No. 20-35412 (consolidated with Nos. 20-35414, 20-35415)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,

Plaintiffs–Appellees,

v.

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

Defendants–Appellants,

and

TRANSCANADA KEYSTONE PIPELINE, LP, *et al.*,

Intervenor-Defendants–Appellants.

On Appeal from the U.S. District Court for the District of Montana
No. 4:19-cv-00044-BMM

PLAINTIFFS' OPPOSITION TO FEDERAL APPELLANTS' AND INTERVENOR APPELLANTS' MOTIONS FOR STAY PENDING APPEAL

DOUG HAYES
ERIC HUBER
Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
Boulder, CO 80301
(303) 449-5595
doug.hayes@sierraclub.org
eric.huber@sierraclub.org

CECILIA SEGAL
ALEXANDER TOM
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100
csegal@nrdc.org
atom@nrdc.org

JARED MARGOLIS
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
(971) 717-6401
jmargolis@biologicaldiversity.org

ERIC GLITZENSTEIN
Center for Biological Diversity
1411 K Street, NW, Suite 1300
Washington, DC 20005
(202) 849-8401
eglitzenstein@biologicaldiversity.org

(additional counsel listed on signature page)

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INTRODUCTION

The district court correctly held that the U.S. Army Corps of Engineers ("Corps") violated the Endangered Species Act ("ESA") when it issued Nationwide Permit 12 ("NWP 12") without first conducting programmatic Section 7 consultation, despite the Corps' awareness of its obligation to do so and resounding evidence in the record that NWP 12 adversely affects protected species and critical habitats. The court properly remanded NWP 12 to the Corps, vacated it, and enjoined the Corps from authorizing any activities under it pending completion of the required consultation.

After issuing that order, the district court, in exercise of its broad discretion to fashion relief, reasonably narrowed the scope of the vacatur and injunction to minimize any disruptive consequences while still protecting against the harms to Plaintiffs and myriad imperiled species. In doing so, the district court reiterated the seriousness of the Corps' violation and the appropriateness of vacatur and injunctive relief under both the ESA and Administrative Procedure Act ("APA").

Now, Federal Defendants and Intervenors TC Energy and NWP 12 Coalition (collectively, "Defendants") ask this Court to stay the partial vacatur and corresponding injunction. If granted, Defendants' request would allow private companies to use an unlawful permit to build massive oil and gas

pipelines through thousands of U.S. waters relied on by protected species nationwide, before the Court can decide the case's merits on appeal.

The requested stay is unwarranted. Defendants have not demonstrated that they are likely to prevail on their appeal of either the district court's merits or remedy decisions. Both decisions are legally sound: they center on an egregious violation of one of the ESA's most vital safeguards for imperiled species, for which the court ordered appropriate relief. And while Defendants complain of procedural irregularities by the district court in reaching those decisions, their complaints are groundless—Plaintiffs challenged NWP 12 on its face and emphasized throughout the case the harms resulting from NWP 12's use for the construction of new oil and gas pipelines.

Even if Defendants could establish a likelihood of success on the merits, they have failed to show that the remaining stay factors justify the extraordinary relief they seek. The district court's partial vacatur and parallel injunction apply to only a small subset of projects covered by NWP 12, and those projects can still be built using the Corps' individual permitting process. That hardly rises to the level of irreparable injury sufficient to support a stay, particularly in the face of a grave ESA violation. Indeed, Supreme Court and Circuit precedent make clear that the public interest in protecting endangered

species weighs strongly against such relief. Accordingly, the stay motions should be denied.

BACKGROUND

I. Statutory framework

In enacting the ESA, Congress found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). To stem the extinction crisis, Congress enacted Section 7(a)(2), a vital safeguard that requires each federal agency, in consultation with the Fish and Wildlife Service ("FWS") and/or National Marine Fisheries Service ("NMFS") (collectively, the "Services"), to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *Id.* § 1536(a)(2).

The ESA and its implementing regulations set forth a detailed consultation process that must be followed in order to "insure" against jeopardy or harm to critical habitat. Pursuant to that process, action agencies must engage in "formal consultation" with FWS and/or NMFS—culminating in a Biological Opinion analyzing whether the action will jeopardize any

species or impair any critical habitat—with respect to *every* action that "may affect" a listed species or critical habitat in any manner. 50 C.F.R. § 402.14(a), (g). Actions subject to this mandate include "*all activities or programs of any kind* authorized, funded, or carried out" by a federal agency, including the granting of any "permits." *Id.* § 402.02 (emphasis added).

For broad federal programs, action agencies and the Services must conduct "programmatic consultation" to consider the program's cumulative impacts and to conserve protected species by establishing general criteria to avoid, minimize, or offset adverse effects. *See id*. §§ 402.02, 402.14(g). Project-specific consultation does not and cannot supplant the need for programmatic consultation. *See* 50 C.F.R. § 402.14(c)(4); *see also* 80 Fed. Reg. 26,832, 26,836 (May 11, 2015) (explaining that a programmatic biological opinion allows for a "broad-scale examination of a program's potential impacts").

Section 404 of the Clean Water Act ("CWA") prohibits the discharge of any pollutant—including dirt or other fill material—into waters of the United States without a permit. 33 U.S.C. § 1311(a); *see id.* §§ 1342, 1344. The Corps is responsible for issuing permits for the discharge of dredged soil or other fill material on either an individual or categorical basis. *See id.* § 1344(a), (e). Before issuing an individual permit, and consistent with the CWA's goal of protecting the integrity of the nation's waters, the Corps must ensure that the

discharge will not cause significant degradation of the waters. 40 C.F.R. §§ 230.1(a), 230.10. Alternatively, the Corps can issue a Nationwide Permit ("NWP") to provide streamlined authorization to an entire category of "similar" activities if the activities "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." 33 U.S.C. § 1344(e)(1); *see also* 33 C.F.R. § 330.2(b) (defining NWP).

II. Factual background

This case challenges the Corps' 2017 issuance of NWP 12, a general permit that will be used an estimated 69,700 times over five years to authorize the construction of pipelines and other utility projects, impacting 8,900 acres of U.S. waters. TCAppx4 at 70.[1]

NWP 12 authorizes the discharge of dredged or fill material associated with the construction of pipelines and other linear utility projects so long as each "single and complete project" will not result in the loss of more than half an acre of U.S. waters. 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). Notably, the Corps defines "single and complete project" to mean *each individual water*

[1] "FedAppxXXX" refers to the appendix submitted by Federal Defendants, ECF No. 12. "TCAppxX at X" refers to the appendix submitted by TC Energy, ECF No. 19. "CoalAppxXXX" refers to the appendix submitted by the NWP 12 Coalition, ECF No. 34-6. "PlsAppxXXX" refers to the appendix filed concurrently by Plaintiffs herewith.

crossing along a utility line, not the overall project. 33 C.F.R. § 330.2(i); 82 Fed. Reg. at 2007. Thus, along the length of a single pipeline, a permittee can (and often does) rely on NWP 12 for multiple water crossings and can cause a half-acre loss of U.S. waters at *each one* without running afoul of NWP 12's terms. *See* TCAppx4 at 7, 11.

"In most cases," projects meeting NWP 12's terms and conditions may be constructed without any further action by, or notification to, the Corps. *See* 33 C.F.R. § 330.1(c), (e)(1). But when a project meets certain criteria, the applicant must submit a preconstruction notification ("PCN") to a Corps district engineer for verification that the project complies with NWP 12. *See id.* §§ 330.1(e)(1), 330.6(a)(1). For example, General Condition 18 requires an applicant to submit a PCN if a project "might affect" listed species or critical habitat. *See* 82 Fed. Reg. at 1888, 1999-2000. The district engineer then evaluates the PCN to determine whether the project "may affect" listed species or critical habitat, such that project-specific consultation under the ESA is necessary, and to otherwise determine whether the project complies with NWP 12's terms and conditions. *See id.* at 1986, 1999-2000, 2004-05. If the project does not meet NWP 12's terms and conditions, the district engineer must deny verification; the applicant may then seek an individual permit instead. *See* 33 C.F.R. § 330.6(a)(2). Regardless of whether a PCN must be submitted to a

district engineer, applicants need not provide any *public* notice or opportunity for public comment, *cf.* 33 U.S.C. § 1344(a), or undergo any project-level review under the National Environmental Policy Act ("NEPA"), *see* 82 Fed. Reg. at 1861, before proceeding with construction of an NWP 12-authorized project.

In 2012, the Corps consulted with NMFS on a previous iteration of NWP 12. PlsAppx103. In its ensuing Biological Opinion, NMFS concluded that the Corps' implementation of the NWP program, including NWP 12, was jeopardizing the continued existence of listed species under NMFS's jurisdiction. PlsAppx105; *see also* PlsAppx104. The Corps subsequently reinitiated consultation and, in 2014, NMFS issued a new Biological Opinion reiterating many of its earlier concerns and requiring the Corps to adopt certain data collection, monitoring, and reporting measures. *See* PlsAppx284-86, PlsAppx289. It was only on the basis of these measures that NMFS concluded that the NWP program would not jeopardize listed species within NMFS's jurisdiction. *See* PlsAppx284-86, PlsAppx290-91. The Corps did not engage in any consultation with FWS.

Although versions of NWP 12 have been in place since 1977, the Corps did not use it to fast-track authorizations for major interstate oil and gas pipelines until 2012. Before then, the Corps routinely required such pipelines

to seek individual permits, reserving NWP 12 for projects with truly minimal impacts. *See, e.g.*, *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 961-63 (S.D. Ohio 2006) (Corps declined to issue NWP 12 verification for 149-mile oil pipeline crossing 400 waterways, requiring individual permit instead). Beginning in 2012, the Corps changed tack and began allowing large pipelines to proceed under NWP 12. *See, e.g.*, *Sierra Club v. Bostick*, No. 12-cv-742, 2013 WL 6858685, at *1, *23 (W.D. Okla. Dec. 30, 2013) (Corps issued verifications for 485-mile Gulf Coast pipeline);[2] *see also* 77 Fed. Reg. 18,891, 18,892 (Mar. 28, 2012) (Presidential Memorandum directing federal agencies to expedite review of various pipelines). Thus, the Corps' and oil and gas industry's use of NWP 12 to avoid a more transparent and robust review of major pipeline projects under the CWA is a relatively recent occurrence.

Overall, NWP 12 usage has risen from an estimated 7,900 annual uses under the 2012 permit, PlsAppx243, to an estimated 11,500 annual uses under the 2017 permit, TCAppx4 at 69-70—an increase of more than 45 percent.

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[2] As Plaintiffs indicated in their summary judgment brief, they are unaware of the Corps previously authorizing a pipeline of Gulf Coast's magnitude under NWP 12. FedAppx245. Defendants were unable to provide any such example in response. *See, e.g.*, PlsAppx172 (citing cases involving 34-mile intrastate pipeline (Florida), 60-mile intrastate pipeline (Oregon), and 23-mile intrastate pipeline (Arkansas)).

These uses, individually and cumulatively, adversely impact listed species. *See* TCAppx4 at 45, 49; *see also* PlsAppx287-89.

Yet, in 2017, the Corps refused to conduct any Section 7 consultation before issuing the latest permutation of NWP 12. Instead, it declared that NWP 12 itself would have "no effect" on listed species or critical habitat because any such effects would be analyzed on a project-specific basis under General Condition 18 (which requires a PCN if a project "might affect" listed species or critical habitat). *See* 82 Fed. Reg. at 1873-74. The Corps' regulatory program manager at that time evidently recognized the agency's legal vulnerability, but nonetheless recommended that the Corps make a "national 'no effect' determination for each NWP reissuance until it is challenged in federal court and a judge rules against the Corps." PlsAppx322. He reasoned that, if the agency "lose[s] in federal court, then [it] would start doing the national programmatic consultations again." *Id.*

III. Procedural background

Plaintiffs, a coalition of non-profit conservation groups, filed suit in July 2019 to challenge the Corps' issuance of NWP 12 under the ESA, CWA, and NEPA. *See* FedAppx323 (first amended complaint). Plaintiffs also challenged the application of NWP 12 to Keystone XL, a 1200-mile-long pipeline that would transport up to 830,000 barrels per day of tar sands crude oil through

hundreds of rivers and wetlands in Montana, South Dakota, and Nebraska. *Id.*; *see* FedAppx327, FedAppx366, FedAppx370. TC Energy (Keystone XL's developer), the State of Montana, and a coalition of industry associations ("NWP 12 Coalition") intervened to defend NWP 12. *See* FedAppx305-06, FedAppx412.

Upon learning that the Corps had withdrawn its previously issued verifications for Keystone XL, and at Federal Defendants' urging, Plaintiffs agreed to stay their two claims challenging those verifications and proceed with their facial challenge to NWP 12. PlsAppx; FedAppx308-09.[3] Plaintiffs moved for partial summary judgment, arguing that the Corps' issuance of NWP 12 was unlawful and presenting evidence of NWP 12's extensive environmental harms, particularly with regard to massive pipelines like Keystone XL. *See, e.g.*, PlsAppx39-41, PlsAppx43.

On April 15, 2020, the district court ruled for Plaintiffs on their ESA claim. It found "substantial evidence" that NWP 12 "may affect" listed species and held the Corps' failure to consult with the Services prior to issuing NWP 12 unlawful. FedAppx58-59. Accordingly, the court remanded NWP 12 to the

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[3] While the Corps had withdrawn its verifications for the few Keystone XL water crossings that triggered the PCN requirement, the construction of Keystone XL through hundreds of non-PCN waters remained authorized under NWP 12. *See* PlsAppx2.

Corps, vacated NWP 12 pending compliance with the ESA, and enjoined the Corps from authorizing any dredge or fill activities under NWP 12 in the meantime. FedAppx59. Anticipating that the consultation could bear on the Corps' NEPA and CWA determinations as well, the court declined to address the merits of Plaintiffs' claims under those statutes. FedAppx60.

Defendants filed motions for a stay pending appeal before the district court, with the federal government simultaneously inviting the court to amend the relief ordered. *See* FedAppx2. Plaintiffs maintained that the relief ordered was legally appropriate, but did not oppose a partial narrowing of the vacatur and injunction to focus on the kinds of projects raising the most serious concerns for listed species and critical habitat while ameliorating the potential disruptions cited by Defendants. *See* FedAppx6.

On May 11, 2020, after underscoring the seriousness of the Corps' violation and the propriety of the relief originally ordered, the district court amended its earlier order. FedAppx7-24. Based on a careful weighing of the parties' competing interests, the court limited the vacatur and injunction to cover the use of NWP 12 for the construction of new oil and gas pipelines, thereby substantially addressing Defendants' claimed disruption and allowing NWP 12 to remain in place during remand for use by non-pipeline construction activities and routine maintenance, inspection, and repair

activities on existing projects. FedAppx38. The court denied Defendants' stay motions in light of that modification. FedAppx25-38.

ARGUMENT

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009). Rather, the movant bears the burden of establishing that a stay is warranted in view of four factors: (1) whether the movant has made a strong showing that it is likely to succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether the stay will substantially injure the other parties; and (4) where the public interest lies. *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). Because a stay pending appeal is an "extraordinary request," motions panels of this Court "exercise restraint" in disturbing the district court's decision. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1264 (9th Cir. 2020) (citation omitted).

Defendants cannot show that any of these factors justifies a stay here. Their motions should be denied.

I. Defendants have not demonstrated that they are likely to succeed on the merits

"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). Defendants fall far short.

A. The district court correctly held that the Corps violated the ESA

In view of the plain terms of Section 7, its protective purpose, controlling precedent from this Court, and the extensive administrative record, the district court correctly determined that the Corps violated the ESA by failing to engage in Section 7 consultation to consider the impacts of NWP 12 on endangered and threatened species and their critical habitats. Defendants have failed to provide a convincing argument to the contrary.

Given the Corps' wholesale failure to comply with one of the ESA's most vital safeguards for imperiled species, denial of Defendants' requested stay is warranted. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (noting that Congress "indicate[d] beyond doubt" that endangered species must be "afforded the highest of priorities"); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc) (observing that compliance with ESA's procedural requirements is critical to effectuating Act's substantive protections).

1. The district court properly found that the Corps' issuance of NWP 12 meets the low threshold for ESA consultation

The ESA and its implementing regulations require consultation for all agency actions—including, specifically, "permits" and "programs" that "may

affect" listed species—in order to "insure" that such actions are not likely to jeopardize listed species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14.

Defendants do not dispute that the Corps' issuance of NWP 12 was an agency "action" within the meaning of the ESA because it constitutes *both* a "permit" and a "program." 50 C.F.R. § 402.02. Nor is there any doubt that it was an action that both "may affect" and is "likely to adversely affect" listed species and critical habitat, triggering consultation. *Id.* § 402.14; *see Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 3, 9-11 (D.D.C. 2005) (finding Corps' 2002 issuance of NWP 12 to be agency action requiring Section 7 consultation).

This Court has found that "[t]he minimum threshold for an agency action to trigger consultation" is "low." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) ("Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (alteration omitted)). It is clear that NWP 12 "may affect" listed species, and the district court thus correctly held—based in large part on the Corps' own statements about NWP 12's environmental impacts—that programmatic consultation was required. FedAppx49-52.

Indeed, the district court found "resounding evidence" in the record that the Corps' issuance of NWP 12 "may affect" listed species and their habitat. FedAppx49, FedAppx53-54. The court explained that "NWP 12 authorizes actual discharges of dredged or fill material into jurisdictional waters," FedAppx53 (citing 82 Fed. Reg. at 1985), and stressed that "[t]he Corps itself has acknowledged that the discharges *will* contribute to the cumulative effects to wetlands, streams, and other aquatic resources," *id*. The district court also set forth the Corps' acknowledgement of both permanent and temporary consequences of NWP 12-authorized activities, including converting "wetlands, streams, and other aquatic resources to upland areas, resulting in permanent losses of aquatic resource functions and services." FedAppx50. It further referenced the Corps' acknowledgement that the NWP program is a "common cause[] of impairment for rivers and streams, habitat alterations and flow alterations." FedAppx51.

While Defendants assert that these are merely general statements as to the NWP program's environmental effects, Fed. Defs.' Mot. Stay Pending Appeal ("Fed. Mot.") 36, ECF No. 11, and that the Corps did not suggest such discharges may affect listed species or critical habitat, TC Energy's Mot. Stay Pending Appeal ("TC Mot.") 18, ECF No. 19, the district court concluded otherwise, supporting its determination by describing harm to specific listed

species from NWP 12-authorized activities. The court found, based on Plaintiffs' declarations, that "[p]allid 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," and that construction activities that increase sediment loading (like NWP 12-authorized activities, *see* FedAppx51) "pose a significant threat to the pallid sturgeon populations in Nebraska and Montana." FedAppx52. The court likewise found that activities "approved by NWP 12 . . . can cause harm to species such as the American burying beetle." FedAppx53.[4]

TC Energy contends that these species are confined to certain areas of the country and so any harm is geographically limited, TC Mot. 18-19, but that misses the point; the district court referenced these species as examples of those that may be adversely affected by NWP 12 and ultimately held that NWP 12's national scope requires programmatic consultation—as the Corps undertook

[4] The record further shows that NWP 12-authorized activities harm listed species due to habitat loss and fragmentation, power line collisions, sedimentation and contamination of waters from spills, and indirect impacts associated with climate change. TCAppx4 at 58, 61; PlsAppx319-21; PlsAppx300-11. For example, pipelines authorized by NWP 12 can leak and spill oil into the Corps' jurisdictional waterways, with disastrous impacts on aquatic resources. *See, e.g.*, PlsAppx312-18 (discussing several pipeline spills).

with NMFS in 2012 and 2014—to ensure that *all* listed species will not be jeopardized by the cumulative impacts of NWP 12-authorized activities.[5]

The district court further bolstered its determination with analysis of this Court's precedents. For example, the court compared the instant case to the facts of *Kraayenbrink*. FedAppx49. There, the Court held that the Bureau of Land Management had an obligation to consult when it amended national grazing regulations, despite the agency's view that the amendments were "purely administrative" and would have no independent effect on listed species. 632 F.3d at 498. The Court concluded, based on the record, that the amendments would have a substantive effect on listed species. *Id.* Similarly here, the district court found, based on the Corps' statements and other record evidence, that NWP 12 "would have a substantive effect on listed species." FedAppx49-54; *see also* FedAppx55 (discussing similar decision in *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992)).[6]

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[5] Nor is there any merit to the suggestion that the district court should not have considered the declarations. Fed. Mot. 37. Plaintiffs' Section 7 claim against the Corps "is evaluated with any admissible evidence and is not limited to the administrative record." *Native Fish Soc'y v. NMFS*, 992 F. Supp. 2d 1095, 1106 (D. Or. 2014) (citing, *inter alia*, *Kraayenbrink*, 632 F.3d at 481).

[6] The *Kraayenbrink* Court additionally reasoned that given the "sheer number of acres affected" by the Bureau's regulations and the number of listed species present on those lands, the regulatory amendments "handily" met the ESA's "minimum threshold" for triggering consultation. *Id.* at 496. So too

2. The district court correctly found that project-specific consultation, General Condition 18, and other regional conditions do not supplant programmatic consultation

Defendants argue that the Corps' failure to engage in programmatic consultation on NWP 12 is of no consequence because imperiled species and critical habitats are adequately protected through project-specific consultations as well as NWP 12's general and regional conditions. *See, e.g.*, Fed. Mot. 31-34. These arguments, which the district court correctly rejected, FedAppx54-58, are impossible to harmonize with ESA regulations that expressly mandate consultation on "programs" (here, a nationwide permit for CWA compliance), irrespective of whether project-specific consultations might occur. *Supra* p. 4. This requirement ensures that both site-specific *and cumulative impacts* are analyzed by the Services and allows them to issue programmatic Biological Opinions that establish appropriate nationwide criteria for avoiding, minimizing, and mitigating adverse impacts. *See* 50 C.F.R. §§ 402.02, 402.14(g).

Defendants' argument ignores the fundamental purpose of programmatic consultation. NWP 12 is used an estimated 11,500 times each year, *see*

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here: the Corps estimated that NWP 12 will be used for approximately 69,700 projects and impact 8,900 acres of waters, TCAppx4 at 70, evidencing a similarly significant impact to hundreds of listed species that rely on wetlands, streams, and rivers across the country.

TCAppx4 at 69-70, including for pipelines that often cross hundreds of waterways, *see, e.g.*, PlsAppx298-99; *see also* PlsAppx51 (citing PlsAppx003). Moreover, such pipelines' water crossings are often in close proximity to each other. *See, e.g.*, PlsAppx297; *see also* PlsAppx39-40. Adverse effects to listed species and critical habitat may appear unlikely when a particular waterway crossing, or even a single project, is viewed in isolation; however, such limited reviews fail to fully capture the *cumulative* impacts to listed species from all NWP 12-authorized activities, which can only be analyzed through programmatic review. *See Conner v. Burford*, 848 F.2d 1441, 1453-58 (9th Cir. 1988) (rejecting the Services' deferral of programmatic impacts analysis to a second, project-specific stage); *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082 (9th Cir. 2015) ("[P]roject-specific consultations do not include a unit-wide analysis comparable in scope and scale to consultation at the programmatic level."). Indeed, the Corps admits that approximately 3,400 PCNs have been triggered by General Condition 18 since the 2017 NWP 12 went into effect, Fed. Mot. 11, further highlighting the need for an analysis of cumulative effects to listed species.

That the Corps authorizes its officials to adopt, at their discretion, "regional conditions" similarly does not and cannot replicate the legal or practical function of programmatic consultation. *Contra* Fed. Mot. 34. Even

when they are adopted, such conditions by their nature cannot account for the cumulative impacts of NWP 12 *nationally*, and do not address impacts to species that cross regions and therefore may be affected by multiple NWP 12-authorized projects.

Recognizing these facts, the district court held that "[t]he Corps cannot circumvent ESA Section 7(a)(2) consultation requirements by relying on project-level review or General Condition 18." FedAppx54 (citing 82 Fed. Reg. at 1999; *Conner*, 848 F.2d at 1457-58). "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." *Id.* Simply put, the potential for fragmented, project-level review cannot justify a "no effect" determination for NWP 12. *See* FedAppx56 (recognizing that "[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat").[7]

To be sure, this is precisely why the ESA's implementing regulations mandate programmatic consultation in addition to project-level consultation.

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[7] TC Energy argues that the district court's decision is "inconsistent with the operation of the ESA in the issuance of individual permits," TC Mot. 20, which only undergo project-specific review. However, this disregards that NWP 12 is *itself* a "permit" that is used thousands of times each year and therefore has broad cumulative impacts. The ESA unequivocally requires consultation commensurate with this programmatic action.

See 50 C.F.R. § 402.14(c)(4) (clarifying that, while consultation "may encompass . . . a number of similar individual actions within . . . a programmatic consultation," that "does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole").[8]

Keystone XL provides an example. Migratory birds such as whooping cranes, interior least terns, and piping plovers traversing the length of the pipeline corridor suffer significant *cumulative* effects from wetland loss associated with Keystone XL and other NWP 12-authorized projects, and yet under the approach adopted by the Corps, these cumulative effects will never be analyzed in a Biological Opinion in the manner that Section 7 requires. TC Energy claims that such cumulative effects were analyzed in a Biological Assessment for Keystone XL, TC Mot. 16; however, that analysis was limited to the project area, and therefore did not consider the effects of other NWP 12-authorized projects to birds that migrate through multiple project areas and

[8] Amicus Energy Infrastructure Council ("EIC") argues that the definition of "cumulative effects" precludes an analysis of future uses of NWP 12 that are subject to Section 7 consultation, EIC's Amicus Br. Supp. Appellants' Mots. Stay Pending Appeal 8, ECF No. 30-2 (citing 50 C.F.R. § 402.02); however, this is inapposite in the context of programmatic consultations, which are specifically intended to consider the potential impacts of, and measures for ameliorating, "future action[s] that are authorized, funded, or carried out at a later time," and where "take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation." 50 C.F.R. §§ 402.02, 402.14(i)(6). That is precisely the situation at hand with NWP 12.

even regions. *See* 50 C.F.R. § 402.02 (defining cumulative effects in the context of project-specific consultations as "those effects . . . that are reasonably certain to occur within the action area"); TCAppx7 at 26.

This Court has reached the same conclusion as the district court in analogous cases. *Conner* is particularly illustrative. There, the Court concluded that Biological Opinions must be coextensive with an agency's action and rejected the Services' deferral of impacts analysis to a project-specific stage. 848 F.2d at 1453-58. The Court reasoned that "the ESA on its face requires the [agency] . . . to consider all phases of the agency action . . . in its biological opinion," and refused to "carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion . . . be completed before initiation of the agency action." *Id*. at 1455.

TC Energy's attempt to distinguish *Conner* is unpersuasive. TC Mot. 21. As in *Conner*, the project-specific consultations for NWP 12-authorized projects, as well as NWP 12's general and regional conditions, do not provide the "checks and balances" necessary to ensure against jeopardy from cumulative impacts. *See* 848 F.2d at 1455-58; *see also, e.g.*, *Lane Cty.*, 958 F.2d at 294 (holding that broad timber management strategy that may affect listed species must undergo Section 7 consultation, even if subsequent timber sales completed pursuant to strategy would be subject to project-specific

consultation); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (similar).[9]

3. The district court found that the Corps was well aware of its duty to consult

While the foregoing is sufficient to resolve whether Defendants can meet their high burden to justify a stay pending appeal, their likelihood of success on the merits is especially doubtful given the district court's determination that the Corps *knew* it needed to undertake programmatic consultation, and yet avoided doing so in clear violation of the ESA.

The district court found that the Corps was "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." FedAppx58. The court further emphasized that "[t]he Services specifically have listed the Corps' nationwide permit program as an example of the type of federal program that

[9] Moreover, even if project-specific consultations could otherwise be sufficient to fulfill the Corps' ESA duties, the district court explained that General Condition 18 improperly delegates the initial effect determination to the permittee and so cannot fulfill *the Corps'* obligations under the ESA. FedAppx57-58 (citing 50 C.F.R. § 402.14(a)).

provides a national-scale framework and that would be subject to programmatic consultation." FedAppx48 (citing 80 Fed. Reg. at 26,835).[10]

The district court also pointed to record evidence showing that the Corps was acutely aware of its ESA obligations and yet decided to roll the dice with a legally dubious "no effect" determination. When asked whether the Corps would consult with NMFS again for the 2017 NWPs, the Corps' regulatory program manager stated that "for the 2017 NWPs, *we would have to do a new consultation.*" PlsAppx322 (emphasis added). But he went on to recommend that rather than engage in such consultation, the Corps should "make a 'no effect' determination" and that the Corps "could continue to make" such a determination "for each NWP reissuance until it is challenged in federal court and a judge rules against the Corps. If we lose in federal court, then we would start doing the national programmatic consultations again." *Id.*

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[10] It is notable that the Services promulgated this regulation in 2015, following the Corps' 2014 programmatic consultation with NMFS; therefore, the Services were aware of the value and suitability of programmatic consultation for the NWP program. This further belies Defendants' arguments that such consultation is superfluous or that NMFS's 2014 Biological Opinion somehow fulfilled the Corps' ESA duties for the 2017 NWPs. TC Energy's reliance on a subsequent sentence in the Federal Register stating that consultation is not required for framework programmatic actions that have no effect on listed species misses the point. TC Mot. 17-18. While framework programmatic actions that truly have no effect on listed species would not require consultation, NWP 12 *does* affect listed species, as the district court found.

That scenario has now come to pass. *See* FedAppx28 ("rul[ing] against the Corps, just as the Corps anticipated"). If the Corps had initiated consultation on NWP 12 at the "earliest possible time," 50 C.F.R. § 402.14(a)—i.e., when it proposed reauthorizing the NWPs—rather than evading its known ESA duties, it could have avoided this litigation and the harms that Defendants and Amici now contend will occur from the Corps' failure to follow the law. *See* 51 Fed. Reg. at 19,949 (explaining that where an agency opts not to engage in consultation, it "bears the risk of an erroneous decision"); *see also infra* pp. 64-65.

4. The district court properly concluded that the Corps' prior ESA consultations do not suffice for the 2017 iteration of NWP 12

The Corps' prior consultation with NMFS on a previous iteration of the NWPs simply cannot cure the agency's failure to consult on the 2017 NWPs, as Defendants suggest. Fed. Mot. 34-35. Indeed, the district court properly found that those prior consultations underscore, rather than refute, the need for programmatic consultation when the Corps reissued NWP 12 in 2017. FedAppx58.

In addition to the fact that NMFS's 2014 Biological Opinion states that it is valid only for the 2012-2017 version of the NWPs, *see* PlsAppx283, the record shows that annual NWP 12 usage increased by more than 45 percent in

that time, *supra* p. 8. The Corps also started using NWP 12 for massive oil pipelines only in 2012, *supra* pp. 7-8, further rendering any prior consultation obsolete and underscoring the need for programmatic consultation for the 2017 version of NWP 12. Moreover, the prior consultations occurred only with NMFS and thus covered species only within NMFS's jurisdiction—even though many NWP 12-authorized projects, such as fossil fuel pipelines, are located well inland and thus cross rivers, streams, and wetlands providing habitat for species that come under FWS's jurisdiction.

Defendants' reliance on the 2014 Biological Opinion to suggest the Corps *has* complied with the ESA is also misplaced because that opinion followed NMFS's initial determination in 2012 that NWP 12 (along with other NWPs) *was* jeopardizing the continued existence of listed species. *See* FedAppx430-31. Defendants ignore NMFS's 2012 jeopardy determination, which NMFS altered in 2014 only after the Corps agreed to adopt additional protective measures. *See* PlsAppx284-86, PlsAppx290-91. That the Corps agreed to apply some, but not all, of those protective measures to the 2017 iteration of the NWPs, *see* Fed. Mot. 12, also undermines the Corps' "no effect" determination, given that all of these measures were necessary to reverse NMFS's 2012 jeopardy determination. And it remains far from clear that the measures still being implemented are avoiding jeopardy, particularly

considering the dramatic increase in NWP 12-authorized projects since 2012. Consultation on the NWP 12 now in effect is necessary to determine whether those measures, to the extent the Corps continues to apply them, are indeed sufficient to ensure that species are not being jeopardized and that critical habitats are not being destroyed in piecemeal fashion.

Similarly, the Corps' prior consultations with NMFS bely Defendants' arguments that "it is difficult to understand what formal programmatic consultation would meaningfully add," or that the speculative use of NWPs somehow makes programmatic consultation unnecessary. Fed. Mot. 29, 35-36. Not only are these arguments contradicted by the Services' use of the NWPs as an example in the regulations establishing programmatic consultations, 80 Fed. Reg. at 26835, but NMFS's 2012 Biological Opinion and 2014 revision show both the feasibility of, and urgent need for, programmatic consultation to ensure protective measures are sufficient to prevent jeopardy. The 2012 and 2014 Biological Opinions also show that programmatic review of NWP 12 can be undertaken to craft measures to protect species without necessarily knowing all of NWP 12's future uses.[11]

[11] Federal Defendants' reliance on a Tenth Circuit case to suggest that speculation undermines the point of programmatic consultation, Fed. Mot. 35-36, is therefore misplaced, particularly given that it did not even concern the ESA. *See Sierra Club v. Bostick*, 787 F.3d 1043, 1057-59 (10th Cir. 2015).

Nor did NMFS approve the Corps' "no effect" determination for the current version of NWP 12, as Defendants repeatedly claim. *See* Fed. Mot. 29. The record contains no such statement. Indeed, Defendants can cite only to a letter and email the Corps sent to NMFS and the Office of Management and Budget, respectively, reiterating *the Corps'* belief that its reauthorization of NWP 12 has "no effect" on listed species and setting forth the subset of measures from the 2014 Biological Opinion that the Corps would continue to implement. TC Mot. 20 (citing FedAppx424-28); Fed. Mot. 12 (citing FedAppx429-31).[12] Nowhere does this suggest that NMFS agreed with the Corps' determination.

Instead, the record shows that NMFS was unequivocal in its objection to the Corps' "no effect" determination, stating that it "cannot support [the determination's] inclusion in the preamble of [the Corps' proposal to reissue NWP 12 in 2017]," and that "such a conclusion is not supportable under the ESA." PlsAppx282. NMFS further stated that it is "concerned that the [Corps'] failure to consult on the effects of this rule pursuant to Section 7(a)(2) of the ESA is not consistent with the [Corps'] legal obligations." *Id.* Notably, these statements came well after NMFS's 2014 Biological Opinion, belying TC

[12] The Corps also offered to consult under a different provision of the ESA, Section 7(a)(1), that is not at issue here.

Energy's assertion that the court's decision was somehow "inconsistent with the expert judgement of NMFS" as set forth in 2014. TC Mot. 3, 14.

Defendants' claim that FWS did not raise any concerns with the Corps' "no effect" determination is similarly misplaced. Fed. Mot. 12. "Until an action agency requests consultation, [the Services] have no obligation to consult, and in fact cannot engage in consultation, even if they believe the 'no effect' determination was erroneous." *Sierra Forest Legacy v. U.S. Forest Serv.*, 598 F. Supp. 2d 1058, 1067 (N.D. Cal. 2009). Accordingly, while FWS provided a letter *acknowledging* the Corps' "no effect" determination, it never *endorsed* that position. Rather, FWS distanced itself by making clear that the Corps' determination avoided any section 7(a)(2) consultation. PlsAppx292.

In short, the Corps' prior consultation with NMFS, far from curing the ESA violation, reinforces why Defendants are unlikely to prevail on the merits. *Cf. Kraayenbrink*, 632 F.3d at 498 (finding agency's failure to conduct programmatic consultation arbitrary and capricious in part because agency had consulted on previous iteration of regulations at issue and did not give rational basis for new position that regulations would not affect listed species). Defendants' prospects for success are especially dim given the record evidence that the Corps knew of its obligation to consult on NWP 12 and yet, rather

than engage in consultation, decided to rely on a groundless "no effect" determination to avoid its Section 7 duties.

B. The district court properly ordered vacatur and injunctive relief

Defendants have likewise failed to make a strong showing that they will prevail in their challenge to the district court's remedy.

1. The district court properly vacated the use of NWP 12 for the construction of new oil and gas pipelines

When, as here, an agency violates the APA and ESA, courts "[t]ypically . . . vacate the agency's action." *Defs. of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005), *rev'd and remanded on other grounds sub nom. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); *accord* 5 U.S.C. § 706(2)(A) (directing courts to "set aside agency action . . . found to be . . . not in accordance with law"). Indeed, it is well established that courts remand without vacatur only "[i]n rare circumstances." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *see also Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) ("We leave an invalid rule in place only 'when equity demands' that we do so." (citation omitted)).

In evaluating whether to depart from the presumptive remedy of vacatur, in whole or in part, courts generally look to two factors: (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); *accord Pollinator*, 806 F.3d at 532. The district court's application of these equitable factors is reviewed for abuse of discretion, *see Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1190 (D.C. Cir. 2018), and Defendants have not made a strong showing that the district court abused its discretion here in partially vacating NWP 12.

a. The district court correctly concluded that the Corps' error was serious

As described above, the district court held that the Corps' failure to engage in programmatic consultation before issuing NWP 12 was unlawful. The court concluded that this violation of the Corps' clear duties under the ESA was a "serious error" warranting vacatur. FedAppx9.

The district court was correct. As this Court has repeatedly affirmed, Section 7 is the "heart of the ESA." *Karuk Tribe*, 681 F.3d at 1019 (quoting *Kraayenbrink*, 632 F.3d at 495); *see also California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). Section 7's "consultation requirement reflects 'a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies,'" by requiring agencies like the Corps "to obtain the expert opinion of wildlife agencies" to ensure that an action will not violate Section 7's substantive protections. *Karuk*

Tribe, 681 F.3d at 1020 (quoting *Hill*, 437 U.S. at 185); *see supra* pp. 13-14, 18-21, 26-27.

Accordingly, and as the district court found, the Corps' "failure to initiate ESA section 7 consultation is a serious deficiency" weighing in favor of vacatur. *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014).[13] That failure is especially egregious here, given the sheer volume of projects authorized under NWP 12. The district court recognized that the Corps' issuance of more than 38,000 PCN verifications under NWP 12 since March 2017 "compounds th[e] harm" of its violation. FedAppx35. Indeed, the Corps has indicated that at least 164 NWP 12-authorized projects underwent formal ESA consultation during this period (i.e., were likely to "adversely affect" listed species), and that 1,436 projects underwent informal consultations, FedAppx222-23—all without the safeguards against piecemeal destruction provided by programmatic consultation, FedAppx22.

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[13] As noted above, the district court declined to rule on Plaintiffs' NEPA and CWA claims, anticipating that the information developed in Section 7 consultation could materially alter the Corps' analyses under those statutes. FedAppx61-63; *see also* FedAppx9-10 (noting pending NEPA and CWA claims as relevant to serious error analysis). Until the Corps completes that consultation and the district court determines whether the Corps has complied with the law, NWP 12-authorized activities will threaten the interests protected by those statutes as well.

Federal Defendants—the only party to address this factor—cite no authority for their contrary view that the Corps' violation is not serious. Instead, they reiterate their disagreement with the district court's merits decision, again mischaracterizing the nature and import of the Services' prior involvement with NWP 12 and suggesting that programmatic consultation would serve no function. Fed. Mot. 28-30. All of these assertions lack merit. *See supra* pp. 18-30.

The district court thus correctly determined that this prong of the *Allied-Signal* test warranted vacatur.

b. The district court properly concluded that the disruptive consequences of partial vacatur did not outweigh the Corps' serious error

The district court also properly weighed the Corps' serious error against the disruptive consequences asserted by Defendants, and thus did not abuse its discretion in partially vacating NWP 12 for the construction of new oil and gas pipelines. Defendants bore the burden to "overcome the presumption of vacatur" as to those uses, *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018) (emphasis omitted), and failed to do so. Their showing in support of a stay fares no better.

In their stay motion below, which invited the district court to revise its remedy, Federal Defendants focused mainly on non-pipeline uses of NWP 12,

explaining that "[m]any" pending uses "likely have nothing to do with oil and gas pipelines at all." PlsAppx226; *see also* FedAppx223 (citing "thousands" of "routine" projects). Intervenors similarly highlighted other uses as particularly impacted by vacatur, as the district court noted. *See* FedAppx14 ("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."); PlsAppx237-38; CoalAppx152-57. Plaintiffs did not oppose a partial vacatur that permitted these uses of NWP 12 to continue, especially given Plaintiffs' specific concerns with NWP 12's application to other projects, namely, construction of new oil and gas pipelines. FedAppx89-92.

The district court carefully considered the parties' arguments and narrowed its vacatur accordingly. FedAppx14-16 (concluding that allowing Corps to authorize new oil and gas pipeline construction under NWP 12 "could seriously injure protected species and critical habitats" given that such projects "may extend many hundreds of miles across dozens, or even hundreds, of waterways," "require the creation of permanent rights-of-way," and "often require a network of access roads, pump stations, pipe yards" and other workspaces); *see Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) (discussing "partial or complete vacatur" as a remedy); *League of*

Wilderness Defs./Blue Mountains Biodiversity Project v. U.S. Forest Serv., No. 10-cv-1397, 2012 WL 13042847, at *5 (D. Or. Dec. 10, 2012) ("The second factor of *Allied-Signal* can help inform the appropriate scope of vacatur . . . .").

The district court thus exercised its considerable discretion to fashion an equitable remedy tailored to the circumstances of the case. *See, e.g.*, *Native Fish Soc'y v. NMFS*, No. 12-cv-431, 2014 WL 1030479, at *4 (D. Or. Mar. 14, 2014) (partially vacating a hatchery genetic management plan by allowing a certain amount of fish to be released pursuant to the plan); *Ctr. for Biological Diversity v. BLM*, No. 06-cv-4884, 2011 WL 337364, at *2-3 (N.D. Cal. Jan. 29, 2011) (partially vacating a land management plan by leaving specific protective measures in place); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79-80 (D.D.C. 2010).[14]

Defendants insist that this outcome was improper, reiterating the disruptive consequences that the court considered and rejected—namely, that partial vacatur will strain the Corps' resources, result in delayed projects, and

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[14] In so doing, the district court did not suggest that constructing new oil and gas pipelines always has more severe impacts than other uses for which it declined to vacate NWP 12. *Contra* TC Mot. 15-16; NWP 12 Coal. Mot. Stay Pending Appeal ("Coal. Mot.") 23, ECF No. 34-1. Rather, the court tailored its remedy to vacate NWP 12 for uses that would generally cause more harmful impacts *and* for which vacatur would generally carry fewer disruptive consequences, based on the parties' submissions.

increase costs. Fed. Mot. 30. As explained in detail below, these disruptions continue to be overstated. *See infra* pp. 65-71. In any event, and as the district court properly held, any such disruptions are outweighed by Congress's mandate to protect endangered species and critical habitats from harm until consultation is completed.

Federal Defendants primarily rely on *California Communities Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012) (per curiam), but that case is readily distinguishable. There, this Court—weighing the equities in the first instance—remanded without vacatur because vacatur threatened both economically *and* environmentally harmful consequences. *Id.* at 993-94. Not so here. As the district court found, leaving NWP 12 in place for the construction of new oil and gas pipelines "could seriously injure protected species and critical habitats—'the very danger' that the ESA 'aims to prevent.'" FedAppx15 (quoting *Cal. Cmtys.*, 688 F.3d at 994).[15]

[15] Defendants also criticize the district court for focusing on environmental harm over economic disruption. Fed. Mot. 30 n.6; Coal. Mot. 24-25. But this Court has generally declined to vacate only in those cases where vacatur would lead to environmental harm. *See Pollinator*, 806 F.3d at 532 (citing cases where "vacating could lead to air pollution, undermining the goals of the Clean Air Act" [*Cal. Cmtys.*, 688 F.3d 989], or "risk potential extinction of [a] species," [*Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)]). The district court's analysis, which considered permitting disruptions and associated costs for new oil and gas pipelines but

The district court's application of *Allied-Signal* followed other courts that have concluded that claims of economic disruption from vacatur are outweighed by an unlawful action's environmental risks. *See, e.g.*, *California v. BLM*, 277 F. Supp. 3d 1106, 1125-27 (N.D. Cal. 2017) (rejecting compliance cost argument as insufficient to avoid vacatur); *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 218 F. Supp. 3d 53, 60 (D.D.C. 2016) ("protracted delay" and "significant financial costs and logistical difficulties" did not outweigh consequences of proceeding without sufficient environmental analysis).[16] The district court did not abuse its discretion in reaching a similar conclusion here, particularly given that the serious legal violation at issue "tip[s] the scales in favor of the endangered species under the [ESA's] 'institutionalized caution' mandate." *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015)

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did not find them dispositive, FedAppx17-18, was consistent with this precedent; Defendants' reliance on out-of-circuit cases reveals as much.

[16] The NWP 12 Coalition relies on inapposite cases declining vacatur where the agency's error was not serious. *See* Coal. Mot. 18, 24-25; *see also, e.g.*, *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (remand-only relief appropriate where power supply possibly impacted *and* "errors at issue can probably be mended"); *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994) ("technical" error that agency could correct "when it gets down to trying"). Where "the first prong of *Allied–Signal* supports remand without vacatur," far less disruption can warrant departure from the presumptive remedy. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 108 (D.D.C. 2017) (citation omitted).

(citation omitted)); *cf. Cottonwood*, 789 F.3d at 1091 ("[W]hen evaluating a request for injunctive relief to remedy an ESA procedural violation, the equities and public interest factors always tip in favor of the protected species.").

c. The district court properly concluded that vacatur should extend to pipelines beyond Keystone XL

In the alternative, Federal Defendants suggest that the district court was required to limit partial vacatur to Keystone XL, which, they claim, is the only pipeline that will injure Plaintiffs' interests. Fed. Mot. 27. Their legal premise is wrong: courts do not require a broader showing of injury to support the presumptive remedy of vacating an unlawful agency action. But even were this the law, Plaintiffs' facial challenge to NWP 12 is not limited to Keystone XL, and the Corps' failure to undertake programmatic consultation causes widespread harms to Plaintiffs' interests.

As this Court recently reaffirmed, "when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Empire Health Found. v. Azar*, --F.3d--, 2020 WL 2123363, at *10 (9th Cir. May 5, 2020) (citation omitted); *accord E. Bay Sanctuary Covenant*, 950 F.3d at 1283. To that end, a single plaintiff with a successful challenge to an unlawful agency

action can obtain relief directed at the entire action. *See Empire Health Found.*, --F.3d--, 2020 WL 2123363, at *10 (vacating Medicare/Medicaid reimbursement rule in challenge by single healthcare provider); *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").

This Court has thus routinely vacated invalid agency actions of broad applicability without requiring (or even mentioning a need for) plaintiffs to show harms stemming from each unlawful application. *See, e.g.*, *Empire Health Found.*, --F.3d--, 2020 WL 2123363, at *10; *Pollinator*, 806 F.3d at 532 (pesticide registration); *NRDC v. EPA*, 526 F.3d 591, 608 (9th Cir. 2008) (storm water discharge rule); *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1026 (9th Cir. 2008) (rule exempting vessel discharges from CWA permitting).[17] And when it has departed from that presumptive remedy, it has done so based on

[17] Other circuits have done the same. *See, e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (workplace safety standard); *Chamber of Commerce of U.S. v. Dep't of Labor*, 885 F.3d 360, 388 (5th Cir. 2018) (financial service regulations); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998) (tobacco regulations), *aff'd,* 529 U.S. 120 (2000).

the equitable considerations articulated in the *Allied-Signal* framework, *supra* pp. 33-38.[18]

Federal Defendants' authorities do not undermine this robust consensus. Their lone case actually concerning vacatur, *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), contradicts binding precedent. Federal Defendants' remaining cases concern injunctions, not vacatur, and so are discussed below.

Even if vacatur required a broader showing of harm, the district court found that Plaintiffs proffered evidence of such harm here. Contrary to Federal Defendants' contention, Fed. Mot. 25, Plaintiffs asserted from the outset that NWP 12 harms their interests in ways that extend beyond Keystone XL, explaining that NWP 12 unlawfully authorizes activities that "cause immediate and irreparable impacts to ecosystem functions of streams and

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[18] To the extent Federal Defendants' use of "injury" refers to Article III standing, that contention conflates the need to show Article III standing for each *form* of relief with the proper *scope* of relief. No party contested Plaintiffs' standing to seek their requested forms of relief, and if a party "has standing . . . and prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001); *see also Desert Survivors v. Dep't of Interior*, 336 F. Supp. 3d 1131, 1136 (N.D. Cal. 2018) (rejecting argument to limit vacatur's geographic scope "on the basis of Article III standing").

adjacent wetlands" and "adversely affect hundreds of listed species that rely on rivers, streams, and wetland habitats and other aquatic resources across the country." FedAppx364; *see also* FedAppx334-35, FedAppx403. Indeed, that many projects individually and collectively impact Plaintiffs' interests is inherent in their ESA challenge because—as the district court recognized—"[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." FedAppx56.

Thus, in seeking summary judgment, Plaintiffs explained that "regional conditions and project-level consultations are 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." PlsAppx49 (citing Keystone XL as "illustrative"). While Plaintiffs sought vacatur as to Keystone XL, FedAppx294, they did not suggest that their harms stemmed *only* from that project. Rather, Plaintiffs indicated that their challenge *focused* on the Corps' use of NWP "to approve massive oil pipelines like Keystone XL," *id.*, and their accompanying declarations likewise invoked Keystone XL as illustrative while also pointing to broader harms. *See, e.g.*, PlsAppx73-74 (citing uses of NWP 12 "to approve several major oil and gas pipeline project[s]" and explaining that "the Corps' use of NWP 12 meant that Sierra Club members who were impacted by . . . these major projects were

deprived of the opportunity for public comment"); PlsAppx94-95 (articulating interests "in the preservation of the Missouri River system" and explaining that the Corps' violations prevented the agency from "understand[ing] the full environmental impacts of the NWP program or the Keystone XL project, including the impacts to the Missouri River and the species that call it and its tributaries home").[19]

Plaintiffs' supplemental declarations "further underscore" the widespread nature of NWP 12's harms to their interests. FedAppx102-03; *see generally* FedAppx121-211 (describing impacts from pipelines across the country, including in New Mexico, Texas, Virginia, and North Carolina).[20] In short, Plaintiffs demonstrated a broad range of harms stemming from NWP 12, even despite the fact that the Corps' failure to consult prevented them from

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[19] Plaintiffs likewise highlighted Keystone XL as emblematic of NWP 12's threats to particular species. *See* PlsAppx66-67 ("Since the [American burying beetle] is endangered, any loss of individual [beetles] through exposure to potentially toxic oil spills, such as from the Keystone XL pipeline, would hamper my ability to undertake . . . research [on the beetle]."); PlsAppx86, PlsAppx88-89 (explaining that "[c]onstruction activities that increase sediment loading pose a significant threat to the imperiled pallid sturgeon" and highlighting that Keystone XL would "be constructed across hundreds of waterways").

[20] Plaintiffs properly submitted these declarations to inform the district court's consideration of remedy. *Infra* pp. 62-64. And while the court did not discuss those declarations in any depth, FedAppx10, this Court may decline to stay the district court's decision "on any ground supported by the record," *Sierra Club v. Trump*, 929 F.3d 670, 688 n.14 (9th Cir. 2019) (citation omitted).

learning the full scope of those harms. *Cf. Cottonwood*, 789 F.3d at 1082 (plaintiffs are "not required to establish what a Section 7 consultation would reveal, or what standards would be set").

Given this record, the district court properly crafted a vacatur extending beyond Keystone XL. Collectively, Plaintiffs have members in every state. Further, as noted throughout the litigation, some of the plaintiff groups are nationwide organizations that have long opposed NWP 12 and its impacts on their members. *See* FedAppx331-33; PlsAppx72, PlsAppx74, PlsAppx79, PlsAppx99; *see also* PlsAppx294-96 (comment letter submitted by several plaintiff groups opposing use of NWP 12 for major fossil fuel pipelines). And, as explained above, Plaintiffs' injuries are not limited to a single project, because the cumulative effects of NWP 12-authorized activities cause harm to species and, thus, to Plaintiffs' members. Similarly, because NWP 12 may affect "listed species, like migratory birds, that cross regions," FedAppx3, Plaintiffs' members' interests in those species are impaired by projects throughout the country, many of which are authorized under NWP 12 without public notice, *supra* pp. 6-7.

Accordingly, the district court properly vacated NWP 12 for the construction of all new oil or gas pipelines, not just Keystone XL.[21]

2. The district court properly issued an injunction that imposes no additional burden on Defendants

Upon determining that a partial vacatur limited to NWP 12's use for the construction of new oil and gas pipelines was warranted, the district court properly enjoined the Corps from authorizing dredge or fill activities under NWP 12 for those same activities. FedAppx24, FedAppx38. Defendants fail to identify any additional burden the injunction imposes on top of vacatur. The injunction operates solely on the Corps and requires only that the Corps refrain from authorizing certain activities under NWP 12 until it completes consultation—it does not, for instance, require the Corps to adopt additional measures to protect species or otherwise constrain the agency's implementation of its Section 7 obligations.

Recognizing, however, that partial vacatur would preclude the Corps from authorizing the construction of new oil and gas pipelines using NWP 12,

[21] Focusing exclusively (and mistakenly) on the question of irreparable harm, TC Energy contends that Plaintiffs have failed to show harm to justify any vacatur as to Keystone XL specifically. TC Mot. 11-15. But partial or complete vacatur is presumptively available "whether or not [a party] has suffered irreparable injury." *Am. Bioscience*, 269 F.3d at 1084. As explained above, Plaintiffs are clearly entitled to that remedy here. And in any event, Plaintiffs meet the standard TC Energy invokes. *See* FedAppx21-22, FedAppx105-06.

Plaintiffs informed the district court of that view and proposed limiting any injunctive relief to the use of NWP 12 for Keystone XL. FedAppx104; *see also* PlsAppx227 (Federal Defendants agreeing that vacatur would "prevent[] private parties from relying on the [p]ermit"). Plaintiffs made that request because TC Energy had repeatedly asserted in its stay motion that the district court's reasoning as to the facial invalidity of NWP 12 did not apply to Keystone XL, thereby suggesting that the project would somehow be exempt from the partial vacatur. FedAppx104-05; *cf. Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 946 (N.D. Tex. 2019) (indicating injunctive relief may be warranted where defendants "attempt to apply the vacated [r]ule"), *appeal docketed*, No. 20-10093 (5th Cir. Jan. 24, 2020); *O.A.*, 404 F. Supp. 3d at 154. Plaintiffs went on to describe the irreparable injury they and their members would suffer absent an injunction against Keystone XL's use of NWP 12. FedAppx105-08 (citing Supreme Court and Circuit precedent curtailing four-factor injunctive relief test in recognition of priority afforded to protected species under the ESA).

In response, TC Energy represented that it would abide by any vacatur that covered Keystone XL but objected to the "singling out" of that project for injunctive relief. PlsAppx254, PlsAppx259. Federal Defendants similarly requested that the district court make any vacatur and injunction "coextensive

[to] avoid[] unnecessary confusion for the public and regulated community." PlsAppx267. In light of those statements, and having already found that a partial vacatur as to NWP 12's use for the construction of new oil and gas pipelines was merited, the court fashioned the injunction to parallel the scope of the partial vacatur. FedAppx24, FedAppx38.

Defendants now decry this result, marching out a parade of cases limiting the scope of nationwide injunctions. Those cases have no bearing on this one. Several do not acknowledge vacatur as the presumptive remedy for a facially invalid agency action, or even involve APA or ESA challenges. *See, e.g.*, *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018); *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011). Others deal with preliminary injunctions, and thus are governed by different considerations. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) ("The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward." (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017))); *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987) (distinguishing

precedent limiting scope of relief "[b]ecause the injunction was *preliminary*").[22]

Defendants have therefore failed to show that the district court erred in issuing the narrowed injunction. Should this Court nonetheless determine that the injunction is unnecessary on the record here, *see O.A.*, 404 F. Supp. 3d at 153-54 (citing *Monsanto*, 561 U.S. at 165), that would at most support lifting the injunction and would in no way undermine the propriety of the partial vacatur.[23] Nor would that determination support the broad stay relief Defendants seek. Rather, it could only support staying the injunction portion of the remedy—although, even as to that, Defendants have not shown that irreparable harm or the balance of the equities justifies any stay.

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[22] In any event, these cases support the scope of the court-ordered relief, given the nationwide breadth of Plaintiffs' membership and interests and the cross-regional nature of both NWP 12-authorized pipelines and the endangered and threatened species they impact, *see supra* pp. 38-43—no part of which "operate[s] in a fashion that permits neat geographic boundaries." *E. Bay Sanctuary Covenant*, 950 F.3d at 1282-83 (citation omitted) (distinguishing *California v. Azar* as a case where "individual states [sought] affirmance of an injunction that applied past their borders"); *cf. L.A. Haven*, 638 F.3d at 665 (single entity contesting calculation of its liability).

[23] Under that scenario, Plaintiffs reserve their right to seek further injunctive relief from the appropriate court, should the circumstances change and vacatur prove insufficient. *See NRDC v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001); Fed. R. Civ. P. 62(d).

C. The district court's relief was procedurally proper and consistent with law

Apparently recognizing that it cannot prevail in appealing the substance of the district court's relief, the federal government manufactures a long list of procedural grievances in an attempt to undermine it. For example, Federal Defendants claim they had no "notice" that vacatur was a possible remedy if a court finds an agency action unlawful, that Plaintiffs somehow "waived" any relief beyond Keystone XL, and that "the court essentially permitted Plaintiffs to institute a brand new lawsuit" after the court's merits decision. Fed. Mot. 19-23. These claims are meritless.

This case was never limited to Keystone XL alone, but rather challenged the lawfulness of NWP 12 itself. The nature and scope of Plaintiffs' direct challenge to NWP 12 and the potential remedies were always clear. The court found that the Corps' issuance of NWP 12 violated the ESA and properly vacated the unlawful action. In response to Federal Defendants' request that the court amend its order, Plaintiffs proposed a narrower remedy to alleviate many of Defendants' claims of disruption. The district court then narrowed the relief on the tight timeframe that Federal Defendants demanded. In short, there was nothing procedurally improper, and certainly nothing that would support the extraordinary relief now sought.

1. Plaintiffs challenged NWP 12 on its face

From the outset, all parties were aware that this case was about more than Keystone XL. In addition to two claims challenging the Corps' authorization of Keystone XL using NWP 12, Plaintiffs' operative First Amended Complaint ("Complaint") included three facial claims challenging the Corps' issuance of NWP 12 as violating NEPA, the CWA, and the ESA. FedAppx394-98, FedAppx402-05. In fact, much of the Complaint discussed legal violations and potential adverse impacts stemming from the Corps' issuance of NWP 12, as opposed to being limited to Keystone XL. *See, e.g.*, FedAppx351-65; *supra* pp. 38-43. The Complaint likewise sought broad relief that went beyond Keystone XL, as it asked the Court to "[d]eclare the Corps' issuance of NWP 12 in violation of" the relevant statutes and regulations, to remand NWP 12 to the Corps, and to "[p]rovide for such other relief as the Court deems just and appropriate." FedAppx408-09.

Following the Corps' withdrawal of its NWP 12 authorizations for Keystone XL, and at the federal government's urging, the parties stipulated to a stay of Plaintiffs' as-applied claims. PlsAppx2-4. After that point, as the government well knows, Plaintiffs' case dealt with facial challenges to NWP

12 itself, and those were the only claims briefed on summary judgment.[24]

Indeed, Plaintiffs' motion for summary judgment begins: "Plaintiffs challenge the U.S. Army Corps of Engineers' 2017 reissuance of Nationwide Permit 12 . . . ." PlsAppx15. Plaintiffs argued that the Corps' Environmental Assessment prepared for NWP 12 in 2017 violated NEPA, PlsAppx24-40; that its failure to engage in programmatic consultation for NWP 12 violated the ESA, PlsAppx41-52; and that its issuance of NWP 12 violated the CWA, PlsAppx52-57. Plaintiffs again asked for broad relief as to NWP 12 itself—to declare NWP 12 unlawful and to remand to the Corps. PlsAppx57-58. Defendants' attempt to reframe this case as pertaining only to Keystone XL is a patent misrepresentation of the proceedings below.

Defendants' summary judgement briefs confirm that there was little question Plaintiffs' challenge and potential relief were directed at NWP 12 as a whole. In fact, the federal government itself insisted that the court ignore Keystone XL entirely in resolving Plaintiffs' facial claims, *see* PlsAppx139-40 (arguing that the claims at issue on summary judgment "are facial challenges to NWP 12" and that "those claims have nothing substantively to do with the

[24] Indeed, the nationwide implications of the case was the basis of NWP 12 Coalition's participation as intervenors. *See* CoalAppx28-30 (arguing that the industry groups' interests would be harmed if NWP 12 were found unlawful and the groups' members were forced to seek individual permits).

Keystone XL pipeline”). Intervenors did likewise. *See, e.g.*, PlsAppx190 (“The partial summary judgment motions before this Court must be limited to facial legality of NWP 12, not whether Keystone XL’s future use of NWP 12 is lawful.”). Yet, while insisting that Plaintiffs’ arguments were facial in nature, Defendants objected to correspondingly broad relief. *See, e.g.*, PlsAppx158 (“Given the multitude of other activities for which NWP 12 can authorize work . . . vacatur would be inappropriate, over-broad, and extremely disruptive.”).

It is therefore disingenuous for Defendants to now claim that they were unaware of the possibility that the court might grant the presumptive relief for Plaintiffs’ facial challenges to NWP 12, or that they lacked any notice of available remedies. Fed. Mot. 21. Federal Defendants cite Rule 65(a)(1), which requires notice before issuance of preliminary injunctions. Fed. R. Civ. P. 65(a)(1). However, that rule simply ensures that, immediately following the filing of an action, “a motion for a preliminary injunction cannot be heard and granted *ex parte*” before the defendant has an opportunity to be heard. *List Indus., Inc. v. List*, No. 17-cv-2159, 2017 WL 3749593, at *4 (D. Nev. Aug. 30, 2017). No such concerns are present here, where all parties were heard and participated in the proceedings, from the outset of the case to the refinement of the remedy.

2. Plaintiffs did not "waive" the district court's ability to craft appropriate relief

Defendants erroneously insist that Plaintiffs waived or "expressly disclaimed" the possibility of any relief beyond the application of NWP 12 to Keystone XL. *Contra* Fed. Mot. 20, 23. In fact, Plaintiffs' claims of NWP 12's illegality extended well beyond that single project and particularly "focus[ed] on the Corps' use of NWP 12 to approve massive oil pipelines *like* Keystone XL." FedAppx294 (emphasis added).[25] Consequently, the relief ultimately awarded by the district court and now before this Court is consistent with the arguments made and issues raised in summary judgment briefing.

The fact that this is not the specific relief sought in Plaintiffs' Complaint is of no moment. The law is clear that courts "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

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[25] Plaintiffs stated they were not seeking to "have NWP 12 broadly enjoined [because] . . . this case . . . is not meant to affect other uses of NWP 12 that provide a public benefit and would have only minimal environmental impacts." FedAppx294. As Plaintiffs made clear in proposing modification of the remedy, such uses with minimal impacts include routine maintenance, repair, and inspection of existing projects and construction of more minor projects like broadband or fiber-optic cables, FedAppx92, which the court addressed by narrowing the remedy, FedAppx16-19. Plaintiffs never suggested that the construction of major oil and gas pipelines would have only minimal effects or should not be subject to appropriate relief.

Cir. 2002) ("So long as a party is entitled to relief, a trial court *must* grant such relief despite the absence of a formal demand in the party's pleadings." (emphasis added)). Particularly where, as here, Plaintiffs brought facial claims and requested in their Complaint that the court issue "such other relief as the Court deems just and appropriate," FedAppx409, the court could properly grant the presumptive remedy: in this case, vacatur of NWP 12 given the Corps' egregious violation of the ESA.

Indeed, the Supreme Court has found that courts can grant broad facial relief even if it exceeds the as-applied relief plaintiffs requested. In *Whole Woman's Health v. Hellerstedt*, plaintiffs challenged two Texas laws restricting abortion and, for the provision regarding physician admitting privileges, sought relief only as applied to two specific facilities. 136 S. Ct. 2292, 2301, 2307 (2016). The district court found both laws unconstitutional and enjoined their enforcement statewide. *Id.* at 2303. The Fifth Circuit reversed on the partial basis that plaintiffs had only challenged the application of the admitting-privileges provision at the two facilities, and the district court had thus "granted more relief than anyone requested or briefed." *Id.* at 2307 (citation omitted). The Supreme Court reversed again, discussing Rule 54(c) and holding "[n]othing prevents . . . awarding facial relief as the appropriate

remedy for petitioners' as applied claims" despite their more limited relief request. *Id*. at 2307.

The district court correctly applied this Supreme Court precedent and noted that, as in *Whole Woman's Health*, Plaintiffs had requested "such other relief as the Court deems just and appropriate," which includes all remedies available under the law. FedAppx3-4. Here, the proper relief was to vacate NWP 12 given the Corps' wholesale failure to comply with one of the most vital safeguards for imperiled species in the ESA.

Federal Defendants acknowledge the rule articulated in *Whole Woman's Health*, *see* Fed. Mot. 23 n. 4, but attempt to create exceptions to it that either have no bearing here or do not exist at all. First, they argue that Plaintiffs "waived" any remedy beyond Keystone XL, but that is incorrect. Rather, Plaintiffs argued that NWP 12 in its entirety violated the ESA; the presumptive remedy for that violation is vacatur. The only case Federal Defendants cite is *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 864 (9th Cir. 2017), but there the court observed that a plaintiff may waive a *basis* for relief —not an entire *form* of relief—by failing to argue its merits at summary judgment. *Bayer* did not hold, as Federal Defendants suggest, that a plaintiff can waive the default remedy for a claim for which it successfully argued the merits on summary judgment.

Federal Defendants next attempt to avoid *Whole Woman's Health* and Rule 54(c) by relying on dicta from two out-of-circuit cases. In *Powell v. National Board of Medical Examiners*, the court suggested that a party may be prejudiced if it had no notice of a particular relief. 364 F.3d 79, 86 (2d Cir. 2004). But, as set forth above, all parties had sufficient notice here given the nature of the claims and the arguments briefed. *See Cal. Ins. Guarantee Ass'n v. Burwell*, 227 F. Supp. 3d 1101, 1116 (C.D. Cal. 2017) ("[T]he Ninth Circuit has liberally construed what constitutes sufficient notice of the requested relief."). Indeed, *Powell* did not even examine the sufficiency of notice and held that the court *could* grant injunctive relief despite the fact that the plaintiff had not requested it in the complaint, further undermining the federal government's arguments. *Powell*, 364 F.3d at 86.

Likewise, *Versatile Helicopters, Inc. v. City of Columbus* found no evidence of any prejudice and held that defendants had sufficient notice of a jury verdict that went far beyond the relief requested in the complaint. 548 F. App'x 337, 343-44 (6th Cir. 2013). There is simply no authority to suggest that, for an APA or ESA claim challenging a federal agency action as unlawful, an agency defendant could lack notice that a court might vacate the action, *see* 5 U.S.C. § 706(2)(A) (directing courts to "set aside agency action . . . found to be . . . not in accordance with law"), or enjoin its use.

Finally, Federal Defendants and the NWP 12 Coalition rely on language discussing the principle of "party presentation" from *United States v. Sineneng-Smith*, 140 S. Ct. 1575, at *3 (2020)—a case that has little relevance here. There, a criminal defendant who was convicted of a federal crime unsuccessfully asserted various defenses in the district court and on appeal. *Id* at *2-3. But rather than adjudicating the case presented by the parties on appeal, the court named three amici to brief new and different constitutional challenges to the statute, which the court accepted. *Id*. at *3. The Supreme Court reversed, admonishing the court's "radical transformation" of the merits of the case. *Id*. at *1, 6. The present case involved nothing of the sort—rather than transform the case by adding new claims by non-parties, the district court merely applied the appropriate remedies after holding an agency action unlawful based on extensive merits briefing as to the facial validity of that action.[26]

Federal Defendants and the NWP 12 Coalition also seize on language from the court's denial of the NWP 12 Coalition's and the State of Montana's

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[26] The other two "party presentation" cases cited by Defendants are likewise inapposite. *United States v. Oliver* suggested a court should ordinarily not *sua sponte* dismiss an untimely appeal of a criminal conviction when the government had failed to raise the issue of timeliness, but found that dismissal was in fact warranted under the facts presented. 878 F.3d 120, 127, 130 (4th

intervention as of right—but grant of permissive intervention—stating that the parties "could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits." FedAppx304; Fed. Mot. 20-21; Coal. Mot. 6-7. First, the district court made that observation early in the case, before the parties presented their merits arguments and the court had the opportunity to review the record, and thus before it was fully apprised of the Corps' willful and egregious ESA violation. It did not preclude the court from issuing lawful relief. Second, as the NWP 12 Coalition concedes, Coal. Mot. 6, the district court *granted* the NWP 12 Coalition and State of Montana permissive intervention, and these parties participated throughout the proceedings below. Defendants fail to articulate any way in which either intervenor was prejudiced by permissive intervention rather than intervention as of right.

The NWP 12 Coalition next claims that "[t]he parties briefed partial motions for summary judgment in reliance on [these] judicially-endorsed assertions." Coal. Mot. 7. But the parties had a full and fair opportunity to brief whether the Corps' issuance of NWP 12 was lawful. The NWP 12

Cir. 2017). And in *Greenlaw v. United States*, a criminal defendant appealed a conviction and the appeals court increased the sentence by 15 years, even though the government had not appealed, which the Court held was improper. 554 U.S. 237, 242-43, 245-46 (2008).

Coalition does not identify any way it would have briefed the merits differently had the court reminded it that vacatur is a likely outcome if an agency action is found unlawful. Since the parties were well aware of the nature of the claims against NWP 12 and that vacatur is the presumptive remedy for the Corps' failure to follow the law, Defendants' arguments as to the likelihood of their success on appeal regarding remedy are unavailing.

3. Defendants had sufficient opportunity to brief remedy

Federal Defendants also complain that they were not afforded a "fair opportunity to contest the appropriateness of [the] relief," Fed. Mot. 21, but those criticisms are unfounded—all parties presented arguments and evidence on the appropriate scope of relief, which caused the district court to narrow it substantially.

Defendants had the opportunity to ask the court to amend a ruling they believed was overbroad, as is common practice. For example, in a 2018 case before the same court and involving several of the same parties, TC Energy filed a motion to amend the court's order and injunction pursuant to Rules 59(e) and 60(b). *Indigenous Envtl. Network v. U.S. Dep't of State*, 369 F. Supp. 3d 1045, 1047 (D. Mont. 2018). The court carefully considered the parties' arguments and granted TC Energy's motion in part, narrowing the scope of the injunction to allow certain limited activities to proceed. *Id.* at 1047, 1053;

see also N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1154 (9th Cir. 1988) (district court amended injunction following Rule 59(e) motion).

In the instant case, Federal Defendants similarly sought modification of the relief, but took a different approach. They filed a motion styled as a motion to stay pending appeal, emphatically arguing that the remedy was overbroad while also proposing, in the alternative, that the court could revise its order under Rule 54(b). PlsAppx212. They further explained that they had delayed filing a notice of appeal to ensure that the court retained jurisdiction for such revisions. PlsAppx212.

Plaintiffs noted in response that the federal government's motion should be construed in part as a Rule 59 motion. FedAppx77 (quoting *Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) (a motion "should be treated as a motion for reconsideration under Rule 59" if it requests modification of the court's summary judgment disposition and "seeks to relitigate the issues underlying the original [permanent] injunction order")). While arguing that the district court's initial relief was justified, Plaintiffs proposed a substantial modification to address many of the concerns that Defendants raised.[27]

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[27] Plaintiffs did not formally cross-move for amended relief under Rule 59 because they understood Federal Defendants had already made such a request and because Federal Defendants had insisted on expedited briefing.

Following Defendants' reply briefs, which further addressed the appropriateness of the relief, the district court issued an order responding to the parties' arguments and carefully crafting a narrower vacatur and injunction. Thus, Federal Defendants' claim that they never had an opportunity to sufficiently brief the remedy is false.[28]

To the extent Federal Defendants prioritized seeking a stay pending appeal over directly seeking modification of the district court's initial relief, they "cannot now complain that the district court denied [them] a full opportunity to be heard." *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1322 (9th Cir.) (observing that party had foregone opportunity to be heard by filing motion to modify injunction after filing appeal), *amended*, 775 F.2d 998 (9th Cir. 1985).

Similarly, Federal Defendants complain that they only had two days to reply to Plaintiffs' opposing arguments. Fed. Mot. 21 n.3. But that was due to the expedited briefing schedule *the government itself proposed* under threat of an immediate appeal if the court failed to grant the expedited schedule and issue

[28] Defendants continue to criticize a lack of analysis supporting the district court's grant of relief in the April 15 order, but those criticisms are misdirected since that order has been superseded by the May 11 order. *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 386 (9th Cir. 1988) ("[A]n amended judgment supersedes the original judgment.").

relief by May 11. FedAppx215-16; PlsAppx212. Plaintiffs objected to this compressed schedule. FedAppx216. Nonetheless, the district court granted Federal Defendants' requested schedule and issued its order on their tight timeframe. Federal Defendants' complaint that they were prejudiced by their own expedited briefing schedule is absurd on its face and should be rejected.

The NWP 12 Coalition's assertion that the district court "denied multiple requests . . . for briefing on appropriate remedies," Coal. Mot. 7, is likewise meritless. The court never specifically denied any such requests, and never barred any parties from addressing remedies. Defendants could have addressed the appropriate relief in their summary judgment briefs, but opted not to do so. When another opportunity came to brief the remedies, the federal government, in its rush to appeal, insisted on a compressed timeline. Nonetheless, all parties submitted extensive arguments and evidence on the appropriate remedies. This Court should reject Defendants' attempt to mischaracterize the course of events and their opportunity to brief the remedy before the district court. The reality is that all parties *did* have an opportunity to address remedy issues in the proceedings below, and the district court properly crafted a remedy that took those arguments into consideration. Nothing in that process supports the extraordinary relief sought here.

4. All parties appropriately submitted declarations to inform the district court's remedy

Finally, Federal Defendants argue that the district court "had no basis for considering Plaintiffs' post-decisional submissions—either their new requested relief or the fourteen new standing declarations submitted in response to Defendants' motion to stay." Fed. Mot. 22. But as set forth above, Plaintiffs did not request new relief after the district court's decision. Rather, in response to *Defendants'* concerns regarding the scope of the relief awarded, Plaintiffs agreed that the remedy could be narrowed to address some of Defendants' alleged disruptions. Plaintiffs submitted additional declarations—as did Defendants at that stage—only "to underscore the [irreparable] harm that they and their members may suffer from NWP 12's unlawful use," FedAppx10, not to establish standing at the threshold. In fact, Plaintiffs made clear that Federal Defendants' concerns and their own response were directed at the scope of relief, not Article III standing. FedAppx100 n.8; *see also supra* p. 40 n.18.[29]

Plaintiffs were fully justified in submitting declarations to aid the district court in fashioning appropriate relief and resolving Defendants' stay motions.

[29] Federal Defendants' reliance on *Summers v. Earth Island Institute*, 555 U.S. 488, 495 n.*, 508 (2009), which declined to consider affidavits submitted after the merits decision to determine standing, is therefore inapposite.

For example, courts may consider such evidence to assess the "existence and magnitude of potential harms," including harm to the public interest, from the issuance of an injunction. *NRDC v. Evans*, No. 02-cv-3805, 2003 WL 22025005, at *1 (N.D. Cal. Aug. 26, 2003) (citation omitted); *see also Winter v. NRDC*, 555 U.S. 7, 24-25 (2008) (considering extra-record declarations on impacts of an injunction); *cf. Jiahao Kuang v. U.S. Dep't of Def.*, No. 18-cv-3698, 2019 WL 293379, at *3-4 (N.D. Cal. Jan. 23, 2019) (allowing discovery on equitable factors relevant to vacatur and injunctive relief). In fact, Defendants submitted a combined nine post-merits declarations of their own to illustrate the alleged harms from an injunction and/or vacatur. For them to now suggest that Plaintiffs should not have had the same opportunity is unfounded.[30]

In short, Plaintiffs had every right to submit their own declarations to inform the district court's consideration of the appropriate remedy, just as Defendants did. There was nothing untoward in Plaintiffs' doing so and there

[30] The federal government cites two inapposite cases holding a party cannot submit new evidence attached to a motion for reconsideration to support its case on the *merits*, which is clearly not what occurred here. *See Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988) (prohibiting a party from submitting new evidence on the merits following entry of summary judgment); *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (declining to consider new legal arguments presented in a Rule 59 motion that plaintiffs failed to raise on summary judgment).

is no reason these materials cannot be taken into consideration in assessing the propriety of the extraordinary relief now being sought.

II. Defendants have not shown that they will suffer irreparable injury absent a stay

Defendants also cannot satisfy the irreparable injury prong of the stay inquiry; accordingly, a stay cannot issue. *See Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam) (irreparable harm is the "bedrock requirement" of a stay).

Federal Defendants claim that the Corps will be irreparably harmed, but largely abandon any discussion of what those harms entail. *See* Fed. Mot. 40-43 (omitting discussion of harms to agency). For good reason. Although Federal Defendants had represented to the district court that the Corps would be burdened by having to process an increased number of individual permit applications, the court properly recognized that those burdens are "a fault of the Corps' own making" and cannot justify a stay. FedAppx27. The Corps was "well aware" of its consultation obligations and of the likelihood that its failure to consult would be successfully challenged in court. FedAppx58. Thus, any harms the Corps faces absent a stay stem from the Corps' "failure to follow the law in the first instance" and "carry little weight." *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014); *accord Al Otro Lado*, 952 F.3d at

1008 ("That the government's asserted harm is largely self-inflicted severely undermines its claim for equitable relief." (citation and quotation marks omitted)).

Rather than discuss harms to the agency, Federal Defendants instead focus on harms to the public, which, they contend, are one and the same. Fed. Mot. 40. But the lack of any showing of irreparable harm to the agency is meaningful. *See Doe #1 v. Trump*, 957 F.3d 1050, at *6 (9th Cir. 2020) (rejecting government's claim that "monetary injury to third parties . . . or to the economy in general" was sufficient irreparable harm). Indeed, even the case Federal Defendants rely on to suggest otherwise "consider[ed] the respective impacts" of a stay on "Defendants, Plaintiffs, and others interested in the proceedings, and in the general public." *Sierra Club v. Trump*, 929 F.3d at 705; *id.* at 706 (placing little stock in agency's claim that it would incur "unrecoverable fees and penalties of thousands of dollars" absent stay). In any event, the federal government's asserted interests and the public's interests diverge, as detailed in the next section.

Intervenors, meanwhile, bemoan their inability to rely on NWP 12, focusing on the costs and delays that might result. *See, e.g.*, TC Mot. 22. Their cited disruptions, however, are exaggerated. As the district court explained, "[p]atrial vacatur does not block any projects. It vacates only the Corps'

categorical approval of new oil and gas pipeline construction under NWP 12" until programmatic consultation is completed. FedAppx16-17. Project proponents can therefore still proceed with construction of these pipelines by, for example, altering their construction plans to avoid discharges in U.S. waters, *see* TC Mot. 22, or taking advantage of other NWPs, *see* CoalAppx201. And they can always seek individual permits under CWA Section 404(a), as applicants do for many other projects. In short, the district court's order does not prevent any new oil and gas pipelines from getting built through U.S. waters; it merely prevents them from relying on a permit issued in contravention of the ESA to do so.[31]

Indeed, Intervenors do not dispute that projects can move forward under these other options. Rather, they complain that doing so is more burdensome than the streamlined process NWP 12 affords. But project proponents "possess

[31] Amici's generic and overblown claims about the importance of, and harms to, the oil and gas industry writ large are thus entirely misplaced. *See generally* U.S. Chamber of Commerce et al.'s Amicus Br. Supp. Appellants' Mots. Stay Pending Appeal ("Chamber Br."), ECF No. 31-2; States of W. Va. et al.'s Amicus Br. Supp. Appellants' Mots. Stay Pending Appeal ("States' Br."), ECF No. 33. While it is clear that Amici, and Intervenors, prefer the use of NWP 12, their references to national security concerns, the current pandemic, and the "[t]rillions of dollars" at stake, Chamber Br. 2—a wholly unsupported statement—cannot alter the fact that NWP 12 is unlawful on its face. Amici also emphasize the importance of electrical power, States' Br. 2, 4, ignoring the fact that the court-ordered remedy explicitly keeps NWP 12 in place for use by electric utility projects, FedAppx36.

no inherent right to maximize revenues by using a cheaper, quicker permitting process, particularly when their preferred process does not comply with the ESA." FedAppx34. Though Congress may have allowed the Corps to reduce administrative burdens by issuing general permits, it has also made clear that "endangered species" are "to be afforded the highest of priorities." *Hill*, 437 U.S. at 174. Put differently, the issuance and use of general permits like NWP 12 cannot come at the expense of protected species.

Furthermore, pipeline construction projects often span several years, face lengthy and expensive permitting processes and related litigation, and encounter unexpected delays. *See, e.g.*, States' Br. 8 (indicating that state water regulators "currently average 130 days" to complete necessary water quality surveys); Fed. Mot. 44-45 (describing litigation over individual pipelines). Any resulting "lost profits and industrial inconvenience[s]" are "the nature of doing business, especially in an area fraught with bureaucracy and litigation." *Standing Rock*, 282 F. Supp. 3d at 104; *accord N. Cheyenne Tribe*, 851 F.2d at 1157. That is particularly true with respect to TC Energy, which has been involved in litigation over Keystone XL for years. *See Indigenous Envtl. Network*, 369 F. Supp. 3d at 1047.

In any event, Intervenors' alleged burdens associated with the individual permitting process are overblown. *See* Kim Diana Connolly, *Survey Says: Army*

Corps No Scalian Despot, 37 Envtl. L. Rep. 10317, 10318 (2007) (concluding that despite persistent portrayals of the individual permitting process as being unnecessarily burdensome, "[e]mpirical data reveal the inaccuracy of this assertion"). For example, the NWP 12 Coalition insists that projects could face up to two additional years of delay. Coal. Mot. 12. Yet that prediction is based in part on the Corps' estimates as to how long it would take to process individual permits for *all* pending NWP 12 PCNs, including "thousands" that are unaffected by the modified vacatur and injunction. *See* FedAppx223, FedAppx225-27; *see also* PlsAppx226 (asserting that "[m]any" of the 5,500 pending PCNs "likely have nothing to do with oil and gas pipelines at all"). It also ignores that the Corps could complete the required programmatic consultation well before then, and could "hire new personnel" to help process any uptick in permit applications in the meantime. FedAppx226.

The NWP 12 Coalition similarly complains of the added expense of the individual permitting process. But, according to the Corps, the cost of obtaining an individual permit is approximately $26,000, as compared to $9,000 for an NWP 12 verification. Fed. Mot. 42. There is no evidence that this difference in permitting costs would be prohibitive (or result in higher costs for consumers)—especially for the major pipelines subject to the court's relief, which often cost billions of dollars to build, *see, e.g.*, TCAppx3 at 3; Rorick

Suppl. Decl. Supp. Coal. Mot. ("Rorick Suppl. Decl.") ¶ 5, ECF No. 34-2, and can require dozens, if not hundreds, of verifications, *see, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 24 (D.D.C. 2016) (204 verifications issued for Dakota Access pipeline).[32]

Intervenors contend that delays associated with the individual permitting process will add to these costs. Coal. Mot. 12 (estimating that, assuming a full year of delay, project costs will increase by about six percent); *see also* TC Mot. 22. As above, there is no evidence that these asserted costs are insurmountable. *See, e.g.*, PlsAppx244-45 (TC Energy reaffirming commitment to scheduled 2023 startup date notwithstanding vacatur of NWP 12). And while these costs may eat into overall profits, "loss of anticipated revenues . . . does not outweigh . . . potential irreparable damage to the environment," *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001), *abrogated on other grounds by Monsanto*, 561 U.S. 139, and certainly cannot outweigh the need to safeguard imperiled species in the manner required by the ESA, *cf. Cottonwood*,

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[32] Indeed, the NWP 12 Coalition offers only speculative assertions that the individual permitting process could force developers to abandon projects altogether. *See, e.g.*, CoalAppx224-25 (projects "*may*" be "*at risk*" for securing financing (emphases added)); CoalAppx203 ("*some* projects *may* be cancelled *if* the risk profile . . . becomes too great" (emphases added)). "[S]imply showing some possibility of irreparable injury" is insufficient. *Nken*, 556 U.S. at 434-35 (citation and quotation marks omitted).

789 F.3d at 1091; *supra* pp. 38-43. Thus, the disruptions Intervenors complain of cannot support a stay in light of the Corps' serious ESA violation. Any remaining economic consequences are temporary and, as with lost revenues, insufficient when stacked against irreparable environmental injury. *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014).[33]

Finally, the NWP 12 Coalition contends that the district court's remedy creates vast uncertainty. Coal. Mot. 8-9. That contention is also exaggerated. The NWP 12 Coalition itself recognizes that one category of precluded activities is "clear": new oil and gas pipeline construction. Coal. Mot. 9. All uses of NWP 12 for *non*-pipeline projects are thus authorized. So, too, are uses of NWP 12 for routine maintenance, inspection, and repair activities on existing projects—a category that the NWP 12 Coalition itself referred to

[33] The contrary cases on which TC Energy relies, TC Mot. 22-23, neither of which involved an ESA violation, are readily distinguishable. In *Amoco Production Co. v. Village of Gambell*, the Supreme Court reaffirmed that if environmental injury "is sufficiently likely [] the balance of harms will usually favor the issuance of an injunction." 480 U.S. 531, 545 (1987). However, on the facts of the case, the Court found that the financial harm to the oil company from an injunction was truly irreparable, while the environmental harm absent the injunction "was not at all probable." *Id.* In *Alaska Survival v. Surface Transportation Board*, this Court granted a request to allow a project to move forward because the corporation had already won its appeal and would soon be able to proceed with the project anyway. 704 F.3d 615, 616 (9th Cir. 2012). None of those circumstances is present here.

throughout its original stay motion. *See* CoalAppx152-57. That the court narrowed the vacatur and injunction to exclude these uses in response to the NWP 12 Coalition's concerns about disruptive consequences only underscores the reasonableness of its decision. For the NWP 12 Coalition to now characterize this narrowing as "no better" than a full vacatur and injunction, Coal. Mot. 11, is nonsensical, especially since nothing precludes Intervenors or the government from seeking clarification from the district court if it is truly necessary, *see Garamendi v. Henin*, 683 F.3d 1069, 1078-79 (9th Cir. 2012) (district court may modify judgment to reflect its original intent and facilitate enforcement); *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997) (district court retains jurisdiction to clarify its judgment during appeal).

In sum, Defendants cannot establish irreparable harm.

III. The balance of harms and public interest do not support Defendants' request for extraordinary relief

Because Defendants have not satisfied the irreparable harm requirement, the Court need not reach these final two factors. *See Leiva-Perez*, 640 F.3d at 965. Regardless, "the balance of equities and public interest tip sharply" in Plaintiffs' favor. *Al Otro Lado*, 952 F.3d at 1015; *cf. Cottonwood*, 789 F.3d at 1091 ("[W]hen evaluating a request for injunctive relief to remedy an ESA

procedural violation, the equities and public interest factors always tip in favor of the protected species.").

As detailed above and in the district court's decision, Plaintiffs and their interests in protecting listed species would suffer substantial harm if Keystone XL and other new oil and gas pipelines were allowed to rely on NWP 12 during the pendency of the appeal. *Supra* pp. 38-43; FedAppx34-35; *see also, e.g.*, CoalAppx177-78 (stating that developer was one month away from receiving verification for a pipeline "designed to extend hundreds of miles across multiple states"); CoalAppx222 (stating that developers have plans to construct pipelines in 17 states). Such projects would be fast-tracked under NWP 12, some without further action by, or notification to, the Corps, *see* 33 C.F.R. § 330.1(c), (e)(1), and without a full analysis of the projects' cumulative effects to listed species and critical habitat.[34] As the district court found, "[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." FedAppx 56; *cf. Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 523 (9th Cir. 2010) (lamenting that "a

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[34] While construction of these projects could move forward during the remand using individual permits, that process would at least guarantee project-level review and provide an opportunity for Plaintiffs, their members, and the public to weigh in on the permit application, urge a more robust cumulative-effects analysis, and propose mitigation measures. *See* 33 U.S.C. § 1344(a).

listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest" and characterizing that "slow slide into oblivion" as "one of the very ills the ESA seeks to prevent" (citation omitted)). Such programmatic consultation could—as it did in 2014—yield protective measures designed to ensure that NWP 12-authorized activities will not collectively jeopardize listed species. *Cf. Cottonwood*, 789 F.3d at 1082.

Federal Defendants claim that Plaintiffs will suffer no harm because the specific pipelines complained of are subject to individual environmental review and litigation. Fed. Mot. 43-46.[35] But as detailed above, Plaintiffs and their members will suffer injuries from oil and gas pipelines across the country, not just a specific few. There is no assurance that all of these projects will undergo individual review under NWP 12. *See* 33 C.F.R. § 330.1(c), (e)(1); *see also* Fed. Mot. 41 (complaining that pipeline activities "that did not previously require any notification to the Corps" will now require individual permits). In any event, and as the district court repeatedly explained, "project-level review . . .

[35] Contrary to Federal Defendants' highly misleading suggestion, Fed. Mot. 44, the Mountain Valley and Atlantic Coast pipelines continue to rely on NWP 12 for authorization. *See, e.g.*, Status Report 4-5, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1713 (4th Cir. Feb. 25, 2020), ECF No. 69 (noting that the Corps had received a PCN for construction activities associated with the Mountain Valley pipeline in West Virginia, and that action on that PCN could lead to additional verifications in Virginia).

cannot cure the Corps' violation of a failure to engage in programmatic consultation." FedAppx35; *see also* FedAppx56; *supra* pp. 18-23.

Similarly, litigation over the adequacy of those project-level reviews is irrelevant to the question of whether the Corps should have conducted programmatic consultation before reissuing NWP 12—a question the district court already answered in the affirmative. Having found NWP 12 to be facially invalid, the district court appropriately issued a partial vacatur and parallel injunction extending to NWP 12's use for the construction of all new oil and gas pipelines. *Supra* pp. 30-47.

The public interest further weighs against the issuance of a stay. As an initial matter, Federal Defendants do not fully represent the interests of the public at large. *Contra* Fed. Mot. 40. They focus on the purported energy and economic benefits of oil and gas pipelines, yet ignore that Congress has "established an unparalleled public interest in the 'incalculable' value of preserving endangered species." *Cottonwood*, 789 F.3d at 1090 (quoting *Hill*, 437 U.S. at 187-88). Here, the public interest is best served by barring the Corps and project proponents from relying on a permit that violates the ESA. *See Karuk Tribe*, 681 F.3d at 1019-20 (Section 7 is the "heart of the ESA" and must be followed to avoid substantive violations of the Act (citation omitted)); *accord All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011)

(agency's faithful compliance with the law "comports with the public interest").

In response, Federal Defendants invoke their merits argument—that NWP 12 contains sufficient safeguards to prevent harm to listed species, Fed. Mot. 43—which the district court appropriately rejected, twice. Federal Defendants also contend that the district court's order could increase reliance on rail projects, and suggest that such projects pose greater environmental harm than pipelines. *Id.* Neither premise is supported by the record. *Cf. Standing Rock*, 282 F. Supp. 3d at 107 (rejecting unsupported assertions that vacatur of pipeline approval would increase transportation by rail and pose greater environmental risk). The public interest disfavors a stay.

Defendants' emphasis on the purported security and economic benefits of oil and gas pipelines does not compel otherwise. Though Defendants suggest that these benefits are imminent, they fail to identify any new pipelines that, if able to use NWP 12, would become operational while this appeal is pending. Indeed, many new pipelines that would rely on NWP 12 for construction are months, if not years, away from completion. *See, e.g.*, TCAppx3 at 4 & PlsAppx244-45 (indicating that Keystone XL is expected to become operational in 2023 as planned, notwithstanding partial vacatur); Rorick Suppl. Decl. ¶¶ 15, 17 (describing construction activities "scheduled to

begin this summer or fall" and "future pipeline projects"); Black Suppl. Decl. Supp. Coal. Mot. ¶ 9, ECF No. 34-5 (describing two projects with construction "scheduled to begin in the third quarter of 2020 or later").

Thus, there is no basis for a finding that a stay would promote energy security or increase tax revenue—benefits that will materialize only once these pipelines go into service. *See Washington*, 847 F.3d at 1168 (faulting federal government for failing to "explain the urgent need" for a stay); *see also Doe v. Trump*, 284 F. Supp. 3d 1172, 1179 (W.D. Wash. 2018) (warning that unspecified security concerns "must not become a talisman used to ward off inconvenient claims" (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017)).[36]

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[36] The same is true of the pipelines the NWP 12 Coalition identifies as having environmental benefits. The Coalition has failed to indicate when any of these projects were expected to be completed and, thus, when their benefits would be expected to accrue. Coal. Mot. 15-17.

Amicus American Fuel & Petrochemical Manufacturers ("AFPM") likewise suggests that new oil and gas pipelines are particularly necessary in light of COVID-19, but provides no evidence that the relevant demands are unmet by existing infrastructure and, in any event, fails to explain how a stay would change that fact. *See, e.g.*, AFPM's Amicus Br. Supp. Appellants' Mots. Stay Pending Appeal 8-9 & n.5, ECF No. 28-2 (citing shortages of ventilators and personal protective equipment, not the raw materials needed to make those supplies); *id.* at 9 (declaring that "building pipelines" is necessary but identifying only one pipeline that would come online between now and a decision on appeal); *see also, e.g.*, PlsAppx246 (reporting a "collapse in global demand" of Canadian crude oil "as a result of the coronavirus pandemic"). Furthermore, the *existing* supply chain is unaffected by the district court's order. *See supra* pp. 33-34.

And even if there were such a basis, those benefits cannot outweigh the cumulative environmental harm that would occur were a stay to issue. *Supra* pp. 38-43; *cf. Cottrell*, 632 F.3d at 1138.[37]

As for economic benefits that may be realized during pipeline construction, they will continue to exist. *See supra* pp. 65-67 (district court's order does not halt the construction of new oil and gas pipelines, it simply bars the projects' reliance on NWP 12); PlsAppx247 (reporting that "[s]everal pipeline companies said they were . . . continuing to work as normal on their projects" notwithstanding the district court's ruling). That is true even if construction is delayed; any corresponding economic benefits would likewise be delayed, but would not disappear altogether. *See Connaughton*, 752 F.3d at 765-66 (finding "marginal harm" from moving "jobs and tax dollars to a future year" unpersuasive).

On balance, the equities and public interest plainly counsel against the issuance of a stay.

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[37] The out-of-circuit cases on which the NWP 12 Coalition relies, Coal. Mot. 18, are therefore off point. *See Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (environmental harms from vacatur were inconsequential); *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1310-11 (11th Cir. 1999) (same); *Caballo Coal Co. v. Ind. Mich. Power Co.*, 305 F.3d 796, 801-02 (8th Cir. 2002) (no countervailing environmental interest at issue); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (same); *see also supra* p. 36 (distinguishing *Cal. Cmtys. Against Toxics*, 688 F.3d at 993-94).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to stay paragraphs 5 and 6 of the district court's May 11 order pending appeal.

Respectfully submitted,

Dated: May 20, 2020

/s/ Doug Hayes
Doug Hayes
/s/ Eric Huber
Eric Huber
Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
Boulder, CO 80301
(303) 449-5595
doug.hayes@sierraclub.org
eric.huber@sierraclub.org
Attorneys for Sierra Club and Northern Plains Resource Council

/s/ Cecilia Segal
Cecilia Segal
/s/ Alexander Tom
Alexander Tom
Natural Resources Defense Council
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100
csegal@nrdc.org
atom@nrdc.org
Attorneys for Bold Alliance and Natural Resources Defense Council

/s/ Jared Margolis
Jared Margolis
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
(971) 717-6401
jmargolis@biologicaldiversity.org

/s/ Eric Glitzenstein
Eric Glitzenstein
Center for Biological Diversity
1411 K Street, NW, Suite 1300
Washington, DC 20005
(202) 849-8401
eglitzenstein@biologicaldiversity.org
Attorneys for Center for Biological Diversity and Friends of the Earth

/s/ Timothy M. Bechtold
Timothy M. Bechtold
Bechtold Law Firm, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net
Attorney for all Plaintiffs–Appellees

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases pending in this Court other than the two consolidated appeals listed on the foregoing caption page, and another appeal of the same underlying district court orders filed by State of Montana and listed on the docket as companion case No. 20-35432.

/s/ Alexander Tom

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing opposition contains 17,990 words, excluding the material exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f). This complies with the Court's Order of May 19, 2020, ECF No. 39.

I also certify that the foregoing brief has been prepared in a proportionately spaced typeface using Microsoft Word Calisto MT 14-point font. This complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

/s/ Alexander Tom

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing opposition on May 20, 2020 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alexander Tom