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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

and

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

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

FEDERAL APPELLANTS' OPENING BRIEF

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GLOSSARY

BiOp	Biological Opinion
CWA	Clean Water Act
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NWP 12	Nationwide Permit 12
OMB	Office of Management and Budget
PCN	Pre-Construction Notice

INTRODUCTION

The Clean Water Act (CWA) prohibits discharge of pollutants into navigable waters without a permit from the U.S. Army Corps of Engineers (Corps). In 1977, Congress authorized the Corps to issue general permits for certain kinds of activities. Ever since, the Corps has issued a nationwide utility-line general permit, known as "Nationwide Permit 12" (NWP 12) since 1982, which also applies to oil and gas pipelines. The "nationwide permit system is designed to streamline the permitting process," *Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers*, 683 F.3d 1155, 1164 (9th Cir. 2012) (per curiam), enabling the Corps to focus individual permitting review on activities with greater environmental effects.

Plaintiffs sued under, among other statutes, the Endangered Species Act (ESA) to enjoin the Corps from authorizing the construction of portions of the Keystone XL pipeline under NWP 12. Plaintiffs contended that NWP 12 "may affect" listed species or their habitat, such that the Corps was required to "programmatically" consult with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (the Services) before re-issuing it. Plaintiffs so contended even though NWP 12 is subject to a condition barring its use for any individual activity that "may affect" listed species or habitat absent consultation with the appropriate Service.

The relief that Plaintiffs sought below was limited. Their Complaint expressly sought vacatur of only Keystone XL-specific NWP 12 verifications and injunctive

relief against its use only as to Keystone XL. Plaintiffs subsequently stated that they "do not seek to vacate NWP 12, but rather seek vacatur and injunctive relief only as to Keystone XL approvals," representations that Plaintiffs repeated throughout the litigation. And the district court itself observed at an earlier stage of this case that "Plaintiffs do not ask the Court to vacate NWP 12," and it reassured a coalition of energy organizations seeking intervention that it "could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits."

The district court ultimately granted Plaintiffs summary judgment on their ESA claim. As to the merits, the district court ruled that NWP 12's re-issuance "may affect" listed species or habitat notwithstanding the condition prohibiting such activities absent consultation. Contrary to Plaintiffs' Complaint, their subsequent representations, and the district court's own statements, the court then issued broad vacatur and injunctive relief extending beyond the Keystone XL pipeline.

Initially, and with no analysis whatsoever, the district court enjoined and vacated the entire permit, an action which would have ground to a halt or significantly delayed thousands of routine utility line projects across the country. In response to several motions for a stay pending appeal, Plaintiffs declined to meaningfully defend that order and instead asked the court to modify it to enjoin the use of NWP 12 for the construction of all new oil and gas pipelines (not just

Keystone XL), and they submitted fourteen new declarations identifying newly targeted projects and setting forth newly alleged injuries. The court amended its order more or less as Plaintiffs proposed, enjoining the use of NWP 12 for construction of new oil and gas pipelines across the country.

The district court and this Court denied a stay pending appeal. But the Supreme Court, without any noted dissent, then granted a stay of the district court's order with respect to everything other than the Keystone XL Pipeline. Consistent with the Supreme Court's order granting a stay, the district court's decision was wrong and should be reversed. The court's nationwide prohibition of NWP 12's use for any new oil or gas pipeline construction was procedurally improper and issued without fair notice, and in any event was unsupported by the record. In addition, the Corps correctly determined that merely re-issuing NWP 12 would have no effect on listed species or critical habitat — and therefore did not trigger any consultation requirement — because the regulatory scheme and conditions in NWP 12 ensure that any necessary consultation occurs on an activity-specific basis.

STATEMENT OF JURISDICTION

(a) The district court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under several federal statutes including, as relevant to the order under review, the Administrative Procedure Act, 5 U.S.C. §§ 701-706; and the ESA, 16 U.S.C. §§ 1531-1544. 3 Excerpts of Record (E.R.) 493.

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

(c) The district court's initial order was entered on April 15, 2020, 1 E.R. 39, and amended on May 11, 2020, 1 E.R. 1. Federal Appellants filed their notice of appeal on May 13, 2020. 2 E.R. 81. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that the mere re-issuance of NWP 12 was an action that "may affect" listed species — thereby requiring consultation with the Services — where the regulatory scheme ensures that any environmentally sensitive activities receive environmental review, including any necessary consultation with the Services, before those individual activities begin.

2. Whether the district court erred in issuing a nationwide vacatur and injunction of NWP 12 as to the construction of all new oil and gas pipelines where Plaintiffs did not introduce or even allege any evidence of injuries from any specific pipelines other than Keystone XL; Plaintiffs did not ask for such relief in their Complaint and on multiple occasions expressly disclaimed seeking an injunction or vacatur extending beyond the Keystone XL Pipeline; and the district court itself acknowledged the more limited relief at issue.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Clean Water Act

The Clean Water Act prohibits the discharge of any "pollutant," including dredged or fill material, into "navigable waters" without a permit from the Corps. 33 U.S.C. §§ 1311(a), 1344(a). The term "navigable waters" means "the waters of the United States," which include (by regulation) certain tributaries and wetlands. *Id.* § 1362(7); 33 C.F.R. § 328.3(a). The Corps authorizes discharges of dredged or fill material into waters of the United States through individual and general permits. 33 U.S.C. §§ 1344(a), (e). A standard individual permit generally may be issued only after the applicant submits extensive, site-specific documentation and the Corps then provides an opportunity for public comment. *See* 33 C.F.R. Part 325 (permitting process). A standard individual permit does not authorize activities that may affect endangered or threatened species or their critical habitat without completing consultation with the appropriate Service. *Id.* § 325.2(b)(5).

In 1977, Congress amended the CWA to authorize the Corps to issue "general" permits for discharges associated with certain categories of activities. *See*

33 U.S.C. § 1344(e). As amended, the CWA authorizes general permits "for any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." *Id.* § 1344(e)(1).

Nationwide permits — the type of general permit at issue here — are "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b); *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 663 F.3d 470, 472 (D.C. Cir. 2011) (general permits "allow parties to proceed with much less red tape" than is involved with individual permits). They may be in force for as long as five years, after which the Corps may re-issue them through notice-and-comment rulemaking. 33 U.S.C. § 1344(e)(1), (2). The Corps regulates the parameters and application of nationwide permits at the national, regional, and project-specific levels.

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

that activity and the permittee satisfy all of the [permit's] terms and conditions." *Id.* § 330.1(c).

At the regional level, each division engineer is empowered "to modify, suspend, or revoke [nationwide permit] authorizations for any specific geographic area, class of activities, or class of waters within his division." *Id.* § 330.5(c)(1). This authority may be exercised whenever the division engineer "determines sufficient concerns for the environment under [40 C.F.R. Part 230] or any other factor of the public interest so requires, or if [the division engineer] otherwise determines that the [nationwide permit] would result in more than minimal adverse environmental effects either individually or cumulatively." *Id.* § 330.4(e)(1). Before a division engineer may take such action, the changes likewise must undergo public notice and comment. *See id.* § 330.5(b)(2)(ii), (c)(1).

Finally, at the activity-specific level, certain circumstances require prospective permittees to submit a pre-construction notice (PCN) seeking verification that a proposed activity complies with the nationwide permit. A PCN is a site-specific notice to the Corps about the potential effects of a proposed activity at specific crossings of navigable waters. Upon receipt of a PCN, if "the adverse effects are more than minimal," the district engineer must "notify the prospective permittee that an individual permit is required." *Id.* § 330.1(e)(3). For activities that do not require a PCN and satisfy all the terms and conditions of a permit (including any regional

requirements), a prospective permittee may assess that the activity is covered by a nationwide permit without notifying the Corps.

2. Endangered Species Act

Section 7(a)(2) of the ESA requires each federal agency, "in consultation with" the Services, to "insure that any action authorized, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). If the so-called "action agency" determines that its action "may affect" endangered or threatened species (listed species), it must pursue either informal or formal consultation with the appropriate Service. 50 C.F.R. §§ 402.13, 402.14(b)(1).

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

B. Factual background

1. Nationwide Permit 12

a. Structure of NWP 12

NWP 12 has existed in some form since 1977. *See* 42 Fed. Reg. 37,122, 37,146 (July 19, 1977). After a three-year review, the latest iteration of NWP 12 was issued on January 6, 2017. *See* 82 Fed. Reg. 1860 (Jan. 6, 2017).[1] In 2015, the Tenth Circuit upheld the prior version of NWP 12. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043 (10th Cir. 2015).

The current version of NWP 12, like the 2012 version upheld by the Tenth Circuit, applies to "the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States." 82 Fed. Reg. at 1985. "Utility line" is defined to include electric, telephone, internet, radio, and television cables, lines, and wires, as well as oil or gas pipelines. *Id.* NWP 12 applies only if "the activity does [1] not result in the loss of greater than 1/2-acre of waters of the United States for [2] each single and complete project." *Id.* NWP 12 requires a PCN "prior to commencing the activity" if, among other reasons, the "discharges [will]

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[1] On August 3, 2020, the Corps publicly announced a new set of proposed nationwide permits — including a new version of NWP 12 limited to oil and natural gas pipeline activities — and provided the pre-publication version of the proposed rule on its website. *See* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/National-Notices-and-Program-Initiatives/. As of today, the proposed rule has not yet been published in the Federal Register, which would commence the comment period.

result in the loss of greater than 1/10-acre of waters of the United States." *Id.* at 1986.

NWP 12 is also subject to thirty-two General Conditions. Those include General Condition 18, which like the standard individual permit, provides that "[n]o activity is authorized under any [nationwide permit] which 'may affect' a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed." 82 Fed. Reg. at 1999; 33 C.F.R. § 325.2(b)(5). General Condition 18 expressly excludes from its authorization any activity which is likely to jeopardize the continued existence of an ESA listed species or destroy or adversely modify designated critical habitat. *Id.* The Condition advises that no nationwide permit — including NWP 12 — constitutes an authorization to "take" a listed species within the meaning of the ESA. 82 Fed. Reg. at 1999-2000. To legally take a listed species, a utility must obtain "separate authorization" from the Services in the form of an individual permit under Section 10 of the ESA or "a Biological Opinion with 'incidental take' provisions" issued following consultation under Section 7 between the Services and the Corps. *Id.* at 2000.

General Condition 18 also requires non-federal permittees to submit a PCN to the Corps for a broader range of activities that could conceivably affect ESA-listed species. Specifically, it requires a PCN "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is

located in designated critical habitat." *Id.* at 1999; *accord* 33 C.F.R. § 330.4(f)(2). The Corps explained that it settled on this "might affect" standard because it is a broader standard (encompassing more activities) than the "may affect" threshold for potentially triggering Section 7(a)(2) consultation. 82 Fed. Reg. at 1873.

Other structural features of the PCN process and General Condition 18 reinforce these protections. For one, whenever a PCN is required for a proposed project, it must identify all jurisdictional waters that the project will cross, regardless of whether those other crossings would independently require a PCN. 82 Fed. Reg. at 1986. When a PCN is submitted to the Corps under General Condition 18 and the Corps makes a "may affect" determination, Section 7 consultation must be completed "before the activity is authorized." 3 E.R. 589. Regardless of the Corps' ultimate determination, a prospective permittee may not "begin work on the activity" that triggers General Condition 18 until it is notified by the Corps that the activity is authorized. 82 Fed. Reg. at 1999.

Many other General Conditions further narrow the availability of NWP 12 and other nationwide permits to address potential environmental effects. *See infra* p. 27. Regional conditions also restrict use of nationwide permits, including NWP 12. In March 2017, for example, the Corps' Omaha District imposed regional conditions on nationwide permits, many of them to provide additional layer of protection for listed species or habitat in that particular region. *See infra* pp. 27-28.

In re-issuing NWP 12 in 2017, the Corps estimated that the permit would be relied on 14,000 times per year throughout the nation. 2 E.R. 259. Of those 14,000 uses, the Corps estimated that approximately 11,500 (around 82 percent) would be submitted to the Corps as part of a written request for NWP 12 authorization. *Id.* This estimate is consistent with subsequent historical data. Since NWP 12 went into effect on March 19, 2017 and through the district court's initial Order on April 15, 2020 — a little more than three years — the Corps had verified more than 38,000 PCNs under NWP 12. *Id.* Approximately 3,400 of those PCNs were triggered wholly or in part by General Condition 18. *Id.*

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

b. The Corps' no-effect determination

In the 2017 re-issuance of the NWP 12, the Corps explained that issuing the nationwide permits themselves has no effect on listed species or critical habitat — and therefore triggers no consultation requirement — because the regulatory scheme and the permits are designed to ensure that any necessary consultation occurs on an activity-specific basis. In particular, the Corps explained that General Condition 18 and 33 C.F.R. § 330.4(f)(2) require prospective permittees to provide the Corps with pre-construction notification of any activity that "might affect" a listed species or

critical habitat, which is a broader standard (encompassing more activities) than the "may affect" threshold for potentially triggering ESA Section 7(a)(2) consultation. 82 Fed. Reg. at 1873.

The Corps further explained that "[e]ach year, [it] conducts thousands of ESA section 7 consultations with the [Services] for activities authorized by NWPs." 3 E.R. 589. "During the period of March 19, 2012, to September 30, 2016, Corps districts conducted 1,402 formal consultations and 9,302 informal consultations for NWP activities under ESA section 7." *Id.* In light of these safeguards, the Corps determined that it was not required to consult with the Services prior to re-issuing NWP 12. 3 E.R. 590.

The Corps' no-effect determination in 2017 was consistent with prior consultation history. Before issuances of the nationwide permits in 2007 and 2012, the Corps engaged in voluntary consultation with the Services. As to the 2012 re-issuance, FWS did not conclude the consultation, and NMFS issued a biological opinion (BiOp) in 2014 concluding that the nationwide permits were *not* likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. 3 E.R. 603. But in voluntarily consulting, the Corps made clear that it did not believe consultation was required. *See* 81 Fed. Reg. 35,186, 35,194 (June 1, 2016). Consistent with that view, the Corps proceeded with the 2012 re-issuance even though FWS did not conclude the consultation. *Id.*

Although the Corps concluded that consultation with the Services was not legally required (consistent with its prior issuance of nationwide permits), the Services were kept closely in the loop on the Corps' decisionmaking and reasoning. During the spring of 2016, the Office of Management and Budget (OMB) in the prior Administration hosted a series of meetings that included the Corps, NMFS, and FWS. 3 E.R. 602-03. During that process, the Corps explained its no-effect determination to the Services and made certain edits to that determination as a result of NMFS's input. 3 E.R. 597. Both agencies also committed to working together and, among other accommodations, the Corps agreed to share permit data with NMFS and help identify, when appropriate, additional measures to improve protection of particular ESA-listed species and designated critical habitat. 3 E.R. 593. The Corps also agreed to continue the protective measures from NMFS's 2014 BiOp examining the 2012 version of NWP 12 (save for three measures that NMFS itself had determined were infeasible). 3 E.R. 599-601. And although either Service could have requested formal consultation, *see* 50 C.F.R. § 402.14(a), neither did.

2. Keystone XL and TC Energy

TC Energy is the project proponent for the proposed Keystone XL pipeline, a major pipeline for the importation of petroleum from Canada to the United States. As proposed, Keystone XL would cross the U.S. border near Morgan, Montana and continue for approximately 882 miles to Steele City, Nebraska. The environmental

effects of Keystone XL were analyzed in a 2013 ESA consultation with FWS that resulted in a no jeopardy biological opinion and a Final Supplemental Environmental Impact Statement issued by the Department of State in 2014; supplemental NEPA and ESA analysis has since been issued, addressing the revised route and issues identified by the District of Montana in *Indigenous Environmental Network v. U.S. Department of State*, 347 F. Supp. 3d 561 (D. Mont. 2018). The 2019 ESA analysis once again found that Keystone XL would not jeopardize any protected species.[2] In 2017 and again in 2020, TC Energy submitted to the Corps PCNs that included all of Keystone XL's proposed crossings of covered waters for the proposed project. 3 E.R. 545. The Corps suspended its 2017 verifications of those notices. 3 E.R. 557-58. TC Energy's 2020 PCNs remain pending before the Corps, and TC Energy has since submitted an individual permit request as well.

C. Proceedings below

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

Plaintiffs filed this suit in July 2019 and filed their operative amended complaint on September 10, 2019. *See* 3 E.R. 486. That five-count Complaint challenges the Corps' issuance of NWP 12 as violating the National Environmental Policy Act (NEPA) (Count One), the CWA (Count Two), and the ESA (Count Four).

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

3 E.R. 558-62, 566-69. The Complaint also challenges purported Corps PCN verifications under NWP 12 for crossings in the construction of the Keystone XL pipeline (Counts Three and Five). 3 E.R. 563-66, 570-72. Those latter two counts are stayed by court order pending further action by the Corps.

The Complaint did not seek vacatur of NWP 12 or broad, let alone nationwide, injunctive relief. Instead, the Complaint sought these remedies limited to the Keystone XL pipeline; indeed, it identified no other ongoing pipeline project. In addition to declaratory relief and a remand of NWP 12 to the Corps, Plaintiffs sought vacatur only as to the alleged "Corps verifications or other approval of *Keystone XL* under NWP 12." 3 E.R. 573 (emphasis added). The Complaint's plea for injunctive relief sought only an "injunction enjoining the Corps from using NWP 12 to authorize the construction of the *Keystone XL pipeline* in waterbodies or wetlands, or otherwise verifying or approving the *Keystone XL pipeline* under NWP 12, and [a request to] enjoin any activities in furtherance of pipeline construction." *Id.* (emphasis added).

Plaintiffs reiterated this Keystone-specific request for relief as the case proceeded. In opposing intervention sought by the State of the Montana, Plaintiffs explicitly stated that "[a]s the Corps points out, Plaintiffs do not seek to vacate NWP 12, but rather seek vacatur and injunctive relief only as to Keystone XL approvals." 3 E.R. 464. Recognizing the limited and narrow nature of Plaintiffs' requested relief, the district court denied intervention as of right to the State of Montana and to a

coalition of business-related groups (the NWP 12 Coalition), though the court did grant permissive intervention. In its ruling, the court explained that "Plaintiffs do not ask the Court to vacate NWP 12. Plaintiffs seek instead declaratory relief as to NWP 12's legality." 3 E.R. 456-57 (citations omitted). Indeed, the court reassured that Montana and the NWP 12 Coalition that they "could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits." 3 E.R. 457.

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

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

2 E.R. 274-75 (citations omitted and emphasis added).

2. The district court's April 15 decision

On April 15, 2020, the district court resolved the Parties' cross-motions for summary judgment on Counts One, Two, and Four. 1 E.R. 39. The court granted Plaintiffs summary judgment on their ESA claim, ruling that NWP 12 "may affect"

listed species or critical habitat and, therefore, consultation with the Services was required. 1 E.R. 47-59.

The district court based this conclusion primarily on general statements from the Corps about minor environmental effects, none of which discussed General Condition 18 or even harm to species in general. 1 E.R. 49-51; *see also infra* pp. 31-32. The court also relied on two short declarations submitted by Plaintiffs, which contended that the Corps' issuance of NWP 12 authorizes discharges that may affect endangered species and their habitats. 1 E.R. 52-53. The declarations were submitted for purposes of establishing Plaintiffs' standing, not in support of their merits position (or to establish irreparable harm). *See infra* p. 32. Doubtless for this reason, the declarations are largely devoid of detail: they do not discuss General Condition 18, regional conditions, or the other provisions of NWP 12 that trigger site-specific review; nor, for that matter, do they mention any project other than Keystone XL. 3 E.R. 346-52, 367-74. The district court concluded that these materials supplied "'resounding evidence' . . . that the Corps' reissuance of NWP 12 may affect listed species and their habitat." 1 E.R. 49 (internal quotation marks omitted) (quoting *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011)).

The district court acknowledged that General Condition 18 requires permittees to submit a PCN to the Corps for any activity that might affect listed species or critical habitat, and that such a permittee may not commence that activity

unless and until the Corps — after completing any consultations — determines the activity is authorized. 1 E.R. 46-47. And the court did not suggest that permittees or the Corps would fail to comply with these requirements: Plaintiffs presented no evidence of such non-compliance, and the court "presume[d] that the Corps, the Services, and permittees will comply with all applicable statutes and regulations." 1 E.R. 57. But the district court concluded that "General Condition 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 non-federal permittees." *Id.* And the court held that activity-specific review of any activity that "might affect" listed species or habitat was an insufficient substitute for programmatic consultation on NWP 12 as a whole. 1 E.R. 54-57.

The district court accordingly granted Plaintiffs' summary judgment on their ESA claim and denied without prejudice all parties' motions for summary judgment on the remaining two non-stayed claims. 1 E.R. 60. After finding a violation of the ESA, the court "remanded" NWP 12 to the Corps "for compliance with the ESA." 1 E.R. 64. Without even mentioning the standards for injunctive relief, and despite Plaintiffs' repeated statements that they sought only narrow relief (and the court's own statements acknowledging this narrow requested relief), the court "vacated" NWP 12 and "enjoined" the Corps "from author[izing] any dredge or fill activities under NWP 12" until completion of the remand. *Id.*

3. Subsequent district court proceedings

On April 27, 2020, the Corps moved in the district court for a stay pending appeal. 2 E.R. 230. The Corps also suggested that the district court's broad remedies may have been unintentional and explained that it would delay filing a notice of appeal to ensure that the court retained authority to revise them.

Plaintiffs' defense of the relief ordered by the district court consisted of a one-page section reciting legal boilerplate. 2 E.R. 100-101. The remainder of Plaintiffs' opposition, however, proposed and defended a remedy that Plaintiffs had not previously sought and that the district court had not issued: vacatur of NWP 12 as applied to the construction of *all* new oil and gas pipelines anywhere in the country. 2 E.R. 101-33. In support of this novel proposal, Plaintiffs filed fourteen new declarations identifying a handful of additional oil and gas pipelines that the declarants allege will cause individual members various harms. 2 E.R. 137-227. As discussed further below, many if not all of these newly identified pipelines are the subject of separate environmental challenges in other courts and, in any event, have been subject to site-level environmental review far more specific than the general programmatic consultation that the district court faulted the Corps for failing to conduct prior to re-issuing NWP 12. *See infra* pp. 53-54 & n.6.

On May 11, 2020, the district court amended its order essentially along the lines that Plaintiff proposed, vacating NWP 12 "as it relates to the construction of

new oil and gas pipelines" and enjoining its use to authorize "any dredge or fill activities for the construction of new oil and gas pipelines" pending completion of the consultation process and compliance with all environmental statutes and regulations. 1 E.R. 38. The court did not specifically acknowledge or address Plaintiffs' multiple representations expressly disclaiming broader relief, let alone the court's own assurances to the same effect. Rather, the district court simply cited the general principle that courts may grant relief broader than that requested in the pleadings. 1 E.R. 3-4.

4. Subsequent appellate proceedings

The Corps, TC Energy, Montana, and the NWP 12 Coalition noticed appeals from the district court's order and (with the exception of Montana) all filed emergency motions for a stay pending appeal. Two Judges assigned to this Court's May motions panel denied a stay in a brief order. 2 E.R. 79.

The Corps then sought a stay from the Supreme Court. On July 6, 2020 — without any noted dissent — that Court granted a stay in substantial part, staying the district court's order granting partial vacatur and an injunction of NWP 12 except as it applies to Keystone XL. 2 E.R. 65. In so ordering, the Court necessarily (and apparently unanimously) concluded that the district court's far-reaching order is not likely to survive appellate review. *See San Diegans for Mount Soledad National War Memorial v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers).

SUMMARY OF ARGUMENT

The district court's broad and highly disruptive order lacks any sound basis in the ESA. And even if the court had correctly identified an ESA violation, its order was overbroad, procedurally improper, and unsupported by the record — as the Supreme Court necessarily concluded when it stayed that order in all respects except as applied to Keystone XL. The order should be reversed.

1. The district court erred in ruling that the Corps' re-issuance of NWP 12 violated the ESA.

a. The Corps correctly determined that the mere re-issuance of NWP 12 itself would have no effect on any listed species or designated critical habitat. General Condition 18 makes clear that NWP 12 does not authorize any activities that may affect listed species or habitat until consultation with the appropriate Service is completed, and the Condition requires notification to — and pre-construction approval from — the Corps for an even broader range of potentially sensitive activities. That Condition and many other safeguards ensure that any necessary consultation occurs on an activity-specific basis.

b. The district court's reasons for discounting these and many other protections built into NWP 12 are unpersuasive. Contrary to the court's analysis, the Corps' regulatory scheme does not delegate the "may affect" determination to non-federal permittees because the Corps itself makes this determination. Nor is

there any merit to the court's conclusion that the record had "resounding evidence" contradicting the Corps' no-effect determination. The Corps' general statements referenced by the district court do not undermine the Corps' more specific determination that re-issuance of NWP 12 would not itself affect listed species or critical habitat. And the two extra-record declarations submitted by Plaintiffs solely for standing purposes likewise do not support the court's conclusion. The court's contention that activity-specific review is insufficient because it fails to consider the overall impacts of NWP 12-authorized activities misunderstands the regulatory scheme, which requires that any necessary activity-specific consultation take into account the effects of other human activities in the same area. Finally, the court relied on the Corps' voluntary consultation on prior agency actions for expired nationwide permits; but that history, to the extent that it is relevant at all, only further supports the Corps' determination here.

2. Even if the district court had correctly identified an ESA violation, its remedy — enjoining the use of NWP 12 for new oil and gas pipeline construction anywhere in the country — was procedurally improper and substantively flawed.

a. In issuing broad relief that Plaintiffs themselves repeatedly and explicitly disclaimed, the district court acted contrary to basic principles of party presentation, waiver, and fair notice. Nor were these defects somehow cured by the court's amendment of the order in response to Defendants' motion to stay. Indeed,

the court had no basis for considering Plaintiffs' post-decisional submissions at all — either their new requested relief or the fourteen new declarations submitted in response to Defendants' motions to stay. Predictably, the district court's ruling blindsided both the regulatory community and many states, none of whom had reason to think this case implicated their interests. And the court's many deviations from ordinary litigation procedure unsurprisingly resulted in a poorly crafted order that is grievously ambiguous in several basic respects, which only underscores the impermissibility of the process that produced it.

b. Although the Court need not consider this question here, even if the broad nationwide relief the district court imposed had been properly sought and litigated, neither the district court's vacatur nor its nationwide injunction would have been legally permissible or appropriate remedies. Plaintiffs' submissions fall far short of demonstrating that the district court's nationwide injunction was necessary to redress any Article III injury, let alone to prevent irreparable harm, which Plaintiffs also failed to demonstrate. Likewise, the court's broad vacatur is also contrary to basic equitable principles and this Court's case law.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *Native Ecosystems Council v. Marten*, 883 F.3d 783, 789 (9th Cir. 2018). Challenges to an agency's compliance with the ESA are reviewed under the APA's

deferential standard of review. *Id.* at 788; *accord Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1256-57 (9th Cir. 2017). Under that standard, courts uphold an agency's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund v. USDA*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotation marks omitted).

ARGUMENT

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

A. The Corps' no-effect determination was correct.

The district court held that the Corps violated the ESA when it re-issued NWP 12 based on a single asserted defect: that the Corps was supposedly required to engage in "programmatic consultation" with the Services before re-issuing NWP 12. But neither Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), nor its implementing regulations require an agency to engage in formal or informal consultation unless the agency determines that its proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Here, the Corps determined that NWP 12's re-issuance would have "no effect" on protected species and critical habitat. 82 Fed. Reg. at 1873. Contrary to the district court's ruling, that determination was neither arbitrary nor inconsistent with the facts before the agency.

Most prominently, General Condition 18 requires a PCN "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." 82 Fed. Reg. at 1999. The Corps has explained that the "might affect" threshold of General Condition 18 was intended to be "more stringent than the 'may affect' threshold for [ESA] section 7 consultation" with the Services. *Id.* at 1873. Although most General Conditions authorize permittees to begin construction if the Corps does not respond to a PCN within 45 days, *see id.* at 1861, General Condition 18 is structured differently: prospective permittees may not begin work under authority of NWP 12 unless and until the district engineer notifies them that the ESA's requirements have been satisfied, and that the activity is authorized. *Id.* at 1999; 33 C.F.R. § 330.4(f)(2).

The district court did not dispute that NWP 12 simply does not authorize any activity that might implicate the ESA until the Corps either makes a "no effect" determination or completes a site-specific ESA Section 7 consultation. Nor did the court question the effectiveness of General Condition 18 in ensuring site-specific consultation where appropriate. To the contrary, the court "presume[d] that the Corps, the Services, and permittees will comply with all applicable statutes and regulations." 1 E.R. 57. Plaintiffs have provided not a single example of a permittee who did not submit a PCN where General Condition 18 required one. Indeed, permittees who proceed without submitting a PCN where General Condition 18

applies are subject to Corps enforcement action, 33 C.F.R. § 330.1(c), and possibly even to civil or criminal penalties under the ESA, 16 U.S.C. §§ 1540(a)(1), (b)(1).

General Condition 18 is also far from the only safeguard built into NWP 12. First of all, many other General Conditions also address potential environmental effects. Those include, but are not limited to —

- General Condition 2, which provides that activity may not substantially disrupt the necessary life cycle movements of indigenous aquatic life;
- General Condition 3, which requires that activities in spawning areas during spawning seasons be avoided to the maximum extent practicable, and which prohibits any activity resulting in the physical destruction of an important spawning area;
- General Condition 8, which requires any activities creating an impoundment of water to be structured to minimize adverse effects to the aquatic system and restricting the flow of the impoundment; and
- General Condition 12, which mandates appropriate soil erosion and sediment controls.

82 Fed. Reg. at 1998-99.

Regional conditions can and do provide additional protections. In March 2017, for example, the Corps' Omaha District imposed regional conditions on the use of nationwide permits, many of them to protect listed species or habitat. These conditions include requiring PCNs for activities in Nebraska habitat for protected species that include the whooping crane, pallid sturgeon, and American burying beetle. 3 E.R. 576-85.

More generally, NWP 12 requires a PCN if discharges from a proposed project will "result in the loss of greater than 1/10-acre of waters of the United States." 82 Fed. Reg. at 1986. The Corps estimated, based on historical data, that the vast majority of NWP 12 authorizations would likely require a PCN, thus providing the Corps with notice of the project and an opportunity to make a determination about whether consultations are required. *See supra* p. 12. The district court discussed none of these other safeguards.

The Corps' determination that re-issuance of NWP 12 did not require programmatic consultation is particularly appropriate in light of the structure of CWA general permits — which, given the breadth of activities that they authorize, necessarily involve prediction under conditions of imperfect information. *See Ohio Valley Environmental Coalition v. Bulen*, 429 F.3d 493, 500 (4th Cir. 2005) ("Congress anticipated that the Corps would make its initial minimal-impact determinations under conditions of uncertainty."). And as in *Bulen*, the Corps' partial reliance on post-issuance procedures does not render its initial no-effect determination any less valid. *See id.* at 502. The Tenth Circuit made similar points in rejecting a challenge to the prior version of NWP 12. *See Bostick*, 787 F.3d at 1057-58. Indeed, the great utility of a general permit, like NWP 12 (or like the nationwide permit in *Bulen*) as compared to a nationwide regulation on the one hand, or as compared to an individual permit on the other hand, is precisely that it permits

hybridization of a rulemaking-like approach and an individual-permitting approach, fusing the virtues of each. *See Bulen*, 429 F.3d at 498 (overruling district court's conclusion that a nationwide permit was invalid because it allowed back-end, post-NWP issuance actions by the Corps tied to particular sites instead of establishing across-the-board "objective requirements or standards").

B. The district court's contrary analysis is unpersuasive.

Against all of these considerations, the district court gave four sets of reasons for rejecting the Corps' no effect determination. None withstands scrutiny.

1. General Condition 18 does not delegate the no-effect determination to permittees.

While purporting not to doubt the effectiveness of General Condition 18, the district court dismissed the Corps' reliance on that Condition, reasoning that it "fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees." 1 E.R. 57. This is incorrect: the Corps itself makes the Section 7(a)(2) determination. *See* 82 Fed. Reg. at 1954-55, 1999-2000. As the Corps noted, the General Condition "is written so that prospective permittees *do not decide* whether ESA section 7 consultation is required." *Id.* at 1954 (emphasis added); *see also id.* at 1955 ("that is the Corps' responsibility").

To be sure, General Condition 18 does rely on prospective permittees to identify those activities for which such a determination might be necessary. But all

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

General Condition 18, moreover, sets a threshold that is both broad and objective. It applies not only when listed species or critical habitat "might be affected," but also when listed species are "in the vicinity of the activity" or when the activity is "located in designated critical habitat." 82 Fed. Reg. at 1999. As noted above, permittees who proceed without submitting a PCN where General Condition 18 applies are subject to potentially serious civil and criminal liability. The district court gave no reason why General Condition 18 would not be effective to ensure site-specific consultation for projects warranting consultation; indeed, the court presumed that permittees would comply with it (as TC Energy did with respect to Keystone XL proposed activities). *See supra* p. 19. This is accordingly not a basis for rejecting the Corps' no-effect determination. The record demonstrates that the Corps considered the relevant factors and articulated a rational connection between (1) the available data and the structure of regulatory scheme and (2) the "no effect" determination. *Center for Biological Diversity v. BLM*, 833 F.3d 1136, 1150 (9th Cir. 2016). Even if the data and regulatory scheme is "susceptible of more than

one rational interpretation, [the court] must uphold [the agency's] findings." *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003).

2. The Corps' no-effect determination is consistent with the record and the evidence before the Corps.

The district court also reasoned that consultation was required because there was " 'resounding evidence' in this case that the Corps' reissuance of NWP 12 may affect listed species and their habitat." 1 E.R. 49 (some internal quotation marks omitted) (quoting *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011)). There was no such evidence.

The district court initially pointed to the Corps' general acknowledgment that discharges authorized by NWP 12 would have certain environmental effects. *See, e.g.*, 1 E.R. 50 (quoting Corps' acknowledgments that authorized activities, among other things, "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources" and "will fragment terrestrial and aquatic ecosystems"); *see also id.* (court's observation that "Human activities alter ecosystem structure and function"). But the district court's extrapolation from these broad statements is simply not reasonable. The Corps did not suggest that any of these highly general effects may affect listed species or critical habitat and the court did not suggest otherwise. Indeed, these statements were part of the Corps' general *NEPA* review, similar variants of which were upheld in *Bulen* and *Bostick* — and they have nothing to do with the ESA.

In any event, the district court's reliance on these statements misses the point. The very existence of General Condition 18 assumes that some proposed activities may affect listed species and habitat. It therefore mandates activity-specific review and consultation in those circumstances. The Corps reasonably concluded that General Condition 18 — as well as other General Conditions, regional restrictions, and additional site-specific circumstances triggering PCN requirements — ensure that re-issuance of NWP 12 itself would have no effect on endangered species or critical habitat. The general statements identified by the district court are simply not inconsistent with, or even in tension with, that conclusion.

The district court's reliance on Plaintiffs' two extra-record declarations fares no better. As a threshold matter, consideration of those declarations for merits purposes was improper, because they were submitted only for standing purposes. In moving for summary judgment, Plaintiffs cited the declarations only in their general discussion of standing but not at all in their ESA merits argument. 2 E.R. 307, 325-36. Although Plaintiffs moved to supplement the record with other materials — including a prior NMFS BiOp — they did not move to supplement with either of these two declarations. 2 E.R. 279-88. Because they were submitted for standing purposes only, the Corps could not reasonably have been expected to address them.

In any event, because not even Plaintiffs intended these two declarations to support their ESA merits claims, the declarations not surprisingly lend no support to

the district court's conclusion. Putting aside that neither mentions a project other than Keystone XL, the declarations do not discuss General Condition 18, regional conditions, or the other provisions of NWP 12 that trigger site-specific review; and they certainly do not engage with the Corps' reasoned conclusion that, given these safeguards, the issuance of NWP 12 itself does not have any effect on endangered species or critical habitat. *See generally* 3 E.R. 346-52, 367-74. For example, although the two declarants express concern about the potential status of the pallid sturgeon and American burying beetle species in particular, *see* 3 E.R. 348, 370, they fail to discuss or even acknowledge regional conditions requiring PCNs for activities in Nebraska habitat for these two species. These sorts of conclusory and almost entirely unresponsive submissions outside the administrative record are no basis for disturbing the Corps' reasoned determination that the mere re-issuance of NWP 12 would have no effect on listed species or critical habitat.

3. The Corps may rely in part on future activity-specific review for its no-effect determination.

The district court also more broadly criticized the Corps' reliance on future activity-specific review, suggesting that neither activity-specific review nor General Condition 18 could substitute for programmatic review because the former would not consider the effects of NWP 12 as a whole. 1 E.R. 54-57. Programmatic review, the court opined, "provides the only way to avoid piecemeal destruction of species and habitat." 1 E.R. 56. This logic is wrong and, indeed, entirely circular. The court

did not explain why NWP 12 as a whole "may affect" listed species or habitat when all activities that "might affect" listed species or habitat (a lower threshold) receive the requisite environmental review before they are permitted to proceed.[3]

To the extent that the district court intended to suggest that activity-specific review fails to take into account the combined effects of other NWP 12-authorized activities, *see* DktEntry 45-1, at 18-19 (May 20, 2020) (Plaintiffs making this argument), the court simply misunderstood the regulatory scheme. To the contrary, whenever a particular activity triggers a formal consultation requirement, the effects of the proposed action must be measured against the "environmental baseline" for the listed species or critical habitat, 50 C.F.R. §§ 402.14(g)(2) and (4) — which requires taking account "the past and present impacts of all Federal, State, or private actions and other human activities in the action area," *id.* § 402.02. The regulations also require considering "cumulative effects," *id.* §§ 402.14(g)(3) and (4), which are

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[3] The district court relatedly suggested that consultation is required "when an agency's proposed action provides a framework for future proposed action," and that the Services "have listed the Corps' nationwide permit program as an example of the type of federal program that provides a national-scale framework and that would be subject to programmatic consultation." 1 E.R. 48. The Services' guidance is not binding on the Corps. *See infra* p. 38. In any event, the district court misunderstood that guidance. The Services have recognized that "framework programmatic actions" *might* require ESA Section 7 consultation, and that "the U.S. Army Corps of Engineers' Nationwide Permit Program" is an example of such a framework action. *See* 80 Fed. Reg. 26,832, 26,835 (May 11, 2015). But the Services made clear that "this regulatory change does not imply that section 7 consultation is required for a framework programmatic action that has no effect on listed species or critical habitat," *id.* at 26,835, as the Corps determined was the case here.

defined to include future state or private activities reasonably certain to occur within the action area, *id.* § 402.02. An "action area" in turn is itself described broadly to include "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." *Id.*

Therefore, the regulatory scheme assuredly does not consider the effects of particular activities in isolation. Moreover, the district court's order is not actually responsive to any such concerns. As the court acknowledged, in the absence of a valid general permit, the proponents of activities that would otherwise be authorized under NWP 12 would need to apply to the Corps for an individual permit. 1 E.R. 16-17. But any ESA consultation that occurs during the individual permitting process involves the same activity-specific analysis that would occur in a formal consultation — with no added layer of nationwide programmatic review that the court wrongly thought was needed here. *See* 50 C.F.R. § 402.02; 33 C.F.R. § 325.2(b)(5). Thus, in addition to being legally erroneous, the court's order would impose significant economic harm and inconvenience (to the Corps, to the regulated community, and to the public) without any meaningful countervailing benefit to the environment.[4]

[4] The district court at various points cited four decisions from this court in support of this or similar points: *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015); and *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992). Those cases are readily distinguishable from the situation here. Whatever impacts that the Court in *Kraayenbrink* believed the action at issue might have had on species, *see*

4. The district court's contention that the Corps was "aware" of its supposed duty to consult is irrelevant and, in any event, incorrect.

Finally, the district court suggested that the Corps was "well aware that its reauthorization of NWP 12 required Section 7(a)(2) consultation," because the Corps consulted with the Services prior to re-issuing NWP 12 in 2007 and 2012, and because NMFS initially issued a biological opinion in 2012 that the Corps' implementation of the nationwide permit program had "more than minimal adverse environmental effects on the aquatic environment when performed separately or cumulatively." 1 E.R. 58. The court's analysis on this point is flawed for several reasons.

First, the district court's inferences about the Corps' supposed "awareness" are irrelevant. Whether consultation is required is a legal question that is governed by legal standards, not an issue as to which agency omniscience is somehow pertinent. Even if the Corps had concluded at an earlier point in time that consultation

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632 F.3d at 495-97, those impacts cannot occur here because NWP 12 does not apply where it might affect a listed species. Because *Conner* involved a situation in which FWS failed to prepare a BiOp despite its concession that the relevant lease sale could affect listed species, pursuant to a statute that provided "no checks and balances" following that sale, it is also unlike the situation here. 848 F.2d at 1452, 1455-56. In *Cottonwood*, there was no dispute that the underlying agency action required consultation, and the issue was merely whether and under what circumstances an agency retained responsibility to reinitiate consultation when the underlying action was complete. 789 F.3d at 1086. Finally, in *Jamison*, this Court concluded with little analysis that the BLM strategy under review may affect the spotted owl because it sets forth criteria for harvesting owl habitat; as in *Kraayenbrink*, whatever those impacts might have been in this 28-year-old case not involving a nationwide permit, those impacts cannot occur here (at least absent consultation) given the existence of General Condition 18.

was legally required — when considering a different version of NWP 12 — it no doubt would have been entitled to change its mind. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007) (noting both that action agency is not bound by initial determination to consult and that agencies may pursue voluntary consultations); *cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (agencies may reverse course).

Second, even assuming that the history discussed by the district court was pertinent, the court drew the wrong lessons from that history — which, if anything, supports the Corps' 2017 no-effect determination. First of all, no appellate court has ever held that such consultation is required for the nationwide permit program. And although the Corps initiated voluntary consultation on the 2007 and 2012 nationwide permits, it made clear in doing so that it did not believe consultation was legally required. *See supra* p. 13. Again, consistent with that position, the Corps proceeded with the 2012 re-issuance even though FWS had not concluded the consultation. 81 Fed. Reg. at 35,194. Nor was the 2012 re-issuance an outlier in this respect. *See* 65 Fed. Reg. 12,818, 12,828 (Mar. 9, 2000) (rejecting commenters' assertion that the Corps could not issue previous version of nationwide permits prior to completing programmatic consultations). Consequently, it is the district court's position that cannot be reconciled with the history of the nationwide permit system, not the Corps' position.

Third and finally, the district court's reliance on NFMS's 2012 BiOp was ill-considered. To start, that opinion was *superseded* when NMFS issued another BiOp in 2014 concluding that the nationwide permits were *not* likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. 3 E.R. 603. In any event, the no-effect determination was the Corps' to make and an expired BiOp addressing a previous and expired version of NWP 12 has no bearing on whether the Corps' no-effect determination for the 2017 re-issuance was lawful. *Cf.* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (Services' long-standing recognition that the action agency, here the Corps, "makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision"). Prior to the 2017 re-issuance, the Corps engaged with the Services in an OMB-led inter-agency process that culminated in an agreement between the Corps and NMFS to work together to improve protection for ESA-listed species, with the Corps maintaining all of the feasible protective measures identified in NMFS's 2014 BiOp, and neither of the Services requesting consultation. *See supra* pp. 13-14. This context reinforces the Corps' reasoned judgment that the mere re-issuance of NWP 12 would have no effect on listed species or critical habitat.

* * * * *

The district court erred in concluding that the Corps violated the ESA by determining there was no duty to engage in programmatic consultation before re-issuing NWP 12. For this reason alone, the district court's order should be reversed.[5]

II. Irrespective of the merits, the district court erred in vacating NWP 12 and enjoining its use for new oil and gas pipelines.

For the reasons explained in the previous section, the Corps was not required to programmatically consult with the Services before re-issuing NWP 12. But even if the district court had correctly identified an ESA violation, the court had no basis for vacating and enjoining NWP 12 as it applied to new oil and gas pipeline construction anywhere in the country. On this point, the Supreme Court's July 6 order is instructive, if not dispositive. That Court necessarily concluded that the district court's remedy was unlikely to survive appellate review. *See supra* pp. 21-22.

Initially, the relief the district court ordered was procedurally improper: The court granted relief that Plaintiffs did not seek and expressly disclaimed, and it imposed remedies that the court itself ruled out at an earlier stage of the case. In any event, the district court's nationwide injunction and vacatur are contrary to basic tenets of Article III standing, equitable principles, and the law of this Circuit, and this relief is likewise unwarranted as to Keystone XL.

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[5] Even if the district court had correctly identified an ESA violation, it should have remanded the issue back to the agency for further analysis, not decided itself whether consultation was required: "When an agency's inquiry is inadequate, we generally remand the matter to the agency for further consideration." *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 450 F.3d 930, 943 (9th Cir. 2006).

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

The Supreme Court recently emphasized that in "our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Because courts "are essentially passive instruments of government," "our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.*

The district court's order cannot be reconciled with these principles. The record in this case is clear: Plaintiffs' Complaint sought only injunctive relief and vacatur directed at the Keystone XL project; indeed, the Complaint identifies no other pipeline project. *See supra* p. 16. Throughout the proceedings below, Plaintiffs have denied seeking broader relief and have done so expressly. *See, e.g.*, 3 E.R. 464 ("Plaintiffs do not seek to vacate NWP 12, but rather seek vacatur and injunctive relief only as to Keystone XL approvals."); *see also supra* pp. 16-17. Consistent with all of this, the district court itself explained that "Plaintiffs do not ask the Court to vacate NWP 12," and that "Montana and the Coalition could still prospectively rely on the permit until it expires," even if Plaintiffs prevailed. 3 E.R. 456-57.

In previous briefing, Plaintiffs principally argued that the relief ordered by the district court was nonetheless appropriate because they asserted "facial" claims challenging re-issuance of NWP 12 and asked for "broad relief" on those claims.

See DktEntry 45-1, at 49-51. This is a red herring. There is no dispute that Plaintiffs challenged the re-issuance of NWP 12 "on its face," i.e., that prior programmatic consultation was required without regard to how NWP 12 was later applied to Keystone XL or any other project. But there is likewise no dispute that Plaintiffs repeatedly made clear that they sought only declaratory relief and remand without vacatur as to those claims. The district court could not have said it better: "Plaintiffs do not ask the Court to vacate NWP 12." 3 E.R. 456.

Nor does it matter that, after the district court issued its initial overbroad order, Plaintiffs embraced that order (while urging the court to narrow it somewhat in hopes of strengthening it for appeal). This circumstance was also present in *Sineneng-Smith*, where "[u]nderstandably," the defendant "rode with an argument suggested by the panel." 140 S. Ct. at 1581. Similarly here, Plaintiffs' desire to preserve the unrequested windfall the district court gave them is understandable but does not justify the court's takeover of the case.

It should also go without saying that "[n]o extraordinary circumstances justified [that] takeover. *Id.* Indeed, as in *Sineneng-Smith*, the expansion of this case was particularly egregious in that it resulted in remedies (a nationwide injunction and partial vacatur of an important nationwide permit) that are highly disruptive. *Cf. id.* (noting that the remedy imposed in that case, invalidation for First Amendment overbreadth, "is strong medicine that is not to be casually employed"). Nationwide

injunctions are at best highly dubious and controversial even when properly sought and litigated; similarly, this Court's case law recognizes that vacatur can have disruptive consequences. Indeed, as discussed in the next section, the remedies imposed by the district court would have been inappropriate in any event. *See infra* pp. 48-56. But at the very least, it is certainly not appropriate to impose those remedies where, as here, Plaintiffs expressly declined to seek them — and based on those representations, the district court expressly denied intervention as of right by some of the very parties ultimately most affected by the injunction.

Relatedly, Plaintiffs plainly waived any claim for injunctive relief or vacatur of NWP 12 extending beyond the Keystone XL project. This Court has made clear that a "plaintiff may waive a claim for injunctive relief by failing to argue its merits at summary judgment." *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 864 (9th Cir. 2017). Here, of course, Plaintiffs did far more than that: they expressly and repeatedly made clear that they were not seeking injunctive relief or vacatur extending beyond Keystone XL. That is waiver under any standard. *See, e.g.*, *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) (holding that plaintiffs' express waiver of certain remedies at oral argument "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 after plaintiff "disclaimed an injunctive remedy during oral argument").

The district court offered no legally sound basis for ignoring principles of party presentation and for imposing remedies that Plaintiffs had expressly waived. In its amended order, the court did not dispute that Plaintiffs' complaint expressly sought only vacatur and injunctive relief as applied to Keystone XL, or that Plaintiffs expressly disavowed the very relief that the court ordered. Remarkably, the court made no attempt to reconcile either its April 15 order or its amended order with the its own prior reassurances, even after the Corps brought those rulings to its attention.

Instead, the district court stated that it could award these broad remedies both because the Complaint included an umbrella request for "such other relief as the Court deems just and appropriate," and because Federal Rule of Civil Procedure 54(c) provides that a court "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." 1 E.R. 3. To be sure, a court *may* grant relief to which a party is entitled even if the party has not expressly demanded it. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (cited by the district court for this unremarkable proposition). But there is "an exception [to Rule 54(c)] for explicit waivers." *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006); *see also Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 341 (5th Cir. 2015) ("Peterson's failure to seek injunctive relief until after the judgment was entered unduly prejudiced Bell and waived Peterson's claim, which cannot be salvaged by Rule 54(c)."). And for

good reason: were it otherwise, parties could never shape their own litigation, party opponents could never rely on their adversaries' representations, and courts could not fulfill their role as "essentially passive instruments of government." *Sinenenq-Smith*, 140 S. Ct. at 1579.

But even if the district court theoretically retained authority to impose the remedies that Plaintiffs did not seek and expressly waived — which it did not — at the very least the order was entered without fair notice. *See* Fed. R. Civ. P. 65(a)(1) (even preliminary injunction may not issue without notice to the adverse party); *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 432 n.7 (1974); *Powell v. National Board of Medical Examiners*, 364 F.3d 79, 86 (2d Cir. 2004) (although court may grant relief not expressly sought in the complaint, there is an "exception to this rule . . . when a court grants relief not requested and of which the opposing party has no notice, thereby prejudicing that party"); *Versatile Helicopters, Inc. v. City of Columbus*, 548 Fed. Appx. 337, 343 (6th Cir. 2013) (similar).

Indeed, consistent with the previously discussed representations by both Plaintiffs and the district court, neither Plaintiffs nor the Corps even *briefed* the propriety of broad vacatur or injunctive relief during summary judgment, precisely because Plaintiffs and the court had made clear that those remedies were off the table. For example, the Corps' summary judgment reply brief noted that Plaintiffs

sought a remand without vacatur and sought only injunctive relief as to use of NWP 12 for the Keystone XL pipeline (while arguing that further briefing would be required for even such limited injunctive relief). 2 E.R. 271-72. The NWP 12 Coalition similarly stated that further briefing would be required prior to imposition of *any* remedy. 2 E.R. 278 n.7. Plaintiffs did not push back on these statements, and neither did the district court. Moreover, during the hearing on the parties' summary judgment motions, the issue of remedy was addressed only once, when the NWP 12 Coalition's counsel asked for "the opportunity to submit additional briefing on the appropriate scope of a remedy" if the court ruled for plaintiffs, to which the district court responded: "All right." 2 E.R. 269.

Plaintiffs previously argued that this lack of notice was harmless because the parties had the opportunity to contest the scope of relief after the fact, which caused the district court to narrow somewhat its vacatur and injunction. *See* DktEntry 45-1, at 58-61. But that course of events only underscores the irregularity of the order. After the court had already adjudicated Plaintiffs' failure-to-consult claim and had granted sweeping nationwide relief, Plaintiffs submitted (and the court relied on) fourteen new and untested declarations seeking new relief and identifying new targeted projects. The court had no basis for considering these post-decisional submissions — either the declarations themselves or the new requested relief that they purportedly supported. *See Summers v. Earth Island Institute*, 555 U.S. 488,

495 n.*, 508 (2009) (declining to consider standing affidavits submitted after decision as part of opposition to a motion to stay); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-95 (1990) (affirming exclusion of similarly belated affidavits); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988) ("[T]he obligation of this Court is to look at the record before the District Court at the time it granted the motion [for summary judgment], not at some later point."). The district court's consideration and acceptance of Plaintiffs' entirely new proposal made the procedural irregularity of its remedies worse, not better.

The district court's many deviations from principles of party presentation, waiver, and fair notice resulted in a ruling that blindsided not only the parties but also project proponents and other affected members of the public across the country — who certainly had no notice or opportunity to object to the court's far-reaching decision. For example, 18 States, all but one of which are outside this Circuit, previously explained to this Court that they "had no notice that the district court would go beyond Plaintiffs-Appellees' requested relief to issue an Order affecting States far afield of the Keystone XL route." DktEntry 33, at 2 (May 15, 2020). Because the district court acted without fair notice and contrary to ordinary principles of party presentation and waiver, it lacked the benefit of hearing from those affected third parties about the harms that its sweeping order would impose.

Finally, the substance of the district court's order reflects the deficient process through which it was crafted. Because the court bypassed traditional rules of litigation, the order in many respects fails to give reasonable notice as to what it permits and prohibits — ambiguities that would undoubtedly have been fleshed out and corrected if the court had followed ordinary litigation procedure. First, as to pipeline construction, regulated parties need guess how the order applies to mid-construction projects, as it alternates among "construction of new . . . pipelines," 1 E.R. 6, 15, 36, 38; "new . . . pipeline construction," 1 E.R. 15, 17, 18, 29; and "new construction of . . . pipelines," 1 E.R. 22. Second, although the order carves out "routine" maintenance on "existing NWP 12 projects," it does not define such projects: are they projects that have already been completed? projects that have started the NWP 12 verification process? any project that complies with the existing NWP 12? or something else entirely? Third, the order does not delineate which maintenance and repair projects will be considered "routine": those that relocate or replace an existing pipeline? those that replace fill?

These ambiguities hardly involve minor or ancillary issues; indeed, they relate to core aspects of the district court's vacatur and injunction. But given the deficient process followed by the court, those oversights are as predictable as they are regrettable. As a result of the limited nature of Plaintiffs' challenge, the court had before it no evidence concerning the universe of potential pipeline activities or the

consequences of eliminating NWP 12 as a source of authorization for them. For this reason as well, it had no basis to reach out to vacate and enjoin NWP 12 broadly with respect to the construction of all new oil and gas pipelines.

* * * * *

Although "a court is not hidebound by the precise arguments of counsel," the district court's "radical transformation of this case goes well beyond the pale." *Sineneng-Smith*, 140 S. Ct. at 1581-82. For this reason alone, the district court's order should be reversed.

B. The district court's injunction and vacatur were in any event unsupported by the record.

Even if this Court were to overlook the issues of party presentation, waiver, and fair notice discussed above, the nationwide injunction and partial vacatur should nonetheless be reversed. Equitable principles require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994). Accordingly, this Court has repeatedly vacated or stayed the nationwide scope of injunctions where such broad relief is not necessary to provide the plaintiff with complete relief. *See, e.g.*, *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) ("Under our case law . . . all injunctions — even ones involving national policies — must be narrowly tailored to remedy the specific harm shown."); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (collecting cases).

Prior to its response to the Corps' motion to stay, Plaintiffs alleged only harms emanating from the Keystone XL pipeline: no surprise, given that Plaintiffs *sought relief* related only to Keystone XL. *See supra* p. 16. For example, Plaintiffs submitted fourteen declarations with their motion for summary judgment. With one *de minimis* exception — a declaration discussing *past* use of a prior version of NWP 12 on the Flanagan South, Dakota Access pipeline and the Gulf Coast pipeline — none of those declarations even *identified* a specific project besides Keystone XL. *See* 2 E.R. 137-227.

Nor do Plaintiffs' post-decisional declarations justify the district court's injunction. As explained above, the court should not have considered those materials to begin with. In any event, those declarations identified only a handful of selected pipeline projects, which categorically cannot justify an injunction against every oil and gas pipeline project all over the country. Plaintiffs cannot conceivably be said to have met the standard for obtaining injunctive relief against all new pipeline construction when they have not plausibly alleged concrete, particularized, and certainly impending injuries that are caused by every impacted pipeline.

Even as to the identified projects (including Keystone XL), the district court acknowledged that Plaintiffs must demonstrate irreparable injury to obtain injunctive relief, and that "there is no presumption of irreparable injury where there has been a procedural violation in ESA cases." 1 E.R. 20 (quoting *Cottonwood Environmental*

Law Center v. U.S. Forest Service, 789 F.3d 1075, 1091 (9th Cir. 2015)). But the court then ignored this very principle. Plaintiffs' initial declarations concerning Keystone XL were simply submitted to establish standing; they do not even attempt to establish that Keystone XL *will* cause a definitive threat of harm to endangered species or critical habitat. Plaintiffs' belated declarations are equally defective; they do not even attempt to establish that the identified pipeline projects will potentially harm endangered species or critical habitat, let alone that such harms would impact the declarants' stated interests. Many do not discuss endangered species at all; in those that do, the discussion is entirely conclusory. *See, e.g.*, 2 E.R. 176 (asserting without elaboration that the Double E Pipeline "will potentially impact Endangered Species Act listed species, such as the Pecos bluntnose shiner, northern aplomado falcon, western snowy plover, and southwestern willow flycatcher").

Indeed, the District of Montana would not even have jurisdiction to review challenges to several of the pipelines that Plaintiffs belatedly named, as those are subject to the Natural Gas Act. *See* 15 U.S.C. § 717r(d)(1) (providing that the court of appeals for the circuit in which a facility subject to the Act is proposed to be constructed, expanded, or operated has "original and exclusive jurisdiction" over any civil action for the review of an action of a federal agency). On this record, the district court's issuance of a nationwide injunction was improper. *See City & County of San Francisco v. Trump*, 897 F.3d 1231, 1244-45 (9th Cir. 2018) (nationwide

injunction was abuse of discretion because plaintiffs' "tendered evidence is limited to the effect of the Order on their governments and the State of California").

Given all this, Plaintiffs previously made little attempt to defend the district court's nationwide injunction. Instead, Plaintiffs have insisted that this case is distinguishable from others involving impermissible nationwide injunctions because the court also partially vacated NWP 12 — an equitable remedy that Plaintiffs argued was, in any event, justified under the APA. *See* DktEntry No. 45-1, at 44-47 (defending injunction exclusively on ground that it paralleled the partial vacatur).

This argument is unfounded. The APA provides that a reviewing court shall "set aside agency action" found to be unlawful. 5 U.S.C. 706(2)(A). But the only "agency action" that Plaintiffs had Article III standing to challenge — and the only agency action as to which they actually sought vacatur or an injunction throughout this case — was the Corps' purported use of NWP 12 to verify the Keystone XL project. *See Lujan*, 497 U.S. at 891 (an APA plaintiff generally must allege "some concrete action applying [a] regulation to the claimant's situation in a fashion that harms or threatens to harm him"). Moreover, the APA does not provide that a reviewing court "set aside" a challenged agency action *universally*, rather than as applied to the parties. Instead, the "set aside" language in Section 706 is best read to "direct[] the court not to decide [a case] in accordance with [an unlawful] agency action." John Harrison, *Section 706 of the Administrative Procedure Act Does Not*

Call for Universal Injunctions or Other Universal Remedies, 38 Yale J. on Reg. Bull. (Apr. 12, 2020). In short, "[n]othing in the language of the APA" requires an unlawful regulation to be enjoined or vacated "for the entire country." *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001).

More fundamentally, there is no basis for exempting the equitable remedy of vacatur from the principles that apply to all other remedies. As the Supreme Court has explained, underlying Article III principles apply with respect to "each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (internal quotation marks omitted). Accordingly, for vacatur no less than an injunction, the "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (same). If the rule were otherwise, a district court could evade any limitations on nationwide injunctions in APA litigation (which of course is almost all litigation challenging federal agency action) by relying instead on nationwide vacatur. To the extent that this Court's decisions suggest that vacatur is subject to less stringent requirements, those decisions are incorrect.

In any event, vacatur is not an appropriate remedy here under this Court's decisions. It is "well established" that the APA does not compel vacatur whenever there is a legal violation or procedural flaw. *United States v. Afshari*, 426 F.3d 1150, 1156 (9th Cir. 2005). In deciding whether to vacate a flawed agency action, this

Court has looked to the two factors described in *Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). *See California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Those two factors are the seriousness of the agency's errors and the disruptive consequences that would result from vacatur. *Id.* These factors do not support any vacatur here, including as to Keystone XL.

As to the first factor, even if the district court were correct that formal consultation was required, this would simply not be a serious ESA violation. As explained previously (pp. 9-12), NWP 12 is itself structured to ensure additional consultation when a project at a particular crossing might impact listed species or habitat. Plaintiffs previously characterized the Corps' determination that formal consultation was not required as a "serious" and "egregious" error, DktEntry 45-1, at 31-33, but this claim is difficult to take seriously given the many safeguards built into NWP 12, including its triggers for (far more specific) activity-level review. Indeed, this contention is not even consistent with Plaintiff Sierra Club's own previous behavior. When Sierra Club challenged the 2012 re-issuance of NWP 12, it did not even bother to assert an ESA claim, even though FWS never completed the consultation for that re-issuance either. *See Bostick*, 787 F.3d at 1046-47.

Indeed, given NWP 12's built-in protections, it is far from obvious what formal programmatic consultation would meaningfully add in this specific context. The Keystone XL project — the only project that Plaintiffs have plausibly

established constitutional standing to challenge — illustrates the point. As explained above (pp. 14-15), Keystone XL has already undergone extensive and site-specific environmental analysis. In fact, a Biological Opinion issued in December 2019 concluded that only one protected species would be adversely affected by the project, but that its continued existence was not jeopardized. *See supra* note 2 (p. 15). The other pipelines that Plaintiffs purported to challenge for the first time in response to the Corps' motion for a stay pending appeal have also been subject to similarly specific review, and many are the subject of pending or past litigation.[6] The programmatic review for which the district court's order would place many of these projects and others on hold, by contrast, would not even address their particular environmental effects.

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[6] For example, Plaintiffs' post-decisional declarations repeatedly referred to the Atlantic Coast Pipeline — which was at issue in *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837 (2020) — and the Mountain Valley Pipeline. The Federal Energy Regulatory Commission prepared environmental impact statements for each of those pipelines, one of which has already been upheld by the D.C. Circuit. *See Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (Feb. 19, 2019) (per curiam). The Fourth Circuit, by contrast, has held that NWP 12 did not cover the proposed construction of the Mountain Valley Pipeline, and so it vacated the Corps' authorization, *see Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 655 (4th Cir. 2018), and the Corps thereafter withdrew its authorization of the Atlantic Coast Pipeline on the same grounds. The Permian Highway Pipeline and the Dakota Access Pipeline — other projects identified in Plaintiffs' belated declarations — are the subject of ongoing litigation. *See City of Austin v. Kinder Morgan Texas Pipeline, LLC*, No. 1:20-cv-00138 (W.D. Tex. filed Feb. 5, 2020); *Sierra Club v. U.S. Army Corps of Engineers*, No. 1:20-cv-00460 (W.D. Tex. filed Apr. 30, 2020); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 440 F. Supp. 3d 1 (D.D.C. 2020).

As to the second factor, the disruptive consequences flowing from the district court's partial vacatur of NWP 12 would be severe. The court's order, before the Supreme Court stayed it, halted NWP 12's use for all new oil and gas pipeline construction anywhere in the country. Under that order, all proposed activities associated with these projects — regardless of diameter, length, purpose, or even whether they are in the vicinity of protected species — would have been channeled into the time-consuming and resource-intensive individualized permit process, which would increase strain on the Corps' resources and result in delays and increased costs for projects across the nation. *See* 2 E.R. 258-67 (First Moyer Declaration); 1 E.R. 66-76 (Second Moyer Declaration); DktEntry 11, at 30, 40-43 (prior Corps briefing); DktEntry 48, at 13, 19-26 (same). This frustrates Congress's very purpose in having established the more efficient mechanism of nationwide general permits. *See supra* p. 1. The disruptions at issue here are no less pervasive and severe than those that counseled against vacatur in *California Communities*. *See* 688 F.3d at 993 (noting that vacatur "could well delay a much needed power plant," threatening blackouts and economic disruption).[7]

[7] The district court suggested that, under the second *Allied Signal* factor, a "court largely should focus on potential environmental disruption, as opposed to economic disruption." 1 E.R. 11. This distinction has no basis in law or common sense. *See California Communities*, 688 F.3d at 994 (citing power outages and observing that "stopping construction would also be economically disastrous"); *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (vacatur analysis considers "the social and economic costs of delay" (quoting *NRDC v. U.S. NRC*, 606 F.2d 1261, 1272 (D.C. Cir. 1979))).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order.

Dated: August 26, 2020.

Respectfully submitted,

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Date August 26, 2020

ADDENDUM

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

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

. . . .

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

Clean Water Act
33 U.S.C. § 1344(e)

§ 1344. Permits for dredged or fill material

. . . .

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

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

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

ESA Regulations
50 C.F.R. § 402.14

§ 402.14 Formal consultation.

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