization expires, or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP. Finally, the response should include any known expiration date that would occur during the specified period of time. A period of time less than the amount of time remaining until the expiration date of the NWP may be used if deemed appropriate.

(iii) For activities where a state has denied 401 water quality certification and/or did not agree with the Corps consistency determination for an NWP the DE's response will state that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of a state 401 water quality certification and/or CZM consistency concurrence. The response will also indicate the activity is denied without prejudice and cannot be authorized until the requirements of §§ 330.4(c)(3), 330.4(c)(6), 330.4(d)(3), and 330.4(d)(6) are satisfied. The response will also indicate that work may only proceed subject to the terms and conditions of the state 401 water quality certification and/or CZM concurrence.

(iv) Once the DE has provided such verification, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the authorization.

(b) *Expiration of nationwide permits.* The Chief of Engineers will periodically review NWPs and their conditions and will decide to either modify, reissue, or revoke the permits. If an NWP

is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities which have commenced (i.e, are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5 (c) or (d). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.

(c) *Multiple use of nationwide permits.* Two or more different NWPs can be combined to authorize a ''single and complete project'' as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.

(d) *Combining nationwide permits with individual permits.* Subject to the following qualifications, portions of a larger project may proceed under the authority of the NWPs while the DE evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.

(1) When a portion of a larger project is authorized to proceed under an NWP, it is with the understanding that its construction will in no way prejudice the decision on the individual permit for the rest of the project. Furthermore, the individual permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by NWP.

(2) NWPs do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the Corps or EPA.

(e) *After-the-fact authorizations.* These authorizations often play an important part in the resolution of violations. In appropriate cases where the activity complies with the terms and conditions of an NWP, the DE can elect to use the NWP for resolution of an after-the-fact permit situation following a consideration of whether the violation being resolved was knowing or intentional and other indications of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the-fact authorization. Use of after-the-fact NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.

[56 FR 59134, Nov. 22, 1991, as amended at 78 FR 5733, Jan. 28, 2013]

PART 331—ADMINISTRATIVE APPEAL PROCESS

Sec.

§ 401.21 Patents and inventions.

Determination of the patent rights in any inventions or discoveries resulting from work under project agreements entered into pursuant to the Act shall be consistent with the ''Government Patent Policy'' (President's memorandum for Heads of Executive Departments and Agencies, August 23, 1971, and statement of Government Patent Policy as printed in 36 FR 16889).

§ 401.22 Civil rights.

Each application for Federal assistance, grant-in-aid award, or project agreement shall be supported by a statement of assurances executed by the Cooperator providing that the project will be carried out in accordance with title VI, Nondiscrimination in federally Assisted Programs of the Civil Rights Act of 1964 and with the Secretary's regulations promulgated thereunder.

§ 401.23 Audits.

The State is required to conduct an audit at least every two years in accordance with the provisions of Attachment P OMB Circular A–102. Failure to conduct audits as required may result in withholding of grant payments or such other sanctions as the Secretary may deem appropriate.

[49 FR 30074, July 26, 1984]

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

Subpart A—General

Sec.

Subpart B—Consultation Procedures

Subpart C—Counterpart Regulations For Implementing the National Fire Plan

Subpart D—Counterpart Regulations Governing Actions by the U.S. Environmental Protection Agency Under the Federal Insecticide, Fungicide and Rodenticide Act

AUTHORITY: 16 U.S.C. 1531 *et seq.*

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

Subpart A—General

§ 402.01 Scope.

(a) This part interprets and implements sections 7(a)–(d) [16 U.S.C. 1536(a)–(d)] of the Endangered Species Act of 1973, as amended (''Act''). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants (''listed species'') and habitat of such species that has been designated as critical (''critical habitat''). Section

7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

§ 402.02 Definitions.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Incidental take refers to takings that result from, but are not the purpose of,

carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

[51 FR 19957, June 3, 1986, as amended at 73 FR 76286, Dec. 16, 2008; 74 FR 20422, May 4, 2009; 80 FR 26844, May 11, 2015; 81 FR 7225, Feb. 11, 2016]

§ 402.03 Applicability.

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

[74 FR 20423, May 4, 2009]

§ 402.04 Counterpart regulations.

The consultation procedures set forth in this part may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service. Such counterpart regulations shall be published in the FEDERAL REGISTER in proposed form and shall be subject to public comment for at least 60 days before final rules are published.

§ 402.05 Emergencies.

(a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)–(d) of the

likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

[74 FR 20423, May 4, 2009]

§ 402.14 Formal consultation.

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

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service

with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although

the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions*. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''jeopardy biological opinion''); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion). A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take*. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species (A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the

incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

[51 FR 19957, June 3, 1986, as amended at 54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015]

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service,