UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NORTHERN PLAINS RESOURCE COUNCIL; et al.,

Plaintiffs-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TODD T. SEMONITE, In his official capacity and U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers,

Defendants-Appellants,

and

TRANSCANADA KEYSTONE PIPELINE, LP; et al.,

Intervenor-Defendants.

No. 20-35412

D.C. No. 4:19-cv-00044-BMM
District of Montana,
Great Falls

ORDER

NORTHERN PLAINS RESOURCE COUNCIL; et al.,

Plaintiffs-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TODD T. SEMONITE, In his official capacity and U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers,

No. 20-35414

D.C. No. 4:19-cv-00044-BMM

Defendants,

TRANSCANADA KEYSTONE PIPELINE, LP; et al.,

Intervenor-Defendants,

and

AMERICAN GAS ASSOCIATION; et al.,

Intervenor-Defendants-Appellants.

NORTHERN PLAINS RESOURCE COUNCIL; et al.,

Plaintiffs-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TODD T. SEMONITE, In his official capacity and U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers,

Defendants,

STATE OF MONTANA; et al.,

Intervenor-Defendants,

and

TRANSCANADA KEYSTONE PIPELINE, LP; TC ENERGY CORPORATION,

No. 20-35415

D.C. No. 4:19-cv-00044-BMM

Intervenor-Defendants-Appellants.

Before: SILVERMAN and NGUYEN, Circuit Judges.

The motions to become amicus curiae submitted by American Fuel & Petrochemical Manufacturers; Energy Infrastructure Council; the Chamber of Commerce of the United States; the Energy Equipment and Infrastructure Alliance; the States of West Virginia, Texas, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and Utah; Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition; and the Rosebud Sioux Tribe and Fort Belknap Indian Community (Docket Entry Nos. 28, 30, 31, 40, 51, and 53 in 20-35412) are granted.

The Federal Appellants' request to file an oversized reply in support of their motion for a stay pending appeal (Docket Entry No. 49 in 20-35412) is granted.

Appellants' emergency motions for a partial stay of the district court's April 15, 2020 and May 11, 2020 orders pending appeal (Docket Entry Nos. 11, 12, 19, and 34 in 20-35412) are denied. Appellants have not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal. *See Nken v. Holder*, 556 U.S. 418, 425–26 (2009).

The previously established briefing schedule remains in effect.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

v.

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

Defendants,

TC ENERGY CORPORATION, et al.,

Intervenor-Defendants,

STATE OF MONTANA,

Intervenor-Defendant,

AMERICAN GAS ASSOCIATION, et al.,

Intervenor-Defendants.

CV 19-44-GF-BMM

ORDER AMENDING SUMMARY JUDGMENT ORDER (DOC. 130) AND ORDER REGARDING DEFENDANTS' MOTIONS FOR STAY PENDING APPEAL

INTRODUCTION

The Court issued an order on the parties' motions for summary judgment on April 15, 2020. (Doc. 130.) The Court concluded that the Army Corps of Engineers ("Corps") violated the Endangered Species Act ("ESA") when it reissued Nationwide Permit 12 ("NWP 12") in 2017. (*Id.* at 25.) The Court

remanded NWP 12 to the Corps for compliance with the ESA. (*Id.* at 26.) The Court also vacated NWP 12 and enjoined the Corps from authorizing any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations. (*Id.*)

DISCUSSION

Federal Defendants and TC Energy have filed motions for a partial stay pending appeal. (Docs. 131 & 136.) Federal Defendants also suggest that the Court could revise its remedy. (Doc. 131 at 7.) Plaintiffs propose a revised remedy that would narrow the scope of the vacatur and injunction. (Doc. 144 at 10.)

I. THE PLAINTIFFS' FACIAL CHALLENGE AND THE COURT'S DECISION

The Court focused its ESA analysis on Plaintiffs' facial challenge to NWP 12. (Doc. 130 at 7-21.) Plaintiffs alleged that NWP 12 authorized activities that "cause immediate and irreparable impacts to ecosystem functions of streams and adjacent wetlands" and "adversely affect hundreds of listed species that rely on rivers, streams, and wetland habitats and other aquatic resources across the country." (Doc. 36 at 43.) Plaintiffs' challenge focused on the Corps' use of NWP 12 to approve pipeline projects like Keystone XL, but Plaintiffs did not suggest that their harms stemmed only from pipelines, let alone only from Keystone XL. (Doc. 144 at 33.)

Plaintiffs explained in seeking summary judgment that "regional conditions and project-level consultations" represented "inadequate substitutes for programmatic consultation" because they "fail to adequately analyze NWP 12's cumulative impacts to listed species, like migratory birds, that cross regions." (Doc. 73 at 42 (citing Keystone XL as "illustrative")). The Court agreed with Plaintiffs. The Court concluded that the Corps cannot circumvent the consultation requirements of ESA § 7 by relying on project-level review. (Doc. 130 at 16.) The Court recognized that "[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." (Doc. 130 at 18.) The Court vacated NWP 12 and enjoined the Corps from authorizing activities under NWP 12. (Doc. 130 at 26.)

The relief that the Court provided comports with law. A district court "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c); *see also In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002). The Court properly can grant the presumptive remedy of vacating the unlawful action, particularly where, as here, Plaintiffs requested "such other relief as the Court deems just and appropriate." (Doc. 36 at 88); s*ee Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016).

The U.S. Supreme Court recently addressed a district court's authority in

determining the appropriate relief in the face of an unconstitutional statute in *Whole Woman's Health*. A group of doctors challenged Texas's law that required doctors to perform abortions in a surgical center and that required doctors who perform abortions to have admitting privileges at a local hospital, as applied to doctors at two separate abortion facilities. *Id.* at 2299, 2301. The district court enjoined enforcement of both provisions throughout Texas. *Id.* at 2303.

The Fifth Circuit reversed, in significant part, due to the fact that res judicata barred the district court from holding the admitting-privileges unconstitutional statewide when petitioners had challenged its application only to two separate facilities. *Id.* at 2300-301. The Supreme Court reversed. Petitioners had asked for as-applied relief and for "such other and further relief as the Court may deem just, proper, and equitable." *Id.* at 2307. The Supreme Court concluded that "[n]othing prevents . . . awarding facial relief as the appropriate remedy for petitioners' as applied [constitutional] claims" even when the facial relief exceeds the other relief requested. *Id.* at 2307. Plaintiffs here also asked for "other relief as the Court deems just and appropriate." (Doc. 36 at 88.)

The Ninth Circuit likewise has recognized that "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed" when a reviewing court determines that agency regulations are unlawful. *Empire Health Found. v. Azar*, __ F.3d __, 2020 WL 2123363, *10 (9th

Cir. May 5, 2020) (citation omitted). The Ninth Circuit invalidated on substantive grounds a rule promulgated by the Secretary of Health and Human Services regarding Medicare reimbursement. *Id.* at *8-9. The Ninth Circuit saw no reason not to apply the "ordinary result" of vacating the invalid rule that it had deemed unlawful. *Id.* at *10.

Accordingly, a single plaintiff with a successful Administrative Procedure Act ("APA") claim may obtain broad programmatic relief. *See E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1283 (9th Cir. 2020); *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019) (rejecting argument that vacatur "should be limited to the plaintiffs in this case"). The Ninth Circuit affirmed a nationwide injunction to ensure the implementation of a "uniform federal policy" and to avoid having important parts of federal immigration law being determined according to the law of a local forum rather than having a "uniform federal definition." *E. Bay Sanctuary Covenant*, 950 F.3d at 1283 (citations omitted). The ESA likewise has nationwide application and significance that should be interpreted and applied pursuant to a "uniform federal definition."

Other courts routinely have vacated invalid agency actions of broad applicability without requiring plaintiffs to show harms stemming from each unlawful application. The Ninth Circuit in *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 526 F.3d 591, 608 (9th Cir. 2008),

vacated a rule adopted by EPA that prevented EPA from requiring permits for storm water discharge comprised solely of sediment from oil and gas construction activities. *See also Chamber of Commerce of U.S. v. Dep't of Labor*, 885 F.3d 360, 388 (5th Cir. 2018) (vacating Department of Labor's application of the "fiduciary rule" to broker-dealer and insurance agents as conflicting with the Employee Retirement Income Security Act). The facts presented here, and the cases analyzed, indicate that the Court exercised appropriate discretion when it chose to vacate broadly and enjoin the Corps' authorizations under NWP 12 due to the Corps' program-level ESA violation. *See Empire Health Found.*, 2020 WL 2123363 at *10.

II. REMEDY

Federal Defendants now suggest that the Court has the authority to amend the scope of the relief ordered. (Doc. 131 at 7.) Plaintiffs do not oppose a partial narrowing of the vacatur and injunction. (Doc. 144 at 9-10.) Plaintiffs suggest that the Court narrow the vacatur of NWP 12 to a partial vacatur that applies to the construction of new oil and gas pipelines. (*Id*.) This proposed narrowing would keep NWP 12 in place during remand insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects. (*Id.* at 10.) Plaintiffs also recommend that the Court narrow the injunction to enjoin the Corps from authorizing any dredge or fill

activities for Keystone XL under NWP 12. (*Id.*) Plaintiffs contend that this narrowed relief would afford endangered and threatened species and their habitat appropriate protection while minimizing any potential disruption. (*Id.*)

Vacatur stands as the presumptively required remedy when an agency acts unlawfully. *See* 5 U.S.C. § 706(2)(A) (directing courts to "set aside agency action . . . found to be . . . not in accordance with law"). The Ninth Circuit in *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 530-31 (9th Cir. 2015), invalidated EPA's unconditional registration of an insecticide used in beekeeping as being in violation of its own regulations. The question of the appropriate remedy remained. The precariousness of bee populations led the Ninth Circuit to determine that "leaving EPA's registration . . . in place risks more potential environmental harm than vacating it." *Id.* at 532. As a result, the Ninth Circuit rejected EPA's request to leave the unconditional registration in place on remand. *Id.* Here, injunctive relief likewise furthers the core purposes of the ESA and reflects the potentially widespread harms caused by the Corps' violation. *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498-500 (9th Cir. 2011) (enjoining revisions to nationwide grazing regulations for federal lands); *Lane Cty. Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992) (enjoining BLM from conducting any timber sales until it had consulted with Fish and Wildlife Service regarding potential endangered species issues).

a. Vacatur

Vacatur remains the presumptive remedy when an agency violates the law. 5 U.S.C. § 706(2)(A). The Ninth Circuit remands agency actions without vacating that action only in "limited circumstances." *Pollinator*, 806 F.3d at 532 (quoting *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012)); *see Wood v. Burwell*, 837 F.3d 969, 975-76 (9th Cir. 2016) (recognizing that remand without vacatur is a remedy "used sparingly"). A district court possesses "broad latitude," however, in fashioning equitable relief "when necessary to remedy an established wrong." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008).

A district court may exercise that discretion where appropriate to order partial, rather than complete, vacatur. *See, e.g.*, *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79-80 (D.D.C. 2010). The district court in *Van Antwerp* determined that the Corps had violated the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA") in issuing permits. *Id.* at 78. The district court tailored its relief to reduce the harm caused by the violations. The fact that the developers already had completed work on some of the project prompted the district court to narrow the scope of its vacatur to allow the developer to continue with the construction of a partially-completed county road and to maintain a storm water maintenance program as the continuation of these activities would promote

the purposes of the CWA. *Id.* at 79-80.

Two factors guide the Court in deciding whether to depart from, or limit, the presumptive remedy of vacatur: (1) "the seriousness" of an agency's errors; and (2) "the disruptive consequences" that would result from vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *see Cal. Cmtys. Against Toxics*, 688 F.3d at 994 (applying *Allied-Signal*'s two-factor test). The Court will address each of these factors.

i. The Seriousness of the Corps' Error

The Corps committed serious error in failing to engage in programmatic consultation. The Corps should have engaged in programmatic consultation before it issued NWP 12 as required by § 7 of the ESA. (Doc. 130 at 18-19.) The Court determined that programmatic consultation represents "the only way to avoid piecemeal destruction of species and habitat" and that project-level review "cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat." (*Id.* (citing *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1, 9-10 (D.D.C. 2005); 50 C.F.R. § 402.14(c))). The Court further noted that the Corps' ESA violation may have repercussions under NEPA and the CWA. (*Id.* at 21-25.) The Court acknowledged that the Corps' ESA § 7 programmatic consultation could alter the Corps' assessment of NWP 12's environmental consequences under NEPA and the CWA.

(*Id.* at 22-25.)

Plaintiffs proffered evidence in their summary judgment brief that addressed Keystone XL as illustrative of potential injuries. (Docs. 73-2 & 73-7.) Plaintiffs also pointed to harms likely to arise from other projects. (*Id.*) Plaintiffs now have submitted additional declarations to underscore the harm that they and their members may suffer from NWP 12's unlawful use, particularly from construction of major oil and gas pipelines throughout the country. (*See, e.g.*, Docs. 144-1 to 144-15.)

A court should tip the scales in favor of the endangered species under the ESA's "institutionalized caution" mandate in applying the *Allied-Signal* test to ESA violations like this one. *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)). The need for "institutionalized caution" led the district court in *Klamath-Siskiyou Wildlands Center* to vacate permits issued to a logging company that included an improperly issued 50-year incidental take permit that allowed the logging company to take two threatened species in violation of the ESA. *Id.* The district court declined to categorize the agency's errors as "mere technical or procedural formalities" when the errors included the agency's failure to conduct a cumulative impacts analysis under NEPA for the timber harvest projects. *Id.* at 1244. The agency's failure to

conduct a cumulative impacts analysis compares with the Corps' failure here to engage in programmatic consultation analysis as required by § 7 of the ESA. This same need for "institutionalized caution" in evaluating ESA violations supports vacatur until the Corps adequately analyzes NWP 12's impacts to listed species through programmatic ESA consultation. *See Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1242.

ii. The Vacatur's Disruptive Consequences

A court largely should focus on potential environmental disruption, as opposed to economic disruption, under the second *Allied-Signal* factor. *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010). As noted by the district court in *Center for Food Safety*, "the Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely serious irreparable environmental injury." *Id.* The district court invalidated an agency decision to deregulate a variety of genetically engineered sugar beets without having prepared an environmental impact statement. In vacating the rule, the district court declined to classify the NEPA violations as "not that serious or numerous." *Id.* at 953. The district court ultimately determined that the equities favored vacatur of the rule despite allegations of potential economic consequences. *Id.* at 954.

A few examples of decisions to remand without vacatur provide further context for the Court's analysis. For example, the Ninth Circuit's decision in *California Communities Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012), demonstrates the limited nature of remanding an invalid agency action without vacating the action. Environmental groups challenged the decision of the EPA to approve revisions to California's clean air plan. The groups contended that EPA had committed procedural errors during the rulemaking process and that the substance of the revised state plan violated the Clean Air Act. *Id.* at 991-92. The district court agreed. EPA had violated the notice-and-comment provisions of the APA when it failed to list all pertinent documents in the docket index. The district court deemed the error harmless because the environmental groups already had the documents in their possession from earlier proceedings. *Id.* at 992.

The Ninth Circuit affirmed on this harmless error point. *Id.* at 993. EPA may have violated the Clean Air Act in approving the revisions to California's plan. *Id.* The Ninth Circuit agreed with EPA, however, that remand without vacatur would be appropriate in light of the harmless nature of EPA's procedural error and the potential harm caused by the vacatur. Vacatur would delay the construction of a much-needed power plant that could result in power blackouts over the coming summer. *Id.* at 994. These blackouts, in turn, would require the use of diesel generators that would add to air pollution in contravention of the purpose of the

Clean Air Act. *Id.* This combination of economically *and* environmentally harmful consequences led the Ninth Circuit to affirm the order of remand without vacatur. *Id.*; s*ee also Pollinator*, 806 F.3d at 532 (confirming that the *Allied-Signal* inquiry centers on "whether vacating a faulty rule could result in possible environmental harm").

Finally, the Ninth Circuit's analysis in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995), highlights the proper application of vacatur as a remedy in environmental cases. The district court set aside the decision of the Fish and Wildlife Service ("FWS") to list the Bruneau Hot Springs snail due to several procedural errors committed by FWS during the period between the initial proposal and final listing. The Ninth Circuit remanded without vacatur of FWS's listing decision for two reasons: (1) the minor nature of the agency's procedural error; and (2) concerns that immediately vacating the listing decision threatened the potential extinction of a snail species that constituted an irreparable environmental injury. *Id.* The procedural error arose from the agency's failure to make available for public comment one study that the agency had relied upon in making its decision. *Id.* at 1405. The Ninth Circuit discussed no potential harm that would have occurred by leaving the listing of the endangered species *in place* while the agency reconsidered its decision. *Id.*

Defendants here point to no potentially irreparable environmental injury

that could arise from the Court's failure to remand without vacatur. Defendants and Intervenor-Defendants focus on disruptions stemming from vacatur of NWP 12 as to the construction of electric, internet, and cable lines, and to routine maintenance, safety, and repair of projects that already have been built and that may pose less risk to species. For example, the NWP 12 Coalition discusses routine maintenance and repair of gas pipelines to ensure safety, vegetation removal along electric lines to prevent forest fires, placement of protective matting to prevent rutting from service vehicles, and ongoing maintenance of utility projects in navigable waters. (Doc. 138 at 9-12, 21-22.) The Corps raises similar concerns. The Corps cited a fiber optic cable upgrade project, an improvement to a wastewater management system, and work associated with removal of a tree from an exposed and leaking water line that would be halted by the vacatur. (Doc. 131 at 16.)

Plaintiffs' arguments on summary judgement centered on threats to listed species and critical habitats by the construction of major oil and gas pipelines such as Keystone XL. (Doc. 144 at 21.) Plaintiffs note that these major oil and gas pipelines potentially affect numerous waterbodies and thereby involve precisely the kinds of cumulative impacts that should be addressed through programmatic consultation. (*Id.* at 21-22.) On the other hand, other activities authorized by NWP 12, such as routine maintenance and repair, raise issues that the Corps must

consider on remand. (*Id.* at 22.) These routine maintenance and repair projects, however, do not necessarily involve the same level of potential severe risk to listed species and their habitat as pipelines. (*Id.*)

To allow the Corps to continue to authorize new oil and gas pipeline construction could seriously injure protected species and critical habitats—"the very danger" that the ESA "aims to prevent." *Cal. Cmtys. Against Toxics*, 688 F.3d at 994. Plaintiffs contend that the appropriate course would be for the Court to narrow the vacatur of NWP 12 to a partial vacatur that applies only to the construction of new oil and gas pipelines. (Doc. 144 at 10.) Plaintiffs' proposed partial vacatur would keep NWP 12 in place during remand insofar as it authorizes more routine and minor projects in order to avoid these claimed disruptions. (*Id.*)

To narrow the vacatur of NWP 12 to a partial vacatur that applies to the construction of new oil and gas pipelines strikes a reasonable balance under the *Allied-Signal* factors while still redressing the potential harms to listed species and habitat that those projects pose. For example, the Court discussed adverse effects to threatened and endangered species from NWP 12-authorized construction activities, including increased sedimentation, and from horizontal directional drilling used during pipeline construction. (Doc. 130 at 14-15.) These impacts likely would be particularly severe when constructing large-scale oil and gas pipelines. (Doc. 144 at 24.) These large-scale oil and gas pipelines may extend

many hundreds of miles across dozens, or even hundreds, of waterways and require the creation of permanent rights-of-way. (*See* Doc. 138-5 at 4 (asserting that several developers "have relied on NWP 12 authorizations to construct hundreds of miles" of oil and gas pipelines within the past five years).) These large-scale oil and gas pipelines often require a network of access roads, pump stations, pipe yards, contractor yards, and extra workspace. (*See* Doc. 137 at 16 (describing Keystone XL's proposed Project footprint); Doc. 144-14 (Keystone XL's Biological Assessment).)

Plaintiffs acknowledge that the potential impacts arising from NWP 12, by contrast, likely would be less severe for routine maintenance, repair, and inspection activities on *existing* NWP 12 projects, and for the installation of non-pipeline projects like broadband and fiber optic cables. (Doc. 107 at 64-65.) The Corps must address all such impacts on remand. To narrow the vacatur portion of the remedy to the more severe threats posed by NWP 12 proves justified in this instance. *See Idaho Farm Bureau Fed'n*, 58 F.3d at 1405-06; *see also Van Antwerp*, 719 F. Supp. 2d at 79-80 (noting that a district court may exercise discretion where appropriate to order partial, rather than complete, vacatur).

The continued availability of the ordinary individual permit process under CWA § 404(a) tempers any disruption caused by this partial vacatur. Partial vacatur does not block any projects. It vacates only the Corps' categorical approval

of new oil and gas pipeline construction under NWP 12. Defendants acknowledge that the individual permit process remains available. Defendants simply complain that the individual permit process proves too expensive and time-consuming.

The need to protect endangered species and critical habitat from harm until the Corps completes programmatic consultation outweighs any disruption or permitting delays that would result from this partial vacatur. Numerous other courts have agreed. For example, state and tribal groups brought an action against BLM in *California v. BLM*, 277 F. Supp. 3d 1106, 1125-27 (N.D. Cal. 2017). The groups alleged that BLM had violated the APA in adopting its decision to postpone compliance dates in a rule governing natural gas waste and royalties without following the notice-and-comment period after the rule's effective date had passed. *Id.* at 1110-11. The magistrate judge agreed.

The magistrate judge rejected BLM's argument that the cost of compliance warranted remand without vacatur, and, instead, concluded that "the general rule in favor of vacatur" would be appropriate. *Id.* at 1127; s*ee also Pub. Emps. for Envtl. Responsibility v. FWS*, 189 F. Supp. 3d 1, 3 (D.D.C. 2016) (reasoning that "[a]bsent a strong showing by [the agency] that vacatur will unduly harm economic interests . . . , the Court is reluctant to rely on economic disruption" to deny relief of vacatur of rules adopted in violation of NEPA); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017)

(noting that allegations of financial harm to pipeline developer will not necessarily have a "determinative effect" on remedy, because claims of "lost profits and industrial inconvenience" are "the nature of doing business, especially in an area fraught with bureaucracy and litigation").

The Ninth Circuit approved of this type of limited vacatur in *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836 (9th Cir. 2007). BLM had taken a "hard look" at the environmental consequences caused by coal bed methane development. *Id.* at 844. This "hard look" had found evidence to suggest that coal bed methane development would cause less environmental damage than BLM anticipated. *Id.* BLM failed to analyze, however, a phased development alternative in addition to the five proposals. Under these circumstances, the district court properly found that the limited injunction proposed by BLM would minimize potential damage to the environment. *Id.* at 846.

Partial vacatur proves appropriate under the circumstances. To vacate NWP 12 only as it relates to new oil and gas pipeline construction will prohibit the Corps from relying on NWP 12 for those projects that likely pose the greatest threat to listed species. The Corps may not approve the discharge of dredged or fill material under NWP 12 for projects constructing new oil and gas pipelines. NWP 12 will remain in place during remand insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on

existing NWP 12 projects. The "less drastic remedy" of partial vacatur adequately will prevent harm to listed species and critical habitat at this point. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The continued availability of the ordinary permitting process further supports partial vacatur as it represents the "nature of doing business" in this area. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 104.

b. Injunctive Relief

A plaintiff seeking injunctive relief must satisfy a four-factor test by showing the following:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). The Ninth Circuit long has recognized an exception to the traditional test for injunctive relief when addressing procedural violations under the ESA. *Cottonwood Env. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015). No question exists that the ESA strips courts of at least some of their equitable discretion in determining whether injunctive relief proves warranted. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 543 n.9 (1987) (explaining that the ESA "foreclose[s] the traditional discretion possessed by an equity court").

The Ninth Circuit also has recognized that the ESA "removes the latter three factors in the four-factor injunctive relief test from [courts'] equitable discretion." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Service*, 886 F.3d 803, 817 (9th Cir. 2018). This analysis requires a court to "presume that remedies at law are inadequate, that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction." *Id*. This approach comports with the "fundamental principle" that Congress has "afford[ed] endangered species the highest of priorities." *National Wildlife Fed'n v. Nat'l Marine Fisheries Service*, 422 F.3d 782, 794 (9th Cir. 2005) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)).

The court must exercise its discretion to determine whether a plaintiff has suffered irreparable injury. *Cottonwood*, 789 F.3d at 1090. "[T]here is no presumption of irreparable injury where there has been a procedural violation in ESA cases." *Id.* at 1091. Plaintiffs must demonstrate that irreparable injury "is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original). A "possibility" of irreparable harm cannot support an injunction. *Id.* The Ninth Circuit has recognized that "establishing irreparable injury"—the remaining factor— should not "be an onerous task" given "the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them." *Cottonwood*, 789 F.3d at 1091.

A court determines irreparable harm by reference to the purposes of the statute being enforced. *Nat'l Wildlife Fed'n*, 886 F.3d at 818 (citing *Garcia v. Google*, 786 F.3d 733, 744-45 (9th Cir. 2015)). The types of harms that may be irreparable "will be different according to each statute's structure and purpose." *Sierra Club v. Marsh*, 872 F.2d 497, 502-03 (1st Cir. 1989). The Court determined that the Corps violated § 7 of the ESA. (Doc. 130.)

One of the ESA's central purposes is to conserve species. *See* 16 U.S.C. § 1531(b) (a purpose of the ESA is to provide "a program for the conservation of . . . endangered species and threatened species"). The "plain intent" of Congress in enacting the ESA was "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 184. To fulfill this important purpose, the ESA requires the Corps to determine "at the earliest possible time" whether any action it takes "may affect" listed species and critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). If the Corps' action "may affect" listed species or critical habitat, the Corps must consult with FWS and/or National Marine Fisheries Service ("NMFS"). 16 U.S.C. § 1536(a)(2).

The Court explained in its Order how the Corps' reissuance of NWP 12 in 2017 failed to comply with the ESA. (Doc. 130 at 7-21.) The Corps failed to initiate § 7(a)(2) consultation to ensure that discharge activities authorized under NWP 12 comply with the ESA. *See* 16 U.S.C. § 1536(a)(2). Plaintiffs assert that

the Court must enjoin Keystone XL to avoid irreparable harm. (Doc. 144 at 36.) TC Energy asserts that it would be improper to single out Keystone XL from the new construction of other oil and gas pipelines for different treatment. (Doc. 137 at 18.)

The Court agrees that it would be improper to single out Keystone XL. The Court's ESA analysis focused on Plaintiffs' facial attack to NWP 12. (Doc. 130 at 7-21.) Plaintiffs now have argued and demonstrated that certain activities authorized under NWP 12 pose more of a threat to listed species and critical habitat than other activities authorized under NWP 12. *See supra* at 11-18. Large-scale oil and gas pipelines, including Keystone XL, repeatedly utilize NWP 12 to approve dredge and fill activities for a pipeline that extends hundreds of miles across many waterways. (*See* Doc. 138-5 at 4.)

The Court discussed at length in its Order that the Corps needed to consider NWP 12's entire effect when it reissued the permit in 2017. (*See, e.g.*, Doc. 130 at 16.) The Court concluded that "[p]rogrammatic review of NWP 12 in its entirety, as required by the ESA for any project that 'may effect' listed species or critical habitat, provides the only way to avoid piecemeal destruction of species and habitat." The Corps failed to ensure that its reissuance of NWP 12 in 2017 was not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. (Doc. 130 at 21); *see* 16 U.S.C. §

1536(a)(2). The Court noted that the types of discharges that NWP 12 authorizes "may affect" listed species and critical habitat. (Doc. 130 at 13.) The Corps should have initiated § 7 ESA consultation before it reissued NWP 12 in 2017, and irreparable injury "is *likely*" if developers continue to build new, large-scale oil and gas pipeline projects. *See Nat'l Wildlife Fed'n*, 886 F.3d at 819 (citation omitted).

Although case law instructs the Court to presume that the remaining factors favor injunctive relief, the Court addresses these factors briefly below out of an abundance of caution. *See Nat'l Wildlife Fed'n*, 886 F.3d at 817. The second factor—whether remedies available at law are inadequate to compensate for the injury—plainly favors injunctive relief. *Amoco*, 480 U.S. at 545 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages"). This need for injunctive relief proves especially true considering that the Court identified a violation of the ESA. *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1090 (noting that it is the "incalculability" of an ESA injury that "renders the remedies available at law . . . inadequate" (citation omitted)); *Nat'l Wildlife Fed'n*, 886 F.3d at 817 (noting Congress's "plain intent" in enacting the ESA was to "halt and reverse the trend toward species extinction, whatever the cost").

The Court addresses the third and fourth factors together. *See Padilla v. Immigration and Customs Enforcement*, 953 F.3d 1134, 1141 (9th Cir. 2020)

(noting where the government is a party is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge). Preserving endangered species is of "incalculable" value to the public interest. *Cottonwood*, 789 F.3d at 1090. The public also has an interest in the repair, maintenance, and construction of vital infrastructure. (*See e.g.*, Doc. 131 at 16). The Court's order strikes a balance between these important interests by narrowing the relief to allow for certain of these vital projects to continue while the Corps completes the consultation and compliance process pursuant to the ESA.

Routine maintenance, inspection, and repair activities on existing NWP 12 projects pose less of a risk. *See supra* p. 16. No evidence exists, however, that the construction of Keystone XL pipeline necessarily poses a greater risk under the ESA than the construction of other new oil and gas pipelines. The Court will amend its order to narrow its injunctive relief to the same scope that it narrowed its vacatur relief. *See supra* pp. 17-18.

III. STAY PENDING APPEAL

Federal Defendants and TC Energy have filed separate motions for partial stays pending appeal. (Docs. 131 & 136.) Federal Defendants ask the Court to stay the portions of the Order that vacate NWP 12 and enjoin the Corps from authorizing any dredge or fill activities under NWP 12. (Doc. 131 at 6.) Federal Defendants ask the Court, at the very least, to stay the vacatur and injunction as

they relate to anything other than the Keystone XL pipeline. (*Id.*) TC Energy asks the Court to stay the order for Keystone XL and all other utility projects. (Doc. 137 at 18.)

"A stay [pending appeal] is not a matter of right, even if irreparable injury might otherwise result." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (per curiam) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). The U.S. Supreme Court has set forth a four-factor test to evaluate a request for a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434. A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

a. Federal Defendants' and TC Energy's Likelihood of Success on the Merits of Their Appeal

"An applicant for a stay pending appeal must make 'a strong showing that he is likely to succeed on the merits.'" *Al Otro Lado v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020) (quoting *Nken*, 556 U.S. at 434). The Court determined that the Corps' reissuance of NWP 12 in 2017 violated the ESA. (Doc. 130 at 25.) Well-settled case law indicates that Defendants likely would be unable to succeed on appeal.

See, e.g., *Brownlee*, 402 F. Supp. 2d at 9-10. The district court in *Brownlee* reached the same conclusion regarding NWP in 2002 as did the Court regarding NWP 12—the Corps needed to engage in programmatic consultation to comply with the ESA. *Id.* The Ninth Circuit similarly determined in *Lane County Audubon Society*, 958 F.2d at 295, that BLM's failure to consult with FWS before implementing management guidelines for conservation of northern spotted owl violated § 7 of the ESA.

These circumstances differ greatly from those faced by the Ninth Circuit in *Alaska Survival v. Surface Transportation Board*, 704 F.3d 615 (9th Cir. 2012). The Surface Transportation Board ("STB") issued a decision to allow a construction project to move forward that plaintiffs sought to challenge as violating the board's statutory authority and NEPA. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1079, 1084 (9th Cir. 2013). The Ninth Circuit originally granted plaintiffs a stay of the STB's decision. *Id.* at 1077 n.2. The Ninth Circuit then received merits briefing and heard oral argument on the claims. *Alaska Survival*, 704 F.3d at 616. The Ninth Circuit issued a brief opinion after oral arguments to lift the stay with notice that "[a]n opinion on the merits of denial of the petition for review will follow in due course." *Id.* The brief opinion explained that it had decided to lift the stay because "the balance of hardships no longer tips sharply in the [plaintiffs'] favor." *Id.* To leave the stay in place would result in hardships

because it would "prevent the award of construction contracts, postpone the hiring of construction employees, and significantly increase costs." *Id.* Plaintiffs, on the other hand, would suffer almost no hardships because the court had determined on the merits that STB had complied fully with the law. *Id.* No reason existed to leave a stay in place during a time in which the Ninth Circuit completed work on an opinion in favor of the STB.

b. Irreparable Injury

Defendants' claims of irreparable injury fail to support a stay. Irreparable harm stands as the "bedrock requirement" of a stay pending appeal. *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam). Federal Defendants complain that, absent a stay, the Corps will be burdened by having to process an increased number of individual permit applications under § 404(a). (Doc. 131 at 19-20.) Those burdens prove to be a fault of the Corps' own making. Federal Defendants' claimed harms appear "less than convincing" in light of the Corps' knowledge that its reauthorization of NWP 12 required § 7(a)(2) consultation given its prior consultation on the reissuance of NWP 12 in 2007. (Doc. 130 at 20); *Ctr. for Food Safety v. Vilsack*, 10-cv-04038, 2010 WL 11484449, at *6 (N.D. Cal. Nov. 30, 2010) (citation omitted); *see also Al Otro Lado*, 952 F.3d at 1008 (noting that the fact that the government's asserted harm was largely self-inflicted severely undermined the government's claim for equitable relief).

Indeed, the Corps' own regulatory manager acknowledged the Corps' consultation obligations before recommending that the Corps simply make a "national 'no effect' determination for each NWP reissuance until it is challenged in federal court and a judge rules against the Corps." NWP036481. Plaintiffs challenged the Corps' no effect determination in federal court. The Court ruled against the Corps, just as the Corps anticipated. (Doc. 130 at 7-21.) This type of "largely self-inflicted" harm undermines the Corps' claim for equitable relief. *See Al Otro Lado*, 952 F.3d at 1008.

The Corps' alleged burden fails to support a stay where, as here, "the troubles complained of resulted from [the agency's] failure to follow the law in the first instance." *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014) (enjoining Forest Service from authorizing or accepting harvest plans for site-specific timber projects due to failure to comply with NEPA and ESA); *accord Miller v. Carlson*, 768 F. Supp. 1341, 1343 (N.D. Cal. 1991) (denying stay based on rejection of fiscal constraints as justification for a state's failure to comply with its legal obligations). The Ninth Circuit affirmed a preliminary injunction that required the federal government to hold bond hearings before an immigration judge. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013). The Ninth Circuit, in rejecting the government's cost concerns in complying with the terms of preliminary injunction, noted that even the likelihood of the

government facing "severe logistical difficulties in implementing [the injunction]" would not warrant a stay as these difficulties "would merely represent the burdens of complying with the applicable statutes." *Id.* The Corps similarly faces the burdens of complying with the ESA. Moreover, any burdens that the Corps will face represent largely a fault of its own making. *See Swan View Coal.*, 52 F. Supp. 3d at 1161-62.

Intervenors claim that their inability to rely on NWP 12 will cause additional costs and delays. (Doc. 137 at 15-18 & Doc. 138 at 14-16.) The Court's amended remedy to partial vacatur and partial injunction lessens the burdens suggested by Intervenors. The Court narrowed the scope of the vacatur and injunction to minimize potential disruption to existing projects and smaller-scale projects while ensuring appropriate protection for endangered and threatened species and their critical habitats. *See supra* pp. 17-18, 20. NWP 12 does not stand as Intervenors' only option. Developers remain able to pursue individual permits for their new oil and gas pipeline construction. *See Pub. Emps. for Envtl. Responsibility*, 189 F. Supp. 3d at 3.

TC Energy states that enjoining Keystone XL from using NWP 12 would cause substantial harm to TC Energy, TC Energy's employees and its customers, the State of Montana, and all the local governments, businesses, and individuals that will benefit from the economic activity generated by construction of Keystone

XL. (Doc. 137 at 20-21.) TC Energy relies largely upon the U.S. Supreme Court's decision in *Amoco Production Company*, 480 U.S. at 545, to support its claim that courts should not necessarily presume irreparable harm in environmental cases.

Two Alaska Native villages and a Native organization sought to enjoin exploratory drilling off the Alaska coast under leases that the Secretary of the Interior had granted to oil companies. *Amoco*, 480 U.S. at 535. Plaintiffs alleged that the leases violated the Alaska National Interest Lands Conservation Act ("ANILCA") because it restricted their use of subsistence resources. *Id.* The U.S. Supreme Court reversed the Ninth Circuit's grant of injunctive relief based on it use of a presumption of irreparable harm in the context of ANILCA. *Id.* at 545.

The presumption of irreparable injury when an agency fails to evaluate thoroughly the environmental impact of a proposed action runs contrary to traditional equitable principles involved in determining the appropriateness of granting injunctive relief. *Id.* To permit oil exploration to continue pending administrative review did not violate ANILCA where "injury to subsistence resources from exploration was not at all probable." *Id.* The Supreme Court understood, however, that in most instances "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Id.* The balance of harms usually will favor the issuance of an injunction to protect the environment when "such injury is

sufficiently likely." *Id.*

Amoco looked with disfavor upon the presumption of irreparable harm in the context of ANILCA. *Id.* The Ninth Circuit and other circuits have questioned the applicability of *Amoco* to NEPA cases. *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190 (9th Cir. 1988); *Marsh*, 872 F.2d at 502–03 (holding *Amoco* should not routinely control the decision of whether to enjoin agency action in NEPA cases). The First Circuit has outlined why harm may not prove irreparable under ANILCA even when irreparable under other statutes. Under NEPA, for example, if "the decisionmaker has fully considered the environmental impacts of the proposed action, NEPA does not stop him from deciding to cause environmental damage." *Marsh*, 872 F.2d at 502. ANILCA, on the other hand, allows a court to make the decisionmaker choose a different option entirely. *Id.* at 503. This distinction, according to the First Circuit, proves important because agency decisions in general face "every-growing bureaucratic commitment" as interest groups, workers, suppliers, potential customers and local officials "become ever more committed to the action initially chosen." *Id.* at 503. Under ANILCA, environmental harm proves "reparable" because the court can require the decisionmaker to make a new choice, regardless of the level bureaucratic commitment. Under NEPA, however, the court's limited ability to review actions means that any later litigation "effort to bring about a new choice, simply by

asking the agency administrator to read some new document, will prove an exercise in futility" due to bureaucratic commitment. *Id.* This futility means "that ever-growing bureaucratic commitment to a project . . . may prove to be 'irreparable harm' in a NEPA case in a sense not present in an ANILCA case." *Id.*

These decisions, and their reasoning, appear to support the presumption of irreparable damage employed by the Ninth Circuit in evaluating alleged NEPA violations. Here, we face a violation of the ESA and its programmatic consultation requirement. This programmatic consultation requirement compares to the procedural requirements of NEPA that serve to apprise the agency of environmental consequences. The Court nevertheless will follow *Amoco* and not presume that irreparable injury would arise from the Corps' failure to engage in programmatic consultation as required by the ESA. *See, e.g.*, *Cottonwood Envtl. Law Ctr*, 789 F.3d at 1089–91; *Pub. Serv. Co. of Colorado v. Andrus*, 825 F. Supp. 1483, 1504–08 (D. Idaho 1993), *modified*, No. CIV. 91-0035-S-HLR, 1993 WL 388312 (D. Idaho Sept. 21, 1993).

The district court in *Andrus* found that Idaho had shown several irreparable injuries that would result from the decisions of the Department of Energy ("DOE") regarding the shipment, receipt, processing, and storage of spent nuclear fuel at the national engineering laboratory in Idaho. The number and volume of shipments of spent nuclear fuel to the laboratory would increase dramatically under DOE's

current proposals and it was undisputed that the total amount of radiation exposure increases as the number of shipments increases. *Andrus*, 825 F. Supp. at 1505. The risk of an accident in transit also increases as the number of shipments increase. *Id.* at 1505-06. The environmental consequences of even a single accident could be devastating. *Id.* at 1504-08. These factors easily satisfied the irreparable injury requirement. Spent nuclear fuel admittedly poses a risk of a kind different than the construction and development of oil and gas pipelines. Nevertheless, an increase in the number and size of pipelines increases the risk of an accident or harm to the environment in the construction and development of these pipelines. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 235 F. Supp. 2d 1109, 1139–40 (D. Or. 2002) (determining that the potential over-harvesting of cougars satisfied the likelihood of irreparable harm requirement to support injunction until completion of EIS).

Intervenors' alleged harm stems from the requirement that Intervenors and their members follow the law and obtain permits for their projects. These type of ordinary compliance costs likewise do not rise to the level of irreparable harm. In fact, "monetary injury is not normally considered irreparable" absent a threat of being driven out of business. *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019) (citation and alteration omitted)); *see also Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (determining that "injury resulting from attempted compliance with government regulation ordinarily is not

irreparable harm"). Intervenors possess no inherent right to maximize revenues by using a cheaper, quicker permitting process, particularly when their preferred process does not comply with the ESA. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (determining that the "loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment"), *abrogated on other grounds by Monsanto*, 561 U.S. 139; *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (irreparable environmental injuries outweigh temporary economic harms).

c. The Balance of the Equities and Public Interest

Defendants' failure to satisfy the irreparable harm requirement relieves the Court from needing to address the final two factors. *See Leiva-Perez*, 640 F.3d at 965. Out of an abundance of caution, however, the Court will address the balance of equities and the public interest. The balance of equities and public interest "tip sharply" in Plaintiffs' favor in this case. *See Al Otro Lado*, 952 F.3d at 1015. The equities and public interest factors always tip in favor of the protected species "when evaluating a request for injunctive relief to remedy an ESA procedural violation." *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1091.

As detailed above, Plaintiffs would suffer substantial harm if the Court allowed Keystone XL and other oil and gas pipelines to be constructed using

NWP 12 during the remand. (*See* Doc. 138-1 at 6-7 (stating that developer was one month away from receiving verification for a pipeline "designed to extend hundreds of miles across multiple states"); Doc. 138-5 at 5 (stating that developers have plans to construct pipelines in 17 states)). The fact that the Corps *already* has issued more than 38,000 preconstruction notification ("PCN") verifications under NWP 12 since March 19, 2017, up and until the April 15, 2020 Order, compounds this harm. (*See* Doc. 131-1 at 3.)

Federal Defendants claim that Plaintiffs will suffer no such harm. Federal Defendants note that very few of the 5,500 pending PCNs relate to oil and gas pipelines or implicate listed species. (Doc. 131 at 16.) This argument fails. The mere fact that many *other* PCNs remain pending does not mean that the oil and gas pipelines waiting on verifications will not harm Plaintiffs if allowed to proceed. Further, even if the Court were to assume that permittees correctly determine whether their NWP 12-authorized activities trigger General Condition 18, the ensuing project-level review for those activities cannot cure the Corps' violation of a failure to engage in programmatic consultation pursuant to § 7 of the ESA. (*See* Doc. 130 at 18-20.) NWP 12 requires programmatic consultation to ensure that the cumulative impacts of oil and gas pipelines, combined with the thousands of other PCN and non-PCN uses of NWP 12, will not cause adverse effects to listed species. (*Id.* at 20.)

The public interest further weighs against the issuance of a stay. In arguing otherwise, Defendants cite the need to use NWP 12 for the maintenance and repair of electric, internet, and cable lines and wires. (*See, e.g.*, Doc. 131 at 16; Doc. 135 at 4-5.) The Court's narrowing of the vacatur and injunction will allow these uses to continue. This narrowing of the vacatur and injunction thereby avoids many associated harms to the public.

The Court's narrowing of the vacatur ensures that the Corps can enforce special conditions in existing verifications for projects that already have been built. The Ninth Circuit considered whether vacatur would risk greater environmental harm to vulnerable bee populations in rejecting the agency's request to leave the unlawful registration decision in place on remand. *Pollinator*, 806 F.3d at 532. The Court similarly declines to risk potential environmental harm to endangered species by leaving NWP 12 in place on remand. And no confusion should result from the Corps' regulation deeming PCNs presumptively authorized after 45 days. The Corps should deny verifications to address any uncertainty, but the narrowed scope of the Court's vacatur dictates that non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects remain authorized.

No public interest exists in allowing the construction of new oil and gas pipelines to proceed before the Corps has completed the legally required

programmatic consultation under § 7 of the ESA. This programmatic consultation "allows for a broad-scale examination" of NWP 12's potential impacts and safeguards against the "piecemeal destruction" of listed species and critical habitat. (Doc. 130 at 10, 18.) The threat of such destruction from oil and gas pipelines proves substantial.

The public's interest in ensuring that the Corps follows the ESA trumps any purported tax and energy security benefits of new oil and gas pipelines. (*See* Doc. 137 at 17-18; Doc. 135 at 6; Doc. 138 at 8-9). The district court in *Montana Wilderness Association v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006), understood that the "most basic premise of Congress' environmental laws" is that "the public interest is best served when the law is followed." The U.S. Supreme Court likewise opined that it remains "beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Hill*, 437 U.S. at 174; *see also Indigenous Envtl. Network v. State Dep't*, 369 F. Supp. 3d 1045, 1051-52 (D. Mont. 2018) (concluding potential environmental damage to the public outweighed any energy security and economic benefits provided by Keystone XL). The Court agrees.

ORDER

Accordingly, it is **HEREBY ORDERED** that the relief in the Court's April 15, 2020 Order (Doc. 130 at 26) is **AMENDED AS FOLLOWS**:

5. NWP 12 is vacated as it relates to the construction of new oil and gas pipelines pending completion of the consultation process and compliance with all environmental statutes and regulations. NWP 12 remains in place during remand insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects.

6. The Corps is enjoined from authoring any dredge or fill activities for the construction of new oil and gas pipelines under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations. The Corps remains able to authorize dredge or fill activities for non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects.

It is further **ORDERED** that Federal Defendants' and TC Energy's Motions for Partial Stay Pending Appeal (Docs. 131 & 136) are **DENIED**.

DATED this 11th day of May, 2020.

Brian Morris, Chief District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, et al., Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, et al., Defendants, TC ENERGY CORPORATION, et al., Intervenor-Defendants, STATE OF MONTANA, Intervenor-Defendant, AMERICAN GAS ASSOCIATION, et al., Intervenor-Defendants.	**CV-19-44-GF-BMM** **ORDER**

Northern Plains Resource Council, et al. ("Plaintiffs") filed this action to challenge the decision of the United States Army Corps of Engineers ("Corps") to reissue Nationwide Permit 12 ("NWP 12") in 2017. (Doc. 36.) Plaintiffs allege five claims in their Amended Complaint. (*Id.*) Claims Three and Five relate to the Corps' verification of the Keystone XL Pipeline crossings of the Yellowstone River and the Cheyenne River. (Doc. 36 at 78-81, 85-87.) The Court stayed

Plaintiffs' Claims Three and Five pending further action by the Corps. (Doc. 56 at 1.)

Plaintiffs' Claims One, Two, and Four relate to the Corps' reissuance of NWP 12 in 2017. Plaintiffs allege that the Corps' reissuance of NWP 12 violated the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), and the Clean Water Act ("CWA"). (Doc. 36 at 73-77, 81-84.) Plaintiffs, Defendants the Corps, et al. ("Federal Defendants"), and Intervenor-Defendants TC Energy Corporation, et al. ("TC Energy") filed cross-motions for partial summary judgment regarding Plaintiffs' Claims One, Two, and Four. (Docs. 72, 87, 90.) Intervenor-Defendants the State of Montana and American Gas Association, et al., filed briefs in support of Defendants. (Docs. 92 & 93.) Amici Curiae Edison Electric Institute, et al., and Montana Petroleum Association, et al., also filed briefs in support of Defendants. (Docs. 106 & 122.)

BACKGROUND

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Corps regulates the discharge of any pollutant, including dredged or fill material, into jurisdictional waters. *See* 33 U.S.C. §§ 1311, 1362(6), (7), (12). Section 404 of the CWA requires any party seeking to construct a project that will

discharge dredged or fill material into jurisdictional waters to obtain a permit. *See* 33 U.S.C. § 1344(a), (e).

The Corps oversees the permitting process. The Corps issues individual permits on a case-by-case basis. 33 U.S.C. § 1344(a). The Corps also issues general nationwide permits to streamline the permitting process for certain categories of activities. 33 U.S.C. § 1344(e). The Corps issues nationwide permits for categories of activities that 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." 33 U.S.C. § 1344(e)(1). Nationwide permits may last up to five years, at which point they must be reissued or left to expire. 33 U.S.C. § 1344(e)(2).

The Corps issued NWP 12 for the first time in 1977 and reissued it most recently in 2017. 82 Fed. Reg. 1860, 1860, 1985-86 (January 6, 2017). NWP 12 authorizes discharges of dredged or fill material into jurisdictional waters as required for the construction, maintenance, repair, and removal of utility lines and associated facilities. 82 Fed. Reg. at 1985-86. Utility lines include electric, telephone, internet, radio, and television cables, lines, and wires, as well as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, including oil and gas pipelines. 82 Fed. Reg. at 1985. The discharge may not result in the loss of greater than one-half acre of jurisdictional waters for

each single and complete project. 82 Fed. Reg. at 1985. For linear projects like pipelines that cross a single waterbody several times at separate and distant locations, or cross multiple waterbodies several times, each crossing represents a single and complete project. 82 Fed. Reg. at 2007. Activities meeting NWP 12's conditions may proceed without further interaction with the Corps. *See Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 3 (D.D.C. 2005).

A permittee must submit a preconstruction notification ("PCN") to the Corps' district engineer before beginning a proposed activity if the activity will result in the loss of greater than one-tenth acre of jurisdictional waters. 82 Fed. Reg. at 1986. Additional circumstances exist under which a permittee must submit a PCN to a district engineer. *See* 82 Fed. Reg. at 1986. The PCN for a linear utility line must address the water crossing that triggered the need for a PCN as well as the other separate and distant crossings that did not themselves require a PCN. 82 Fed. Reg. at 1986. The district engineer will evaluate the individual crossings to determine whether each crossing satisfies NWP 12. 82 Fed. Reg. at 2004-05. The district engineer also will evaluate the cumulative effects of the proposed activity caused by all of the crossings authorized by NWP 12. *Id.*

All nationwide permits, including NWP 12, remain subject to 32 General Conditions contained in the Federal Regulations. 82 Fed. Reg. 1998-2005. General Condition 18 prohibits the use of any nationwide permit for activities that are

likely to directly or indirectly jeopardize threatened or endangered species under the ESA or destroy or adversely modify designated critical habitat for such species. 82 Fed. Reg. at 1999-2000.

The ESA and NEPA require the Corps to consider the environmental impacts of its actions. Section 7(a)(2) of the ESA requires the Corps to determine "at the earliest possible time" whether any action it takes "may affect" listed species and critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). If the Corps' action "may affect" listed species or critical habitat, the Corps must consult with U.S. Fish and Wildlife Service ("FWS") and/or National Marine Fisheries Service ("NMFS") (collectively, "the Services"). 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Under NEPA, the Corps must produce an environmental impact statement unless it issues a finding of no significant impact (FONSI). 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.9.

The Corps issued a final Decision Document explaining NWP 12's environmental impacts when it reissued NWP 12 in 2017. NWP005262-5349. The Corps determined that NWP 12 would result in "no more than minimal individual and cumulative adverse effects on the aquatic environment" under the CWA. NWP005340. The Corps also concluded that NWP 12 complied with both the ESA and NEPA. NWP005324, 5340. The Decision Document comprised a FONSI under NEPA. NWP005340.

The Corps explained that its 2017 reissuance of NWP 12 complied with the ESA because NWP 12 would not affect listed species or critical habitat. NWP005324. The Corps did not consult with the Services based on its "no effect" determination. NWP005324-25. A federal district court in 2005 concluded that the Corps should have consulted with FWS when it reissued NWP 12 in 2002. *Brownlee*, 402 F. Supp. 2d at 9-11. The Corps initiated formal programmatic consultation with the Services when it reissued NWP 12 in 2007. NWP031044. The Corps continued the programmatic consultation when it reissued NWP 12 in 2012. *Id.*

LEGAL STANDARD

A court should grant summary judgment where the movant demonstrates that no genuine dispute exists "as to any material fact" and the movant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment remains appropriate for resolving a challenge to a federal agency's actions when review will be based primarily on the administrative record. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006).

The Administrative Procedure Act's ("APA") standard of review governs Plaintiffs' claims. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). The APA instructs a reviewing court to "hold unlawful and set

aside" agency action deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

DISCUSSION

I. ENDANGERED SPECIES ACT

A. ESA Section 7(a)(2) Consultation

Section 7(a)(2) of the ESA requires the Corps to ensure any action that it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). The Corps must review its actions "at the earliest possible time" to determine whether an action "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a). The Corps must initiate formal consultation with the Services if the Corps determines that an action "may affect" listed species or critical habitat. 50 C.F.R. § 402.14; 16 U.S.C. § 1536(a)(2). The ESA does not require Section 7(a)(2) consultation if the Corps determines that a proposed action is not likely to adversely affect any listed species or critical habitat. 50 C.F.R. § 402.14(b)(1).

Formal consultation is a process that occurs between the Services and the Corps. 50 C.F.R. § 402.02. The process begins with the Corps' written request for consultation under ESA Section 7(a)(2) and concludes with the Services' issuance of a biological opinion. 50 C.F.R. § 402.02. A biological opinion states the

Services' opinion as to whether the Corps' action likely would jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. *Id.*

Programmatic consultation involves a type of consultation that addresses multiple agency actions on a programmatic basis. 50 C.F.R. § 402.02. Programmatic consultations allow the Services to consult on the effects of a programmatic action such as a "proposed program, plan, policy, or regulation" that provides a framework for future proposed actions. *Id.*

B. The Corps' Reissuance of NWP 12 in 2017

The Corps concluded that its reissuance of NWP 12 in 2017 would have no effect on listed species or critical habitat. 82 Fed. Reg. at 1873-74; *see also* 81 Fed. Reg. 35186, 35193 (June 1, 2016). General Condition 18 provides that a nationwide permit does not authorize an activity that is "likely to directly or indirectly jeopardize the continued existence of a" listed species or that "will directly or indirectly destroy or adversely modify the critical habitat of such species." 82 Fed. Reg. at 1999.

A non-federal permittee must submit a PCN to the district engineer if a proposed activity "might" affect any listed species or critical habitat. 82 Fed. Reg. at 1999. The permittee may not begin work on the proposed activity until the district engineer notifies the permittee that the activity complies with the ESA and

that the activity is authorized. *Id.* The Corps determined that General Condition 18 ensures that NWP 12 will have no effect on listed species or critical habitat. NWP005324-26. The Corps declined to initiate Section 7(a)(2) consultation based on that determination. *Id.*

C. The Corps Acted Arbitrarily and Capriciously

Plaintiffs argue that the Corps' failure to initiate Section 7(a)(2) consultation violates the ESA. (Doc. 36 at 6.) Plaintiffs assert that the Corps should have initiated programmatic consultation when it reissued NWP 12 in 2017. (Doc. 36 at 6.) Defendants argue that the Corps properly assessed NWP 12's potential effects and did not need to initiate Section 7(a)(2) consultation. (Doc. 88 at 43.) Defendants assert that the Corps did not need to conduct programmatic consultation because project-level review and General Condition 18 ensure that NWP 12 will not affect listed species or critical habitat. (Doc. 88 at 46.)

To determine whether the Corps' "no effect" determination and resulting failure to initiate programmatic consultation proves arbitrary and capricious, the Court must decide whether the Corps "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983)). The Corps' decisions are entitled to deference. *See Kisor v. Wilkie,* 139 S.

Ct. 2400, 2417-18 (2019); *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

Programmatic consultation proves appropriate when an agency's proposed action provides a framework for future proposed actions. 50 C.F.R. § 402.02. Federal actions subject to programmatic consultation include federal agency programs. *See* 80 Fed. Reg. 26832, 26835 (May 11, 2015); 50 C.F.R. 402.02. A federal agency may develop those programs at the national scale. *Id.* The Services specifically 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. *See* 80 Fed. Reg. at 26835.

Programmatic consultation considers the effect of an agency's proposed activity as a whole. A biological opinion analyzes whether an agency action likely would jeopardize a listed species or adversely modify designated critical habitat. 50 C.F.R. §§ 402.02, 402.14(h). This type of analysis allows for a broad-scale examination of a nationwide program's potential impacts on listed species and critical habitat. *See* 80 Fed. Reg. at 26836. A biological opinion may rely on qualitative analysis to determine whether a nationwide program and the program's set of measures intended to minimize impacts or conserve listed species adequately protect listed species and critical habitat. *Id.* Programmatic-level biological opinions examine how the overall parameters of a nationwide program align with

the survival and recovery of listed species. *Id.* An agency should analyze those types of potential impacts in the context of the overall framework of a programmatic action. A broad examination may not be conducted as readily at a later date when the subsequent activity would occur. *Id.*

The Ninth Circuit in *Western Watersheds Project v. Kraayenbrink*, 632 F.3d at 472, evaluated amendments that the Bureau of Land Management ("BLM") made to national grazing regulations. BLM viewed the amendments as purely administrative and determined that they had "no effect" on listed species or critical habitat. *Id.* at 496. The Ninth Circuit rejected BLM's position based on "resounding evidence" from experts that the amendments "'may affect' listed species and their habitat." *Id.* at 498. The amendments did not qualify as purely administrative. The amendments altered ownership rights to water on public lands, increased barriers to public involvement in grazing management, and substantially delayed enforcement of failing allotments. *Id.* The amendments would have a substantive effect on listed species. *Id.*

There similarly exists "resounding evidence" in this case that the Corps' reissuance of NWP 12 "may affect" listed species and their habitat. NWP 12 authorizes limited discharges of dredged or fill material into jurisdictional waters. 82 Fed. Reg. at 1985. The Corps itself acknowledged the many risks associated

with the discharges authorized by NWP 12 when it reissued NWP 12 in 2017. NWP005306.

The Corps noted that activities authorized by past versions of NWP 12 "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources." NWP005306. Discharges of dredged or fill material can have both permanent and temporary consequences. *Id.* The discharges permanently may convert wetlands, streams, and other aquatic resources to upland areas, resulting in permanent losses of aquatic resource functions and services. The discharges also temporarily may fill certain areas, causing short-term or partial losses of aquatic resource functions and services. *Id.*

The Corps examined the effect of human activity on the Earth's ecosystems. NWP005307. Human activities affect all marine ecosystems. *Id.* Human activities alter ecosystem structure and function by changing the ecosystem's interaction with other ecosystems, the ecosystem's biogeochemical cycles, and the ecosystem's species composition. *Id.* "Changes in land use reduce the ability of ecosystems to produce ecosystem services, such as food production, reducing infectious diseases, and regulating climate and air quality." *Id.* Water flow changes, land use changes, and chemical additions alter freshwater ecosystems such as lakes, rivers, and streams. NWP005308. The construction of utility lines "*will* fragment terrestrial and aquatic ecosystems." *Id.* (emphasis added).

The Corps more specifically discussed that land use changes affect rivers and streams through increased sedimentation, larger inputs of nutrients and pollutants, altered stream hydrology, the alteration or removal of riparian vegetation, and the reduction or elimination of inputs of large woody debris. NWP005310. Increased inputs of sediments, nutrients, and pollutants adversely affect stream water quality. *Id.* Fill and excavation activities cause wetland degradation and losses. NWP005310-11. The Corps emphasized that, although "activities regulated by the Corps under Section 404 of the [CWA]" are "common causes of impairment for rivers and streams, habitat alterations and flow alterations," a wide variety of causes and sources impair the Nation's rivers and streams. NWP005311.

The ESA provides a low threshold for Section 7(a)(2) consultation: An agency must initiate formal consultation for any activity that "may affect" listed species and critical habitat. 50 C.F.R. § 402.14; 16 U.S.C. § 1536(a)(2). The Corps itself has stated that discharges authorized by NWP 12 "*will* result in a minor incremental contribution to the cumulative effects to wetlands, streams, and other aquatic resources in the United States." NWP005313. The types of discharges that NWP 12 authorizes "may affect" listed species and critical habitat, as evidenced in the Corps' own Decision Document. The Corps should have initiated Section 7(a)(2) consultation before it reissued NWP 12 in 2017.

Plaintiffs' experts' declarations further support the Court's conclusion that the Corps should have initiated Section 7(a)(2) consultation. These expert declarants state that the Corps' issuance of NWP 12 authorizes discharges that may affect endangered species and their habitats. The ESA's citizen suit provision allows the Court to consider evidence outside the administrative record in its review of Plaintiffs' ESA claim. *See* 16 U.S.C. § 1540(g); *W. Watersheds*, 632 F.3d at 497.

Martin J. Hamel, Ph.D., an assistant professor at the University of Georgia who studies anthropogenic and invasive species' impacts on native riverine species, submitted a declaration stating that the discharges authorized by NWP 12 may affect adversely pallid sturgeon, an endangered species. (Doc. 73-4 at 2, 4, 6.) Pallid sturgeon remain susceptible to harm from pollution and sedimentation in rivers and streams because pollution and sedimentation can bury the substrates on which sturgeon rely for feeding and breeding. (*Id.* at 4.) Fine sentiments can lodge between coarse grains of substrate to form a hardpan layer, thereby reducing interstitial flow rates and ultimately reducing available food sources. Construction activities that increase sediment loading pose a significant threat to the pallid sturgeon populations in Nebraska and Montana. (*Id.*)

Dr. Hamel also stated his understanding that the horizontal directional drilling method ("HDD") for crossing waterways may result in less sedimentation

of the waterway than other construction methods, such as open trench cuts. (Doc. 73-4 at 5.) HDD can result, however, in an inadvertent return of drilling fluid. An inadvertent return of drilling fluid would result in increased sedimentation and turbidity, which would affect aquatic biota such as pallid sturgeon and the species sturgeon rely on as food sources. (*Id.*)

Jon C. Bedick, Ph.D., a professor of biology at Shawnee State University who has worked extensively with the endangered American burying beetle, submitted a declaration detailing his concerns regarding the Corps' failure to analyze NWP 12's threat to the American burying beetle. (Doc. 73-1 at 2-3, 5.) Certain construction activities, including those approved by NWP 12, can cause harm to species such as the American burying beetle. (*Id*. at 5.) Dr. Bedick relayed his concern that the Corps failed to undertake a programmatic consultation with FWS regarding its reissuance of NWP 12. (*Id.*)

NWP 12 authorizes actual discharges of dredged or fill material into jurisdictional waters. 82 Fed. Reg. at 1985. Two experts have declared that the discharges authorized by NWP 12 will affect endangered species. (Docs. 71-1 & 71-3.) The Corps itself has acknowledged that the discharges *will* contribute to the cumulative effects to wetlands, streams, and other aquatic resources. NWP005313. There exists "resounding evidence" from experts and from the Corps that the

discharges authorized by NWP 12 may affect listed species and critical habitat. *See W. Watersheds*, 632 F.3d at 498.

The Corps cannot circumvent ESA Section 7(a)(2) consultation requirements by relying on project-level review or General Condition 18. *See* 82 Fed. Reg. 1999; *Conner v. Burford*, 848 F.2d 1441, 1457-58 (9th Cir. 1988). Project-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the programmatic level. The Corps must consider the effect of the entire agency action. *See Conner*, 848 F.2d at 1453-58 (concluding that biological opinions must be coextensive with an agency's action and rejecting the Services' deferral of an impacts analysis to a project-specific stage). The Federal Regulations make clear that "[a]ny request for formal consultation may encompass . . . a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan." 50 C.F.R. § 402.14(c)(4). The regulations do "not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole." *Id.*; *see also Cottonwood Envtl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir. 2015) (concluding that the Forest Service needed to reinitiate consultation at programmatic level); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1266-

67 (W.D. Wash. 2007) (holding that deferral of analysis to the project level "improperly curtails the discussion of cumulative effects").

The Ninth Circuit in *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992), analyzed what had become commonly known as the "Jamison Strategy." Under the Jamison Strategy, BLM would select land for logging consistent with the protection of the spotted owl. *Id.* at 291. BLM would submit individual timber sales for ESA consultation with FWS, but would not submit the overall logging strategy itself. *Id.* at 292. The Ninth Circuit determined that the Jamison Strategy constituted an action that may affect the spotted owl, because the strategy set forth criteria for harvesting owl habitat. *Id.* at 294. BLM needed to submit the Jamison Strategy to FWS for consultation before BLM implemented the strategy through the adoption of individual sale programs. BLM violated the ESA by not consulting with FWS before it implemented the Jamison Strategy. *Id.*

The district court in *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d at 10, relied, in part, on the Ninth Circuit's holding in *Lane County* when it determined that the Corps' reissuance of NWP 12 in 2002 violated the ESA. In *Brownlee*, the Corps had failed to consult with FWS when it reissued NWP 12 and three other nationwide permits in 2002. *Id.* at 2, 10. Two environmental groups challenged the Corps' failure to consult. *Id.* at 2. The environmental groups argued

that the nationwide permits, including NWP 12, authorized development that threatened the endangered Florida panther. *Id.*

The Corps asserted that NWP 12 complied with the ESA because project-level review would ensure that no harm befell Florida panthers and their habitats. *Id.* at 10. The court disagreed. *Id.* NWP 12 and the other nationwide permits authorized development projects that posed a potential threat to the panther. *Id.* at 3. Large portions of panther habitat existed on lands that could not be developed without a permit from the Corps. *Id.* at 3. Project-level review did not relieve the Corps from considering the effects of NWP 12 as a whole. *Id.* at 10 (citing 50 C.F.R. § 402.14(c)). The Corps needed to initiate overall consultation for the nationwide permits "to avoid piece-meal destruction of panther habitat through failure to make a cumulative analysis of the program as a whole." *Id.*

The same holds true here. Programmatic review of NWP 12 in its entirety, as required by the ESA for any project that "may affect" listed species or critical habitat, provides the only way to avoid piecemeal destruction of species and habitat. *See Brownlee*, 402 F. Supp. 2d at 10; 50 C.F.R. § 402.14(c). Project-level review, by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat. The Corps has an ongoing duty under ESA Section 7(a)(2) to ensure that its actions are not likely to jeopardize the continued existence of endangered and threatened species or result

in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). The Corps failed to fulfill that duty when it reissued NWP 12 in 2017.

The Court certainly presumes that the Corps, the Services, and permittees will comply with all applicable statutes and regulations. *See, e.g.*, *United States v. Norton*, 97 U.S. 164, 168 (1887) ("It is a presumption of law that officials and citizens obey the law and do their duty."); *Brownlee*, 402 F. Supp. 2d at 5 n.7 (presuming that permittees will comply with the law and seek the Corps' approval before proceeding with activities affecting endangered species). That presumption does not allow the Corps to delegate its duties under the ESA to permittees.

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. The Corps must determine "at the earliest possible time" whether its actions "may affect listed species or critical habitat." *See* 50 C.F.R. § 402.14(a). The Corps decided that NWP 12 does not affect listed species or critical habitat because General Condition 18 ensures adequate protection. NWP005324-26. General Condition 18 instructs a non-federal permittee to submit a PCN to the district engineer if the permittee believes that its activity "might" affect listed species or critical habitat. 82 Fed. Reg. at 1999-2000. In that sense, General Condition 18 turns the ESA's initial effect determination

over to non-federal permittees, even though the Corps must make that initial determination. *See* 50 C.F.R. § 402.14(a). The Corps' attempt to delegate its duty to determine whether NWP 12-authorized activities will affect listed species or critical habitat fails.

The Corps remains well aware that its reauthorization of NWP 12 required Section 7(a)(2) consultation given the fact that it initiated formal consultation when it reissued NWP 12 in 2007 and continued that consultation during the 2012 reissuance. NWP031044. NMFS released a biological opinion, which concluded that the Corps' implementation of the nationwide permit program has had "more than minimal adverse environmental effects on the aquatic environment when performed separately or cumulatively." (Doc. 75-9 at 222-23.) The Corps reinitiated consultation to address NMFS's concerns, and NMFS issued a new biological opinion in 2014. NWP030590. The Corps' prior consultations underscore the need for programmatic consultation when the Corps reissued NWP 12 in 2017.

Substantial evidence exists that the Corps' reissuance of NWP 12 "may affect" listed species and critical habitat. This substantial evidence requires the Corps to initiate consultation under ESA Section 7(a)(2) to ensure that the discharge activities authorized under NWP 12 comply with the ESA. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14. The Corps failed to consider relevant

expert analysis and failed to articulate a rational connection between the facts it found and the choice it made. *See W. Watersheds*, 632 F.3d at 498. The Corps' "no effect" determination and resulting decision to forego programmatic consultation proves arbitrary and capricious in violation of the Corps' obligations under the ESA. The Corps should have initiated ESA Section 7(a)(2) consultation before it reissued NWP 12 in 2017. The Corps' failure to do so violated the ESA.

These failures by the Corps entitle the Plaintiffs to summary judgment regarding their ESA Claim. The Court will remand NWP 12 to the Corps for compliance with the ESA. The Court vacates NWP 12 pending completion of the consultation process. The Court further enjoins the Corps from authorizing any dredge or fill activities under NWP 12.

II. PLAINTIFFS' REMAINING CLAIMS

Plaintiffs further allege that NWP 12 violates both NEPA and the CWA. (Doc. 36 at 73-77, 81-84.) Plaintiffs, the Corps, and TC Energy each have moved for summary judgment regarding Plaintiffs' NEPA and CWA Claims. (Doc. 72 at 2; Doc. 87 at 2; Doc. 90 at 2.) The Court already has determined that the Corps' reissuance of NWP 12 violated the ESA, remanded NWP 12 to the Corps for compliance with the ESA, and vacated NWP 12 pending completion of the consultation process.

The Court anticipates that the Corps may need to modify its NEPA and CWA determinations based on the Corps' ESA Section 7(a)(2) consultation with the Services, as briefly discussed below. The Court will deny without prejudice all parties' motions for summary judgment regarding Plaintiffs' NEPA and CWA claims pending ESA Section 7(a)(2) consultation and any further action by the Corps.

A. The National Environmental Policy Act

Plaintiffs allege that NWP 12 violates NEPA because the Corps failed to evaluate adequately NWP 12's environmental impacts. (Doc. 36 at 4.) Congress enacted NEPA to ensure that the federal government considers the environmental consequences of its actions. *See* 42 U.S.C. 4331(b)(1). NEPA proves, in essence, to be a procedural statute designed to ensure that federal agencies make fully informed and well-considered decisions. *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 18 (D.D.C. 2013). NEPA does not mandate particular results, but instead prescribes a process to ensure that agencies consider, and that the public is informed about, potential environmental consequences. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

NEPA requires a federal agency to evaluate the environmental consequences of any major federal action "significantly affecting the quality of the human environment" before undertaking the proposed action. 42 U.S.C. § 4332(C). A

federal agency evaluates the environmental consequences of a major federal action through the preparation of a detailed environmental impact statement ("EIS"). 40 C.F.R. § 1501.4. An agency may opt first to prepare a less-detailed environmental assessment ("EA") to determine whether a proposed action qualifies as a "major federal action significantly affecting the quality of the human environment" that requires an EIS. *Id.* The agency need not provide any further environmental report if the EA shows that the proposed action will not have a significant effect on the quality of the human environment. 40 C.F.R. § 1501.4(e); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757-58 (2004).

The Corps conducted an EA in the process of reissuing NWP 12. NWP005289. The Corps determined that the issuance of NWP 12 would not have a significant impact on the quality of the human environment. NWP005340. The Corps accordingly concluded that it did not need to prepare an EIS. *Id.* Plaintiffs argue that the EA proves insufficient under NEPA for various reasons. (Doc. 73 at 17-34.)

The Decision Document detailed NWP 12's environmental consequences. NWP005303-5317. The Court anticipates that the ESA Section 7(a)(2) consultation will further inform the Corps' NEPA assessment of NWP 12's environmental consequences. Armed with more information, the Corps may decide to prepare an EIS because NWP 12 represents a major federal action that

significantly affects the quality of the human environment. *See* 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.4.

B. The Clean Water Act

Section 404(e) of the CWA allows the Corps to issue nationwide permits for categories of activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). The Decision Document evaluated NWP 12's compliance with CWA Section 404 permitting guidelines. NWP005340. The Corps concluded that the discharges authorized by NWP 12 comply with the CWA. *Id.* The Corps specifically noted that the activities authorized by NWP 12 "will result in no more than minimal individual and cumulative adverse effects on the aquatic environment." *Id.*

Plaintiffs allege that NWP 12 violates the CWA because NWP 12 authorizes activities that will cause more than minimal adverse environmental effects. (Doc. 36 at 5.) Plaintiffs note that, although NWP 12 authorizes projects that would result in no more than one-half acre of water loss, linear utility lines may use NWP 12 repeatedly for many water crossings along a project's length. Plaintiffs argue that this repeated use causes more than minimal adverse environmental effects. (*Id.*)

The Court similarly anticipates that the ESA Section 7(a)(2) consultation will inform the Corps' CWA assessment of NWP 12's environmental effects. The

Corps' adverse effects analyses and resulting CWA compliance determination may change after ESA Section 7(a)(2) consultation brings more information to light.

At this point in the litigation, the Court does not need to determine whether the Corps made a fully informed and well-considered decision under NEPA and the CWA when it reissued NWP 12 in 2017. The Court has remanded NWP 12 to the Corps for ESA Section 7(a)(2) consultation. The Court anticipates that the Corps will conduct additional environmental analyzes based on the findings of the consultation.

ORDER

It is hereby **ORDERED** that:

1. Plaintiffs' Motion for Partial Summary Judgment (Doc. 72) is **GRANTED, IN PART, and DENIED WITHOUT PREJUDICE, IN PART**. The Court grants Plaintiffs' motion for summary judgment regarding Plaintiffs' ESA Claim, Claim Four. The Court denies without prejudice Plaintiffs' motions for summary judgment regarding Plaintiffs' NEPA and CWA Claims, Claims One and Two.

2. Federal Defendants' Motion for Partial Summary Judgment (Doc. 87) is **DENIED, IN PART, and DENIED WITHOUT PREJUDICE, IN PART**. The Court denies Federal Defendants' motion for summary judgment regarding Plaintiffs' ESA Claim, Claim Four. The Court denies without prejudice Federal

Defendants' motions for summary judgment regarding Plaintiffs' NEPA and CWA Claims, Claims One and Two.

3. TC Energy's Motion for Partial Summary Judgment (Doc. 90) is **DENIED, IN PART, and DENIED WITHOUT PREJUDICE, IN PART**. The Court denies TC Energy's motion for summary judgment regarding Plaintiffs' ESA Claim, Claim Four. The Court denies without prejudice TC Energy's motions for summary judgment regarding Plaintiffs' NEPA and CWA Claims, Claims One and Two.

4. NWP 12 is remanded to the Corps for compliance with the ESA.

5. NWP 12 is vacated pending completion of the consultation process and compliance with all environmental statutes and regulations.

6. The Corps is enjoined from authoring any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations.

DATED this 15th day of April, 2020.

Brian Morris, Chief District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, et al., Plaintiffs, vs. U.S. ARMY CORPS OF ENGINEERS, et al., Defendants, TC ENERGY CORPORATION, et al., Intervenor-Defendants.	**CV-19-44-GF-BMM** **ORDER**

INTRODUCTION

Northern Plains Resource Council, Bold Alliance, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, and Friends of the Earth (collectively, "Plaintiffs"), filed their complaint in this case on July 1, 2019. (Doc. 1.) Plaintiffs named the U.S. Army Corps of Engineers ("Corps") and Lieutenant General Todd T. Semonite, in his official capacity, as defendants

(collectively, "Federal Defendants"). (*Id.*) TransCanada Keystone Pipeline LP and TC Energy Corporation (collectively, "TC Energy") filed a motion to intervene shortly thereafter, on July 16, 2019. The Court granted TC Energy's motion to intervene on July 23, 2019. (Doc. 20.)

Plaintiffs filed an amended complaint on September 10, 2019. (Doc. 36.) Federal Defendants filed their answer on October 1, 2019. (Doc. 39.) TC Energy field its answer on October 8, 2019. (Doc. 45.)

DISCUSSION

I. The State of Montana's Motion to Intervene

The State of Montana ("Montana") filed an "Unopposed Motion to Intervene" on October 7, 2019. (Doc. 42.) Montana's motion stated that "[t]he Plaintiffs, Defendants, and Intervenor-Defendants do not oppose this Motion." (*Id.* at 2.) The Court granted Montana's motion on October 8, 2019. (Doc. 44.) Montana filed an answer to Plaintiffs' amended complaint on October 10, 2019. (Doc. 46.)

Plaintiffs timely filed a Response to Montana's motion to intervene on October 18, 2019. (Doc. 50.) Plaintiffs assert that Montana mischaracterized the motion to intervene as "unopposed." (*Id.* at 2.) Plaintiffs state that Plaintiffs and Plaintiffs' counsel were still considering Plaintiffs' position regarding the motion on the date Montana planned to file. (*Id.*) Plaintiffs' counsel notified Montana's

counsel that Plaintiffs took no position on Montana's motion to intervene at that time, but Plaintiffs' counsel reserved the right to file a response. (Doc. 50-1 at 4.)

Plaintiffs now notify the Court that they oppose Montana's intervention as of right, but do not oppose permissive intervention. (Doc. 50 at 2.) Plaintiffs request that the Court issue an order to clarify that Montana's intervention is on a permissive basis. Plaintiffs ask additionally that the Court strictly limit Montana's participation in the case to avoid delay and prejudice to the parties. (*Id.*)

II. NWP 12 Coalition's Motion to Intervene

Five national energy organizations, American Gas Association, American Petroleum Institute, Association of Oil Pipe Lines, Interstate Natural Gas Association of American, and National Rural Electric Cooperative Association (collectively, the "Coalition") filed a motion to intervene on October 15, 2019. (Doc. 48.) Plaintiffs oppose the Coalition's motion. TC Energy and Montana consent to the Collation's motion. Federal Defendants do not oppose the Coalition's motion for permissive intervention. (*Id.* at 2.)

III. Intervention as of Right

A party seeking to intervene as of right pursuant to Fed. R. Civ. P. 24(a) bears the burden of establishing that: (1) the motion is timely; (2) the applicant has a "significantly protectable" interest relating to the action; (3) the applicant is so situated that the disposition of the action may, as a practical matter, impair or

impeded the applicant's ability to protect its interest; and (4) the existing parties will not adequality represent the applicant's interests. *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011).

Courts determine adequacy of representation by examining three factors: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that the other parties would neglect. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011).

Neither Montana, nor the Coalition, have demonstrated that they are entitled to intervention as of right. Both submitted timely motions and articulated a "significantly protectable" interest in Nationwide Permit 12 ("NWP 12") that relates to the present action. Montana and the Coalition have failed to demonstrate at this point, however, that they are situated so that the action's disposition would impair or impede their abilities to protect their interests in NWP 12 or that the existing parties will not adequately represent their interests.

The action's disposition as currently pled by Plaintiffs proves unlikely to impair or impede Montana or the Coalition's abilities to rely on NWP 12. Plaintiffs do not ask the Court to vacate NWP 12. (*See* Doc. 36 at 87-88.) Plaintiffs seek

instead declaratory relief as to NWP 12's legality. (*Id.*) Montana and the Coalition could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits.

Further, Federal Defendants and Intervenor TC Energy are currently defending against Plaintiffs' amended complaint. Federal Defendants and TC Energy represent a wide range of governmental and private energy company interests. Montana and the Coalition have not identified a state interest sufficiently different from the Federal Defendants' interests or TC Energy's interests to merit intervention as of right. The existing parties will adequately represent Montana's and the Coalition's interests.

IV. Permissive Intervention

A court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). A party seeking permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1) must show: (1) independent grounds for jurisdiction; (2) that the motion is timely; and (3) that the applicant's claim or defense and the main action have a question of law or fact in common. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). A party does not need to demonstrate that independent jurisdictional grounds exist in federal-question cases when the party seeking intervention does not raise new claims. *Id.* at 843-44.

Montana and the Coalition have satisfied factors one and two. Independent jurisdictional grounds are not required in this federal-question case where Montana and the Coalition do not raise new claims. Montana and the Coalition timely filed their motions to intervene before the parties briefed any dispositive motions.

Montana and the Coalition also have shown that their defenses share a question of law or fact in common with the main action. Plaintiffs' complaint focuses on the Corps' use of NWP 12 in its approvals of the Keystone XL Pipeline. (Doc. 36 at 87-88.) Montana asserts a significant interest in the litigation through promoting economic development and ensuring that NWP 12 remains a streamlined regulatory process. (Doc. 43 at 13-14.) The Coalition asserts similarly a significant interest in defending NWP 12's legality. (Doc. 49 at 36.)

The Court must consider finally "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" in exercising its discretion to allow permissive intervention. Fed. R. Civ. P. 24(b)(3). Permissive intervention appears appropriate in this case. The Court remains concerned, however, that unlimited intervention could result in undue delay and prejudice. Four separate motions could materialize from the Defendant's side in this proceeding if the Court failed to place limitations on Montana and the Coalition.

The Court will allow Montana and the Coalition to intervene permissively in this action. The Court concludes, however, that it must place limitations on

Montana's and the Coalition's intervention to avoid prejudice to the original parties. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987). The Court limits Montana and the Coalition to filing briefs in support of Federal Defendants' and TC Energy's motions. The Court will not permit Montana and the Coalition to file their own motions.

Montana's and the Coalition's limited intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Montana's and the Coalition's participation in the action will not unduly delay the proceeding because they are not entitled to file their own motions. Montana and the Coalition are simply permitted to file briefing in support of Federal Defendants' and TC Energy's motions. That limited involvement will not prejudice the adjudication of the original parties' rights.

ORDER

Accordingly, **IT IS ORDERED** that the Court's Order granting Montana's motion to intervene (Doc. 44) shall remain in full force and effect, subject to the limitations stated herein.

It is further **ORDERED** that the Coalition's motion to intervene (Doc. 48) is **GRANTED**, subject to the limitations stated herein.

It is also ORDERED that the Coalition must file its Answer, (Doc. 48-2) and motions for pro hac vice (Docs. 48-3 and 48-6) with the Court.

DATED this 7th day of November, 2019.

Brian Morris
United States District Court Judge

No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

U.S. ARMY CORPS OF ENGINEERS AND LIEUTENANT GENERAL TODD T. SEMONITE, CHIEF OF ENGINEERS, APPLICANTS

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

DECLARATION OF JENNIFER MOYER
IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT AND PENDING
FURTHER PROCEEDINGS IN THIS COURT

I, Jennifer Moyer, hereby declare and state as follows:

1. I am currently employed as the Chief of the Regulatory Program at the U.S. Army Corps of Engineers (Corps), Headquarters, Directorate of Civil Works, Operations and Regulatory Division in Washington, D.C. I have been employed by the Corps since 1994, and have served in this capacity since 2014. In this capacity, I am responsible for providing leadership, direction and oversight for the Corps Regulatory Program including developing rules, guidance, and initiatives to enhance effective program implementation, taking necessary and appropriate actions to

promote consistency, and providing authoritative advice on interpretation of regulations to Corps and Department of the Army senior leadership and regulatory staff across the country.

2. After a three-year review process beginning in March 2014, the Corps issued the final rule that reissued 50 existing Nationwide Permits (NWP), their general conditions, and definitions in the Federal Register on January 6, 2017. 82 Fed. Reg. 1,860. That final rule reissued NWP 12 for utility line activities in waters of the United States. Covered utility line activities could include construction, maintenance, or repair of water intake structures for drinking water, aerial transmission lines for electric power, telephone and telegraph lines and cables, the infrastructure for internet, radio, and television communications such as optic cables, utility substations, utility line access roads, and oil and natural gas pipelines.

3. On December 21, 2016, the Corps issued a Decision Document for the NWP 12 that would become effective March 19, 2017. In that Decision Document, the Corps estimated that NWP 12 would be used approximately 14,000 times per year on a national basis, resulting in impacts to approximately 1,750 acres of waters of the United States, including jurisdictional wetlands. NWP005331. Of those 14,000 uses, approximately 11,500 are reported to the Corps as part of written requests for NWP 12 verifications. Id. Approximately 2,500 of non-reporting NWP 12 activities are authorized per year without additional notification to the Corps,

because those activities fall below the reporting requirements in NWP 12. Id.

4. Since NWP 12 went into effect on March 19, 2017 and up until the April 15, 2020 Order from the district court in this case, the Corps had verified more than 38,000 NWP 12 pre-construction notifications.

5. As of April 26, 2020, Corps Districts had approximately 5,500 pending NWP 12 pre-construction notifications awaiting a written verification determination. Of those 5,500 pending NWP 12 pre-construction notifications, we estimate that approximately 3,200 are related to construction of oil and gas pipelines. This estimate is based on our review of a sample that is broadly representative of NWP 12 verifications issued during the first two years that the 2017 NWPs were in effect. That sample showed that approximately 58% were related to oil and gas pipeline activities. Based on the estimates in the Decision Document for the 2017 NWP 12, the Corps estimates that the 2017 NWP 12 would be used 28,000 times for any utility line activity from the date of the district court order until NWP 12 expires on March 18, 2022. Applying the percentage of oil and gas pipelines from the sample of NWP 12 verifications issued during the first two years the 2017 NWPs were in effect, we estimate that NWP 12 would be used approximately 16,240 more times to authorize activities related to the construction of oil or gas pipelines from the date of the district court order until NWP 12 expired on March 18, 2022. The Corps

collects NWP 12 use data commensurate with its Clean Water Act and Rivers and Harbors Act of 1899 authority. The Corps collects data on the number of NWP 12 pre-construction notifications and verifications, as well as the acreage of impacts to waters of the United States, regardless of the commodity that is eventually transported by the permittee during its operations.

6. Based on all NWP 12 verifications since the 2017 NWP 12 went into effect, utility line activities averaged six pre-construction notifications per unique Department of Army permit number (i.e. project). Therefore, we estimate that approximately 2,700 oil and gas pipeline projects will be affected by the court order.

7. As the Corps reads the district court's order, as amended on May 11, 2020, NWP 12 is vacated for any activity that relates to the construction of new oil and gas pipelines, unless the activity is considered routine maintenance, inspection, and repair activities on existing oil or gas pipelines. The Corps reads the court's order to apply to any activity that relates to new oil and gas pipeline construction regardless of the diameter or purpose of the pipeline (e.g., a 4 inch pipeline delivering natural gas to a new commercial or residential subdivision). The order could also apply to activities where a new pipeline segment is needed to relocate only a portion of an existing pipeline because that pipeline portion is in the way of construction of other projects. For example, a state Department of Transportation may need to

expand a highway,but in order to implement the highway construction a portion of an operational 4-inch natural gas pipeline must be relocated to accommodate the expansion. Without NWP 12 as a permitting mechanism for the activities related to the pipeline relocation, the highway expansion project is likely to experience delays.

8. As the Corps reads the court's amended order, activities related to the construction of new oil and gas pipelines that otherwise could proceed under NWP 12 (some without advance notice to the Corps), will now likely only be able to proceed after receiving Clean Water Act and/or Rivers and Harbors Act of 1899 authorization through the time and labor intensive individual permit process. Individual permits require a resource-intensive, case-by-case review, including extensive, site-specific documentation, public comment, and a formal determination on the permit application.

9. Requiring routine utility line project activities related to the construction of new oil and gas pipelines with minimal impacts to obtain individual permits will be a major change in how the oil and gas industries operate. General permits for utility line activities have been approved in nearly the same form under NWP since 1977. 47 Fed. Reg. 31,833; 65 Fed. Reg. 12,887. For routine utility projects that require Clean Water Act or Rivers and Harbors Act of 1899 authorization, the oil and gas industry has relied on receiving permits with little delay or paperwork

because the regulated activities associated with their projects have been intentionally designed to have minimal effect on the aquatic environment.

10. Given the longstanding availability of NWP 12 for utility line activities related to the construction of new oil and gas pipelines, the industry factors in the faster processing times associated with NWP 12 into their project planning and timelines for their infrastructure projects.

11. In my experience, the oil and gas industry also factors in construction windows in project planning. Construction windows, or times when construction is possible versus times when it is prohibited, can result from naturally occurring conditions, such as frozen ground, or from statutory compliance requirements. Although consideration of these construction windows is not a factor in the issuance of NWP 12 or verifications of NWP 12, identification of windows when work in jurisdictional waters is not permissible due to the presence of listed species or the need to protect designated critical habitat are frequently added as either regional conditions or as special conditions on NWP 12 verifications. This is done by Corps Districts after consulting with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service to further protect listed species and/or designated critical habitat under Section 7 of the Endangered Species Act. Construction windows included as conditions in

individual permits may further compound the disruption experienced by the oil and gas industry.

12. One of the core economic benefits of NWP 12 is that it is less costly to obtain an NWP verification than a standard individual permit. Based on the Regulatory Impact Analysis for the 2017 NWPs, the Corps estimates a project proponent's average cost of obtaining an NWP verification is approximately $9,000, whereas the average cost of obtaining a standard individual permit is approximately $26,000. NWP001941. A 2002 article in the Natural Resources Journal found that once project costs were appropriately controlled for size, complexity, and other factors, permit preparation costs would double when switching from NWP to an individual permit. See David Sunding & David Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 NATURAL RESOURCES J. 59, 75 (2002).

13. An NWP verification can also be obtained in less time than obtaining a standard individual permit. In 2018, the average time to receive an NWP verification from the Corps was 45 days, while the average time to receive a standard individual permit from the Corps was 264 days. As a result of the court's amended order, we expect the average time to process a standard individual permit will increase because of the sudden increase in individual permit applications that have been diverted from NWP 12.

15. On average, the Corps receives 3,000 individual permit applications annually. Requiring individual permit review for routine utility line activities with minimal impacts that are only related to construction of new oil and gas pipelines will reduce the Corps' ability to devote appropriate resources to evaluating activities that have greater adverse environmental effects. The Corps assigns its resources based on its decades-long experience in using the NWP program. Inability to use that program, without additional budgetary resources and/or workforce augmentations (both of which may require new appropriations) will affect the Corps' ability to process permit applications for utility-line work related to new oil and gas pipelines, or any other project that is now incidentally effected by the shift in administrative processing. Currently, there are approximately 1,250 regulatory project managers across the nation assigned to, and familiar with, processing NWP 12 verifications. On average, the workload for Corps project managers embraces the need for each to carry a portfolio of around 60 permit applications and permit-related actions, covering all activities regulated by the Department of the Army. This workload includes the review of other NWPs and individual permits. As a result of the court's amended order, the Corps expects that activities related to the construction of new oil and gas pipelines will experience a significant delay in obtaining approval as compared to the NWP 12 verification timeline.

16. As a result of the court's amended order, I estimate the Corps will have to process around 1,624 additional individual permits per year to cover what would have been 16,240 uses of NWP 12 for activities related to the construction of new oil and gas pipelines that could have been authorized by NWP 12. Note that some of the activities described in the estimated 16,240 NWPs would be part of the same individual permit review. Assuming the number of Corps employees remains constant, we estimate that it will take the current Corps Regulatory Program workforce eleven months to process all of these additional actions if they focused on only new oil and gas pipeline permit applications and nothing else.

17. Impacts to government entities related to processing routine activities related to new oil and gas pipelines are not limited to the Corps. Federal, Tribal, and state resource agencies will be required to review and potentially comment on the large number of public notices for these activities. State agencies and tribal offices assigned responsibility to evaluate and provide decisions on Clean Water Act section 401 water quality certification requests will also experience a surge in workload associated with the increased number of individual permits. In coastal states, state coastal zone management programs will receive a surge in workload to process requests for Coastal Zone Management Act consistency concurrences for standard individual permits authorizing utility lines for oil and gas pipelines in coastal zones. In making these statements about increased workload

on other government entities, I am relying on personal experience interacting with those other government entities.

18. As we observed in the NWP 12 Decision Document, the activities related to the construction of new oil and gas pipelines authorized by NWP 12, have positive impacts to local and regional economies and to the national economy. NWP005317. During construction, these activities support jobs and generate revenue for employers. Also, these benefits likely extend to businesses that not only provide supplies to the projects and services to these employees, but to businesses and households that consume oil and gas products to perform their basic daily functions. Id.

19. The court order vacating NWP 12 for activities related to new oil and gas pipelines may also impose risks upon the public and environment by diverting oil and gas that could otherwise be transported via pipeline to other means of transportation such as rail or truck. In an October 2018 report published by the Pipeline and Hazardous Materials Safety Administration (PHMSA) in the U.S. Department of Transportation, the agency evaluated "the comparative safety of shipping crude oil by truck, rail, and pipeline." PHMSA, The Comparative Safety of Shipping Crude Oil By Truck, Rail, and Pipeline, 2018 (PHMSA Report). The PHMSA report notes that each mode has its own unique safety risks but nonetheless draws analytical conclusions regarding the relative safety of each transportation method, and on each relevant metric pipeline transport was significantly safer than transport by rail

or truck. In addition, a National Bureau of Economic Research working paper found that "air pollution and greenhouse gas costs are nearly twice as large for rail as for pipelines." Karen Clay et al., The External Costs of Transporting Petroleum Products by Pipelines and Rail: Evidence from Shipments of Crude Oil from North Dakota (Nat'l Bureau of Econ. Research, Working Paper No. 23852, Sept. 2017). The abstract concludes that "the policy debate surrounding crude oil transportation has put too much relative weight on accidents and spills, while overlooking a far more serious source of external cost: air pollution and greenhouse gas emissions." Id.

I declare under penalty of perjury that to the best of my current knowledge the foregoing is true and correct. Executed on June ___, 2020, at Baltimore County, Maryland

MOYER.JENNIFER.A.1228480874 Digitally signed by MOYER.JENNIFER.A.1228480874 Date: 2020.06.11 12:44:10 -04'00'

Jennifer Moyer
Chief, Regulatory Program
U.S. Army Corps of Engineers
Directorate of Civil Works