No. 19A1053

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IN THE SUPREME COURT OF THE UNITED STATES

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U.S. ARMY CORPS OF ENGINEERS, ET AL., APPLICANTS

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

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# REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The district court's order wrongly vacates and enjoins in part Nationwide Permit 12 (NWP 12), which the U.S. Army Corps of Engineers (the Corps) and private parties rely on to authorize activities that are necessary for the construction of new oil and gas pipelines. NWP 12 and its predecessors have been in effect continuously in some form for more than 40 years, generating significant reliance interests. E.g., States Amici Br. 7-9. Granting a stay would maintain the longstanding status quo while the lawfulness of the court's order is reviewed on appeal. A stay is particularly warranted in light of plaintiffs' own prior representations that they were not seeking vacatur or injunctive relief beyond the Keystone XL project.

The district court's only basis for entering the order was its conclusion that the Corps violated the Endangered Species Act

of 1973 (ESA), Pub. L. No. 93-205, 87 Stat. 884 (16 U.S.C. 1531 et seq.), by re-issuing NWP 12 in 2017 without engaging in "programmatic" consultation. Stay Appl. App. 58a. That conclusion was incorrect and would not survive this Court's review. The Corps reasonably determined that the mere re-issuance of NWP 12 itself would have no effect on any listed species or designated critical habitat because the regulatory scheme and conditions in NWP 12 would ensure that any necessary consultation occurs on an activity-specific basis. 82 Fed. Reg. 1860, 1873 (Jan. 6, 2017).

Plaintiffs' assertion (Stay Opp. 15) that the Corps' activity-specific approach fails to capture the "cumulative impacts" of NWP 12-authorized activities is at odds with the regulatory scheme, which requires that any necessary activity-specific consultation take into account the effects of other human activities in the same area (see Stay Appl. 30-31). Moreover, plaintiffs' effort to justify partially vacating NWP 12 pending the completion of programmatic consultation does not meaningfully respond to plaintiffs' own assertion. In the absence of a valid general permit, the proponents of activities that would otherwise be authorized under NWP 12 will need to apply to the Corps for an individual permit. Id. at 35. As TC Energy explains (Br. 20-24), any ESA consultation that occurs during the individual permitting process involves the same activity-specific analysis that plaintiffs contend is somehow inadequate. For that and other

reasons, the result of the order below is to impose irreparable harms on the government and the public without any meaningful countervailing benefit to the environment. And plaintiffs' repeated suggestion (e.g., Stay Opp. 1, 3, 43, 45, 59) that those harms will be short-lived because formal consultation, including the preparation of a biological opinion, see 50 C.F.R. 402.14(h), could be completed in mere months is entirely speculative. Indeed, in the voluntary consultations for 2007 and 2012 round of nationwide permits, the Fish and Wildlife Service (FWS) -- which is responsible for many more listed species than the National Marine Fisheries Service (NMFS), see 50 C.F.R. 17.11, 17.12 -- never concluded the consultation.

The nationwide equitable relief granted by the district court was also improper because plaintiffs themselves disclaimed any request for an injunction or vacatur extending beyond Keystone XL, before changing course after the court initially vacated and enjoined NWP 12 in its entirety. Furthermore, plaintiffs make no serious effort to demonstrate that they have Article III standing to challenge the application of NWP 12 to any other proposed pipeline project. Denominating their challenge a "facial" attack on the permit (Stay Opp. 28) cannot substitute for pleading and proving Article III standing. The Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., also does not support, let alone require, the sweeping equitable relief granted below.

A. Likelihood Of Certiorari And Vacatur

If the Ninth Circuit were to affirm the district court's order, the questions presented by the order would warrant review. Stay Appl. 20-22. This Court is also likely to reverse the order.

1. The district court's order violates the limitations imposed by Article III and is inconsistent with traditional principles of equity because it grants equitable relief far broader than necessary to satisfy any cognizable injury plaintiffs or their members may have suffered. Stay Appl. 22-27. That is established by plaintiffs' own submissions in the district court: Plaintiffs repeatedly disclaimed seeking an order vacating or enjoining NWP 12 except as to the Keystone XL project. See id. at 23-24.

In this Court, plaintiffs do not meaningfully defend the district court's unilateral decision to disregard "the principle of party presentation" and enter the very nationwide remedies that plaintiffs had told the court they were not seeking. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020). Nor do plaintiffs seriously dispute that they have not demonstrated Article III standing to challenge the application of NWP 12 to any proposed pipeline other than Keystone XL itself. Cf. Stay Opp. 31-32 (asserting only that plaintiffs' "interests" extend beyond Keystone XL because plaintiffs have members in every State). As previously explained, plaintiffs focused almost exclusively on the Keystone XL project prior to summary judgment; plaintiffs

belatedly addressed other specific pipelines (many of which had already been completed) only in the 14 declarations they submitted in response to the government's motion to stay. Stay Appl. 12-17. By plaintiffs' own account, those post hoc declarations addressed only "the scope of relief, not Article III standing." Stay Opp. 38 n.15. And the declarations fail to support nationwide relief just as they fail to establish standing.

Plaintiffs nonetheless contend (Stay Opp. 32) that any defect in the injunction is unimportant because the injunction merely parallels the district court's partial vacatur of NWP 12. But the congruence between those two forms of nationwide relief is a reason to grant the government's request for a stay, not to deny it. The relevant constraints on a district court's authority to grant an injunction apply equally to "the equitable remedy of vacatur," U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994) (discussing vacatur of lower court decision), which is directed to the same end. As this Court has explained, the underlying principles apply with respect to "each form of relief that is sought." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (citation omitted). Thus, for vacatur no less than an injunction, the "remedy must * * * be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Gill v. Whitford, 138 S. Ct. 1916, 1931 (2018) (citation omitted). If the rule were otherwise, a district court

could evade any limitations on nationwide injunctions in APA litigation by relying instead on nationwide vacatur.[1]

Plaintiffs' contrary view is unavailing. First, the APA does not support plaintiffs' contention that global vacatur is the presumptively correct remedy whenever a reviewing court finds a rule invalid in a suit challenging a specific action in which the rule has been applied. In such a case, Section 706's provision for a reviewing court to "set aside" the challenged agency action simply means that the invoked rule must be removed from the analysis, and the specific agency action must be set aside to the extent it cannot be sustained without reliance on the rule. 5 U.S.C. 706(2). Section 706 does not state that the court may -- let alone must -- vacate the rule universally, rather than barring its application with respect to the specific parties before the court. Stay Appl. 26; see Gov't Br. at 48-50, Trump v. Pennsylvania, No. 19-454 (Mar. 2, 2020). Moreover, the APA's "set aside" language should be read against the backdrop of pre-APA practice, which the APA was intended to preserve, see Heckler v. Chaney, 470 U.S. 821, 832 (1985). Before 1946, appellate courts routinely used the term "set aside" to refer to granting relief to the specific parties in suit. See Bagley & Bray Amici Br. at 12-13, Trump v. Pennsylvania, supra (Mar. 9, 2020) (examples). In

[1] By contrast, a declaratory judgment (Stay Opp. 29) does not improperly provide relief to non-parties, because such a judgment does not bind the government with respect to non-parties. See United States v. Mendoza, 464 U.S. 154, 162-163 (1984).

using that term in the APA, Congress did not implicitly authorize global remedies that were unknown before the APA.

Second, plaintiffs identify no decision in which this Court has endorsed their view that global vacatur is the routine or presumptively correct remedy under Section 706. In the decisions of this Court cited by plaintiffs (Stay Opp. 26-27), the Court did not address any argument that vacatur should have been limited to the parties in suit, and nearly all of those decisions involved direct challenges to rules under special statutes providing for such challenges in the courts of appeals (not district-court APA litigation, as in this case). See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 890 (1990) (NWF).

Of course, the remedial question is often academic in this Court because this Court's decisions establish nationally binding precedent. But the same cannot be said for an order issued by one of the hundreds of district court judges. Plaintiffs' repeated suggestion (Stay Opp. 3, 27, 30, 32) that this Court blessed nationwide vacatur in DHS v. Regents of University of California, No. 18-587 (June 18, 2020), is similarly mistaken. The parties' briefing in Regents did not address the significance of vacatur, and the Court merely concluded that resolving the government's challenge to the lawfulness of nationwide injunctions issued by two district courts was unnecessary in light of the Court's decision to affirm the order of a third district court vacating

the challenged agency action (an affirmance which, of its own force, established nationwide precedent). Slip Op. 29 n.7. The Court's one-sentence footnote stating that conclusion cannot reasonably be understood to settle the lawfulness of global vacatur as a general matter.

Third, Section 706 states that the reviewing court shall set aside the "agency action," 5 U.S.C. 706(2), but the only agency action that plaintiffs had standing to challenge was the purported application of NWP 12 to authorize dredge or fill activities for the proposed Keystone XL pipeline, see Stay Appl. 26. In NWF, this Court explained that the "agency action" required for an APA suit generally refers to "some concrete action" an agency has taken to apply a rule or policy to the alleged detriment of the plaintiff. 497 U.S. at 891. Put differently, plaintiffs could not have brought this suit upon the re-issuance of NWP 12 in January 2017 because plaintiffs did not suffer any alleged injury from the mere re-issuance.

Characterizing their failure-to-consult claim as a "facial attack" (Stay Opp. 28) on NWP 12 does not relieve plaintiffs of the burden to demonstrate Article III standing and an equitable basis for the particular relief sought. A "facial" challenge simply describes one type of legal theory or argument that a plaintiff may invoke to challenge a statute, rule, or general permit. It does not license the court to prohibit application of

the challenged statute, rule, or permit to non-parties, whether by vacatur or injunction. At bottom, plaintiffs' asserted injury rests on the application of NWP 12 to the Keystone XL project, and any remedy may not go beyond that purported injury.

2. This Court would also be likely to set aside or narrow the district court's order because it was entered without fair notice. Stay Appl. 27-28. Plaintiffs argue (Stay Opp. 33-34) that the APA itself provided such notice. But plaintiffs affirmatively disclaimed any request, under the APA or otherwise, for vacatur or an injunction reaching beyond Keystone XL itself, and the district court endorsed those disclaimers in ruling on intervention. Stay Appl. 13-14; see American Gas Ass'n (AGA) Br. 9-11. Plaintiffs cannot dismiss those positions as a stray aside early in the case (Stay Opp. 35), because they reiterated them at summary judgment. More importantly, the district court never gave fair notice that it was considering granting the remedies that it had (correctly) found plaintiffs not to be requesting.

The district court exacerbated those defects when it refashioned its remedial order in response to the stay briefing. Plaintiffs assert (Stay Opp. 37-38) that the 14 new declarations that they submitted at that juncture were comparable to the declarations submitted by the defendants to explain the need for a stay pending appeal. But Plaintiffs' declarations were different in kind, offered in a wholly inadequate attempt to backfill the

record with allegations of harm that plaintiffs had not previously made. And plaintiffs are wrong to suggest (id. at 39-40) that the defendants are responsible for the vagueness of the court's amended order. When the court declined to grant a stay, the defendants were not required to engage in yet more briefing to try to bring additional clarity to an order that should never have been entered.

3. In any event, this Court is likely to reverse the district court's order, if affirmed by the court of appeals, because the order rests on a misapplication of Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2). Stay Appl. 28-33. The Corps reasonably determined that the mere reissuance of NWP 12 would have no effect on listed species or critical habitat, and therefore did not require ESA consultation, because the regulatory scheme and permitting conditions ensure that any necessary consultation occurs on an activity-specific basis. 82 Fed. Reg. at 1873.

Plaintiffs principally contend (Stay Opp. 15) that the Corps' approach fails to capture "the cumulative impacts" of activities authorized under NWP 12.[2] But as the government previously explained (Stay Appl. 30-31), when a particular activity triggers a formal consultation requirement, the effects of the activity

[2] Although plaintiffs repeat (Stay Opp. 15-16) the district court's statement that the Corps improperly "delegated" its duties under the ESA to prospective permittees, plaintiffs do not dispute that the determination as to whether consultation is required is made by the Corps (Stay Appl. 31). And plaintiffs do not identify any instance in which a prospective permittee failed to provide the requisite pre-construction notice. Failure to do so can result in criminal and civil sanctions. See ibid.

must be considered in light of the past and present impacts of other human activities and "reasonably certain" future State or private activities in the same "action area" -- including any activities authorized under NWP 12. 50 C.F.R. 402.02. The district court did not consider those requirements, which answer its concern that the Corps' approach could lead to "piecemeal destruction of species and habitat." Stay Appl. App. 60a.

Plaintiffs argue (Stay Opp. 16) that the ESA regulations define the "action area" for a project too narrowly to capture all of the cumulative effects that plaintiffs would deem relevant, but that is a complaint about the ESA and its implementation, not about the Corps' no-effect determination for NWP 12 under the established ESA framework. Moreover, plaintiffs' dissatisfaction with the geographic focus of activity-specific ESA consultation provides no basis for the equitable remedy awarded by the court. The result of partially vacating and enjoining NWP 12 will be to force some project proponents to apply for individual permits, where the only consultation that might occur would be consultation about a specific "action area."

Plaintiffs further argue that the record contains "resounding evidence" that NWP 12 may affect listed species or critical habitat. Stay Opp. 17-18 (citation omitted). That is incorrect. As to the Corps' statements on which the district court relied, those general statements did not suggest that NWP 12 may affect

listed species or critical habitat, nor did they discuss General Condition 18 or the other safeguards built into NWP 12 and the regulatory scheme. Plaintiffs emphasize (ibid.) the court's discussion of the purported effects of re-issuing NWP 12 on two listed species, but the declarations on which the court relied likewise entirely failed to address, let alone rebut, the various ways in which NWP 12 and the regulatory scheme provide for activity-specific review and regional safeguards. Stay Appl. 33.

Finally, plaintiffs suggest that the Corps made its no-effect determination in bad faith, while "on notice" that programmatic consultation was required. Stay Opp. 19; see id. at 19-22. But no appellate court has ever held that such consultation is required for the nationwide permit program, and the Corps has never acquiesced in the single district-court decision cited by plaintiffs. To the contrary, the Corps has persistently maintained that the consultations it initiated before re-issuing the now-expired 2007 and 2012 versions of NWP 12 were voluntary. See, e.g., 81 Fed. Reg. 35,186, 35,194 (June 1, 2016). Consistent with that position, the Corps proceeded with the 2012 re-issuance even though FWS did not conclude the consultation. The additional 1999 consultation that plaintiffs identify (see Stay Opp. 7), was also voluntary, as again reflected in the Corps' determination that it could re-issue that round of nationwide permits without completing the consultation, see 65 Fed. Reg. 12,818, 12,828 (Mar. 9, 2000).

The FWS and NMFS guidance cited by plaintiffs (Stay Opp. 20) does not show otherwise. The guidance identifies the Corps' nationwide permitting program as an example of a "framework" agency action, but it does not state that consultation is always required before the issuance of any particular nationwide permit. See 80 Fed. Reg. 26,832, 26,835 (May 11, 2015) (indicating that consultation is not required "for a framework programmatic action that has no effect on listed species or critical habitat"). Plaintiffs also err in relying (Stay Opp. 2, 9, 20) on a 2014 email in which a Corps employee recommended making a no-effect determination. The email merely recognized some litigation risk and identified steps the Corps could take to reduce that risk.

B. Balance of Equities

The balance of equities strongly favors a stay pending appeal. Stay Appl. 33-40. If allowed to stand, the district court's order will frustrate the Corps' administration of its Clean Water Act permitting program and will cause irreparable harm in the form of project delays and unrecoverable costs. TC Energy estimates (Br. 19) that the order will cost project proponents "hundreds of millions of dollars from delayed project in-service dates and costs incurred on contracts they cannot perform." See also States Amici Br. 7 (stating that the order "has hugely disruptive consequences for the nationwide energy-distribution network"). Plaintiffs quibble with the precise figures but do not dispute that the

district court's order will affect numerous current and planned oil and gas pipeline projects across the country.[3]

Plaintiffs would dismiss those harms as merely "temporary" (Stay Opp. 45-46), but plaintiffs' rosy predictions for the speed with which formal consultation could be completed are belied by history. Although the Corps initiated voluntary formal consultation with both FWS and NMFS before the 2007 and 2012 re-issuances, FWS never completed any consultation, and NMFS did so only once, ultimately issuing a biological opinion finding no jeopardy. Stay Appl. 10-11; see 76 Fed. Reg. 9174, 9176-9177 (Feb. 16, 2011). The practical difficulty of consulting about the potential effects of all NWP 12-authorized activities on all listed species and habitats is yet another reason that the Corps' activity-specific approach is reasonable.[4]

Plaintiffs argue (Stay Opp. 47-52) that the individual permit process will remain available as an alternative and that the additional delays and costs that individual permitting entails are

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[3] If the district court's order is stayed pending appeal, NWP 12 could be used to authorize the Mountain Valley and Atlantic Coast pipeline projects under Section 404 if they satisfy the terms of the permit. Cf. Stay Opp. 16 n.4; NextEra Amicus Br. 5 n.2. However, the Corps has not made a final determination on those issues; the projects cannot proceed without the Corps' approval.

[4] Plaintiffs fault the government for proceeding too quickly in the lower courts and not quickly enough in this Court (compare Stay Opp. 37-38, with id. at 44-45), even though all steps in the stay proceedings have taken similar amounts of time. Lest there be any doubt, obtaining a stay of the district court's order is an urgent priority for the Corps.

merely "speculative." But the Corps' own data show that, in 2018, individual permit reviews on average took 264 days, as compared to a 45-day average for verifications under NWP 12, Stay Appl. App. 83a -- and those figures do not reflect the anticipated influx of hundreds of additional individual permit applications covering the activities that would otherwise have been authorized under NWP 12. The resulting project delays, which may be compounded by seasonal construction windows and which could result in the loss of thousands of jobs, can hardly be dismissed as "minimal." Stay Opp. 48; cf. AGA Br. 31-33; TC Energy Br. 25-26.

Measured against those real-world harms, the district court's order will not result in any demonstrated environmental benefits. Stay Appl. 37-40. Plaintiffs cite (Stay Opp. 53-54) the public's general interest in the protection of endangered species, but the district court made no finding that any particular species or critical habitat would be at risk in the absence of a stay. And there is no merit to plaintiffs' prediction (id. at 55) of "disastrous" environmental consequences if NWP 12 is permitted to remain in effect pending appeal. NWP 12 and its predecessors have been in effect continuously for decades without such consequences, in part because any necessary ESA consultation occurs on an activity-specific basis. A stay pending appeal would merely return the parties and the public to the status quo.

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The district court's order of April 15, 2020, as amended May 11, 2020, should be stayed pending appeal and, if necessary, pending further proceedings in this Court.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JULY 2020