No. 19A-1053

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.
Respondents.

On Application for a Stay Pending Appeal to the
United States Court of Appeals for the Ninth Circuit
and Pending Further Proceedings in This Court

BRIEF OF RESPONDENTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE LP IN SUPPORT OF APPLICATION FOR A STAY OF ORDERS ISSUED BY THE U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA PENDING APPEAL TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents TC Energy Corporation and TransCanada Keystone Pipeline LP state the following:

TC Energy Corporation is a Canadian public company organized under the laws of Canada. No publicly held corporation owns 10 percent or more of TC Energy Corporation's stock.

TransCanada Keystone Pipeline, LP is a Delaware limited partnership wholly owned by TransCanada Keystone Pipeline, LLC and TransCanada Keystone Pipeline GP, LLC, which are indirectly wholly owned by TC Energy Corporation.

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INTRODUCTION

Respondents TC Energy Corporation and TransCanada Keystone Pipeline LP ("TC Energy") file this brief as respondents in support of the government's application for a stay of orders that the U.S. District Court for the District of Montana issued on April 15 and May 11, 2020, pending consideration and disposition of the appeal of those orders by the government, TC Energy, and others to the United States Court of Appeals for the Ninth Circuit and, if necessary, pending the filing and disposition of petitions for a writ of certiorari and further proceedings in this Court. TC Energy sought stays of the April 15th and May 11th Orders in both of the courts below. It submits this brief to amplify and supplement the arguments the government has raised in this Court in support of a stay.

As the government explains, the nationwide injunction that the district court entered based on its finding of a procedural violation of the Endangered Species Act (ESA) is plainly improper and, if affirmed, would merit review by this Court. The lower court ruled that the U.S. Army Corps of Engineers (Corps) violated the ESA when it reissued a general permit—known as nationwide permit 12 (NWP 12)—that authorizes the discharge of dredge or fill materials into the waters of the United States for the construction, maintenance, repair, and removal of utility lines. NWP 12 expressly provides that, if any ESA-protected species or critical habitat "*might* be affected or is in the *vicinity* of" an activity authorized under the permit, a utility cannot begin work until the Corps determines that the proposed activity "will have 'no effect' on listed species or critical habitat," or until a consultation process required by ESA "has been completed." Issuance and Reissuance of Nationwide Permits, 82

Fed. Reg. 1860, 1999-2000 (Jan. 6, 2017). The district court ruled, however, that such project-specific review of the impact of dredge and fill activities is insufficient to prevent harm to protected species and critical habitat. Instead, it held that the Corps should have engaged in formal "programmatic consultation" with the U.S. Fish and Wildlife Services (FWS) and the National Marine Fisheries Service (NMFS) before it reissued NWP 12. Based on that ruling, the district court enjoined use of NWP 12 for the construction of new oil or gas pipelines anywhere in the nation.

As the government explains, such a nationwide injunction is inconsistent with constitutional and equitable principles that govern the relief that federal courts can grant. But the flaws in the lower court's injunction do not end there. Indeed, the decision below raises enormously consequential questions about the proper scope of relief if a general permit issued under the Clean Water Act (CWA) is found to have been issued in violation of the ESA's procedural requirements.

Although the ESA mandates issuance of an injunction when a federal action threatens the continued existence of listed species or critical habitat, *TVA* v. *Hill*, 437 U.S. 153, 173-74 (1978), the district court found only a procedural violation. Plaintiffs made no showing that this asserted violation would, in fact, jeopardize the continued existence of any protected species or critical habitat. And, no such showing could have been made as to the Keystone XL Pipeline: the impacts of the Project have been fully evaluated in connection with other federal permissions TC Energy has sought, and the FWS determined that Keystone XL is *not* likely to jeopardize the continued existence of any species or adversely affect critical habitat.

Nevertheless, in granting its nationwide injunction, the district court focused on the "potentially widespread harms" of the Corps' asserted procedural violation. App. 11a. The court thus treated the very nature of NWP 12 (*i.e.*, the fact that it is used thousands of times each year across the nation) as a justification for broad injunctive relief. But neither the nature of general permits nor the standards for vacatur under the Administrative Procedure Act (APA) alter the requirement that injunctions should issue only upon a showing of irreparable harm.

In fact, because general permits govern so many dredge and fill activities each year, an injunction that bars use of a general permit due to a purported procedural violation of the ESA has enormous economic consequences. Indeed, here the district court initially enjoined all uses of NWP 12, but the resulting economic disruptions were so sweeping that even the plaintiffs urged the court to limit the injunction to new oil and gas pipelines. This amendment, however, only compounded the court's error. The district court could not identify any meaningful difference between the impacts of dredge and fill activities for oil and gas pipelines and the impacts of such activities for other utilities, such as water sewers or power lines. Thus, the court could make its nationwide injunction less draconian only by making it arbitrary: it inflicts enormous expense and delay on TC Energy and other pipelines—with significant secondary harms to workers, local economies, and local tax revenues—while allowing *thousands* of comparable uses to continue.

Finally, while enormously harmful to TC Energy and others, the nationwide injunction provides no meaningful additional protection to listed species and critical

habitat during the remand that the district court ordered. Without NWP 12, oil and gas pipelines must apply for individual permits under the CWA. The individual permitting process is slower and more expensive than use of a nationwide permit, but the individual permitting process uses *the same project-specific ESA review that occurs under NWP 12* to ensure that activity authorized by the Corps is not likely to threaten the existence of protected species or adversely affect critical habitat. Thus, the district court's nationwide injunction irrationally inflicts delays and economic harms on one subset of utilities without providing any meaningful additional benefit to protected species.

This anomaly demonstrates that the district court fundamentally erred in ruling that the ESA requires programmatic review of general permits issued under the CWA. Project-specific review was the only form of ESA review under the CWA from 1973 (when ESA was enacted) until 1977 (when the Corps was first authorized to issue general permits). And it remains the only form of ESA review when utilities and others apply for individual permits. Such review does not become legally insufficient when used as part of a general permit. And because the Corps relies on project-specific review in over 50 general permits, the district court's contrary ruling would, if affirmed, threaten those permits as well, making review by this Court even more critical.

STATEMENT

I. Statutory and Regulatory Background

A. The CWA, ESA, and Nationwide Permit 12

The CWA requires parties seeking to engage in activities that will discharge dredged or fill material into "navigable waters" to obtain approval from the Corps. See 33 U.S.C. § 1344(f)(2). A party may apply for an individual permit under Section 404(a), *id.* § 1344(a), which is granted on a case-by-case basis. In some situations, however, the party may proceed under a general permit issued for a "category of activities … [that] are similar in nature [and] will cause only minimal adverse environmental effects." *Id.* § 1344(e)(1). General permits "allow parties to proceed with much less red tape" than is involved with individual permits. *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, 663 F.3d 470, 472 (D.C. Cir. 2011). General permits are valid only for five years and must thereafter be reissued. 33 U.S.C. § 1344(e)(2).

Nationwide permits are a type of general permit. As the government explains, App. at 6-8, they are issued after notice and public comment, and are subject to multiple conditions and restrictions to ensure that the individual and cumulative impacts of the activities authorized on a nationwide basis will be no more than "minimal," as the statute requires. 33 U.S.C. § 1344(e)(1).

NWP 12 is one such permit, first issued in 1977 and reissued multiple times since. It "authorizes discharges of dredged or fill material" in navigable waters associated with the construction, maintenance, or repair of utility lines. 82 Fed. Reg. at 1985. This authorization is subject to numerous conditions. Among other things,

the activity must "not result in the loss of greater than 1/2 acre of waters" for each "single and complete project." *Id.* A utility also must obtain a water quality certification from the relevant state. *Id.* at 2002. And the utility must comply with applicable regional conditions. *Id.*

In addition, NWP 12 includes General Condition 18—a condition that appears in over 50 other nationwide permits—to ensure compliance with the ESA. Section 7(a)(2) of the ESA requires federal agencies to ensure, "in consultation with and with the assistance of" FWS or NMFS, that actions they authorize are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). Consultation is required when an agency determines that a proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If an agency requests formal consultation, FWS or NMFS typically issues a Biological Opinion ("BiOp") regarding the effect of the proposed action on the species or its habitat. See 16 U.S.C. § 1536(b)(3)(A).

In accordance with these requirements, General Condition 18 states that "[n]o activity is authorized" under NWP 12 that is "likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species," or "which will directly or indirectly destroy or adversely modify the critical habitat of such species." 82 Fed. Reg at 1999. It further provides that "[n]o activity is authorized" that "'may affect' a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed." *Id.*

A utility must therefore submit a pre-construction notification (PCN) to the Corps "if any listed species or designated critical habitat *might* be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." *Id.* (emphasis added). Among other things, the PCN must identify all jurisdictional waters the project will cross, regardless of whether those other crossings require a PCN. *Id.* at 1890. The Corps must then "determine whether the proposed activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation." *Id.* at 1954. If the Corps makes a "may affect" determination, section 7 consultation must be completed "before the activity is authorized." U.S. Army Corps of Eng'rs, *Decision Document Nationwide Permit 12*, at 65 (Dec. 21, 2016), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6725 [hereinafter *Decision Document*]. After consulting with FWS or NMFS, the Corps may add project-specific conditions to reduce the risk to listed species or critical habitat. *Id.*; see also 82 Fed. Reg. at 2000. The utility "shall not begin work on the activity until notified by the [Corps] that the requirements of the ESA have been satisfied and that the activity is authorized." 82 Fed. Reg. at 1999.

General Condition 18 specifically states that NWP 12 "does not authorize the 'take' of a threatened or endangered species." *Id.* at 2000. To legally take a listed species, therefore, a utility must obtain "separate authorization" from FWS or NMFS in the form of permit under section 10 of the ESA or "a Biological Opinion with 'incidental take' provisions" acquired following section 7 consultation between FWS or NMFS and the Corps. *Id.* Thus, utilities submit PCNs to ensure that any

consultation required by section 7 of the ESA is performed, and any conditions needed to protect listed species are added to the Corps' verification of their use of NWP 12. If a utility fails to do so, "then the activity is not authorized" by NWP 12. *Id.* at 1955.

When it reissued NWP 12 in 2017, the Corps offered to engage in voluntary consultation with FWS and NMFS, but did not initiate the Section 7 consultation process because it determined that reissuance of NWP 12 would have "no effect" on "listed species or critical habitat." *Decision Document* at 63-64. The Corps explained that a utility's obligation to submit a PCN if a project might affect listed species or is in the vicinity of critical habitat, and the procedures for evaluating PCNs and consulting with FWS or NMFS when projects may affect listed species or critical habitat, ensure "compliance with Section 7" of the ESA, and protect threatened or endangered species and their critical habitat. See *id.* at 63.

II. Keystone XL Pipeline

The Keystone XL Pipeline is an international pipeline that will cross the U.S. border in Montana and terminate in Nebraska. Only 19.7 miles, roughly 2.2% of the Project, will traverse U.S. waters. The environmental impacts of Keystone XL were analyzed in 2011, 2014, and 2019.[1] The Corps and other federal agencies have also engaged in extensive consultations with FWS about Keystone XL. As a result, both a Biological Assessment ("BA") and a BiOp were prepared for the Project.

[1] *See* U.S. Dep't of State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project* (Dec. 2019) (2019 Final SEIS), https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=286595.

The BA evaluated various endangered and threatened species that may be affected by Keystone XL, BA at 26-170 (Doc.[2] 144-14, at 97-241), and found that only the American burying beetle "is likely to [be] adversely affect[ed]" by Keystone XL. *Id.* at 123 (Doc. 144-14, at 194) (emphasis omitted). FWS concurred with the BA's assessment that other protected species were not likely to be adversely affected and issued the BiOp for the American burying beetle, concluding that Keystone XL "is not likely to jeopardize [its] continued existence." BiOp at 37 (Doc. 144-14, at 301).

III. Proceedings Below

Plaintiffs brought facial and as-applied challenges to reissuance of NWP 12 under the ESA, the CWA, and the National Environmental Policy Act ("NEPA"). Doc. 36. With respect to their ESA claim, plaintiffs alleged that the Corps should have engaged in programmatic consultation with the Services before it reissued NWP 12 in 2017. Plaintiffs also challenged the Corps' 2017 PCN verifications for Keystone XL under NWP 12. *Id.* The court stayed plaintiffs' as-applied challenges as unripe.[3]

On April 15, 2020, the district court granted summary judgment to plaintiffs on their ESA facial challenge. It held that the Corps' "'no effect' determination and

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[2] All "Doc." citations refer to documents filed in *Northern Plains Resource Council* v. *U.S. Army Corps of Engineers*, No. 4:19-cv-00044-BMM (D. Mont. filed July 1, 2019).

[3] TC Energy had withdrawn the 2017 PCNs and the Corps rescinded its verifications after the court concluded, in earlier litigation involving some of the same plaintiffs, that there were deficiencies in an earlier BiOp issued by FWS and in the NEPA analysis done in connection with TC Energy's application for a Presidential Permit for Keystone XL to cross the U.S./Canada border. *See* Doc. 53, at 1-2. After those counts were stayed, a new NEPA analysis, new BA, and new BiOp were prepared, and TC Energy submitted new PCNs, but the Corps has not acted on them and cannot do so now in light of the ruling below.

resulting decision to forego programmatic consultation proves arbitrary and capricious," and the "Corps should have initiated ESA Section 7(a)(2) consultation before it reissued NWP 12." App. 63a. Citing statements that the Corps made when it reissued NWP 12 in 2017, as well as declarations submitted by plaintiffs, the district court concluded that there was "resounding evidence" that reissuance of NWP 12 "may affect" listed species and their habitat. *Id.* at 58a.

The court rejected the Corps' conclusion that project-specific review under General Condition 18 ensured that use of NWP 12 would not affect listed species and their habitat. The court reasoned that "[p]rogrammatic review" is needed "to avoid piecemeal destruction of species and habitat" because (in the court's view) "[p]roject-level review, by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat." *Id.* at 60a. Instead, "the *only* way to avoid piecemeal destruction of listed species and habitat" is through "[p]rogrammatic review of NWP 12 in its entirety." *Id.* (emphasis added). The court therefore "remand[ed] NWP 12 to the Corps for compliance with the ESA[,] vacate[d] NPW 12 pending completion of the consultation process," and "further enjoin[ed] the Corps from authorizing any dredge or fill activities under NWP 12." *Id.* at 63a.

The government and TC Energy sought a stay of the portions of the Order vacating NWP 12 and enjoining the Corps from authorizing any activity under it. The State of Montana and the NWP 12 Coalition, both intervenors below, also supported those motions. On May 11, the court denied the stay motions, but issued an amended Order. It vacated NWP 12 "as it relates to the construction of new oil and gas pipelines

pending completion of the consultation process," but left NWP 12 in place "insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities existing NWP 12 projects." App. 42a. It also enjoined the Corps from authorizing "activities for the construction of new oil and gas pipelines under NWP 12." *Id.*

The government, TC Energy, and the NWP 12 Coalition filed notices of appeal and moved for stays in the Ninth Circuit. Numerous states and industry groups filed amicus briefs in support of a stay, detailing the sweeping and untoward economic consequences of the lower court's nationwide injunction. After the appeals were consolidated, two judges denied the stay applications in a brief order. App. 3a.

ARGUMENT

Under Rule 23 of this Court and the All Writs Act, 28 U.S.C. § 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals. See, *e.g.*, *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017) (per curiam); *West Virginia* v. *EPA*, 136 S. Ct. 1000, 1000 (2016). "In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice" considers three questions: first, the Justice must "try to predict whether four Justices would vote to grant certiorari" if the court below ultimately rules against the applicant; second, the Justice must "try to predict whether the Court would then set the order aside"; and third, the Justice must "balance the so-called stay equities," *San Diegans for the Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (quoting *INS* v. *Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in

chambers)), by determining "whether the injury asserted by the applicant outweighs the harm to other parties or to the public," *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); see *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987) (stay factors). These factors counsel strongly in favor of a stay here.

I. The Grant Of A Nationwide Injunction To Remedy An Asserted Procedural Violation Of The Endangered Species Act Is Erroneous And, If Affirmed, Warrants Review And Reversal By This Court.

As the government explains, the district court's grant of a nationwide injunction is inconsistent with constitutional and equitable principles that govern the relief that federal courts can award. As TC Energy explains below, the district court's grant of a nationwide injunction in order to remedy an asserted procedural violation of the ESA also offends related equitable principles that have previously prompted this Court to review injunctions entered under the ESA and other environmental laws—and that should lead it do so again here if the district court's injunction is affirmed on appeal.

Since *TVA* v. *Hill*, 437 U.S. 153, where the Court held that the ESA stripped courts of discretion when endangered species were demonstrably threatened with eradication, the Court has intervened on a number of occasions to correct lower court overreactions in the opposite direction. Thus, the Court has instructed that an injunction does not issue as a matter of course when a violation of an environmental permitting law is established, *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311-12 (1982), that plaintiffs suing under environmental statutes must still demonstrate irreparable harm (not a mere possibility of such harm) to obtain an injunction, *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), and that courts must still balance

the relative harms of injunctive relief in such cases, *id.* at 32. The Court's intervention would likewise be warranted here if the lower court's injunction is upheld on appeal. The interplay of the ESA and the Corps' general permitting scheme under the CWA led the lower court to issue a nationwide injunction that is not justified by any need to forestall irreparable harms; that irrationally inflicts enormous economic harms on a subset of utilities that rely on the Corps' general permit; and that affords no additional protection to protected species or critical habitat during the remand that the lower court ordered.

A. The Lower Court's Nationwide Injunction Is Not Necessary To Prevent Any Irreparable Injuries.

An injunction "is not a remedy which issues as of course." *Weinberger*, 456 U.S. at 311 (quoting *City of Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933). It should issue only when necessary to protect the plaintiff from injuries that are "otherwise irremediable," *id.* at 312 (quoting *Cavanaugh* v. *Looney*, 248 U.S. 453, 456 (1919)), and even then, the court should consider any "competing claims of injury" and "should pay particular regard for the public consequences" of the injunction, *id.* The grant of jurisdiction to ensure compliance with a statute "hardly suggests an absolute duty to do so under any and all circumstances." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). The same principles apply to the equitable remedy of vacatur. Although the APA authorizes a court to "hold unlawful and set aside agency action" found to be "not in accordance with law," 5 U.S.C. § 706(2)(a), it does not affect the "power or duty of the court" to deny relief on any "appropriate legal or equitable ground," *id.* § 702.

The district court plainly violated these principles in vacating NWP 12 and enjoining its use for the construction of oil and gas pipelines. The court made no finding that use of NWP 12 by oil and gas pipelines is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species," 16 U.S.C. § 1536(a)(2), which is the substantive harm the ESA prohibits. See *TVA* v. *Hill,* 437 U.S. at 173-74 (operation of a federal dam must be enjoined when "it is clear" that "operation of the dam" will cause "the *eradication* of an endangered species"). Instead, the lower court relied on declarations discussing the harms that plaintiffs "*may* suffer from NWP 12's unlawful use," and found only that allowing "the Corps to continue to authorize new oil and gas pipeline construction *could* seriously injure protected species and critical habitats." App. 19a (emphases added). Such a "possibility of irreparable harm" is not enough. *Winter*, 555 U.S. at 22.

The court's erroneous ruling was influenced by the very nature of a general permit under the CWA, and for this reason constitutes much more than a run-of-the-mill misapplication of established equitable principles. Plaintiffs emphasized below that, over the course of its five-year re-authorization, NWP 12 would be used over 11,000 times a year. Doc. 144, at 6. They submitted declarations stating that NWP 12 "may affect" protected species or critical habitat because, for example, an "inadvertent return of drilling fluid" during pipeline construction "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." App. 57a. The sheer

scope of activities authorized under NWP 12 and the possibility that some of those activities could adversely harm protected species led the court to view irreparable harm as essentially inevitable if (as it believed) the Corps had not adequately reviewed the impacts of those activities on a programmatic basis. See *id.* at 11a (injunctive relief "furthers the core purposes of the ESA and reflects the potentially widespread harms caused by the Corps' violation").

But in effectively treating the widespread use of a nationwide permit as a factor in favor of injunctive relief, the lower court misunderstood the relevant inquiry. General Condition 18 *assumes* that some proposed activities under NWP 12 "may affect" protected species and habitat, and it requires consultation with the Services to address and prevent such impacts before a utility can use NWP 12 to discharge dredge and fill material. To obtain injunctive relief, therefore, plaintiffs had to establish that, due to some inadequacy in the project-specific review that NWP 12 employs, the use of such review is likely to jeopardize the existence of protected species or destroy or adversely modify critical habitat. They failed to do so.

Instead, plaintiffs submitted declarations from members who expressed their "*understanding* that the Corps reauthorized NWP 12 without conducting programmatic consultation … to ensure that projects that use NWP 12 … will not jeopardize the continued existence of listed species."[4] These declarations simply assume that project-specific review is inadequate, and that the Corps should have

[4] Doc. 73-4, ¶ 16 (emphasis added); *see also* Doc. 73-1, ¶ 11; Doc. 73-12, ¶ 12; Doc. 73-3, ¶ 15; Doc. 73-5, ¶ 17; Doc. 144-4, ¶ 9; Doc. 144-7, ¶ 15.

performed a programmatic review instead. Such assumptions cannot provide the basis for injunctive relief. *Amoco Prod. Co.* v. *Vill. of Gambell*, 480 U.S. 531, 544-45 (1987) (presuming harm is "contrary to traditional equitable principles"). The district court thus had no basis for claiming that "[p]rogrammatic review of NWP 12 in its entirety … provides the only way to avoid piecemeal destruction of species and habitat," and that, because such review has not occurred, "irreparable injury is likely' if developers continue to build new, large-scale oil and gas pipeline projects." App. 26a-27a.

In fact, any claim that project-specific ESA review will lead to the "piecemeal destruction of species and habitat," App. 26a, is contradicted by the district court's assertions that "[d]evelopers remain able to pursue individual permits for their new oil and gas pipeline construction," *id.* at 33a. As TC Energy explains in detail below, individual permitting under the CWA relies on the same project-specific ESA review that is conducted under NWP 12. The lower court nowhere explained why such review is acceptable when done in connection with an application for an individual CWA permit yet can somehow cause irreparable harm when done in connection with a PCN under NWP 12.

The district court's rejection of project-specific review is also inconsistent with the opinion expressed by NMFS in a 2014 BiOp issued after consultation with the Corps concerning the nationwide permits issued in 2012. NMFS there expressed the view that the Corps had made improvements to the nationwide permit program that "will place the Corps in a position to prevent adverse effects to endangered or

threatened species under NMFS's jurisdiction or critical habitat that has been designated for such species." Motion of Appellants TC Energy for Stay Pending Appeal, app. 6, at 329-30, *N. Plains Res. Council* v. *U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir. May 14, 2020), ECF No. 5.

B. The Lower Court's Nationwide Injunction Rests On An Irrational Distinction Between Oil And Gas Pipelines And Other Utilities That Use NWP 12.

The court compounded the foregoing errors by enjoining use of NWP 12 by new oil and gas pipelines while allowing comparable dredge and fill activities by other utilities under this permit. This distinction is groundless, and arbitrarily inflicts enormous harms on a subset of utilities while affording no additional protection against harms to species listed under the ESA or to critical habitat.

The court had no rational basis for singling out new oil and gas pipelines and declaring their use of NWP 12 uniquely injurious to protected species or critical habitat. By statute, general permits can only be issued for activities that "are similar in nature." 33 U.S.C. § 1344(e)(1). That requirement doomed the lower court's efforts to identify meaningful differences between dredge and fill activities for oil and gas pipelines and dredge and fill activities for other utilities.

The court cited the potential harm to listed species from "increased sedimentation, and from horizontal directional drilling used during pipeline construction." App. 19a. But this same drilling method is used to construct other buried utility projects like water pipelines and broadband and fiber optic cables. See 82 Fed. Reg. at 1883, 1887. The court speculated that the impacts would be

"particularly severe" for oil and gas pipelines, which cross "dozens, or even hundreds, of waterways." App. 19a-20a. But that, too, is unfounded: Many other utility projects cross numerous waterways. See Doc. 147, at 10 ("300 mile electric transmission line"); *id.* at 11 ("wastewater collection system, which includes over 200 miles of interceptor pipes and many miles of collector pipes"). The court also noted that oil and gas pipelines "often require a network of access roads, pump stations, pipe yards, contractor yards, and extra workspace." App. 20a. But other utility projects require access roads and similar ancillary facilities. See 82 Fed. Reg. at 1985-86 (NWP 12 "authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations"); Doc. 147 at 1-2, 12 (substations for electric utilities).[5]

Thus, the court's injunction allows thousands of dredge and fill activities by some utilities to continue, while it prohibits comparable uses of NWP 12 by oil and gas pipelines. It thereby arbitrarily subjects the latter utilities to significant delays and enormous costs, contrary to the will of Congress, which established the nationwide permit program so development projects can be authorized with less delay and expense if they satisfy stringent criteria imposed by the Corps to protect the aquatic environment. See 33 U.S.C. § 1344(e); 82 Fed. Reg. at 1868. The government

[5] Plaintiffs emphasized below that oil pipelines can leak. Plaintiffs' Opposition to Federal Appellants' and Intervenor Appellants' Motions for Stay Pending Appeal at 16 n.4, *N. Plains Res. Council* v. *U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir. May 20, 2020), ECF No. 45-1 ("Opp."). But the district court did not rely on this fact, and for good reason—oil spills are not cognizable "effects" or "cumulative effects" of a use of NWP 12 because oil spills are not "reasonably certain to occur." 50 C.F.R. § 402.02; *see also* BiOp at 31 (Doc. 144-14, at 295).

reports that average time to obtain an NWP verification in 2018 was 45 days, while the average time to receive a standard individual permit was 264 days. Doc. 131-1, ¶ 13. TC Energy and the NWP 12 Coalition submitted declarations attesting to the fact that an injunction will cost them hundreds of millions of dollars from delayed project in-service dates and costs incurred on contracts they cannot perform. Docs. 137-1, 138-1, 138-2, 138-3, 138-4, 138-5. See also § III, *infra.*

Moreover, visiting such harms on a subset of utilities that rely on NWP 12 will not result in any additional protection to protected species or critical habitat. The Corps will rely on project-specific ESA review in processing individual permits for new oil and gas pipelines, and during the remand the district court has ordered, the Corps will likewise continue to rely on project-specific ESA review in processing PCNs for other utilities still permitted to use NWP 12. The scope of the relief the district court ordered is simply irrational.[6]

* * *

In short, in the context of a general permit issued under the CWA, the proper scope of injunctive relief for a procedural violation of the ESA raises important issues worthy of this Court's review, given the number of general permits the Corps has issued, the number of times such permits can be used, and the significant economic harms that overbroad injunctive relief can cause in this setting.

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[6] Plaintiffs have argued that the individual permitting process will afford them an "opportunity … to weigh in on the permit application, urge a more robust cumulative-effects analysis, and propose mitigation measures." Opp. 72 n.34. But the ESA affords plaintiffs no right to participate in the Corps' consultation with the Services.

II. The District Court's Finding Of A Procedural Violation Of The Endangered Species Act Is Erroneous And, If Affirmed, Warrants Review And Reversal By This Court.

The district court's conclusion that the Corps violated the ESA when it reissued NWP 12 would, if affirmed, also merit review and reversal by this Court. The linchpin of the district court's ruling is that project-specific review cannot ensure that dredge and fill activities will not jeopardize protected species. That reasoning is profoundly mistaken: it ignores the nature and scope of project-specific review and, indeed, calls into question the validity of the Corps' longstanding individual permitting scheme, which relies exclusively on project-specific review. This error is also important to the administration of the entire nationwide CWA permitting scheme, as over 50 other nationwide permits also rely on General Condition 18's project-specific review mechanisms.

The district court relied on declarations submitted by plaintiffs as well as a statement by the Corps to conclude that activities authorized under NWP 12 "may affect" protected species or critical habitat. App. 55a. But this evidence—some of which the lower court misread[7]—is ultimately irrelevant: as noted earlier, General Condition 18 *assumes* that some proposed activities under NWP 12 may affect protected species and habitat, and it requires consultation with the Services in those situations. The real issue, therefore, is whether the project-specific review required

[7] Contrary to the district court's conclusion, the Corps' statement 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," *Decision Document* at 52 (emphasis added), is not a concession that these minor incremental contributions may affect ESA listed species or critical habitat.

under NWP 12 adequately addresses such activities to ensure that they do not, in fact, result in adverse effects. It plainly does.

To begin with, ESA-protected species do not live in, or depend upon, every wetland and navigable water in the United States. In the proceedings below, for example, plaintiffs expressed concerns about impacts on pallid sturgeon and the American burying beetle. Pallid sturgeon, however, "move throughout the Missouri and Mississippi River systems and are built for migrating through swift flowing muddy water."[8] American burying beetles "are known to occur in only four states: Rhode Island, Oklahoma, Arkansas, and Nebraska."[9] Utility projects can be constructed in many wetlands or waters without affecting any listed species or critical habitat. Critically, however, "if any listed species or designated critical habitat *might* be affected or is in the *vicinity* of the activity, or if the activity is located in designated critical habitat," the utility must submit a PCN to the Corps and cannot begin work "until the Corps has provided notification that the proposed activity will have 'no effect' on listed species or critical habitat, or until ESA section 7 consultation has been completed." 82 Fed. Reg. at 1999-2000 (emphasis added).

The district court dismissed this protection as an improper delegation to private parties of the Corps' duty to determine whether its actions "may affect"

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[8] *See* U.S. Fish & Wildlife Serv., *Fish Guide: Pallid Sturgeon*, https://www.fws.gov/fisheries/freshwater-fish-of-america/pallid_sturgeon.html (last visited June 15, 2020).

[9] *See* U.S. Fish & Wildlife Serv., *American Burying Beetle: Fact Sheet*, https://www.fws.gov/Midwest/endangered/insects/ambb/abb_fact.html (prepared July 1997) (last updated May 29, 2019) (last visited June 15, 2020).

protected species or critical habitat. App. 61a-62a. But this is incorrect. The "might affect" standard that applies to permittees is different from, and intentionally broader than, the "may affect" standard that governs the Corps. See 82 Fed. Reg. at 1873. Permittees, moreover, have powerful incentives to submit PCNs. They do so to ensure that any consultation required by section 7 of the ESA is conducted, and a BiOp authorizing the incidental take of protected species, if needed, is issued. Without such an "incidental take" statement, a utility faces criminal and civil liability for take of a protected species. See 16 U.S.C. §§ 1536(b)(4), 1536(o)(2), 1538. Indeed, the lower court presumed that utilities "will comply with all applicable statutes and regulations." App. 61a.

When it receives a PCN, the Corps performs the same ESA review that it conducts when it evaluates individual permit applications. *Decision Document* at 64. Thus, it conducts a review "for the potential impact on threatened or endangered species" and "will initiate formal consultation" with the Services if it "finds the proposed activity may affect an endangered or threatened species or their critical habitat." 33 C.F.R. § 325.2(b)(5). In conducting a cumulative effects analysis, moreover, the Corps must consider effects "that are reasonably certain to occur within the *action area*," 50 C.F.R. § 402.02 (emphasis added), and "action area" is broadly defined to include "*all areas* to be affected directly or indirectly by the Federal action and *not merely the immediate area involved in the action*." *Id.* (emphases added).

Plaintiffs argued below that the cumulative impacts analysis performed for Keystone XL demonstrates the flaws in project-specific review, claiming that it "did

not consider the effects of other NWP 12-authorized projects to birds that migrate through multiple project areas." Opp. 21. In fact, the analysis for Keystone XL demonstrates the opposite. There, the State Department prepared a Biological Assessment (in connection TC Energy's application for a Presidential Permit), evaluating whether the Project may affect various endangered and threatened species, BA at 26-170 (Doc. 144-14, at 97-241), and concluding that only the American burying beetle "is likely to [be] adversely affect[ed]" by Keystone XL. *Id.* at 123 (Doc. 144-14, at 194) (emphasis omitted). FWS concurred with the BA's assessment with respect to the other protected species and issued a BiOp for the American burying beetle, concluding that Keystone XL "is not likely to jeopardize [its] continued existence." BiOp at 37 (Doc. 144-14, at 301).

In reaching those conclusions, FWS developed an environmental baseline for the action area, which consisted of "the *past and present impacts* of all Federal, state, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of state or private actions which are contemporaneous with the consultation in process." BiOp at 20 (Doc. 144-14, at 284) (emphasis added). Relying on this baseline, FWS assessed whether Keystone XL either individually or incrementally is likely to affect a protected species. For any future project that requires ESA consultation, FWS will include the impacts from Keystone XL as part of a revised environmental baseline to inform its analysis. See 50 C.F.R. § 402.14(g)(4).

The court did not explain why or how the foregoing evaluation process fails to protect listed species from jeopardy or critical habitat from adverse modification, much less explain how or why programmatic review of NWP 12 would cure any shortcoming. Cf. *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 803 F.3d 31, 39 (D.C. Cir. 2015) ("[T]he Corps cannot accurately anticipate the effects of thousands of future activities at the time it promulgates a general permit …."). Indeed, stripped of its misguided "improper delegation" theory, the district court's claim that "[p]roject-level review, by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat," Doc. 130, at 18, rests on *ipse dixit*. And the court's disparagement of the project-specific review process calls into question the adequacy under ESA of the individual permitting process that the Corps has relied on for decades, and still employs.

The economic impacts of the district court's erroneous reasoning are sufficient, in and of themselves, to warrant review of this ruling. But the legal ramifications of that ruling are also sweeping. The Corps has included General Condition 18 and its project-specific review process in over 50 other general permits. If affirmed, a ruling calling into question the validity of both the Corps' individual permitting decisions and its entire nationwide permit process merits this Court's review.

III. A Stay Is Needed To Forestall Significant Harms To TC Energy And Others.

A stay is needed because the district court's injunction is inflicting enormous harm on TC Energy, on other oil and gas pipelines, and on the workers and communities that benefit from both pipeline construction and transportation.

As discussed above, the district court's injunction is not necessary to prevent any irreparable harm to plaintiffs. They made no showing that continued use of NWP 12 for construction of new oil and gas pipelines is likely to threaten the continued existence of any protected species or adversely modify critical habitat. And they could not do so with respect to Keystone XL's use of that permit, as FWS has already determined that the Project will *not* cause such harm. By contrast, a stay is necessary to mitigate the significant harms that TC Energy is suffering and will continue to suffer as a result of the injunction.

If the Court grants a stay by early July, TC Energy expects that it would receive authorization from the Corps to commence construction by early August, which would enable the company to complete a meaningful, though truncated, amount of pipeline construction in 2020. See Declaration of Gary Salsman ¶ 5 (attached). Without such authorization by early August, however, TC Energy would be forced to delay almost all of the pipeline construction to 2021, limiting work in 2020 to construction of certain pump stations, camps, and other ancillary facilities. *Id.* ¶ 6. If faced with such a delay, TC Energy would undertake accelerated construction in 2021 to try to complete two-year's worth of pipeline construction in 2021, which would increase costs by approximately $200 million. *Id.*

Contrary to the district court's blithe assertion, such delay and increased costs to pipeline companies are not "ordinary compliance costs," nor can they properly be deemed insubstantial "absent a threat of being driven out of business." App. 37a. These are real harms that count in the balance of equities and outweigh plaintiffs'

completely unsubstantiated claims of harm to protected species. See *Amoco Prod. Co*., 480 U.S. at 544-45 (reversing Ninth Circuit's injunction on the sale of federal oil and gas leases where the agency "failed to evaluate thoroughly the environmental impact of a proposed action," but the environmental harm from oil exploration "was not at all probable" and "on the other side of the balance of harms was the fact that the oil company petitioners had committed approximately $70 million to exploration … which they would have lost without chance of recovery had exploration been enjoined").

Moreover, absent a stay in early July and Corps' authorization by August 2020, TC Energy would not be able to employ a majority of the approximately 1,500 unionized construction workers, and approximately 300 administrative, inspection, and management personnel it would otherwise employ for pipeline construction in 2020. Salsman Decl. ¶ 7. The loss of so many high-paying jobs, along with the loss of the secondary employment and economic opportunities that construction activities would otherwise create in local communities, would be particularly harmful in the current distressed economy.

Should there be a delay in the in-service date for Keystone XL, that would have negative impacts on U.S. refiners that process the crude oil, and it would delay the economic benefits the operational pipeline will provide. In the first year of operations, TC Energy plans to spend approximately $488 million in payments for services and wages ($28 million), power utilities ($272 million), and taxes to State, county and municipal governments ($189 million) in the United States. Doc. 137-1, ¶ 10; see also

2019 Final SEIS at 4-63, 4-65 (describing beneficial impacts to economic base and tax revenue).

The lower court's injunction will inflict similar harms on other oil and gas pipelines. Eighteen states filed an amicus brief in the court of appeals attesting to the injunction's "hugely disruptive consequences for the nationwide energy-distribution network." Brief of *Amici Curiae* States of West Virginia, Texas, and 16 Other States in Support of Defendants-Appellants' Motion for Stay Pending Appeal at 7, *N. Plains Res. Council* v. *U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir. May 15, 2020), ECF No. 33 ("States' Amicus"). These states, along with the NWP 12 Coalition and several other amici, explained that the injunction is disrupting the expansion of the nation's energy distribution network, causing a loss of jobs and tax revenue, and harming businesses that rely on pipelines to transport the petroleum products used in nearly every sector of the U.S. economy. See *id.*; Brief of *Amici Curiae* the Chamber of Commerce of the United States of America and the Energy Equipment and Infrastructure Alliance in Support of Appellants' Motion for Stay Pending Appeal, *N. Plains Res. Council* v. *U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir. May 15, 2020), ECF No. 31-2 ("Chamber Amicus"); Brief of *Amicus Curiae* American Fuel & Petrochemical Manufacturers in Support of Motions for Stay Pending Appeal, *N. Plains Res. Council* v. *U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir. May 15, 2020), ECF No. 28-2 ("AFPM Amicus").

As these amici explained, an expansion of the nation's pipeline system is needed to accommodate the increase in the nation's gas production (which grew over

60% from 2009 to 2019) and oil production (which more than doubled). States' Amicus at 4-5. These pipeline projects create billions of dollars in economic activity and support hundreds of thousands of jobs, both during and after construction. Chamber Amicus at 4. One industry study showed that the nearly $26 billion spent constructing natural gas pipelines in 2015 stimulated 348,789 jobs and contributed nearly $34 billion dollars to U.S. gross domestic product. *Id.* at 4 & n.3 (citing IHS Economics, *The Economic Benefits of Natural Gas Pipeline on the Manufacturing Sector* 38-39 (May 2016)). As noted, many of the jobs generated by oil and gas pipeline projects are high-paying jobs that are desperately needed in today's economy. See States' Amicus at 5 (average salary in the oil and gas industry in 2018 was over $100,000). Pipeline projects also generate much-needed tax revenue for all levels of government. See *id.* at 6 ("[J]ust one natural gas pipeline can generate over $10 million in income and property tax revenue every year"). When multiplied by the 2700 oil and gas pipeline projects the government estimates are being delayed by the injunction (App. 80a, ¶ 6), it becomes apparent that the injunction is causing hundreds of millions of dollars in lost wages and tax revenue.

The harm does not end there. The injunction is also raising costs and disrupting the supply chain for fuel and petrochemical products. Pipelines transport crude oil to refineries and wet natural gas to processing plants. AFPM Amicus at 4-5. Pipelines also transport processed natural gas and a variety of processed crude products. *Id.* When producers do not have access to pipeline transport, they have to rely on more expensive methods of transport. See Chamber Amicus at 6; see also

Intervenor-Defendant-Appellants American Gas Association, American Petroleum Institute, Association of Oil Pipe Lines, Interstate Natural Gas Association of America, and National Rural Electric Cooperative Association's Motion for Stay Pending Appeal at 15, *N. Plains Res. Council* v. *U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir. May 15, 2020), ECF No. 34-1 ("project delays and cancellations could affect pipeline customers' supply and costs of obtaining crude oil and refined petroleum products"). This raises the cost of energy products such as the natural gas used to fuel power plants and heat American homes, and the cost of gas and diesel used to fuel power cars, trucks and airplanes.

Beyond that, the injunction disrupts the supply chain for petrochemical products that are ubiquitous in manufacturing today. Pipelines transport the "hydrocarbon feedstock—naphtha, ethane, propane, and butane"—used by petrochemical plants that "make the six base petrochemicals that are the building blocks for producing plastics and advanced engineering composites" used in modern manufacturing. AFPM Amicus at 4-5. The injunction has already delayed the completion of pipeline project to transport feedstock to a propylene production plant that supplies a variety of plastic products to manufacturers. *Id.* at 6-7.

CONCLUSION

For the foregoing reasons, TC Energy respectfully requests that the Court grant the government's application for a stay of the district court's orders of April 15, 2020, and May 11, 2020.

Respectfully submitted,

/s/ Joseph R. Guerra

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*Counsel of Record

June 17, 2020

ATTACHMENT

No. 19A1053

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.

Respondents.

On Application for a Stay Pending Appeal to the
United States Court of Appeals for the Ninth Circuit
and Pending Further Proceedings in This Court

DELCARATION OF GARY SALSMAN

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1. My name is Gary Salsman and I am the Project Vice President, US Execution for the Keystone XL Pipeline at TC Energy. My business address is 700 Louisiana Street, Houston, Texas 77002.

2. In my role as Project Vice President, US Execution, I am responsible for the overall planning and construction of the Keystone XL Pipeline Project ("Keystone XL" or the "Project") in the United States. My responsibilities for the Project include general oversight of all construction activities to bring the Project into operation.

3. I provided a declaration in support of the motion TC Energy filed in the district court seeking a stay of the district court's April 15, 2020 order vacating Nationwide Permit 12 (NWP 12) and enjoining the U.S. Army Corps of Engineers from authorizing activity under NWP 12. The facts I provide are within my personal knowledge.

4. My earlier declaration explained that, unless the Army Corps authorized TC Energy to conduct dredge and fill activities under NWP 12 by early July, 2020, the construction plans for Keystone XL in 2020 would be significantly impacted. Because the Corps is expected to require several weeks to act on the Pre-Construction Notifications that TC Energy previously submitted. TC Energy does not believe it can now obtain the necessary authorization by early July.

5. Having assessed its options in light of the Ninth Circuit's decision, TC Energy has determined that it could complete a meaningful—though truncated—amount of pipeline construction if it received a stay from this Court in early July

and the necessary authorization from the Corps by early August 2020. Authorization to use NWP 12 by early August would not enable TC Energy to complete construction of pipeline spreads in Montana, South Dakota, or Nebraska in the manner it had previously planned for 2020. It would, however, enable TC Energy to complete meaningful pipeline construction in one or more of these states before the end of the 2020 construction season, and such pipeline construction, while limited, would improve the prospects of maintaining the planned in-service schedule for Keystone XL.

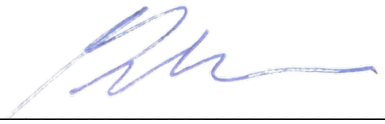
6. If a stay is not obtained, TC Energy will lose its ability to complete any meaningful pipeline construction in 2020 and it will be forced to delay almost all of the pipeline construction to 2021, and limit work in 2020 to certain pump stations, camps and other ancillary facilities. Additionally, if faced with such a delay, TC Energy would undertake accelerated construction in 2021 to try to complete two-year's worth of pipeline construction in 2021. Such efforts would increase costs by approximately $200 million. These additional costs would include escalated contractor costs for accelerated construction, additional camp modules and equipment, additional personnel, and other costs.

7. If a stay is granted and Corps' authorization timely received, such that TC Energy can complete meaningful pipeline construction in 2020, that work would involve a workforce of approximately 1,500 unionized construction workers, and approximately 300 administrative, inspection, and management personnel. A stay would also enable us to optimize economic activity, by supporting significant

employment opportunities beyond direct construction jobs for materials, pipe, consumables, and support services, at a particularly critical time for workers and related businesses. If this pipeline construction cannot be undertaken this year, the vast majority of the high-paying construction-related jobs will be lost this year, along with the further employment and economic opportunities that would otherwise be created in local communities to support construction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of June 2020.



Gary Salsman