No. 19A-1053

IN THE

Supreme Court of the United States

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

Applicants,

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.,

Respondents.

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

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

Respondents Northern Plains Resource Council, Bold Alliance, Center for Biological Diversity, Friends of the Earth, Natural Resources Defense Council, and Sierra Club represent that each is a non-profit organization with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns any stock in any of the organizations.

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INTRODUCTION

Nationwide Permit 12 authorizes the construction of utility projects, including massive oil and gas pipelines, through thousands of waterways relied on by imperiled species across the country. Yet the U.S. Army Corps of Engineers ("Corps") reissued the Permit in 2017 without first evaluating its significant and cumulative effects on these species and their habitat. That is unlawful. Section 7 of the Endangered Species Act ("ESA" or "Act") requires federal agencies to undertake "consultation" with the Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS") on all federal programs and permits that "may affect," in any manner, protected species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The Corps' decision not to do so before reauthorizing Nationwide Permit 12—which will be used an estimated 69,700 times and affect 8,900 acres of water over its five-year lifespan—is a clear-cut violation of the Act.

Due to the gravity of the Corps' violation, the District Court vacated the Permit and enjoined the agency from authorizing any activities under it pending completion of the required consultation—a task that can be accomplished in a matter of months. Subsequently, and in response to the Government's own motion, the District Court significantly narrowed both the vacatur and injunction to apply to a single category of projects: the construction of new oil and gas pipelines. The Permit thus remains available during remand for all other uses, including non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing pipelines.

The Government and other Defendants nonetheless sought an emergency stay of the partial vacatur and injunction (but not the remand) from the Ninth Circuit. The motions panel denied a stay, concluding that Defendants failed to establish a sufficient likelihood of success on the merits or probability of irreparable harm. The Government sat on that decision for nearly three weeks before seeking a stay from this Court, undermining any claim that this matter requires the Court's urgent intervention. In any event, Defendants' arguments in support of such extraordinary relief fall far short.

The underlying legal claim at issue is neither novel nor in conflict across any courts of appeals. There is no serious question that the Corps was required to undertake Section 7 consultation for Nationwide Permit 12 before reissuing it, as the agency has done in the past. In fact, as the District Court found, the Corps sidestepped consultation on the advice of a senior official who explained that, if the agency were to be sued over its failure to consult and lose, it would "start doing the national programmatic consultations again." Olson Email, Pls. App. 8a. That is precisely what occurred. The District Court ruled against the Corps, and Defendants cannot show that they are likely to succeed in appealing that decision.

Defendants instead focus their attacks on the District Court's remedy. Invoking the phrase "nationwide injunction" as a talisman, they attempt to bait this Court's intervention. The Court should ignore that lure. The principal relief here is vacatur—the presumptive remedy for the Corps' violation. As this Court recently confirmed, a court need not wade into considerations that bear on nationwide

injunctions when vacating unlawful agency action. *See Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, -- S. Ct. --, No. 18-587, 2020 WL 3271746 at *17 n.7 (U.S. June 18, 2020). And the District Court's parallel injunction against the Corps imposes no additional burden on anyone. Neither remedy warrants a stay. Defendants' case-specific procedural grievances are likewise meritless; all parties briefed the issue of remedy in the District Court. In short, there is no reasonable probability that this Court will reverse the District Court or even grant certiorari.

Equally important, Defendants have not shown that they would suffer irreparable harm absent a stay. While ensuring that impacts to protected species will be considered in the manner that Congress has mandated, the District Court's order does not halt pipeline construction. To be sure, some projects are temporarily unable to take advantage of Nationwide Permit 12. But the Corps itself controls the time it will take to carry out the remand ordered by the District Court over two months ago, and should be well on its way. And even during the remand, pipelines may utilize individual, project-specific permits instead. There is surely no irreparable injury in that, particularly since the Corps is also in control of the time it takes to process those permits.

On the other hand, Defendants wrongly contend that a stay would harm neither Plaintiffs nor the public. Allowing private companies to build oil and gas pipelines across thousands of waterways using Nationwide Permit 12 before the legally required consultation is complete, as Defendants ask this Court to do, would thwart the very purpose of the ESA: protecting endangered species from extinction

before it is too late. Particularly vulnerable are those species—such as the whooping crane, pallid sturgeon, and Roanoke logperch—caught in the crosshairs of several of these pipelines and therefore at risk of substantial cumulative harm. Section 7 consultation—the heart of the Act—ensures that such harm is fully evaluated and either avoided or mitigated. The Corps should not be allowed to subvert that process, at the risk of pushing imperiled species closer to extinction, through the extraordinary relief sought here. The stay should be denied.

STATEMENT

I. Statutory and factual background

This case arises from the Corps' decision to disregard its statutory obligation under the ESA to conduct programmatic consultation on its 2017 reissuance of Nationwide Permit 12, a general Clean Water Act ("CWA") permit that will be used an estimated 69,700 times over five years and affect 8,900 acres of U.S. waters. 82 Fed. Reg. 1860 (Jan. 6, 2017); 2017 Decision Document, Pls. App. 27a.

A. The Corps' issuance of Nationwide Permit 12 under the CWA

Section 404 of the CWA prohibits the discharge of any dredged soil or other fill material into waters of the United States without a Corps-issued permit. 33 U.S.C. § 1311(a); *see id.* §§ 1342, 1344. The Corps may issue such permits on either an individual or general basis. *Id.* § 1344(a), (e). Individual permits require public notice and opportunity for comment, evaluation of the project's practicable alternatives and effect on the public interest and other factors, and a project-level assessment under the National Environmental Policy Act ("NEPA"). *See id.* § 1344(a); 33 C.F.R. § 320.4; 40 C.F.R. § 230.10(a).

General permits provide a streamlined alternative. The Corps may issue a state, regional, or nationwide permit for an entire category of activities that are "similar in nature" if it determines that the activities will cause "only minimal adverse environmental effects," separately and cumulatively. 33 U.S.C. § 1344(e)(1). Projects meeting a general permit's terms and conditions can then proceed with construction, often without any notification to, or further action by, the Corps. *See* 33 C.F.R. § 330.1(c), (e)(1). Some exceptions exist, such as when a project "might affect" federally listed species or critical habitat. *See* 82 Fed. Reg. at 1888, 1999-2000. In those cases, the permittee must submit a preconstruction notification to a Corps district engineer, who must then determine whether the project can use the general permit or must apply for an individual permit instead. *See* 33 C.F.R. § 330.6(a)(2) (describing "verification" process). The district engineer must also determine whether the project "may affect" listed species or critical habitat, such that project-specific consultation under the ESA is necessary. *See* 82 Fed. Reg. at 1986, 1999-2000, 2004-05.

On January 6, 2017, the Corps reissued 50 existing nationwide permits, including Nationwide Permit 12, and added two new ones. 82 Fed. Reg. at 1860. Nationwide Permit 12 authorizes the discharge of dredged soil or other 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. *Id.* at 1985. But the Corps defines "single and complete project" to mean *each individual water crossing* along a utility line, not the overall project.

33 C.F.R. § 330.2(i); 82 Fed. Reg. at 2007. Thus, so long as each crossing meets the half-acre limit, a single pipeline can use Nationwide Permit 12 multiple if not hundreds of times—no matter how many cumulative acres of waters it affects, or how much cumulative environmental harm results. *See* 2017 Decision Document, Pls. App. 21a, 22a.

Although versions of Nationwide Permit 12 have been in place since 1977, the Corps did not begin using it to approve major interstate oil and gas pipelines until much more recently. *See* Pls. Stay Opp'n 7-8, C.A. ECF No. 45-1 (explaining that such usage increased in 2012). The current, 2017 version of the Permit is set to expire in March 2022, at which point the Corps will decide whether and in what form to reissue it. *See* 82 Fed. Reg. at 1860.

B. The Corps' evasion of its legal obligations under the ESA

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 established Section 7, a vital safeguard that requires each federal agency, in consultation with FWS and/or NMFS, 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).

This consultation obligation applies to every action carried out by an agency—including "programs" and "permits," 50 C.F.R. § 402.02—that "may affect"

listed species or critical habitat, *id.* § 402.14(a). Through a "formal consultation" process, FWS (which has jurisdiction over most terrestrial species) and/or NMFS (which has jurisdiction over most marine species) must analyze whether the action is likely to jeopardize federally listed species or destroy or adversely modify critical habitat. *See id.* § 402.14(g). The process culminates in a Biological Opinion that sets out FWS's/NMFS's determination and prescribes measures for avoiding or mitigating the action's adverse effects. *Id.*; *see also* 16 U.S.C. § 1536(b)(1)(A) (setting presumptive timeframe of 90 days for completion of consultation).

Consistent with the legal obligations imposed by ESA Section 7, the Corps pursued consultation with FWS and/or NMFS on at least four previous iterations of Nationwide Permit 12. *See* 77 Fed. Reg. 10,184, 10,187 (Feb. 21, 2012); 72 Fed. Reg. 11,091, 11,096 (Mar. 12, 2007); 67 Fed. Reg. 2019, 2028 (Jan. 15, 2002); 61 Fed. Reg. 65,874, 65,881 (Dec. 13, 1996). Upon completing consultation in 2012, NMFS issued a Biological Opinion finding that "almost all" of the listed species within its jurisdiction were likely to be adversely affected by activities authorized under the nationwide permit program, including Nationwide Permit 12, and that the Corps had "failed to insure" that the program was "not likely to jeopardize the continued existence" of those species or destroy their critical habitat. 2012 Biological Opinion, Pls. App. 5a, 6a, 7a. NMFS also noted that Nationwide Permit 12 was one of the 21 nationwide permits "likely to have the greatest influence on listed resources under NMFS'[s] jurisdiction." 2012 Biological Opinion, Pls. App. 4a.

The Corps then reinitiated consultation and, in 2014, NMFS issued a new Biological Opinion setting out various measures (such as monitoring and reporting) that the Corps agreed to adopt to ameliorate the nationwide permit program's impacts on listed species. *See* 2014 Biological Opinion, Pls. App. 11a-13a, 16a-17a. NMFS ultimately reached a no-jeopardy conclusion solely on the basis of these measures. *See id.*, Pls. App. 11a-13a, 14a-15a, 18a-20a.

Since 2012, annual usage of Nationwide Permit 12 has increased by more than 77 percent. *Compare* 2012 Decision Document, Pls. App. 1a (estimating 7,900 annual uses under 2012 Permit), *with* 2017 Decision Document, Pls. App. 26a-27a (estimating 14,000 annual uses under 2017 Permit).[1] These uses, individually and cumulatively, adversely affect numerous endangered and threatened species. *See* 2017 Decision Document, Pls. App. 23a, 24a-25a; *see also* 2014 Biological Opinion, Pls. App. 14a-15a, 16a-17a.

Notwithstanding its own prior practice and the demonstrable need for Section 7 consultation to safeguard imperiled species, the Corps decided to forego its consultation obligations entirely before issuing the current iteration of Nationwide Permit 12. Instead, the Corps declared that the Permit itself would have "no effect" whatsoever on listed species or critical habitat. 82 Fed. Reg. at 1873-74. The Corps'

[1] The Corps estimated that, of the 14,000 annual uses of the 2017 Permit, only 11,500 would be reported. Moyer Decl. ¶ 3, Gov't App. 78a-79a. Plaintiffs relied on that 11,500 figure in their briefs below, significantly understating the Permit's increased usage.

regulatory program manager at the time acknowledged that the agency's failure to consult might violate the law and lead to an adverse court ruling. He nonetheless recommended that the Corps make a "national 'no effect' determination for each [nationwide permit] reissuance until it is challenged in federal court and a judge rules against the Corps." Olson Email, Pls. App. 8a. He stated that, should the Corps "lose in federal court, then [it] would start doing the national programmatic consultations again." *Id.* The Corps opted to take this perilous legal path.

II. Procedural background

Plaintiffs, a coalition of regional and national non-profit conservation groups, filed suit in July 2019. They challenged Nationwide Permit 12 as violating several environmental statutes, including the ESA. *See* Am. Compl. ¶ 1, D. Ct. ECF No. 36. They also challenged the application of Nationwide Permit 12 to Keystone XL, *id.*, 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.* ¶¶ 110-11, 122.

At the Government's urging, Plaintiffs stayed their as-applied claims. *See* Stipulation 2-4, D. Ct. ECF No. 53.[2] Plaintiffs then moved for partial summary judgment on their facial challenge. They presented evidence of the Permit's substantial environmental harms and threats to listed species, particularly with regard to massive oil and gas pipelines that degrade many acres of wetlands and

[2] Plaintiffs' as-applied claims involved the few Keystone XL water crossings that triggered Nationwide Permit 12's preconstruction notification requirement. Keystone XL's other hundreds of crossings, which did not require such notification, remained authorized under the Permit. *See* Stipulation 1, D. Ct. ECF No. 53.

pose severe risks of spills along their extensive routes, among other cumulative impacts. *See, e.g.*, Pls. Summ. J. Br. 12-13, 15-16, 25, 28-29, D. Ct. ECF No. 73.

On April 15, 2020, the District Court ruled for Plaintiffs on their ESA claim. Based on its review of the extensive record, the court found "substantial evidence" that Nationwide Permit 12 "may affect" listed species and held the Corps' failure to consult with FWS and NMFS on the Permit unlawful under the ESA and APA. Merits Order, Gov't App. 62a-63a. Accordingly, the District Court vacated the Permit, remanded it to the Corps for Section 7 consultation, and enjoined the Corps from authorizing any dredge or fill activities under it until the Corps completed the required consultation. *Id.* at 63a, 67a-68a.

The Government then moved the District Court for a partial stay pending appeal of the vacatur and injunction, while simultaneously requesting that the court revise its decision by ordering remand only. *See* Gov't Stay Br. 1-2, D. Ct. ECF No. 131; *see also* TC Energy Stay Br., D. Ct. ECF No. 137 (separate stay motion); Coal. Stay Br., ECF No. 138 (brief in support of Government's motion). In response, Plaintiffs did not oppose limiting the vacatur to Nationwide Permit 12's use for the construction of new oil and gas pipelines, which Plaintiffs' summary judgment briefing had stressed as posing the most serious concerns for listed species and critical habitat. Pls. Stay Opp'n 13-16, D. Ct. ECF No. 144. Recognizing that such vacatur would be sufficient to preclude the Corps from authorizing these projects under the Permit, Plaintiffs did not oppose narrowing the injunction to bar the Permit's use for Keystone XL. *Id.* at 28.

The District Court ruled on Defendants' motions within two weeks—as the Government had requested—and gave the Government much of its sought-after relief. While underscoring the seriousness of the Corps' ESA violation, the District Court significantly narrowed the scope of the vacatur and parallel injunction, invalidating Nationwide Permit 12 during the remand as it relates to the construction of new oil and gas pipelines only. *See* Remedy Order, Gov't App. 6a-10a, 13a-28a. Having tailored the relief in this manner, the District Court held that Defendants did not satisfy the standard for obtaining a stay. *Id.* at 31a-41a.

Defendants appealed and sought a stay of the partial vacatur and parallel injunction from the Ninth Circuit. The Government asked the Court of Appeals to rule on its stay motion by May 29. Gov't Stay Br. i, C.A. ECF No. 11. On May 28, the Court of Appeals denied the stay, concluding that Defendants had "not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay." Stay Denial, Gov't App. 3a. The case remains pending before that court. No Defendant has requested expedited merits briefing.

ARGUMENT

A stay pending appeal is an extraordinary remedy. *See Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) ("[A] stay issues not of right but pursuant to sound equitable discretion."). The movant bears a "heavy burden" of showing: (1) "a reasonable probability that certiorari will be granted"; (2) "a significant possibility that the judgment below will be reversed"; and (3) "a likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010)

(Scalia, J., in chambers). Even then, the movant must also show that the balance of equities favors a stay. *See Barnes*, 501 U.S. at 1304-05.

A movant's burden is "especially heavy" where, as here, the court of appeals denied a stay and the matter remains pending before it. *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). Indeed, "a stay application to a Circuit Justice on a matter currently before a court of appeals is rarely granted." *Pasadena City Bd. of Educ. v. Spangler*, 423 U.S. 1335, 1336 (1975) (Rehnquist, J., in chambers).

Defendants do not come close to meeting this demanding burden here. The Government's application should be denied.

I. The Government cannot demonstrate that it is likely to prevail either in the Court of Appeals or in this Court

This case concerns a straightforward application of Section 7 of the ESA to the facts in the record. The District Court found "resounding evidence" that the Corps' issuance of Nationwide Permit 12 "may affect" listed species and, hence, that the agency's failure to initiate Section 7 consultation on the Permit was arbitrary and capricious and violated the ESA. Merits Order, Gov't App. 51a-53a. The Government tries to manufacture a basis for this Court's intervention by harping on the injunction issued by the District Court, but that injunction merely mirrors the vacatur. Similarly, Defendants' case-specific procedural grievances are overblown and hardly satisfy the stringent standard for obtaining a stay. In short, Defendants fail to provide any compelling argument that they have a substantial case on the merits, let alone any basis on which to seek certiorari and reversal in this Court.

A. The District Court correctly held that the Corps violated the ESA

1. The Corps' issuance of Nationwide Permit 12 was an agency action that required programmatic consultation

As the District Court held, the Corps "should have initiated ESA Section 7(a)(2) consultation before it reissued [Nationwide Permit] 12 in 2017" and its "failure to do so violated the ESA." Merits Order, Gov't App. 63a. In sidestepping that statutory obligation, the Corps "failed to consider relevant expert analysis and failed to articulate a rational connection between the facts it found and the choice it made," *id*. at 62a-63a—including the Corps' own "acknowledge[ment] that the discharges [authorized by Nationwide Permit 12] *will* contribute to the cumulative effects to wetlands, streams, and other aquatic resources," *id*. at 57a. Defendants are unlikely to succeed in overturning the District Court's fact-bound and well-reasoned decision.

This Court has explained that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7" of the ESA. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). It states that "[e]ach Federal agency shall, in consultation with and with the assistance of [FWS and/or NMFS], insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). This "mandate applies to *every discretionary agency action*—regardless of the expense or burden its application might impose." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 671 (2007) (emphasis added).

It is undisputed that the Corps' issuance of Nationwide Permit 12 is an agency "action" under Section 7. The ESA's implementing regulations, issued by FWS and NMFS, broadly define "action" to mean "[a]ll activities or *programs of any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies," including the "promulgation of regulations" and the "granting of . . . permits." 50 C.F.R. § 402.02 (emphasis added). Nationwide Permit 12 is an agency "action" within the meaning of the ESA because it constitutes *both* a "permit" and a "program" (i.e., a nationwide scheme for CWA compliance), requiring project-specific consultation when used for individual projects but also review at the programmatic level when issued by the Corps. Indeed, the ESA regulations specifically mandate consultation on "programs" irrespective of whether project-specific consultations might also occur. *See id.* § 402.14(c)(4) (explaining 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").

This requirement to conduct programmatic consultation—which the Government ignores—ensures that agencies analyze both the site-specific and cumulative impacts of their programs, and allows FWS and NMFS to issue Biological Opinions establishing program-wide criteria for avoiding and mitigating adverse effects. *See id.* §§ 402.02, 402.14(g); *see also* 80 Fed. Reg. 26,832, 26,835-36 (May 11, 2015) (discussing amendments to the ESA regulations concerning programmatic consultations and using the Corps' nationwide permit program as an

example of a federal program subject to such consultation). This is precisely the role programmatic consultation has performed when *past* iterations of Nationwide Permit 12 underwent the mandatory consultation process. *See infra* pp. 21-22.

Defendants insist that the Permit itself need not undergo consultation because any projects potentially affecting listed species will be subject to project-specific review. That argument overlooks the purpose and function of programmatic consultation. Nationwide Permit 12 is used an estimated 14,000 times each year. Moyer Decl. ¶ 3, Gov't App. 78a. The District Court correctly recognized that programmatic review is the *only* way to address the *cumulative* impacts to listed species from all these authorized activities; project-specific reviews cannot play that role. Merits Order, Gov't App. 60a-61a; *see also 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."); *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 3, 9-11 (D.D.C. 2005) (requiring consultation on 2002 issuance of Nationwide Permit 12 to avoid piecemeal destruction of species and habitat).

The Government maintains that project-specific reviews incorporate such a cumulative-effects analysis. Stay Appl. 30-31; *see also* TC Energy Br. 22-23. As an initial matter, and as the District Court recognized, the Corps failed to ensure that project-specific consultations would always occur under Nationwide Permit 12 because it had improperly delegated its legal duty to make an "initial effect

determination" to non-federal permittees.[3] Merits Order, Gov't App. 61a-62a. And when project-specific consultations do occur, the cumulative-effects analysis is narrowly limited to the "action area" for a particular project, 50 C.F.R. § 402.02, and so does not and cannot consider the cumulative effects *of the broader program*.

Such project-level review does not even ensure an analysis of the cumulative impacts of projects in the same geographical vicinity. For example, project-level review may not cover impacts to species, such as migratory birds, that travel through multiple project areas or larger regions. *See* Pls. Stay Opp'n 21-22, C.A. ECF No. 45-1. The proposed Mountain Valley and Atlantic Coast pipelines, neighboring projects in Virginia and West Virginia, are particularly illustrative of this problem.[4] Although both pipelines will adversely affect the endangered Roanoke logperch, the project-specific analysis "for each pipeline ignores the adverse effect of the other when assessing jeopardy." Defs. of Wildlife Amicus Br. 5, C.A. ECF No. 51-2; *see also id.* at 2-8 (explaining how the definition of "action area" produces that result); *contra* NextEra Proposed Amicus Br. 7-10 (avoiding this question and failing to mention Atlantic Coast pipeline, or cumulative effects).

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[3] Defendants' contrary arguments are meritless. Stay Appl. 31; TC Energy Br. 21-22. General Condition 18's notification requirement triggers only project-specific review. As the District Court held, that review is inherently insufficient for the Corps to meet its ESA duties for Nationwide Permit 12 as a whole.

[4] The Government suggests that these pipelines cannot rely on Nationwide Permit 12. Stay Appl. 39. That is misleading, as Plaintiffs have explained. Pls. Stay Opp'n 73 n.35, C.A. ECF No. 45-1. Indeed, NextEra Energy, a "substantial owner" of Mountain Valley, contests the Government's statement. NextEra Proposed Amicus Br. 2, 5 n.2.

Consequently, as a legal and practical matter, project-specific reviews cannot substitute for consultation on Nationwide Permit 12 as a whole.[5]

Defendants contend that any ensuing harm is geographically limited and mitigated by regional measures. Stay Appl. 32; TC Energy Br. 21-22. Again, that misses the point. Nationwide Permit 12, as evident by its very name, is a permitting scheme of national scope. As the District Court explained, "[p]rogrammatic review of [Nationwide Permit] 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." Merits Order, Gov't App. 60a. The Corps thus cannot "circumvent" its Section 7 obligations by relying on project-level review and regional conditions to justify a "no effect" determination for the whole Permit. *Id.* at 58a; *contra* TC Energy Br. 24. Indeed, as part of its consultation with the Corps for the 2012 version of Nationwide Permit 12, NMFS determined that the Permit *was* jeopardizing species and required additional measures at the national level to prevent such jeopardy. *See supra* pp. 7-8. That forecloses any argument that programmatic consultation is unnecessary to safeguard imperiled species.

Finally, the Government asserts that programmatic consultation is not required because, in light of the project-specific and individual measures discussed

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[5] TC Energy's argument that requiring programmatic consultation for Nationwide Permit 12 calls into question the validity of individual Section 404 permits is misplaced. *Contra* TC Energy Br. 20. Individual permits are subject to only project-specific review because they are only project-specific permits. In addition to constituting a "permit" that is used thousands of times per year, Nationwide Permit 12 is also a programmatic scheme for CWA compliance, with broad cumulative impacts. It unequivocally requires programmatic consultation. *See also infra* pp. 56-57.

above, Nationwide Permit 12 does not authorize activities that "may affect" listed species. Stay Appl. 30-33. The District Court disagreed. It determined, based on "resounding evidence," that the ESA's low "may affect" threshold for triggering the consultation requirement was met when the Corps issued the Permit. Merits Order, Gov't App. 53a-54a; *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) ("[A]ny 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))). The District Court found that Nationwide Permit 12 undeniably authorizes actual discharges into jurisdictional waters, Merits Order, Gov't App. 57a; that the discharges authorized by the Permit "permanently may convert wetlands, streams, and other aquatic resources to upland areas, resulting in permanent losses of aquatic resource functions and services" of value to species, *id.* at 54a; and that the Corps itself had conceded that "past versions of [Nationwide Permit] 12 'have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources,'" *id.* (citation omitted).

The Government does not meaningfully rebut the District Court's determination. While it asserts that the District Court erroneously relied only on general statements made by the Corps as to the Permit's environmental effects, Stay Appl. 33, that is incorrect. The District Court supported its determination by describing harm to specific listed species from Nationwide Permit 12-authorized activities. *See, e.g.,* Merits Order, Gov't App. 55a-58a (citing evidence that such activities increase sedimentation, "pos[ing] a significant threat" to pallid sturgeon

by "bury[ing] the substrates on which sturgeon rely for feeding and breeding"); *see also* Pls. Stay Opp'n 15-17, C.A. ECF No. 45-1. This fact-specific determination, based on the District Court's extensive review of record evidence, is highly likely to be affirmed on appeal and, in any case, raises no legal issue that warrants intervention by this Court pending review in the Court of Appeals.

2. The Corps was aware of the need for consultation, yet unlawfully evaded its ESA duties

Defendants' prospects for success on appeal are even dimmer given that the Corps was on notice that it needed to undertake programmatic consultation but purposefully avoided doing so. *See* 51 Fed. Reg. at 19,949 (where an agency opts not to engage in consultation, it "bears the risk of an erroneous decision"). Although certain legal challenges to previous versions of Nationwide Permit 12 have been rejected, *see* Coal. Br. 7, none regarded facial ESA violations. Indeed, no court has ever held that Nationwide Permit 12 may avoid ESA Section 7 consultation. To the contrary, the only other court to rule on this issue held that the Corps was required to consult before issuing the Permit in 2002. *See Brownlee*, 402 F. Supp. 2d at 9-11.

The Corps specifically acknowledged the *Brownlee* decision when it issued Nationwide Permit 12 in 2007 and 2012. *See* 76 Fed. Reg. 9174, 9176-77 (Feb. 16, 2011) (noting, in the context of issuing the 2012 Permit, that *Brownlee* "determined that the Corps is obligated to consult" with FWS and NMFS and that, "[i]n response to that decision," the Corps had initiated programmatic consultation with both agencies); 71 Fed. Reg. 56,258, 56,261 (Sept. 26, 2006) (same as to 2007 Permit). The District Court correctly determined that the Corps was "well aware" of the need

to consult based on these prior consultations. Merits Order, Gov't App. 62a; *contra* Stay Appl. 10-11, 32 (insisting that these prior consultations were merely "voluntary"). The court also emphasized that ESA regulations promulgated by FWS and NMFS in 2015 specifically listed the Corps' nationwide permit program as an example of a federal program subject to programmatic consultation. Merits Order, Gov't App. 52a (citing 80 Fed. Reg. at 26,835).

The District Court found record evidence further showing that the Corps was acutely aware of its ESA obligations and yet attempted to avoid consultation through what it recognized was a legally dubious "no effect" determination. *See* Remedy Order, Gov't App. 32a. When asked whether the Corps would consult with NMFS again for the nationwide permits issued in 2017, the Corps' regulatory program manager stated that, for those permits, "*we would have to do a new consultation.*" Olson Email, Pls. App. 8a (emphasis added). But he went on to recommend that rather than fulfill that obligation, the Corps should "make a 'no effect' determination," and then "continue to make" such a determination "for each [nationwide permit] reissuance until it is challenged in federal court and a judge rules against the Corps." *Id.* He concluded: "If we lose in federal court, then we would start doing the national programmatic consultations again." *Id.* That scenario has now come to pass: "The Court ruled against the Corps, just as the Corps anticipated." Remedy Order, Gov't App. 32a.

For its part, NMFS was unequivocal in its objection to the Corps' "no effect" determination for the 2017 permits. NMFS stated that "such a conclusion *is not*

supportable under the ESA" and 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*." NMFS Comments, Pls. App. 10a (emphasis added).[6] As the District Court found, the Corps' prior consultations with NMFS also underscored the need for programmatic consultation in 2017 with both NMFS *and* FWS.[7] Merits Order, Gov't App. 62a. As explained, NMFS determined in 2012 that the nationwide permit program, including Nationwide Permit 12, *was* jeopardizing listed species—despite Defendants' touted safeguards—and was able make a no-jeopardy determination in 2014 only *after* the Corps agreed to adopt additional protective measures. *Supra* pp. 7-8, 17. This reinforces the critical importance of (and legal obligation for) Section 7 consultation for the 2017 iteration of Nationwide Permit 12.

That such measures were adopted for previous nationwide permits does not render consultation unnecessary now. *Contra* TC Energy Br. 16-17. The 2017 version of Nationwide Permit 12 does not include all the protections NMFS relied on in 2014 to support its no-jeopardy determination. *See* Stay Appl. 11. Even for the measures that remain in place, there has been no examination of their efficacy,

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[6] On reply, the Government may argue—as it did in the Court of Appeals—that NMFS ultimately approved the Corps' "no effect" determination for the 2017 Permit and that FWS did not raise any concerns. The record contains no support for these statements. *See* Pls. Stay Opp'n 28-29, C.A. ECF No. 45-1.

[7] The consultations on the 2012 version of the Permit—which were valid just for that permit's five-year term—occurred only with NMFS and thus only covered species within NMFS's jurisdiction. Yet, many Nationwide Permit 12-authorized projects, such as fossil fuel pipelines, are located well inland and cross rivers, streams, and wetlands that provide habitat for species under FWS's jurisdiction, requiring the Corps to complete consultation with both agencies.

since the Corps refused to consult on the 2017 Permit. *See* Pls. Stay Opp'n 25-29, C.A. ECF No. 45-1. That is particularly concerning given that annual Nationwide Permit 12 usage has increased by more than 77 percent since 2012 and that the Corps only started using the Permit to approve massive oil pipelines relatively recently. *See supra* p. 8. The District Court therefore correctly held that without consultation on the current iteration of Nationwide Permit 12, there is no legal or factual basis for finding that the measures now being implemented are sufficient to satisfy the Corps' duty to prevent jeopardy under Section 7, Merits Order, Gov't App. 60a-61a—especially given Section 7's best-available-science mandate, *see* 16 U.S.C. § 1536(a)(2).

If the Corps had initiated consultation on Nationwide Permit 12 at the "earliest possible time," 50 C.F.R. § 402.14(a)—i.e., when it proposed reauthorizing the Permit, as it did for the 2007 and 2012 Permits—rather than purposefully evading its ESA duties, it could have avoided this litigation and the harms that Defendants now contend will flow from the agency's failure to follow the law. *See also infra* pp. 42-53. Instead, the Corps inexplicably dug in its heels. Even now, the Government continues to insist that no such consultation is required, regardless of the law and the extensive evidence in the record to the contrary. Under these circumstances, Defendants have not met their burden to establish a likelihood of ultimate success on the merits to justify a stay.

3. **This straightforward ESA violation is not an exceptional matter that warrants certiorari, now or in the future**

Defendants are not only unlikely to prevail on the merits of their appeal, but also have failed to set forth any issue that might warrant this Court's review following consideration in the Court of Appeals. Indeed, none of the circumstances that traditionally merit this Court's consideration are implicated here. There is no split among circuit courts, or even district courts, on the underlying legal question. *Contra* Stay Appl. 25 (suggesting that the District Court's order would somehow short-circuit the airing of competing views in cases that do not facially challenge the Corps' failure to consult on the Permit). Nor does this case implicate any novel issue of overriding importance regarding the meaning of Section 7. Rather, an agency's obligation to comply with the Section 7 process for all discretionary actions is well settled. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 671. The Corps simply ignored the process crafted by Congress—embodied in Section 7—to effectuate an "institutionalization of [] caution" and ensure that agency actions will not jeopardize listed species. *Hill*, 437 U.S. at 178 (quoting H.R. Rep. No. 93-412, at 4-5 (1973)).[8]

Because the merits of this case involve a fact-specific, legally straightforward ESA compliance issue, the Government must strain to invent some rationale for this Court's review. It makes a half-hearted argument that the Corps' compliance

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[8] TC Energy's argument that the District Court found only a "procedural violation," and that Plaintiffs failed to show that such a violation would jeopardize protected species, TC Energy Br. 2, misses the point. Consultation ensures that the views of FWS and NMFS (the expert agencies) are brought to bear *before* implementation of an action that might otherwise jeopardize protected species. *See* 50 C.F.R. § 402.14; *see also infra* p. 56 n.28.

with the Act is a matter of "exceptional importance," Stay Appl. 20-21, relying on the fact that the Corps has issued versions of Nationwide Permit 12 several times over the years. That various iterations of the Permit have been issued in the past, however, does not change the fact that the *current* version was issued in violation of the ESA. In any event, the Permit's history hardly suggests that the District Court's application of Section 7 to the agency action here warrants this Court's review.[9]

At bottom, Defendants merely disagree with the District Court's application of Section 7. The Court should therefore reject Defendants' attempt to contort a fact-specific case involving a straightforward ESA violation into an "exceptional" matter warranting a stay, particularly where, as here, the consultation process required by the District Court can be completed in a manner of months. *See Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers) (denying stay and observing that "[c]ertainly the judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay[,] is presumptively correct").

B. The District Court's remedy order accords with well-established precedent

The Government also fails to show that it is likely to succeed in appealing the District Court's remedy order, which was entirely consistent with the APA, or that

[9] TC Energy's contention that this case could have repercussions for other nationwide permits, TC Energy Br. 4, is irrelevant to whether the District Court's decision was correct. Moreover, the decision in *Brownlee*, 402 F. Supp. 2d 1—requiring ESA consultation on Nationwide Permits 12, 14, 39 and 40—did not generate further litigation over the Corps' ESA compliance for other nationwide permits. And in response to that decision, the Corps conducted programmatic consultation on all nationwide permits, indicating that compliance is manageable.

this Court is likely to grant certiorari simply to reconfigure that remedy.

1. The District Court was not required to limit vacatur of the Permit to Keystone XL

Vacatur is the standard remedy when a reviewing court holds an agency action unlawful. *See, e.g.*, *Regents*, 2020 WL 3271746 at *3 (holding that rescission of agency program "violate[d] the APA" and "must be vacated"); *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." (citation omitted)); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 392 (1999) ("Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we must vacate [the unlawful regulation]."); *Defs. of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005) (courts "[t]ypically . . . vacate the agency's action" when it violates the ESA and APA), *rev'd and remanded on other grounds sub nom. Nat'l Ass'n of Home Builders*, 551 U.S. 644. That result stems from the APA's plain language, which mandates that "[t]he reviewing court *shall* . . . hold unlawful and set aside agency action" that fails its standards of review. 5 U.S.C. § 706(2) (emphasis added).

The District Court applied that well-settled law to vacate Nationwide Permit 12 after finding a clear violation of the ESA and APA. Then, in response to further briefing on remedy, the court used its discretion to narrow that vacatur based on an evaluation of the severity of the agency's error and vacatur's disruptive consequences. Remedy Order, Gov't App. 13a (citing *Allied-Signal, Inc. v. U.S.*

Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). No party contests the District Court's general authority to issue a partial vacatur, and the Government does not even address the District Court's application of the *Allied-Signal* factors, let alone identify anything meriting this Court's review. And while TC Energy and the Coalition take issue with the District Court's *Allied-Signal* analysis and resulting tailoring, Coal. Br. 22-24; TC Energy Br. 17-19, those critiques are unfounded because, among other things, the partial vacatur corresponds to the uses on which Defendants focused their claims of disruption, Pls. Stay Opp'n 33-34, C.A. ECF No. 45-1; *see generally id.* at 31-38. In any event, as the Government apparently recognizes, arguments involving "only a factbound determination" do not justify a stay. *Packwood*, 510 U.S. at 1321.

The Government instead posits an unsound and dramatic limitation on vacatur of unlawful agency action, arguing that a court may vacate the action only insofar as it applies to a challenging party. Stay Appl. 26-27. This assertion conflicts with both the APA's text and well-established precedent. None of the Government's contrary arguments demonstrate that the Court is likely to reverse course and adopt the Government's position.

First, courts are empowered to vacate generally applicable actions, such as regulations, irrespective of whether those rules could be applied to other parties not before the reviewing court. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 334 (2014); *AT&T Corp.*, 525 U.S. at 392; *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 & n.18 (1979), *superseded on other grounds as stated in Manhattan Cmty.*

Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019); *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155, 176 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000); Pls. Stay Opp'n 39, C.A. ECF No. 45-1 (collecting circuit court cases). As the D.C. Circuit has summarized, "[w]hen 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." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation omitted); *accord Empire Health Found. v. Azar*, 958 F.3d 873, 886 (9th Cir. 2020).

This Court's recent decision in *Regents* confirms this principle. There, the district court had granted "nationwide" vacatur and "reject[ed] the government's invitation to confine its grant of relief strictly to the plaintiffs." *Nat'l Ass'n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 243 (D.D.C. 2018). The Court affirmed that order, raising no issue with its scope. *Regents*, 2020 WL 3271746, at *3, *17 & n.7.[10]

Against this overwhelming precedent, the Government cites a lone commentator's view that section 706 of the APA does not concern remedies at all,

[10] The Government cites a single case that purportedly suggested a contrary rule, in the course of discussing a nationwide injunction. *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012). But that case failed to distinguish between injunctions and vacatur, *see infra* p. 30, and in other cases the Fourth Circuit has followed the well-settled view that vacatur extends beyond the specific plaintiffs bringing suit. *See, e.g.*, *Casa De Md. v. Dep't of Homeland Sec.*, 924 F.3d 684, 706-07 (4th Cir. 2019) (vacating same program rescission at issue in *Regents*); *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 318-19 (4th Cir. 2009).

and that section 706(2)'s "set aside" language does not itself authorize vacatur even as to the parties. Stay Appl. 26.[11] But section 706 plainly prescribes remedies for unlawful agency actions (and inaction). *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) ("The APA provides relief for a failure to act in § 706(1): 'The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.'" (ellipsis in original)). The Government's attempt to recharacterize the relief available under the APA fails.

Second, the Government contends that, even if vacatur of agency action is the presumptive remedy, the Corps' *verification* of Keystone XL under Nationwide Permit 12 was the "agency action" under review all along, and that Plaintiffs' standing is limited to that single application. Stay Appl. 26.

At the outset, the Government misrepresents the record. At the Government's own urging, the parties litigated Plaintiffs' facial attack on Nationwide Permit 12, while Plaintiffs' challenges to any project-specific verifications for Keystone XL remained stayed. *Supra* p. 9. As the Government acknowledged to the District Court, Plaintiffs sought summary judgment on their claims "that the Corps *issued [Nationwide Permit] 12* in violation of [the CWA],

[11] Notably, even that commentator agrees that courts can grant relief that extends beyond the parties under other judicial review statutes instructing courts to review and "set aside" generally applicable agency actions. *See* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 38 Yale J. on Reg. Bull. (Apr. 12, 2020), https://bit.ly/3duP72Y (citing 15 U.S.C. § 78y(b)(3); 28 U.S.C. § 2342). Equally broad review is available under the APA. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 141, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

NEPA, and the ESA." Gov't Summ. J. Br. 9, D. Ct. ECF No. 86 (emphasis added). Indeed, the Government argued that Plaintiffs' as-applied challenges as to Keystone XL "are . . . not at issue here" and that the "facial challenges" to Nationwide Permit 12 must turn solely on the validity of the Permit as a whole and the process of its issuance. Gov't Summ. J. Reply 1-2, D. Ct. ECF No. 110.

Despite the Government's insistence on the facial nature of Plaintiffs' claims, it never argued that Plaintiffs lacked standing to litigate them—and still does not. And to this day, the Government has not questioned Plaintiffs' standing to obtain declaratory relief regarding the entirety of the Permit. These inconsistencies belie the Government's contention that Plaintiffs' standing cannot support a facial remedy for Plaintiffs' successful facial challenge to Nationwide Permit 12.

More fundamentally, the Government's argument relies on a false premise, namely, that Plaintiffs must show standing for each and every one of the thousands of individual crossings that could be authorized under the Permit. Stay Appl. 25. That is not the law. Courts routinely vacate unlawful agency regulations and other actions without any demonstration that those challenging the action are injured by every potential application of the action. *See supra* pp. 26-27. While the Government cites *Lujan v. National Wildlife Federation*, the Court recognized there that a single plaintiff with standing to challenge an agency action under the APA can obtain relief as to the "entire" action. 497 U.S. 871, 890 n.2 (1990); *accord Nat'l Min. Ass'n*, 145 F.3d at 1409. Indeed, that result flows from the very concept of a facial challenge, whether to agency action, *see PDR Network, LLC v. Carlton &*

Harris Chiropractic, Inc., 139 S. Ct. 2051, 2059-60 (2019) (Kavanaugh, J., concurring) (describing "facial, pre-enforcement" review), or to statutes, *see Shelby County v. Holder*, 570 U.S. 529, 540 (2013); *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Once Plaintiffs establish a concrete injury traceable to Nationwide Permit 12, they need not show a similar injury for each and every crossing that the Permit could authorize.[12]

Third and finally, the Government asserts that equitable principles regarding injunctions require limiting vacatur to Keystone XL. Stay Appl. 22-24; *see also* TC Energy Br. 13. Not so.

To begin, the Government is wrong to suggest that the same standards govern the different remedies. A plaintiff has the burden to establish that the relevant factors warrant the "extraordinary remedy" of an injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010). By contrast, vacatur is a "less drastic remedy," *id.*, which is "normally" required for unlawful agency action "whether or not [a plaintiff] has suffered irreparable injury," *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). The distinction matters. *See Regents*, 2020 WL 3271746, at *17 n.7.

[12] Accordingly, the Government's contention that Plaintiffs improperly relied on supplemental declarations to establish standing as to crossings other than Keystone XL, Stay Appl. 24-25, "rests on a failure to distinguish injury from remedy." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). As explained below, *infra* pp. 38-39, Plaintiffs properly submitted those declarations to further inform the District Court's assessment of remedy.

The cases on which the Government relies are also distinguishable because they involve remedies that exceeded "the extent of the violation established." *Lewis v. Casey*, 518 U.S. 343, 360 (1996) (citation omitted). In *Lewis*, plaintiffs established violations regarding only two prisoners' individual constitutional right of access to the courts. *Id.* at 359. Accordingly, there was no "basis for a conclusion of systemwide violation," i.e., that the state prison system's practices resulted in individual violations throughout the state, and thus, no justification for the "imposition of systemwide relief." *Id.* Similarly, *Gill v. Whitford* concerned injury to an individual's voting rights that "results from the boundaries of the particular district in which he resides." 138 S. Ct. at 1930. Because any violation would turn solely on that district's boundaries, a single individual could not obtain statewide redistricting to cure other, independent violations occurring in other districts. *Id.* But here, by refusing to undertake programmatic consultation on the effects of Nationwide Permit 12, the Corps took a single action that violated the ESA as to the *entire* Permit. Relief corresponding with the nationwide scope of the Permit was therefore appropriate, even under injunctive relief principles. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2303, 2307 (2016) (district court properly issued statewide injunction against facially invalid state law).

The District Court's vacatur was also "necessary to provide complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Plaintiffs' interests extend well beyond Keystone XL. Pls. Stay Opp'n 40-42, C.A. ECF No. 45-1. Plaintiffs have members in every state, Nationwide Permit 12 authorizes pipelines throughout the

country (including individual pipelines that, like Keystone XL, cross multiple states), and several of the listed species threatened by those activities migrate between regions and/or are affected by multiple projects. *Id.* at 43. In short, many Permit-authorized activities individually and collectively impact Plaintiffs' interests because—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." Gov't App. 60a.

The District Court's partial vacatur comports with the APA, well-established precedent, and the record in this case. Defendants have therefore failed to "demonstrate[] that this is one of those rare and exceptional cases in which a stay pending appeal is warranted." *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1013 (1993) (O'Connor, J., concurring in denial of stay).

2. The District Court's injunction imposes no additional burden

Because the injunction issued by the District Court parallels the vacatur, the Court need not consider the injunction issue in assessing the propriety of a stay. *Cf. Regents*, 2020 WL 3271746, at *17 n.7. In any case, the injunction alone cannot support the extraordinary relief sought by Defendants.

The injunction here imposes no burden beyond the vacatur. As Plaintiffs have explained, the injunction operates solely on the Corps and requires only that the Corps refrain from authorizing certain activities under Nationwide Permit 12 until the agency completes consultation. Pls. Stay Opp'n 44, C.A. ECF No. 45-1. Given the Corps' recognition that the District Court's vacatur alone precludes

authorization of the construction of new oil and gas pipelines using Nationwide Permit 12, a court could determine that an injunction is unnecessary on the record here. *Id.* at 47 (citing *O.A. v. Trump*, 404 F. Supp. 3d 109, 153-54 (D.D.C. 2019) and *Monsanto*, 561 U.S. at 165-66); Pls. Stay Opp'n 28, D. Ct. ECF No. 144. But whether an injunction lacks independent significance in this case is certainly not an issue worthy of certiorari. Nor does it warrant a stay, as resolving that issue in the Government's favor would at most mean that the Court would strike a remedy with no practical effect. The Court should reject Defendants' arguments to the contrary.

C. The District Court's remedy order was procedurally proper

Recognizing the weakness of their merits argument, Defendants manufacture an attack on the process in the District Court. They argue they had no notice that vacatur was a possible remedy to this straightforward APA challenge, and that they had insufficient opportunity to address the scope of relief despite submitting multiple briefs and declarations on that very issue. These case-specific arguments are meritless, were properly rejected by the lower courts, and do not raise any issue worthy of this Court's consideration, much less emergency relief.

1. Defendants had notice of the available remedies for Plaintiffs' facial challenge to Nationwide Permit 12

Despite the APA's clear mandate that unlawful agency action "shall" be set aside, 5 U.S.C. § 706(2)(A), Defendants argue that they lacked notice that the District Court might vacate Nationwide Permit 12 rather than order relief limited to Keystone XL. Stay Appl. 27; Coal Br. 14. Defendants' attempt to reframe this case as pertaining only to that one pipeline distorts the proceedings below. As

discussed above, *supra* pp. 28-29, this case clearly involved facial challenges to Nationwide Permit 12. Consequently, Defendants were on notice that the District Court could fashion relief—and particularly the presumptive relief afforded by the APA—regarding Nationwide Permit 12 as a whole.

Defendants nonetheless insist that Plaintiffs "disclaimed" the possibility of any relief beyond the application of Nationwide Permit 12 to Keystone XL. Stay Appl. 3; Coal Br. 10. That is incorrect. While Plaintiffs stated at summary judgment that they did not seek to have Nationwide Permit 12 broadly enjoined, they also made abundantly clear that they were most concerned with the adverse effects of the use of the Permit by oil and gas pipelines, including Keystone XL. *See, e.g.*, Pls. Summ. J. Reply 56-57, D. Ct. ECF No. 107 (explaining that "this case focuses on the Corps' use of [Nationwide Permit] 12 to approve massive oil pipelines like Keystone XL" as opposed to "other uses" like electricity transmission lines and broadband (citing Mont. Summ. J. Br. 17, 19-22, D. Ct. ECF No. 92)). Thus, Plaintiffs requested both declaratory relief and a remand as to the entire Permit. *Id.*; *see also* Am. Compl. 87-88, D. Ct. ECF No. 36 (requesting that relief as well as "such other relief as the Court deems just and appropriate").

The Government's reply brief confirms that there was little question Plaintiffs' challenge and potential relief were directed at Nationwide Permit 12 as a whole. It argued that vacatur of the entire Permit would be "over-broad, and extremely disruptive." Gov't Summ. J. Reply 20, D. Ct. ECF No. 110. And it acknowledged that "Plaintiffs focus on the use of [Nationwide Permit] 12 *for*

construction of new oil pipelines"—not just Keystone XL—and urged that relief be so limited, excluding such matters as "emergency repairs to utility lines." *Id.* (emphasis added). That is fully in accordance with the remedy the District Court ultimately fashioned.

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). In fact, this Court recently confirmed that "[n]othing prevents . . . awarding facial relief as the appropriate remedy" for as-applied claims, despite a petitioner's more limited request for relief. *Whole Woman's Health*, 136 S. Ct. at 2307. Here, Plaintiffs' facial claims supported the presumptive remedy of vacatur—and certainly the partial vacatur ultimately crafted by the District Court—given the Corps' violation of the ESA.

Arguing otherwise, Defendants harp on language from Plaintiffs' opposition to motions to intervene. Stay Appl. 3; Coal Br. 10. But the parties briefed those motions well before the District Court's merits decision, let alone its remedy decision. A statement made by the District Court in allowing intervention certainly did not preclude it from reassessing the appropriate form of relief following consideration of the case on the merits. *See, e.g.*, *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) (recognizing that "a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case").

Moreover, the District Court *granted* permissive intervention to the Coalition and the State of Montana, so Defendants cannot point to any prejudice

resulting from Plaintiffs' statements (or the court's reference to them) at that early stage of the case. Indeed, the Coalition's entry to the case three weeks before briefing on summary judgment began gives lie to NextEra Energy's far-fetched complaint—made in a last-minute brief—that it had "no notice" whatsoever that Plaintiffs' challenge to Nationwide Permit 12 might affect its interests. *See* NextEra Proposed Amicus Br. 13-15. One of NextEra Energy's subsidiaries is a member of the Interstate Natural Gas Association of America—a group within the Coalition. *See* Coal. Br. i, 1;[13] *see also* Coal. Summ. J. Br. 2, D. Ct. ECF No. 93 (arguing, on behalf of its members, against a decision "calling into question or invalidating" the Permit). If the Coalition's participation as a party to the litigation was not enough to represent NextEra Energy's interests, NextEra could have sought to intervene at summary judgment, following the merits decision, or at the Court of Appeals—or it could have filed an amicus brief, as many others did. *See, e.g.*, D. Ct. ECF Nos. 106, 122, 147; C.A. ECF Nos. 28-2, 30-2, 31-2. It chose not to. The Court should squarely reject the belated and duplicative arguments NextEra Energy seeks to make now.

Next, the Government cites Federal Rule of Civil Procedure 65(a)(1) in support of its arguments, Stay Appl. 27, but that rule is inapposite. It imposes notice requirements before entry of ex parte preliminary injunctions and temporary

[13] *See Our Subsidiaries*, NextEra Energy, https://bit.ly/3g2cwdN (last visited June 27, 2020) (listing NextEra Energy Resources, LLC); *INGAA Member Companies*, INGAA, https://bit.ly/3g44WPJ (last visited June 27, 2020) (listing NextEra Energy Resources, LLC). In fact, NextEra Energy Resources touts the Mountain Valley pipeline as one of its pipelines under development. *Our Pipelines*, NextEra Energy Resources, https://bit.ly/3g5i5rX (last visited June 27, 2020).

restraining orders at the outset of an action, before opposing parties have any opportunity to be heard. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 438-39 (1974) (explaining that Rule 65's stringent restrictions guard against "court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute"). No such concerns are present here: these proceedings were not ex parte, and, in any case, all parties were heard on the specific issue of remedy.

In fact, the District Court gave Defendants a full opportunity to contest the appropriate form of relief. Following the District Court's merits ruling, Defendants asked the court to amend the remedy, which they believed was overbroad. Although the Government styled its motion as a motion for stay pending appeal, it also pressed the District Court to revise (and narrow) its order under Federal Rule of Civil Procedure 54(b). *See* Gov't Stay Br. 2, D. Ct. ECF No. 131. The Government stated that it had delayed filing a notice of appeal specifically to ensure that the District Court retained jurisdiction to consider such revisions (while also threatening to appeal if the District Court did not issue a revised ruling within 15 days). *Id.* The District Court acted within that tight timeframe, amending its order and crafting a much narrower vacatur and parallel injunction.

In all, Defendants submitted more than 150 pages of post-merits briefing and declarations, the majority of which dealt with remedy, before the District Court fashioned the relief as to which the Government is now seeking an emergency stay. *See* D. Ct. ECF Nos. 135 to 138-5 and 148 to 150. Thus, the Government's claim that

it never had an opportunity to sufficiently brief the remedy, Stay Appl. 27-28, is meritless. And to the extent that opportunity was curtailed in any way, it was due to the Government's own actions. *See California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1322 (9th Cir. 1985) (observing that a party cannot "complain that the district court denied it a full opportunity to be heard" when it filed an appeal before a motion to modify the injunction).[14]

Also groundless is Defendants' assertion that the District Court erred by considering Plaintiffs' declarations in support of a modified remedy because they were submitted after the merits briefing. Stay Appl. 24, 27. Plaintiffs were responding to *Defendants*' arguments regarding the scope of the relief awarded. They properly submitted additional declarations to inform the District Court's assessment of that issue. *See* Pls. Stay Opp'n 62-64, C.A. ECF No. 45-1; Pls. Stay Opp'n 24 n.8, D. Ct. ECF No. 144; *Winter v. NRDC*, 555 U.S. 7, 24-25 (2008) (considering extra-record declarations on impacts of an injunction).[15] Defendants themselves submitted a combined nine post-merits declarations to illustrate their

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[14] The Coalition's assertion, without citation to any order, that the District Court "denied multiple requests . . . for remedy briefing," Coal. Mot. 10, is likewise meritless. Nothing precluded the Coalition from addressing remedy in its summary judgment briefs, and the Coalition also weighed in when the Government asked for a stay and refinement of the remedy.

[15] Because Plaintiffs' declarations addressed the scope of relief, not Article III standing, the Government's reliance on *Summers v. Earth Island Institute*, 555 U.S. 488, 495 n.* (2009) (declining to consider standing affidavits submitted after judgment and appeal), and *Lujan*, 497 U.S. at 894-95 (district court did not abuse discretion in declining to consider standing declarations submitted after initial summary judgment briefing), is inapposite.

alleged harms, including to pipelines, from an injunction or vacatur. *Contra* Stay Appl. 28 (suggesting the District Court had "no evidence" before it of such harms). For Defendants to assert that it was error for the District Court to afford Plaintiffs the same opportunity makes no legal or logical sense.

In short, Defendants not only had full notice of the appropriate remedy, they submitted briefing and declarations addressing that remedy—a process which ultimately resulted in a modification of the initial order to substantially address Defendants' concerns. Their arguments now are nothing more than flyspecking of the District Court's case management.[16]

2. Defendants' complaint that the scope of the partial vacatur needs clarification is not a basis for a stay from this Court

Defendants argue that the precise scope of the partial vacatur is unclear, Stay Appl. 28; Coal. Br. 26-30, but this does not support their extraordinary request for a stay. First, the scope of the narrowed vacatur is based on categories that Defendants themselves introduced. A substantial portion of the Coalition's remedy brief discussed the use of Nationwide Permit 12 for routine maintenance, inspection, and repair activities, for which it argued the Permit should remain in

[16] The Coalition attempts to support its waiver theory by relying on the principle of "party presentation," which is inapplicable. In the chief case on which the Coalition relies, *United States v. Sineneng-Smith*, this Court admonished a lower court's "radical transformation" of a merits case briefed by the parties. 140 S. Ct. 1575, 1578-79 (2020) (appeals court appointed three amici to brief new and different constitutional challenges and then accepted those new arguments). In contrast here, all parties litigated Plaintiffs' facial claim, the District Court awarded the presumptive legal remedy, and then the court refined that remedy in response to full briefing and evidence submitted by the parties.

place during the remand. *See, e.g.*, Coal. Stay Br. 9-14, D. Ct. ECF No. 138. The District Court addressed those concerns by excluding such routine projects from the partial vacatur and parallel injunction. It is disingenuous for the Coalition to argue those categories are not clearly defined, when it was Defendants that used them.

Second, even if Defendants truly do not understand these terms, nothing precluded them from seeking clarification. Instead, they rushed to file an appeal two days after the District Court's remedy decision. They cannot now use their purported confusion to attack the District Court's order—particularly since they remain able to seek clarification. *See* Fed. R. Civ. P. 60, 62.1. In any event, Defendants' argument does not warrant intervention by this Court.

3. The Coalition's new argument that the Natural Gas Act limits the relief granted by the District Court also affords no basis for a stay

The Coalition, but not the Government or any other party or amici, argues that the District Court lacked jurisdiction to issue any relief that applies to natural gas pipelines because the Natural Gas Act, 15 U.S.C. § 717r(d)(1), confers exclusive jurisdiction on Courts of Appeal over any permits required for those pipelines. Coal. Br. 17-21. This is an unabashedly new (and meritless) argument that the Coalition failed to raise in its intervention motion, its summary judgment briefs, or its stay papers in front of either the District Court or Court of Appeals. The Court should not pay it any heed now. *See Chaidez v. United States*, 568 U.S. 342, 358 n.16 (2013) ("'[M]indful that we are a court of review, not of first view,' we decline to rule on Chaidez's new arguments." (citation omitted)).

Even if the Court were to consider this new argument, the claim is devoid of merit. The Natural Gas Act's jurisdictional provision has nothing to do with facial challenges to nationwide permits, regardless of whether natural gas projects rely on those permits. Rather, it applies only to challenges to agency decisions approving a particular "facility" as defined by that act. *See* 15 U.S.C. § 717r(d)(1) (referring to the "circuit in which *a facility* . . . is proposed to be constructed" (emphasis added)). All of the cases on which the Coalition relies thus concern actions specific to a particular facility. *See, e.g.*, *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 83 (2d Cir. 2006) (state permit for single pipeline). But there is no "facility" at issue in this facial challenge to a general permit, and therefore, no court of appeals with exclusive jurisdiction.

Indeed, to accept the Coalition's argument would mean that every facial challenge to any local, state, or federal permitting program or regulatory requirement could fall under the Natural Gas Act's jurisdiction if there is a possibility that an interstate gas pipeline might someday avail itself of that permit. That would be an absurd result. The District Court had jurisdiction over Plaintiffs' facial challenge to Nationwide Permit 12, no party (including the Coalition) argued otherwise, and the District Court therefore had jurisdiction to devise an appropriate remedy in view of the ESA violation it discerned.

* * *

Defendants have not laid out any plausible argument that they are likely to succeed on the merits of their appeal. Instead, they offer a scattershot assemblage

of procedural arguments that are tangential to the core ruling of the District Court. The central question presented in this litigation—whether the Corps must consult under the ESA before issuing Nationwide Permit 12—is not a close one. This Court would not grant certiorari on that question or on the related issue of whether the presumptive remedy of vacatur is within the District Court's authority to impose for a serious ESA violation. Accordingly, the Court should deny the stay on this basis alone. *See Barnes*, 501 U.S. at 1304-05 (explaining that likelihood that Court will grant certiorari and reverse are necessary conditions of granting a stay); *accord Jackson v. D.C. Bd. of Elections & Ethics*, 559 U.S. 1301, 1301-03 (2010) (Roberts, C.J., in chambers) (denying stay without considering irreparable harm); *California v. Harris*, 468 U.S. 1303, 1304 (1984) (Rehnquist, J., in chambers) (same).[17]

II. Defendants fail to show irreparable harm

Defendants' claimed irreparable injuries are exaggerated and vague; therefore, they cannot support a stay pending appeal. While ensuring that the Corps evaluates the adverse effects on protected species of all Nationwide Permit 12's uses, the District Court's order at most temporarily prevents some project proponents from relying on the Permit to construct new oil and gas pipelines across

[17] There is no colorable argument that the District Court's relief as to Keystone XL should be stayed. *Cf. Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (Breyer, J., concurring in part and dissenting in part from grant of stay) (stating that the Court "may, and sometimes does, 'tailor a stay so that it operates with respect to only 'some portion of the proceeding'" (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam))). Indeed, the Government repeatedly recognizes that, even if the Court agreed with it, a stay as to Keystone XL would be unwarranted. *See* Stay Appl. 33 ("At a minimum, . . . the order . . . should be stayed to the extent it reaches beyond the Keystone XL project itself."); *see also id.* at 22, 33.

U.S. waters. Those projects are not stopped from moving forward; they can use the CWA's individual permitting process during the remand. The Government itself holds the keys to mitigating any harm that might flow from that short-term shift in process: it controls both the time it takes to review individual permit applications and to complete the Section 7 consultation ordered by the District Court more than two months ago. Defendants' speculation as to the additional expense or delay that might nonetheless result does not rise to the level of irreparable harm that would justify a stay from this Court.

A. Defendants' alleged harms are temporary and easily mitigated

Defendants offer no evidence of imminent harm, focusing instead on vague, years-long permitting delays. *See* Stay Appl. 36-37; *see also* Coal. Br. 30 (complaining of delays of "multiple years"). Their arguments lose sight of the relevant timeframe: within a matter of months, the appeal could be resolved or the remand satisfied. *Cf. Blum v. Caldwell*, 446 U.S. 1311, 1316 (1980) (Marshall, J., in chambers) ("[T]he economic harm to be considered on this stay application is only the additional expenditure during the time in which the petition for certiorari is pending."); *Winter*, 555 U.S. at 22. As such, Defendants' claims of prolonged delay do not warrant a stay.

To begin, Defendants' erroneous timeframe overstates the universe of oil and gas pipelines affected by the District Court's order. The Corps "estimates that approximately 2,700 oil and gas pipeline projects will be affected." Moyer Decl. ¶ 6, Gov't App. 80a; *see also* TC Energy Br. 28 (relying on 2,700 figure). That number is inflated in numerous ways. It accounts for all pipelines expected to use the Permit

until its expiration in March 2022, *see* Moyer Decl. ¶ 5, Gov't App. 79a, even though a stay would almost certainly not last that long. And it fails to exclude routine maintenance, inspection, and repair activities—all of which are excepted from the partial vacatur. *See* Stay Appl. 34 (acknowledging that "some portion" of the 2,700 projects could still use Nationwide Permit 12). In short, the true number of affected pipelines is a fraction of what Defendants contend.

The Government tries to pin these muddled numbers on the District Court. *See id.* But any uncertainty about the universe of affected projects is a fault of Defendants' own making; they suggested the categories that the District Court used in the first place and, in any case, have not sought clarification from the District Court. *Supra* pp. 39-40.[18]

Nor have Defendants acted with any acute sense of urgency, further "blunt[ing]" their claimed harms and "counsel[ing] against the grant of a stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers). The Government waited nearly three weeks to file its stay application

[18] The Coalition insists that the purported uncertainty created by the District Court's order will generate a flood of litigation. Coal. Br. 26, 34. But Defendants identify only one case that implicates the District Court's order, and even there the plaintiffs refrained from seeking a preliminary injunction on their Nationwide Permit 12-related claim, citing the pending stay application. *See* Pls. Mot. Prelim. Inj. 1 n.1, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 20-cv-460 (W.D. Tex. June 19, 2020), ECF No. 10.

with this Court, and Defendants have not requested expedited merits briefing before the Ninth Circuit.[19]

Likewise, although the Corps itself has control over how long the remanded consultation will take, it has not shown any urgency there, either. The Government's brief is conspicuously silent on this point, failing to provide any explanation of the Corps' progress. But there is every indication that this consultation could be completed within a reasonable time, as contemplated by the ESA itself. *See* 16 U.S.C. § 1536(b)(1)(A) (prescribing presumptive timeframe of 90 days); 50 C.F.R. § 402.14(e). The Corps has already engaged in consultation for at least four previous iterations of the nationwide permit program. *Supra* p. 7. When it completed consultation with NMFS for the 2012 nationwide permit program, the process took eight months *for all 50 permits*. *See* 2012 Biological Opinion, Pls. App. 2a-3a. It is fair to infer that the Corps, should it choose to do so, could complete consultation with both NMFS and FWS for just Nationwide Permit 12 in an even shorter timeframe. And the Corps should be well on its way; the District Court

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[19] *See* 9th Cir. R. 27-12 (motions to expedite "will be granted upon a showing of good cause"); *In re Williams Sports Rentals, Inc.*, 786 F. App'x 105 (9th Cir. 2019) (expediting appeal and issuing ruling within three months); *In re Consol. Nev. Corp.*, 778 F. App'x 432 (9th Cir. 2019) (same); *Short v. Brown*, 893 F.3d 671 (9th Cir. 2018) (expediting appeal and issuing ruling within two months). The Court of Appeals has already shown it can act quickly in this case: it granted the Government's request for expedited briefing on the stay motion, Order, C.A. ECF No. 16, and ruled on the motion two weeks later, Stay Denial, Gov't App. 1a-3a.

remanded the Permit to the agency over two months ago, and no Defendant sought a stay of that remand until now. *See supra* pp. 10-11.[20]

The temporary impact of the District Court's order—coupled with the Government's "failure to act with greater dispatch" to either resolve the appeal or satisfy the remand, *see Ruckelshaus*, 463 U.S. at 1318—substantially lessens Defendants' claimed injuries. That is all the more true because there is "a straightforward way to avoid harm" to Defendants in the interim. *Trump v. Sierra Club*, 140 S. Ct. at 2 (Breyer, J., concurring in part and dissenting in part from grant of stay). As all Defendants acknowledge, any pipelines unable to use Nationwide Permit 12 while the Corps conducts consultation can proceed with construction in other ways. For example, construction that avoids crossing U.S. waters can continue. *See* TC Energy Br. 25 (describing work that can continue on Keystone XL absent stay); *id.* at 8 (indicating that "roughly 2.2%" of the pipeline "will traverse U.S. waters").[21] So, too, can construction that is authorized by another

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[20] Nowhere does the Government assert that compliance with the remand poses irreparable harm, nor can it. *See Graphic Commc'ns Union v. Chi. Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (holding that "time and money" spent complying with court order "does not show irreparable harm"); *NRDC v. FDA*, 884 F. Supp. 2d 108, 124 (S.D.N.Y. 2012) (reasoning that to hold otherwise "would almost always result in a finding of irreparable harm whenever an agency was required to comply with a court order"); *Shays v. FEC*, 340 F. Supp. 2d 39, 48-51 (D.D.C. 2004).

[21] TC Energy's public statements also acknowledge as much. *See, e.g.*, Dan Healing, *TC Energy Says Keystone XL Construction Continuing Despite U.S. Court Ruling*, BNN Bloomberg (May 1, 2020), https://bit.ly/2YgpnD1 (confirming ability "to complete a significant work in the United States in 2020" on Keystone XL absent stay); *see also, e.g.*, Timothy Gardner & Scott DiSavino, *U.S. Court Ruling Could Threaten Pipeline Projects With Delays*, Reuters (Apr. 28, 2020),

general permit. *See* Dreskin Decl. ¶ 15, D. Ct. ECF No. 138-3. Project proponents can also proceed under the individual permitting process. *See* 33 U.S.C. § 1344(a).[22] Thus, as the District Court explained, the remedy order "does not block any projects. It vacates only the Corps' categorical approval of new oil and gas pipeline construction under [Nationwide Permit] 12" for the duration of the remand. Remedy Order, Gov't App. 20a-21a. The Court should therefore disregard any alleged irreparable injuries that extend months, or even years, into the future.

B. Any harms stemming from the individual permitting process are vague and speculative

The Government complains of the administrative burden associated with processing an increased number of individual permits. Stay Appl. 35-37. That harm is self-inflicted and so cannot justify a stay. *See supra* pp. 19-21; *Veasey v. Perry*, 135 S. Ct. 9, 11 (2014) (Ginsburg, J., dissenting from denial of application to vacate stay) (discounting harm that is "largely attributable to the State itself"); *accord Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (finding that government's self-inflicted wounds severely undermined its stay motion and collecting cases from Second, Third, and Seventh Circuits).

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https://reut.rs/2AKHUP8 (reporting that "[s]everal pipeline companies . . . were continuing to work as normal on their projects" notwithstanding remedy order).

[22] While the individual permit process results in more protections for listed species and the environment generally, very few permits are denied in their entirety. *See Regulatory Program Frequently Asked Questions*, U.S. Army Corps of Eng'rs, https://bit.ly/2Nc5qad (last visited June 28, 2020) (describing "important functions" of wetlands for wildlife, need for careful review of permit applications, and denial rate).

In any event, the Government's burden is overstated. According to the Corps' own estimates, the agency would receive an additional 112 individual permit applications each month, divided among 1,250 regulatory project managers. *See* Moyer Decl. ¶¶ 5-6, 15-16, Gov't App. 79a-80a, 84a-85a (estimating 2,700 pipelines affected over next 24 months). That number is likely much lower when routine maintenance, inspection, and repair activities are excluded and other erroneous assumptions are corrected. *Supra* pp. 43-44.[23] And regardless, these numbers reveal that any permitting burden would be minimal. Indeed, the Corps contends only that it will be forced to "reassign[] . . . personnel or workloads," Stay Appl. 36, not that its mission or operations would be significantly impeded. Put simply, there is no irreparable harm where the Corps "remain[s] able" to exercise its permitting authority. *Ruckelshaus*, 463 U.S. at 1317 (finding no irreparable harm where agency "will remain able . . . to register new pesticides"); *contra Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (finding irreparable harm

[23] For example, the Corps concluded that 2,700 pipelines would be affected by the remedy order, but arrived at that figure by conflating the average number of preconstruction notifications per pipeline with the average number of water crossings per pipeline. *See* Moyer Decl. ¶¶ 5-6, Gov't App. 79a-80a. The two are not the same. Keystone XL is illustrative: TC Energy initially submitted three preconstruction notifications for five water crossings, even though the pipeline would cross approximately 688 jurisdictional waterways. *See* Pls. Summ. J. Br. 8-9 & n.2, D. Ct. ECF No. 73. In other words, while Keystone XL had a *below-average* number of preconstruction notifications (three), it actually accounted for almost 700 water crossings. Thus, dividing the total number of relevant expected uses of the Permit (16,240) by the average number of preconstruction notifications per pipeline (six), to yield 2,700 projects, almost certainly overstates the number of projects that comprise those 16,240 uses.

where state was prevented from "employ[ing] a . . . statute" "duly enacted" by its citizens' representatives).

Nor can the alleged increase in cost and delay to permittees support a showing of irreparable harm. *See* Stay Appl. 36-37; TC Energy Br. 25; Coal. Br. 30. The Corps estimates that the cost of obtaining an individual permit is $26,000, as compared to $9,000 for a verification under Nationwide Permit 12. Moyer Decl. ¶ 12, Gov't App. 83a. But no Defendant explains what proportion of project costs this increase would constitute or contends that the increase would be prohibitive. *See also* Pls. Stay Opp'n 68-69, C.A. ECF No. 45-1 (explaining that major pipelines subject to the partial vacatur and injunction often cost billions of dollars to build and can require dozens, if not hundreds, of verifications).

Meanwhile, the Government's concern over project delays, Stay Appl. 36, is speculative, particularly where the Government itself can shape the time it takes to review individual permit applications. *See Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (stating that "simply showing some 'possibility of irreparable injury'" is insufficient (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998))); *see also* Moyer Decl. ¶ 15 (describing available agency resources and possible "additional budgetary resources and/or workforce augmentations"). Applications for small, routine pipelines can likely be processed more quickly than the Government suggests. *Compare* Moyer Decl. ¶ 13, Gov't App. 83a (stating that applications take approximately nine months to process), *with Regulatory Program Frequently Asked Questions, supra* p. 47 n. 22 (indicating that "routine application[s]" are "normally"

processed in "three to four months"). And Section 404 permitting is hardly the only necessary component of pipeline construction. As Defendants concede, these projects must undergo other permitting and environmental review processes, any number of which could independently create delay. *See* Stay Appl. 38-39; TC Energy Br. 8, 23. Defendants cannot demonstrate that their claimed delays are attributable to the District Court's order.[24]

Even assuming the District Court's order will result in some additional delay, Defendants do not tie that delay to any concrete harm. *See Ruckelshaus*, 463 U.S. at 1317 (concluding that, even though injunction would cause agency to take longer to register new pesticides, delay alone did not constitute irreparable injury). The Government vaguely asserts that pipeline construction activities benefit the economy and energy supplies, and summarily concludes that the remedy order "threatens to undercut those benefits." Stay Appl. 37. But many such benefits arise only when a pipeline becomes operational. *See, e.g.*, TC Energy Br. 26-27. Though the vacatur has been in effect since April 15, the Government has not identified a single pipeline that was scheduled to go into service between then and either resolution of the appeal or completion of consultation, but is now delayed by the District Court's order. The remaining Defendants and amici cobble together at most

[24] Defendants' declarations underscore the speculative nature of their delay arguments. *Compare* Salsman Decl. ¶ 4, D. Ct. ECF No. 137-1 (stating that TC Energy could complete a substantial amount of construction in 2020 if it received necessary authorization from the Corps "by early July"), *with* Salsman Decl. ¶¶ 4-5, TC Energy App. (shifting authorization date to "early August"); *see also* Dreskin Decl. ¶ 20, D. Ct. ECF No. 138-3 (stating that "*some* projects *may* be cancelled *if* the risk profile . . . becomes too great" (emphasis added)).

two examples among them. *See* TC Energy Br. 29 (citing one pipeline identified by amici); Coal. Br. 25-26 & n.19 (alleging only that some pipelines expected to receive verifications of their preconstruction notices soon and that others are in "various stages of development," including "planning stages"); NextEra Proposed Amicus Br. 12-13 (alleging delay but omitting any discussion of when Mountain Valley pipeline's in-service date is, and whether it might be affected).[25]

Stated differently, a stay from this Court would not cause scores of pipelines to suddenly spring into operation. Meanwhile, several companies have publicly represented that they expect to meet their pipelines' target in-service dates notwithstanding any delays (or costs) introduced by the District Court's order. *See* Gardner & DiSavino, *supra* p. 46 n. 21.[26] Given these realities, "the Government's asserted interests" in the national economy and energy supply—even if "important in the abstract"—does not mean that the relief they seek here "will in fact advance those interests." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion).

The Coalition's rhetoric about the public's "security," "economic viability," and "way of life," Coal. Br. 38; *see also* TC Energy Br. 27-29; W. Va. Proposed

[25] NextEra also fails to mention what other permits the pipeline still needs or what other legal hurdles exist that are preventing its completion.

[26] TC Energy has similarly confirmed that it expects Keystone XL to become operational in 2023, as planned. *See* Jordan Blum, *TC Energy Reaffirms Keystone XL Commitment After Permit Pulled*, S&P Global (May 1, 2020), https://bit.ly/3ehhbZ1; Salsman Decl. ¶ 6, TC Energy App. (stating that, if a stay were not granted, TC Energy would respond by accelerating construction in 2021).

Amicus Br. 2, 4, is unpersuasive for the same reasons. And though the Coalition maintains that pipeline construction is particularly important in light of the COVID-19 pandemic, Coal. Br. 39, it fails to acknowledge that such construction poses grave public health risks to vulnerable communities because it may accelerate the spread of COVID-19, *see* Rosebud Sioux Tribe & Fort Belknap Indian Cmty. Amicus Br. 8-14, C.A. ECF No. 47, and that the pandemic has caused a collapse in global oil demand, *see* Blum, *supra* p. 51 n. 26; Vincent Lauerman, *Canadian Pipelines to Nowhere*, Petroleum Econ. (June 16, 2020), https://bit.ly/2NxWEUk.

Finally, Defendants claim that the economic benefits associated with pipeline *construction* will necessarily be delayed for an extended period. *See, e.g.*, Stay Appl. 36-37; TC Energy Br. 28. But again, this ignores the finite nature of the remand and the Government's ability to mitigate harms in the interim. Any resulting short-term delay of these benefits does not rise to the level of irreparable injury. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014) ("Because the jobs and revenue will be realized if the project is approved, the marginal harm to the intervenors of the preliminary injunction is the value of moving those jobs and tax dollars to a future year, rather than the present."); *Downstate Stone Co. v. United States*, 651 F.2d 1234, 1243 (7th Cir. 1981) (observing that denial of injunction "would mean, at most, a delay" in development of quarry at issue and enjoyment of associated economic benefits). As the District Court stated, project proponents "possess no inherent right to maximize revenues by using a cheaper, quicker permitting process, particularly when their

preferred process does not comply with the ESA." Remedy Order, Gov't App. 38a. The stay should be denied.

III. The balance of equities weighs strongly against a stay

Defendants have not carried their heavy burden of demonstrating a reasonable probability that this Court would grant certiorari, let alone that they have a significant possibility of prevailing on the merits. Nor do they establish that they will likely suffer irreparable harm absent a stay. Accordingly, the Court should deny the Government's requested relief on both bases. *See Barnes*, 501 U.S. at 1302, 1304-05. But even if the Court reaches this final factor, the balance of equities confirms that a stay is unwarranted.

Congress has made clear that the public interest in avoiding the extinction of species is "incalculable." *Hill*, 437 U.S. at 187. As a result, when balancing economic harm against impacts to protected species, the equities must tip in the species' favor. *Id.* at 187-88; *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (concluding that where "[e]nvironmental injury" is "sufficiently likely," the "balance of harms will usually favor . . . the environment"). Thus, in *Hill*, the Court disagreed that "the loss of millions of unrecoverable dollars" of public funds, 437 U.S. at 187, or the "permanent halting of a virtually completed dam," *id.* at 172, outweighed the need to avoid the jeopardy of an endangered fish species. "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

So too here. The alleged economic and energy costs of the District Court's order—even assuming they are not exaggerated and speculative, *supra* pp. 42-53—

pale in comparison to the need to ensure that the use of Nationwide Permit 12 to construct hundreds of new oil and gas pipelines across the country will not drive protected species toward extinction or permanently destroy critical habitat.

The Government purports to fully represent the public interest, but ignores these congressionally recognized values. *See* Stay Appl. 33. Instead, it summarily concludes that the stay will not cause any harm and that consultation will not produce any benefits. *Id.* at 37, 38. It is wrong on both counts.

Plaintiffs' briefs and supporting declarations detail Plaintiffs' interests in protecting listed species. *See* Pls. Stay Opp'n 26-27, D. Ct. ECF No. 144. They further detail the harms stemming from the Corps' willful failure to conduct consultation and fully evaluate the cumulative effects of oil and gas pipelines on such species before issuing Nationwide Permit 12. *See id.*; Pls. Stay Opp'n 40-43, C.A. ECF No. 45-1. For example, Permit-authorized construction activities damage wetlands relied on by the iconic endangered whooping crane along its migratory route from Canada to Texas. *See* Pls. Stay Opp'n 15, 21, 40-41, C.A. ECF No. 45-1; Greenwald Decl. ¶¶ 11-13, D. Ct. ECF No. 73-3; Collentine Decl. ¶ 17, D. Ct. ECF No. 144-3; Big Bend Conservation All. Letter Supp. Pls. 1-3, C.A. ECF No. 46. They cause pollution and sedimentation in rivers and streams, threatening endangered pallid sturgeon in Nebraska and Montana and endangered Roanoke logperch and clubshell in Virginia and West Virginia. Pls. Stay Opp'n 16, C.A. ECF No. 45-1; Pls. Stay Opp'n 31-32, D. Ct. ECF No. 144; Leech Decl. ¶ 8, D. Ct. ECF No. 144-11; Defs. of Wildlife Amicus Br. 5-8, C.A. ECF No. 51-2. And they fragment habitat used by

the imperiled Golden-cheeked warbler and Houston toad in Texas's Permian Basin. *See* Reed Decl. ¶¶ 11-14, D. Ct. ECF No. 144-13; Gunnarson Decl. ¶ 5, D. Ct. ECF No. 144-8; Big Bend Conservation All. Letter Supp. Pls. 1-3, C.A. ECF No. 46.

These and other at-risk species lie in the crosshairs of multiple oil and gas pipelines to be constructed using Nationwide Permit 12. *See* Reed Decl. ¶¶ 7, 11, 14 & Ex. 1, D. Ct. ECF No. 144-13; Leech Decl. ¶¶ 3-5, 8, D. Ct. ECF No. 144-11; Defs. of Wildlife Amicus Br. 2, 5-8, C.A. ECF No. 51-2; *see also* Pls. Stay Opp'n 31-32, D. Ct. ECF No. 144. The cumulative effects of such construction activities on protected species across the country could be disastrous. *See* Pls. Summ. J. Br. 28-29, D. Ct. ECF No. 73. Yet the Corps abdicated its duty to ensure, through consultation, that no jeopardy would result. 16 U.S.C. § 1536(a)(2). As the District Court found, the consequent harm to listed species—and to Plaintiffs' and the public's interest in them—counsels heavily against a stay. Remedy Order, Gov't App. 13a-14a, 18a-20a, 38a-41a.[27]

Defendants insist that programmatic consultation carries no additional benefits because the Permit already contains sufficient safeguards to protect

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[27] The cases on which Defendants and amici rely to suggest an overriding public interest in economic and energy concerns are inapposite; none involved an ESA violation and, in any event, the countervailing environmental harms were either inconsequential or absent, or else weighed on the same side of the scale as economic harm. *See* TC Energy Br. 26; Coal. Br. 38; W. Va. Proposed Amicus Br. 4; NextEra Proposed Amicus Br. 12, 13.

TC Energy also wrongly suggests that Plaintiffs, to avoid a stay, must show that Nationwide Permit 12 is likely to jeopardize the continued existence of protected species. *See* TC Energy Br. 25. The burden instead lies with Defendants to demonstrate that the "relative harms" to the parties and public justify a stay. *See Barnes*, 501 U.S. at 1305.

species. Stay Appl. 6-7, 37; Coal. Br. 6. These recycled merits arguments were rejected by the District Court (twice) and are thoroughly rebutted above. Past experience and the Corps' own statements show that consultation on the full Permit is essential and that project-specific review for individual pipelines, including Keystone XL, is an inadequate substitute. *See supra* pp. 13-22; 72 Fed. Reg. at 11,096 (acknowledging that programmatic consultation on nationwide permits provides "tools that districts can use to better address potential impacts to the endangered and threatened species"). This is true regardless of whether some pipelines face litigation over the adequacy of their project-specific review. *Contra* Stay Appl. 38-39; NextEra Proposed Amicus Br. 8-9.

TC Energy similarly argues that the lack of programmatic consultation cannot be harmful because, in the absence of Nationwide Permit 12, the Corps could authorize projects under the individual permit process instead—to which no programmatic consultation obligation attaches. TC Energy Br. 4, 16.[28] But that argument is circuitous and, in effect, reads the obligation for programmatic consultation out of the ESA. That programmatic consultation is not required *in the*

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[28] TC Energy also implies that the availability of the individual permitting process during the remand undercuts Plaintiffs' harms. TC Energy Br. 19. But that process—in contrast to Nationwide Permit 12, which allows certain projects to be built without even notifying the Corps—would at least guarantee project-level review, along with an opportunity for the public to weigh in on the project and urge a more robust analysis. *See* 33 U.S.C. § 1344(a); *see also* Defs. of Wildlife Amicus Br. 9 (explaining that, unlike Nationwide Permit 12 authorization, individual review could compel a practicable project alternative that is less harmful to protected species). That the public cannot participate in the ESA consultation itself does not alter that fact. *Contra* TC Energy Br. 19 n.6.

absence of a programmatic action such as Nationwide Permit 12 does not mean that the same is true when there *is* such a program. Nor does TC Energy's hypothetical of a universe without Nationwide Permit 12 have anything to do with the real-world benefits for imperiled species (and Plaintiffs' interests in them) that are conferred when the Permit goes through that required programmatic consultation.

Defendants complain that Congress allowed the Corps to issue general permits precisely to avoid more intensive review. Stay Appl. 35; Coal. Br. 3. That only underscores Plaintiffs' point. The Corps receives about 3,000 individual permit applications annually for *all* activities. Moyer Decl. ¶ 15, Gov't App. 84a. It authorizes about 14,000 uses each year for activities covered under Nationwide Permit 12 alone. Moyer Decl. ¶ 3, Gov't App. 78a. By choosing to use the Permit to approve the vast majority of linear utility projects under CWA Section 404, the Corps assumes the obligation to ensure that the Permit's cumulative effects will not jeopardize protected species. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 671 (confirming "that the ESA's no-jeopardy mandate applies to every *discretionary* agency action—regardless of the expense or burden its application might impose"). Nothing in the CWA indicates that the Corps may instead issue Nationwide Permit 12 "irrespective of" the ESA's requirements. *Hill*, 437 U.S. at 189.

Finally, the Government speculates that the District Court's order encourages oil to be transported via purportedly less-safe means, such as rail. Stay Appl. 37-38. As an initial matter, and as Defendants' own sources concede, pipelines and oil trains both pose substantial environmental risks. *See, e.g.*, U.S. Dep't of

State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project* ES-35 (2014), https://bit.ly/3dHHHK0 (referenced at TC Energy Br. 8 and finding that oil trains spill more frequently but pipeline spills are bigger); Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 Iowa L. Rev. 947, 1019 (2015) (cited at Stay Appl. 38 and observing that "oil and gas pipelines spilled 2.4 million barrels of hazardous materials, causing '367 deaths, 1465 injuries, and $6.4 billion in property damage'" between 1993 and 2012).

But even if moving oil by train were more dangerous, there is no empirical basis for the Government's conjecture that oil producers will shift to using trains if new pipelines are delayed absent a stay. Rail transport of crude oil is much more expensive, and with the sustained drop in oil prices that began in 2014, crude-by-rail has not provided an economical alternative, even while new pipelines, such as Keystone XL, have remained offline. *See Refinery Receipts of Crude Oil by Method of Transportation*, U.S. Energy Info. Agency, https://bit.ly/2YimqSm (last visited June 28, 2020) (showing that trains move a tiny and decreasing fraction of oil compared to pipelines). The very article the Government cites to make its point notes that sustained low oil prices make rail transport unviable. Klass & Meinhardt, *supra*, at 979 ("But with the rapid drop in global oil prices in late 2014, many of these assumptions regarding the viability of rail transport for crude oil have come into question."). This is especially true now, with the pandemic and corresponding global collapse in oil prices. Lauerman, *supra* (stating that pandemic-related market forces

will cause crude-by-rail volumes to be "curtailed 'first and fast'"). And if this alternate infrastructure *did* somehow materialize, that would only undercut the Government's own irreparable-harm arguments about reduced energy supply.

The Coalition's related rumination that delayed pipeline construction would cause higher greenhouse gas emissions, Coal. Br. 35-36, misses the forest for a tree. Its narrow focus on natural gas *substitution* projects ignores new pipelines (like Keystone XL) that would enable *additional* oil or natural gas use, both of which would significantly increase emissions. The Coalition also fails to identify when any of those projects would be completed and, as such, when their purported benefits would accrue if a stay were granted. *See supra* pp. 50-52. To the extent that safety of *existing* pipelines is a concern, *see* Coal. Br. 36-37, the order specifically exempts "routine maintenance, inspection, and repair activities on existing . . . projects." Remedy Order, Gov't App. 42a. In short, the risk of harm to imperiled species if the Court were to stay the District Court's order far outweighs whatever incremental increase in costs and delay Defendants would face in the months it would take for the Ninth Circuit to resolve the appeal or for the Corps to complete the remand.

* * *

A stay is unwarranted. Defendants have no reasonable chance of prevailing in the Court of Appeals, let alone in this Court (if the Court were to even grant certiorari). The Corps' issuance of Nationwide Permit 12 was a federal action that may affect listed species, rendering the Corps' refusal to conduct ESA Section 7 consultation on the Permit unlawful. The District Court issued the presumptive

remedy of vacatur, which it then significantly narrowed after extensive briefing from all parties. As to harm, Defendants' allegations of cost and delay are overstated and generalized and, in any event, of short duration. The balance of the equities also cuts heavily against Defendants. In crafting Section 7, Congress mandated that protected species must be safeguarded from extinction. Extraordinary relief from this Court would risk the opposite result. The Court should deny the Government's stay application.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Government's application for a stay.

Respectfully submitted,

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June 29, 2020

Plaintiffs' Appendix

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Exhibit A

Excerpts from U.S. Army Corps of Engineers' Decision Document for Nationwide Permit 12 (Feb. 13, 2012, filed in District Court docket at ECF No. 144-14)

maintenance, repair, or removal of utility lines and associated facilities) in a specific category of waters (i.e., waters of the United States). The terms of the NWP do not authorize the construction of utility line substations in tidal waters or in non-tidal wetlands adjacent to tidal waters. The restrictions imposed by the terms and conditions of this NWP will result in the authorization of activities that have similar impacts on the aquatic environment, namely the replacement of aquatic habitats, such as certain categories of non-tidal wetlands, with utility line facilities. Most of the impacts relating to the construction, maintenance, repair, or removal of utility lines will be temporary.

If a situation arises in which the activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

6.2.2 Cumulative effects (40 CFR 230.7(b)(3))

The 404(b)(1) Guidelines at 40 CFR 230.11(a) define cumulative effects as "…the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." For the issuance of general permits, such as this NWP, the 404(b)(1) Guidelines require the permitting authority to "set forth in writing an evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit." [40 CFR 230.7(b)] If a situation arises in which cumulative effects are likely to be more than minimal and the proposed activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

Based on reported use of this NWP during the period of August 1, 2009, to July 31, 2010, the Corps estimates that this NWP will be used approximately 7,900 times per year on a national basis, resulting in impacts to approximately 400 acres of waters of the United States, including jurisdictional wetlands. The Corps estimates that approximately 480 acres of compensatory mitigation will be required to offset these impacts. The demand for these types of activities could increase or decrease over the five-year duration of this NWP. Using the current trend, approximately 39,500 activities could be authorized over a five year period until this NWP expires, resulting in impacts to approximately 2,000 acres of waters of the United States, including jurisdictional wetlands. Approximately 2,400 acres of compensatory mitigation would be required to offset those impacts. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. [33 CFR 332.2]

Wetland restoration, enhancement, and establishment projects can provide wetland functions, as long as the wetland compensatory mitigation project is placed in an appropriate landscape position, has appropriate hydrology for the desired wetland type, and the watershed condition will support the desired wetland type (NRC 2001). The success of wetland restoration, enhancement, and establishment is dependent on the technical expertise

Exhibit B

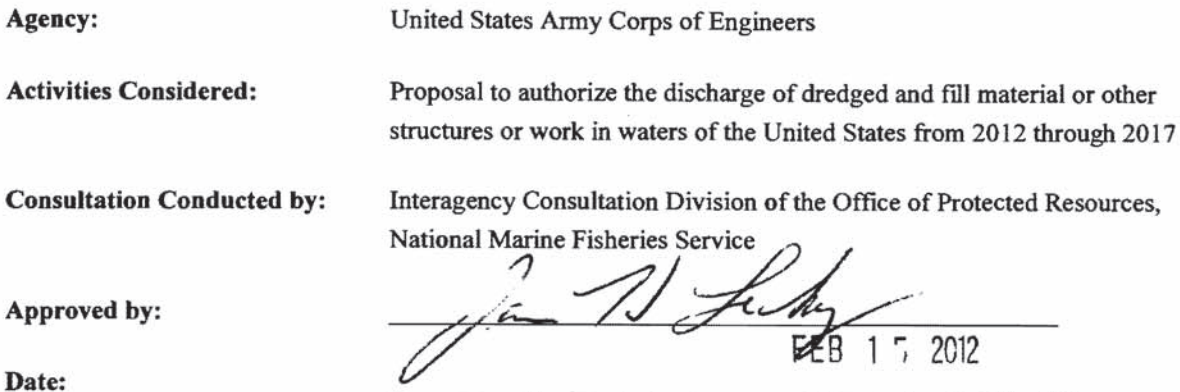
Excerpts from National Marine Fisheries Service's Biological Opinion on U.S. Army Corps of Engineers' Nationwide Permit Program (Feb. 17, 2012, filed in District Court docket at ECF No. 75-9)

National Marine Fisheries Service
Endangered Species Act Section 7 Consultation
Biological Opinion

Agency: United States Army Corps of Engineers

Activities Considered: Proposal to authorize the discharge of dredged and fill material or other structures or work in waters of the United States from 2012 through 2017

Consultation Conducted by: Interagency Consultation Division of the Office of Protected Resources, National Marine Fisheries Service



Approved by:

Date: FEB 1 7 2012

Section 7(a)(2) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1539(a)(2)) requires federal agencies to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. When a federal agency's action "may affect" a protected species, that agency is required to consult formally with the National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service, depending on the particular endangered species, threatened species, or designated critical habitat that may be affected by the action (50 CFR 402.14(a)). Federal agencies are exempt from this general requirement if they have concluded that an action "may affect, but is not likely to adversely affect" endangered species, threatened species, or designated critical habitat and NMFS or the U.S. Fish and Wildlife Service concur with that conclusion (50 CFR 402.14(b)).

The U.S. Army Corps of Engineers initiated formal consultation with NMFS and the U.S. Fish and Wildlife Service on the USACE's proposal to reauthorize 48 existing nationwide permits and establish two new nationwide permits that authorize the discharge of dredged or fill material into waters of the United States from 2012 through 2017. This document represents NMFS' programmatic biological opinion (Opinion) on the USACE's proposal to issue those permits at the national level. As an assessment of a national program of categories of activities, this Opinion does not assess the effects of individual discharges authorized by one or more of these permits to discharged dredged or fill materials into waters of the United States. Instead, this Opinion results from the national-level consultation on an action or series of actions affecting many species over all or a major portion of the United States and its territories as described in the Interagency Endangered Species Consultation Handbook (U.S. Fish and Wildlife Service and NMFS 1998). Specific uses of these proposed permits would be addressed in subsequent consultations by NMFS regions, such as in circumstances where an applicant notifies the Corps of a proposed activity that may affect listed species.

This Opinion is based on our review of the USACE's draft environmental assessments for the proposed nationwide permits, recovery plans for threatened and endangered sea turtles and shortnose sturgeon, status reviews for the

threatened and endangered Pacific salmon, the documents that were used to list green sturgeon and smalltooth sawfish as threatened and endangered species (respectively), reports on the status and trends of wetlands and deepwater habitats in the United States that have been prepared by the U.S. Fish and Wildlife Service's National Wetlands Inventory, past and current research and population dynamics modeling efforts, monitoring reports from prior research, and biological opinions on similar research, published and unpublished scientific information on the biology and ecology of threatened and endangered sea turtles, salmon, sturgeon, sawfish, and seagrasses in the action area, and other sources of information gathered and evaluated during the consultation on the proposed exercises. This Opinion has been prepared in accordance with section 7 of the ESA, associated implementing regulations, and agency policy and guidance (50 CFR 402; U.S. Fish and Wildlife Service and NMFS 1998).

Consultation History

On 30 March 2011, the U.S. Army Corps of Engineers provided the National Marine Fisheries Service with a copy of its 16 February 2011 Federal Register notice in which the USACE proposed to reissue and modify Nationwide Permits. On 1 April 2011, the U.S. Army Corps of Engineers provided the National Marine Fisheries Service with copies of the draft decision documents for the Nationwide Permits the USACE planned to issue.

In a series of telephone calls in May 2011, the National Marine Fisheries Services asked the U.S. Army Corps of Engineers for data on the number of activities that had been authorized by Nationwide Permits since 2007 (when they were last reissued), the acreage that was estimated to have been impacted by those authorizations, and the amount of mitigation the USACE had required. Those data were necessary to assess the potential effects of the proposed Nationwide Permits on endangered and threatened species under NMFS' jurisdiction and critical habitat that had been designated for those species.

Between 13 May and 7 June 2011, the USACE provided the data NMFS had requested. Formal consultation was initiated on 7 June 2011.

On 31 August 2011, the National Marine Fisheries Services provided the U.S. Army Corps of Engineers with a copy of its draft biological opinion on the proposed issuance, reissuance, and modification of the USACE's Nationwide Permits. The USACE provided comments on the draft opinion on 30 December 2011.

1.0 Biological Opinion

1.1 Description of the Proposed Action

The U.S. Army Corps of Engineers proposes to re-issue 48 pre-existing Nationwide Permits, re-issue two Nationwide Permits with possible modifications (NWP 21: Surface coal mining activities and NWP 48: Commercial shellfish aquaculture), issue two new Nationwide Permits, and reissue the pre-existing suite of General Conditions for a period of five years beginning in 2012 and ending in 2017. The purpose of the NWP program is to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources. The U.S. Army Corps of Engineers proposes to issue these nationwide permits action pursuant to section 404(e) of the Clean Water Act

Table 5.3. Total number of activities, total acreage, and mean-acreage-impacted-per activity for the 21 existing Nationwide Permits that are likely to have the greatest influence on listed resources under NMFS' jurisdiction. Based on data for the years 1999, 2007, and 2010. Adjusted mean acreage impacted per activity (column 5) treats the acreage that was estimated to have been impacted by Nationwide Permit 27 in 2010 as an outlier and replaces it with the mean value for 1999 and 2007

NWP #	Permit name (using naming conventions in 2011 proposed rule)	Total Activities (reporting and non-reporting)	Total Acreage (reporting and non-reporting)	Mean Acre/Activity	Adjusted Mean Acre/Activity
1	Aids to navigation	2090	5.32	0.0025	0.0025
3	Maintenance	29615	1067.78	0.0361	0.0361
4	Fish and wildlife harvesting, enhancement, and attraction devices	21449	50.18	0.0023	0.0023
7	Outfall structures and associated intake structures	2133	75.11	0.0352	0.0352
8	Oil and gas structures on the outer continental shelf	106	0.70	0.0066	0.0066
12	Utility line activities	38263	1598.15	0.0418	0.0418
13	Bank stabilization	27805	599.57	0.0216	0.0216
14	Linear transportation projects	20505	884.61	0.0431	0.0431
17	Hydropower projects	21	1.29	0.0614	0.0614
27	Aquatic habitat restoration, establishment, and enhancement activities	3561	30725.81	8.6284	1.2837
28	Modifications of existing marinas	723	10.13	0.0140	0.0140
29	Residential developments	3454	403.02	0.1167	0.1167
31	Maintenance of existing flood control facilities	455	28.18	0.0619	0.0619
33	Temporary construction, access and dewatering	3702	230.49	0.0623	0.0623
35	Maintenance dredging of existing basins	893	131.28	0.1470	0.1470
36	Boat ramps	2469	33.03	0.0134	0.0134
39	Commmercial and institutional developments	1756	190.42	0.1084	0.1084
40	Agricultural activities	1113	203.42	0.1828	0.1828
43	Stormwater management facilities	492	39.49	0.0803	0.0803
46	Discharges into ditches	1022	414.51	0.4056	0.4056
48	Existing commercial shellfish aquaculture activities	103	130.07	1.2628	1.2628
	Total	**159640**	**36817.25**	**0.2306**	**-**

threatened species under NMFS' jurisdiction or critical habitat that has been designated for those species. On that assumption, we would expect about 18,440 activities per year or 92,200 over five years to occur in these 19 USACE Districts. Those activities would impact about 4,050 acres per year or 20,280 acres over five years.

If we assume that the percentages presented in Table 5.4 are representative of what we might expected to occur in the future, we would also expect slightly more than half of the 18,440 activities (9,266 activities) that might occur each year over the next five years and slightly more than 80% of the 4,050 acres impacted each year (or about 3,345 acres) to occur in the USACE Districts that occur along the Atlantic Coast. Over five years, this would result in about 46,330 activities impacting about 16,730 acres of wetlands and other aquatic habitats in the USACE District in this region. Slightly more than 12% of these activities and about 75% of this acreage impacted, or 2,330 activities impacting about 3,050 acres per year, would occur in the Jacksonville USACE District. Districts in the Gulf Region would experience losses of about 365 acres of jurisdictional wetlands and other waters of the United States each year over the five-year duration of the proposed Nationwide Permits or about 1,930 acres of impact.

There is very little information on where activities authorized by Nationwide Permits occur at spatial scales that have higher resolution than USACE Districts. However, three studies examined the spatial distribution of Nationwide Permits within particular sub-basins (Brody *et al*. 2008, Highfield 2008) or counties (Ellis 2005). Those studies suggest an important pattern: activities authorized by Nationwide Permits tend to be concentrated in limited spatial areas and that concentration increases the probability of cumulative impacts in the form of space-crowded

5.A.2 Activities Authorized by Specific Nationwide Permits

A handful of the activities that have been authorized by Nationwide Permits have no known adverse direct or indirect, individual or cumulative impacts on endangered species, threatened species, or designated critical habitat under NMFS' jurisdiction or would not elicit responses that are likely to have adverse consequences for those listed resources. These Nationwide Permits include structures in fleeting and anchorage areas (NWP 9), mooring buoys (NWP 10) and, for species and designated critical habitat under NMFS' jurisdiction, NWP 34 (cranberry production). The activities authorized by the remainder of the existing and proposed Nationwide Permits are known to have direct, indirect, and cumulative impacts on endangered species, threatened species, and designated critical habitat that are exposed to them.

The following narratives focus on specific Nationwide Permits that are known to have potential adverse consequences for endangered and threatened species under the jurisdiction of NMFS or critical habitat that has been designated for those species. Each narrative summarizes the activities associated with the proposed Nationwide Permit, the number of activities the permit has been reported to authorize the impacts of those activities.

Nationwide Permit 1

Nationwide Permit 1 authorizes the placement of aids to navigation and regulatory markers that are approved by and installed in accordance with the requirements of the U.S. Coast Guard (*see* 33 CFR, chapter I, subchapter C, part 66).

The USACE estimated that NWP 1 will be used about 60 times per year over the next five years (totaling about 300 activities over the five-year period; they did not estimate the number of acres that might be impacted by these activities (Table 5.5). Data the USACE provided NMFS for the years 1999, 2007, and 2010, however, leads us to different estimates (see Table 5.3). In those three years alone, NWP 1 authorized 2,090 activities impacting 5.316 acres of jurisdictional wetlands and other waters of the United States. The USACE required 0.25 acres for these impacts. Based on these data, the mean-acreage-impacted-per-activity authorized by NWP 1 would be 0.0025 with 0.0470 acres of mitigation required for each acre impacted.

Extrapolating from the pattern of authorizations between 1988 and 2010, we would expect NWP 1 to authorize about 697 activities each year, impacting about 1.772 acres, and resulting in about 0.0833 acres of compensatory mitigation. Over the five-year duration of the proposed Nationwide Permits, we would expect this Nationwide Permit to authorize about 3,483 activities, impact about 8.86 acres, and result in about 0.4167 acres of compensatory mitigation.

Aids to navigation have been important to prevent coral reefs from being damaged when ships ground on them. For example, in Bahia de Guayanilla, groundings that occurred in 1998, 2005, 2006, and 2009 damaged more than 20,000 square meters of coral. Large ship groundings off southeast Florida had injured aabout 53,400 acres of reef habitat between 1973 and 2004 (Boulon *et al*. 2005) . At the same time, however, chains that anchor aids to navigation have been reported to scour coral reefs: for example, the anchor of a single navigation aid damaged about 83.1 square meters of coral in Bahia de Guayanilla (Karazsia 2011).

Rivers.

The evidence available supports one conclusion: the Nationwide Permits have authorized activities that have had ecologically significant adverse effects on the physical structure and quality of waters of the United States through time-crowding, space-crowding, interactions, and "nibbling." In addition to the direct loss of significant percentages of wetland acreage, the information available demonstrates that the cumulative impacts of the activities authorized by Nationwide Permits have been sufficiently large to change the flow regimes and physical structure of river systems, degrade water quality, and simplify or degrade aquatic ecosystems; these changes have resulted in declines in the abundance of endangered or threatened species (Beechie *et al*. 1994, Lichatowich 1989, Lucchetti and Fuerstenberg 1993, May *et al*. 1997, Moscrip and Montgomery 1997, Scott *et al*. 1986). These outcomes have occurred despite the USACE's commitment to (a) remain aware of potential cumulative impacts resulting from activities authorized by Nationwide Permits and (b) take appropriate administrative action for those activities.

5.A.4 Impacts of Nationwide Permits on Listed Resources

As we have discussed, almost all of the endangered or threatened species under the jurisdiction of NMFS that occur in freshwater, coastal, or estuarine ecosystems within areas under the jurisdiction of the United States during all or portions of their life cycles are likely to be exposed to some of the direct or indirect effects of activities authorized by the proposed Nationwide Permits. In addition to the impacts we have discussed in this Opinion thus far, many of the species that have been listed as endangered or threatened were listed because of the consequences of activities in waters of the United States that were authorized by permits issued by the USACE (Table 5.8), although those permits have usually been contributing causes rather than the sole cause.

For example, when NMFS listed Sacramento River winter-run Chinook salmon as endangered and designated critical habitat for the species, its final rules to list the species and designated its critical habitat identified section 404 permits the USACE issued in the Sacramento River, Sacramento River-San Joaquin Delta, and San Francisco Bay as one of several reasons for the listing (57 *Federal Register* 36626, 59 *Federal Register* 440). When NMFS proposed Oregon coast, Southern Oregon Northern Coastal California, and Central California Coast Coho salmon as threatened, the proposal also identified the loss of wetland habitat, including the USACE's failure to consider the cumulative impact of activities authorized by Nationwide and other permits and inadequate mitigation as reasons for the listing, as some of several reasons for listing these salmon as threatened (60 *Federal Register* 38011, 61 *Federal Register* 56138).

In the *Status of the Listed Resources* and *Environmental Baseline* section of this Opinion, we noted that the destruction or degradation of jurisdictional wetlands and other waters of the United States caused by activities the USACE's authorized with section 404 permits were one of the reasons we listed Sacramento River winter-run Chinook salmon as endangered (57 *Federal Register* 36626, 59 *Federal Register* 440). Southern Oregon Northern Coastal California, and Central California Coast Coho salmon as threatened, Central California Coast, South Central California Coast, Central Valley, Upper Columbia River, Snake River Basin, Lower Columbia River, and Northern California steelhead as threatened and Southern California steelhead as endangered (61 *Federal Register* 41541, 62 *Federal Register* 43937). NMFS also designated or proposed critical habitat for the green and hawksbill sea turtles, several populations of steelhead, and Coho salmon to protect these species from the direct and indirect effects of

9 Reasonable and Prudent Alternative

This Opinion has concluded that the U. S. Army Corps of Engineers has failued to insure that the Nationwide Permits it proposes to use to authorize activities in navigable and other waters of the United States are not likely to jeopardize the continued existence of endangered and threatened species under the jurisdiction of the National Marine Fisheries Service and are not likely to result in the destruction or adverse modification of critical habitat that has been designated for these species. The clause "jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species" (50 CFR §402.02).

Regulations implementing section 7 of the ESA (50 CFR §402.02) define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that: (1) can be implemented in a manner consistent with the intended purpose of the action; (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; (3) are economically and technologically feasible; and (4) would, NMFS believes, avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

9.1 Introduction to the Reasonable and Prudent Alternative

NMFS concluded that the U. S. Army Corps of Engineers has failued to insure that the Nationwide Permits it proposes to use to authorize activities in navigable and other waters of the United States because the evidence available suggests that the USACE has not structured its proposed Nationwide Permit Program so that the USACE is positioned to know or reliably estimate the general and particular effects of the activities that would be authorized by the proposed Nationwide Permits on the quality of the waters that would receive those discharges and, by extension, be positioned to know or reliably estimate the general and particular effects of those discharges on endangered and threatened species. The USACE also has not structured its proposed Nationwide Permit Program so that it is positioned to take actions that are necessary or sufficient to prevent the activities that would be authorized by the proposed Nationwide Permits from individually or cumulatively degrading the quality of the waters of the United States that would receive those discharges. It has not structured its proposed Nationwide Permit Program so that the USACE is positioned to *insure* that endangered or threatened species and designated critical habitat are not likely to be exposed to (a) the direct or indirect effects of the activities that would be authorized each year of the five-year duration of the proposed permits or (b) reductions in water quality that are caused by or are associated with those activities. And it has not structured its proposed Nationwide Permit Program so that the USACE is positioned to *insure* that endangered or threatened species and designated critical habitat do not suffer adverse consequences if they are exposed to (a) the direct or indirect effects of the activities that would be authorized each year of the five-

Exhibit C

Email from David Olson, U.S. Army Corps of Engineers, to Margaret Gaffney-Smith, U.S. Army Corps of Engineers (Jan. 17, 2014, included in Administrative Record at pp. NWP036481-036482)

Olson, David B HQ02

From: Olson, David B HQ02
Sent: Friday, January 17, 2014 9:14 AM
To: Gaffney-Smith, Margaret E HQ
Cc: Moyer, Jennifer A HQ02
Subject: RE: NWPs (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Meg,

If we complete consultation on the 2012 NWPs, the biological opinion will be valid until those NWPs expire. In the meantime, if modify any of those NWPs at the national level, that would be a trigger for re-initiating consultation. So for the 2017 NWPs, we would have to do a new consultation, starting with the proposal we'll publish in the federal register in late 2015 or early 2016. But my recommendation would be to make a "no effect" determination for the proposed and final 2017 NWPs. We would explain our basis for the "no effect" determination in the preamble to the 2015/2016 proposal to reissue the NWPs, and also explain the "no effect" determination in the final rule that will be published late 2016/early 2017. I also recommend that, during the reissuance process, we direct the districts to coordinate with their regional counterparts at FWS and NMFS to determine if any additional regional conditions or local procedures should be adopted to facilitate ESA Section 7 compliance. Requiring local coordination might make a national "no effect" determination more legally defensible.

We could continue to make the national "no effect" 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.

We cannot do a "no effect" determination until after the 2017 NWPs expire because the current jeopardy biological opinion from NMFS is in effect until either: (a) NMFS withdraws or rescinds that biological opinion, or (b) NMFS issues a new biological opinion that replaces the February 15, 2012, biological opinion. If NMFS issues a new biological opinion, to be in compliance with the ESA we would have to implement the measures we agreed to for the non-jeopardy biological opinion.

Thanks,
David

David B. Olson
U.S. Army Corps of Engineers
Headquarters, Directorate of Civil Works
Operations and Regulatory Community of Practice
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Washington, DC 20314-1000
202-761-4922
david.b.olson@usace.army.mil

-----Original Message-----
From: Gaffney-Smith, Margaret E HQ
Sent: Thursday, January 16, 2014 8:32 PM
To: Olson, David B HQ02
Subject: NWPs

David.

If we complete consultation on this round does this mean we'll need to consult every time we reissue? Or is NE possible even if we don't do everything NMFS is requiring this go round?

Classification: UNCLASSIFIED
Caveats: NONE

Exhibit D

Excerpts from National Marine Fisheries Service's Comments to U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits (Apr. 4, 2016, included in Administrative Record at pp. NWP027733-027870)

notify the non-federal applicant and the activity is not authorized by NWP until ESA Section 7 consultation has been completed. If the non-federal project proponent does not comply with 33 CFR part 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

Federal agencies, including state agencies (e.g., certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327~~that have been granted "federal agency status" by the Federal Highway Administration~~, are required to follow their own procedures for complying with Section 7 of the ESA (see 33 CFR part 330.4(f)(1) and paragraph (b) of general condition 18). ~~The federal agency's ESA Section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action.~~

~~On October 15, 2012, the Chief Counsel for the Corps issued a letter to the FWS and NMFS (the Services) clarifying the Corps' legal position regarding compliance with the ESA for the February 13, 2012, reissuance of 48 NWPs and the issuance of two new NWPs. That letter explained that the issuance or reissuance of the NWPs, as governed by NWP general condition 18 (which applies to every NWP and which relates to endangered and threatened species), and 33 CFR 330.4(f), results in "no effect" to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA Section 7 consultation. Although the reissuance/issuance of the NWPs has no effect on listed species or their critical habitat and thus requires no ESA section 7 consultation, the terms and conditions of the NWPs, including general condition 18, and 33 CFR 330.4(f) ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, FWS, and NMFS. The principles discussed in the October 15, 2012, letter apply to this proposed issuance/reissuance of NWPs. Those principles are discussed in more detail below.~~

~~The only activities that are immediately authorized by NWPs are "no effect" activities under Section 7 of the ESA and its implementing regulations at 50 CFR part 402. Therefore, the issuance or reissuance of NWPs does not require ESA section 7 consultation because no activities authorized by any NWPs "may affect" listed species or critical habitat without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f). Regional programmatic ESA Section 7 consultations may also be used to satisfy the requirements of the NWPs in general condition 18 and 33 CFR 330.4(f)(2) if a proposed NWP activity is covered by that regional programmatic consultation.~~

~~ESA Section 7 requires each federal agency to ensure, through consultation with the Services, that "any action authorized, funded, or carried out" by that agency "is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat." (See 16 U.S.C. § 1536(a)(2).) Accordingly, the Services' section 7 regulations specify that an action agency must ensure that the action "it authorizes," including authorization by permit, does not cause jeopardy or adverse~~

Commented [NMFS30]: NOAA Fisheries continues to disagree with the USACE's "no effect" finding and cannot support its inclusion in the preamble of this rule. As we explained in our biological opinion issued on the last iteration of this rule, such a conclusion is not supportable under the ESA. This text needs to be deleted and we continue to be concerned that the USACE's failure to consult on the effects of this rule pursuant to Section 7(a)(2) of the ESA is not consistent with the USACE's legal obligations.

Exhibit E

Excerpts from National Marine Fisheries Service's Biological Opinion on U.S. Army Corps of Engineers' Nationwide Permit Program (Nov. 2014, included in Administrative Record at pp. NWP030590-031026)

data entries, which had unusually large impact values. The Corps found that common data entry errors were responsible for those results. The most common types of errors included entering an entire project area rather than the area of actual impact, lumping impacts of separate and distant activities into a single impact, simple human data entry errors (e.g., entering 10 rather than 0.1), and reporting impact areas in units of square feet rather than acreage.

The discovery of these common errors and the diverse interpretations of how ORM2 is to be populated prompted the Corps to make the following changes to its data collection and entry procedures:

- District Project Managers will use a general permit decision checklist to review each application ensure that it is complete and all requirements have been met.
- More specific data entry guidance will be developed for ORM2 users.
- The ORM2 data entry interface will be revised to include reminders and warnings..
- Regulatory Project Managers will be provided additional training and to ensure accurate data entry.
- Quality assurance/quality control efforts will be increased for the ORM2 data to ensure its accuracy.

1.6 Additional Protective Measures Incorporated into the Proposed Action

The Corps has agreed to incorporate the following additional protective measures into their proposed action in order to minimize adverse effects to ESA listed and proposed species and designated critical habitat under NMFS' jurisdiction:

- The Corps will develop information packages for prospective users of the Nationwide Permits to facilitate compliance with Nationwide Permit General Condition 18; Endangered Species (see section 1.6.1 below).
- The Corps will require that a list of information on the location of the activity (including the particular watershed), area affected and a narrative explanation of how the applicant satisfied requirements or conditions of the Nationwide Permit be provided in PCNs (see section 1.6.2 below).
- The Corps will conduct consultation with NMFS Regional Offices to identify new or modified regional conditions for Nationwide Permits in a particular region (see section 1.6.3 below).
- The Corps will provide NMFS with semi-annual reports on Corps Regulatory Program permitting activities, which will include locations of authorized activities as well as proposed and authorized impacts, required compensatory mitigation, and compliance activities (see section 1.6.4 below). This will include activity-specific information on acres of permanent impacts, in addition to other authorized impacts such as acres of temporary impacts and linear foot impacts, authorized by all types of Corps permits, including the Nationwide Permits. More specifically, the Corps will provide the following information in its semi-annual reports:

- Data from its existing ORM2 automated information system informing NMFS of activities authorized by all forms of Corps permits.
- Data on permanent fill authorized under the Nationwide Permit Program will be separately identified for each Nationwide Permit.
- For other Corps permit authorized fills, data on the authorized permanent fill for each activity and the total amount of permanent fill authorized in the applicable watershed.
- Data informing NMFS of the total amount of permanent fill authorized by all types of Corps permits for each 10-digit Hydrologic Unit Code (HUC) watershed inhabited by listed species and designated critical habitat under NMFS' jurisdiction.

- The Corps will utilize the discretion provided by Nationwide Permit General Condition 23, Mitigation, to require compensatory mitigation for wetland losses of less than 1/10-acre, if the reasonable and prudent measures or Reasonable and Prudent Alternatives (RPAs) in Biological Opinions for activity specific or regional programmatic ESA section 7 consultations for Nationwide Permit activities require wetland compensatory mitigation for losses of less than 1/10-acre (see section 1.6.5 below).
- The Corps will issue guidance to its districts and divisions on conducting cumulative effects analyses for the purposes of the National Environmental Policy Act, CWA Section 404(b)(1) Guidelines, and the ESA (see section 1.6.6 below).
- The Corps will issue guidance to its districts to include a Special Condition to Nationwide Permit verification letters, to require permittees to report incidents where any individuals of fish, marine mammals, abalone, coral or marine plant species listed under the ESA appear to be injured or killed as a result of discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States authorized by a Nationwide Permit (see section 1.6.7 below).
- The Corps will apply the following additional protective measures. The first two measures apply generally to the Nationwide Permit Program, and the remaining measures apply only to eight Nationwide Permits, more precisely Nationwide Permit 12, 13, 14, 29, 31, 33, 36 and 39. These measures are:
  - Within 30 days after a semi-annual report is provided to the NMFS Regional Office, there will be a mandatory meeting between Corps district staff and NMFS Regional staff to discuss the data in the semi-annual report and to determine whether additional permit conditions, consultations, or other protective measures are necessary to address specific types of activities or stressors that affect listed species or designated critical habitat in the watersheds within the Corps district and NMFS Region.
  - The Corps will provide its Regulatory Project Managers with additional training and guidance to ensure accurate data entry into

the Regulatory Program's automated information system, ORM2, which is used to produce the semi-annual reports discussed above. The Corps will also increase its quality assurance/quality control efforts for the ORM2 data to improve its accuracy.

- The Corps will conduct rulemaking to modify Nationwide Permits 12, 13, 14, and 36 to require PCN for proposed activities in waters of the United States in watersheds inhabited by listed species and designated critical habitat under NMFS' jurisdiction if those proposed activities are constructed with impervious materials and would thus add to impervious surface cover in a watershed. The Corps already requires PCNs for all activities under Nationwide Permits 29, 31, 33 and 39.
- The Corps will provide NMFS with the baseline impervious surface cover as of 2006 (or using the most current data[10]) for each 10-digit HUC watershed inhabited by listed species and designated critical habitat under NMFS' jurisdiction.
- The Corps will include in its semi-annual report: the amount of actual impervious surface cover that will result from the activities authorized by the eight Nationwide Permit as well as other Corps permits for each 10-digit HUC watershed inhabited by listed species and designated critical habitat under NMFS' jurisdiction, the ratio of that additional impervious surface cover to the baseline impervious surface cover for the referenced watersheds, and a notation of those watersheds where the ratio is 1% or greater. If the total amount of actual impervious surface cover authorized by Nationwide Permits and other Corps permit activities is greater than 1% of the baseline impervious surface cover in a particular watershed, the Corps will consider that information (as well as other pertinent information) when making its ESA section 7 effect determinations for Nationwide Permit pre-construction notifications associated with these eight Nationwide Permits. If section 7 consultation is initiated, the Corps will also consider this information and include it in preparing a biological assessment.
    - While the scope of the proposed action subject to this consultation is limited to the Nationwide Permit Program, the Corps will, when processing other Corps permits in a watershed where the 1% threshold has been reached (as discussed above), consider this information when making its ESA section 7 effect determinations. If section 7 consultation is initiated, the Corps will also consider this information and include it in preparing a biological assessment.

[10] For example, in 2013 the Multi-Resolution Land Characteristics (MRLC) consortium released an updated National Land Cover Database using data from 2011. http://www.mrlc.gov/nlcd2011.php

individuals, populations, and species or designated critical habitat that are likely to be exposed.

However, Federal agency programs, such as the Nationwide Permits program, authorize, fund or carry out activities over large geographic areas over long periods of time, with substantial uncertainty about the number, location, timing, frequency and intensity of specific activities those programs would authorize, fund or carry out. Our traditional approaches to section 7 consultations, which focus on the specific effects of a specific proposal, are not designed to deal with the spatial and temporal scales and level of uncertainty that is typical of consultations on agency programs.

Rather than trying to adapt traditional consultation approaches to programmatic consultations, we are utilizing an assessment framework that specifically allows us to help Federal agencies insure that their programs comply with the requirements of section 7(a)(2) of the ESA as described in the Interagency Endangered Species Consultation Handbook (U.S. Fish and Wildlife Service and NMFS 1998; Chapter 5).

Specifically, our programmatic consultations examine the decision-making processes that are integrated into Federal agency programs to determine whether those decision-making processes are likely to insure that specific actions the agency authorizes, funds, or carries out through the program comply with the requirements of ESA section 7(a)(2). That is, during programmatic consultations we ask whether or to what degree the Federal action agency (in this case, the Corps) has structured its proposed program so that the agency:

1. Collects the information necessary to allow it to know or reliably estimate the probable individual and cumulative consequences of its program on the environment, generally, and listed resources specifically;
2. Evaluates the information it collects to assess how its actions have affected the environment, generally, and endangered species, threatened species, and designated critical habitat specifically; and, when this information suggests that the activities authorized, funded, or carried out by its program no longer comply with the mandate and purposes of its program or of section 7(a)(2) of the ESA; and
3. When this information suggests that the activities authorized, funded, or carried out by its program no longer comply with the mandate and purposes of its program or of section 7(a)(2) of the ESA, does the action agency use its authorities to bring those activities into compliance with program mandates and the requirements of section 7(a)(2) of the ESA.

The current Nationwide Permit Program authorizes many different types of activities that directly or indirectly produce stressors which affect threatened or endangered species and their designated critical habitat under NMFS jurisdiction. Effects to these species range from injury to individuals to alteration of habitat quality and spatial extent. A programmatic analysis requires examining this broad array of activities and stressors with factors contributing to the decline and endangerment of threatened and endangered species considered in this Biological Opinion. Contributing factors are identified in ESA listing rules, NMFS web pages, status reports and recovery plans. In some cases the factors are identified in terms of the activities or sources of multiple stressors (e.g., gas and oil exploration, urbanization, agriculture), in other cases specific stressors are identified (e.g., entrainment mortality, temperature). We examine the impacts of the

Nationwide Permit Program and the extent to which it may contribute to the larger problem and factors influencing NMFS listed species and their designated critical habitat.

Many of the current Nationwide Permit-authorized activities change degrade or destroy habitat. For example, when an activity disturbs substrate or alters flow, the structure and function of aquatic habitat is affected through subsequent changes in the transport and deposition of sediment, gravel and large woody debris. Nationwide Permits also authorize placement of fill, which can create short-term pulses of sediment and ultimately reduce the spatial extent of aquatic habitat. Habitat alteration by Nationwide Permit authorized projects may present barriers to passage for listed species either by physically blocking access or creating impassable conditions due to excess vessel traffic, anthropogenic noise or avoidance of poor water quality. Anthropogenic noise results from Nationwide Permits authorizing construction (e.g., pile driving) or exploration (e.g., seismic surveys). Poor water quality can result from chemical discharges and alterations in physical parameters such as temperature and dissolved oxygen.

The previous sections describe the frequency, magnitude and distribution of activities authorized by the Nationwide Permits. The following pages describe these activities in terms of the stressors they contribute and the effects of these stressors on endangered and threatened species and their critical habitat under NMFS jurisdiction.

Stressors of the Action

Physical Injury

Direct physical injury of endangered and threatened species under NMFS' jurisdiction may be the result of entanglement, bycatch, entrainment, and in the case of immobile organisms and life stages, dislodging or burying. Animals may become entangled in mooring lines and netting authorized under Nationwide Permit1 (Aids to Navigation), Nationwide Permit 4 (Fish and Wildlife Harvesting Enhancement, and Attraction Devices), and Nationwide Permit 48 (Existing Commercial Shellfish Aquaculture Activities). Nationwide Permit 4 may also result in bycatch or, when using oyster or crab dredges, dislodgement or damage to immobile species such as Johnson's seagrass or corals. Impingement is the trapping of an aquatic organism against a water intake screen as water is drawn into a facility.

Entrainment is the intake of an aquatic organism along with water or sediment drawn into a facility or suction dredge. Entrainment may occur both during construction and in the operation of these projects once completed. Nationwide Permits authorizing discharges of dredged materials resulting from maintenance or construction cover dredging activities, which may employ suction dredges that can entrain organisms.

Disturbance

Any activity occurring in Waters of the United States has the potential to cause organisms to avoid the project area due to the noise and physical activity of equipment and personnel during the installation or operation of the project. Activities occurring in the evening and nighttime contribute additional disturbance in the form of lighting. The likelihood of avoidance is related to the type, frequency and intensity of the disturbance and the sensitivity of the individual or species considered. Individual sensitivities are affected by life stage, reproductive status and prior experience (i.e., acclimation) to disturbance. Disturbance is potentially contributed by all

- Green sturgeon (*Acipenser medirostris*)
- Gulf sturgeon (*Acipenser oxyrinchus desotoi*)
- Shortnose sturgeon (*Acipenser brevirostrum*)

Development, habitat degradation and habitat loss are very generic factors contributing to the threatened or endangered status of all marine and anadromous species under NMFS' jurisdiction (see the *Status of Listed Resources* section 3.0 of this Biological Opinion). Nationwide Permits authorize activities within and changes to wetland and aquatic environments and therefore pose a hazard to the aquatic habitats on which ESA listed species under NMFS' jurisdiction rely. The specific types of habitat effects and associated permits are discussed above.

Nationwide Permit authorized activities and stressors are among factors contributing to the decline and ESA listing of NMFS threatened and endangered species including yellow eye and canary rockfish, smalltooth sawfish, Chinook salmon, steelhead trout, and shortnose sturgeon. For example, degradation of rocky shore habitats of bocaccio, canary rockfish and yellow rockfish was specifically attributed to sewer line construction and the installation of cables and pipelines. These activities are authorized under Nationwide Permit 12, Utility lines. Hydropower projects, which would be authorized under Nationwide Permit 17, were specifically identified as contributing factor for steelhead trout and Chinook, chum, coho, and sockeye salmon. Nationwide Permit 40 authorizes agricultural activities, some of which were identified as contributing to the listing status of smalltooth sawfish, gulf sturgeon, steelhead trout and Chinook, chum, coho, and sockeye salmon.

While the deep-water dwelling bocaccio and rockfish species (canary and yellow eye) are not likely to be exposed to the direct or indirect effects of most of the activities that would be authorized by the Nationwide Permits. Larvae of these species and both adult and larval bocaccio might be exposed to water-based renewable energy generation pilot projects that would be authorized by Nationwide Permit 52. One characteristic of the proposed critical habitat for rockfish that may be influenced by Nationwide permit authorized activities is the need for sufficient water quality and levels of dissolved oxygen to support growth, survival, reproduction and feeding opportunities.

Critical habitat primary constituents or "essential habitat" elements identified for NMFS' listed salmonids, gulf and green sturgeon, and Pacific eulachon generically include appropriate or sufficient:

1. Substrate;
2. Water quality;
3. Water quantity;
4. Water temperature;
5. Water velocity;
6. Cover/shelter;
7. Food
8. Riparian vegetation;
9. Space; and
10. Safe passage conditions.

Nationwide permit-authorized activities potentially influence each of these elements directly or indirectly through alternation of riparian habitat, hydrology, sediment distribution and disturbance from human activity, equipment and incidental pollutant discharges.

Sediment and contaminants from Nationwide Permit-authorized activities enter rivers and their tributaries, affecting water quality. Juvenile salmonids that inhabit urban watersheds often carry high contaminant burdens, which is partly attributable to the biological transfer of contaminants through the food web (Varanasi *et al*. 1993). Eulachon ecotoxicological studies show high contaminant burdens, particularly of arsenic and lead (Futer and Nassichuk 1983, Rogers *et al.* 1990, EPA 2002). Degraded water quality can substantially harm all species of listed sturgeon (ASSRT 2007, SSRT 2010, NMFS 2010), USFWS and GSMFC 1995). Habitat degradation due to runoff contaminants can also have a negative impact on smalltooth sawfish (NMFS 2006b). Chemical contamination is also considered a threat to rockfish recovery (NMFS 2008a). Numerous chemical contaminants are also present in spawning rivers, but the exact effect these compounds have on spawning and egg development is unknown (Gustafson *et al.* 2010).

Entrainment is specifically identified as a factor for the decline and endangerment of Chinook salmon, eulachon, green sturgeon and steelhead trout. Those Nationwide Permits authorizing discharges of dredged materials resulting from maintenance or construction cover dredging activities, which may employ suction dredges that can entrain organisms.

In addition to habitat impairment or outright habitat loss, specific habitat characteristics were identified as factors in the listing status for several species. Insufficient water flow and availability were identified as contributing to the listing status of steelhead trout, Gulf sturgeon and green sturgeon.

Increasing water temperature is among the factors contributing to the listing status of eulachon, Chinook salmon, green sturgeon and steelhead trout. Nationwide Permits authorizing the removal or reduction of bank vegetation that shades water will increase water temperatures. Stream bank stabilization projects authorized under Nationwide Permit 13 increase stream temperatures by removing overhanging stream bank vegetation and by occupying the margins of streams, reducing the area of water shaded by any remaining trees. Nationwide Permit projects that result in impervious cover, for example residential and commercial developments authorized by Nationwide Permits 29 or 39, influence stream temperatures directly through removal of riparian vegetation or indirectly through thermal runoff discharges during storm events.

Nationwide Permits involve substrate disturbance or redirection of water flow that may alter transport and deposition of large woody debris, sediment, and gravel in aquatic systems. Sedimentation may bury the limestone bedrock and cobble where Gulf sturgeon spawn or occlude the interstitial spaces of gravel beds where salmonid eggs are laid. Intentional dredging or scouring due to altered flow may remove spawning substrate used by salmonids (i.e., gravel) or eulachon (i.e., sand and silt). Dredging is also a low to moderate threat to eulachon in the Columbia River because eggs could be destroyed by mechanical disturbance or smothered by in-water disposal of dredged materials. The lower Columbia River mainstem provides spawning and incubation sites, and a large migratory corridor to spawning areas in the tributaries.

information to, and coordinating with and with NMFS Regional Offices (RPA Element 8) allows the Corps to monitor compliance with these obligations, to identify and develop additional protective measures as necessary, and to intervene if those obligations are not met.

By developing and publishing policy and guidance to assist in compliance with General Condition 18 (RPA Element 9), prospective permit applicants will be able to provide accurate information to the Corps so that it will know whether the proposed activities might affect listed species or critical habitat and thus would trigger the requirement for submission of a PCN (if not already required). The Corps would then evaluate the PCN and make an effect determination, and consult with NMFS under section 7 of the ESA if a "may affect" determination is made.

Establishing specific performance triggers (RPA Elements 4, 5, and 6) for the Nationwide Permit Program places the Corps in a position to take timely and effective corrective actions when the consequences of those actions exceed measurable standards and criteria and places the Corps in a position to use its authorities to prevent waters of the United States where listed resources under NMFS' jurisdiction occur from being degraded by the activities that would be authorized by the Nationwide Permits.

5.6 Summary of Effects

As we noted at the beginning of this assessment, analysis of the probable effects of the Nationwide Permits on endangered and threatened species and designated critical habitat under the jurisdiction of NMFS has two components. First, we describe the number and magnitude of activities that have been authorized by the Nationwide Permits and project the number of authorizations expected to occur over the permit term. We then place the spatial and temporal patterns of these impacts and their collective effects in context of the geographic and temporal occurrence of endangered and threatened species and designated critical habitat under the jurisdiction of NMFS, then describe the effectiveness of the control measures that the Corps has included in its program to prevent adverse impacts to those species.

As we discussed in the *Approach to the Assessment* section of this Biological Opinion, we treated the suite of current Nationwide Permits as a "program" that would authorize a wide array of discharges of dredged or fill material. During programmatic consultations we ask whether or to what degree the Corps has structured this program so that the Corps: (1) collects the information necessary to allow it to know how the actions it permits affect the environment, generally, and listed resources specifically; (2) evaluates that information to assess how its actions have affected the environment, generally, and endangered species, threatened species, and designated critical habitat specifically; and (3) when this information suggests that actions authorized by one or more of the Nationwide Permits affecting the environment, generally, and endangered species, threatened species, and designated critical habitat specifically, does the Corps use its authorities to modify or prohibit those actions.

5.6.1 Modifications and Improvements to the Nationwide Permit Program

The Corps has made many modifications to its action during consultation with NMFS, in addition to the improvements that it has already made to the Nationwide Permit Program. These measures will place the Corps in a position to prevent adverse effects to endangered or threatened species under NMFS' jurisdiction or critical habitat that has been designated for such

species.

By coordinating with NMFS and consulting under ESA section 7 on any activity that may affect ESA listed resources under NMFS' jurisdiction, and by collecting and effectively evaluating information on its regulatory activities in light of the conditions of the aquatic habitats on concern in order to make correct effect determinations and undergo effective ESA section 7 consultations as necessary (see sections 1.5 and 1.6 in the *Description of the Action* section of this Biological Opinion) the Corps has structured the Nationwide Permit Program so the Corps will employ an analytical methodology that considers:

1. The status and trends of endangered or threatened species or designated critical habitat;
2. The demographic and ecological status of populations and individuals of those species given their exposure to pre-existing stressors in different drainages and watersheds;
3. The direct and indirect pathways by which endangered or threatened species or designated critical habitat might be exposed to discharges of dredged or fill materials into waters of the United States; and
4. The physical, physiological, behavior, sociobiological, and ecological consequences of exposing endangered or threatened species or designated critical habitat to dredged or fill materials at concentrations, intensities, durations, or frequencies that are known or suspected to produce physical, physiological, behavioral, or ecological responses, given their pre-existing demographic and ecological condition.

Because of the modifications the Corps has made to its Nationwide Permit Program mentioned above, the Corps has structured the Nationwide Permit Program so the Corps will be able to prevent endangered or threatened species from being exposed to discharges of dredged or fill materials:

- At concentrations, rates, or frequencies that are potentially harmful to individual organisms, populations, or these species; or
- To ecological consequences that are potentially harmful to individual organisms, populations, or the species.

The Corps will review information on the Nationwide Permit Program with the relevant NMFS Regional Office semi-annually to determine whether additional preventive measures are warranted and how to implement those measures.

The Corps has committed to modify, suspend or revoke Nationwide Permits if the information and coordination procedures described above identify any potential deficiencies of the program to adequately protect threatened or endangered species under NMFS' jurisdiction or any critical habitat hat has been designated for those species. This may include, among other things, adding new or modified Regional Conditions to restrict or prohibit the use of one or more Nationwide Permits if new information (e.g., data that suggest inadequate protection for species or low levels of compliance) becomes available. Modifications may include additional actions or requirements, reopening of the permits, and reinitiation of section 7 consultation on specific

activities, regional programmatic consultations or the Nationwide Permit Program.

The Corps has committed to fully implement the changes to its Nationwide Permit Program outlined above as expeditiously as possible. In the interim, it is our opinion that the existing protective measures already in place, including General Condition 18, along with the Corps' renewed commitment to adequately conserve NMFS listed species and designated critical habitat, will allow the Corps to insure that the short term and smaller scale individual effects that these permits may cause are not likely to jeopardize the continued existence of any threatened or endangered species under NMFS' jurisdiction, or destroy or adversely modify any critical habitat that has been designated for those species while the Corps achieves full implementation.

As described above, the Nationwide Permit Program is structured so that the Corps will take the actions that are sufficient to protect ESA listed endangered or threatened species under NMFS' jurisdiction, and critical habitat that has been designated for those species occur, from individual or collective effects of the discharges of dredged or fill materials or other activities that would be authorized by the Nationwide Permits. Further discussion of the Corps' program and its anticipated effects is set forth in the *Integration and Synthesis* section below.

Exhibit F

Excerpts from U.S. Army Corps of Engineers' Decision Document for Nationwide Permit 12 (Dec. 21, 2016, included in Administrative Record at pp. NWP005262-005349)

couple of these commenters asserted that this NWP does not authorize activities that are similar in nature because pipelines can carry a variety of types of fluids, some of which are harmful and some of which are benign. Other commenters made the "not similar in nature" objection, stating that pipelines that carry fluids such as oil are different than pipelines that carry water or sewage, which are different than utility lines that carry electricity.

We are retaining the long-standing practice articulated in the NWP regulations at 33 CFR 330.2(i), in which each separate and distant crossings of waters of the United States is authorized by NWP. The utility line activities authorized by NWP 12 are similar in nature because they involve linear pipes, cables, or wires to transport physical substances or electromagnetic energy from a point of origin to a terminal point. For the purposes of this NWP, the term "crossing" refers to regulated activities. However, it should be noted that installing utility lines under a navigable water of the United States subject to section 10 of the Rivers and Harbors Act of 1899 via horizontal directional drilling, as well as aerial crossings of those navigable waters, require authorization under section 10 of the Rivers and Harbors Act of 1899. The substations, tower foundations, roads, and temporary fills that are also authorized by NWP 12 (when those activities require Department of the Army (DA) authorization) are integral to the fulfilling the purpose of utility lines, and thus fall within the "categories of activities that are similar in nature" requirement for general permits stated in section 404(e) of the Clean Water Act.

Many commenters objected to the reissuance of NWP 12, stating that it authorizes oil and gas pipelines that should be subject to the individual permit process instead. Many commenters said that these activities should be subject to a public review process. Many of these commenters cited the risk of oil spills as a reason why oil pipelines should be evaluated under the Corps' individual permit process. Many commenters based their concerns on their views that the Corps is the only federal agency that regulates oil pipelines.

The Corps does not regulate oil and gas pipelines, or other types of pipelines, per se. For utility lines, including oil and gas pipelines, our legal authority is limited to regulating discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899, respectively. We do not have the authority to regulate the operation of oil and gas pipelines, and we do not have the authority to address spills or leaks from oil and gas pipelines. General condition 14, proper maintenance, requires that NWP activities, including NWP 12 activities, be properly maintained to ensure public safety. The proper maintenance required by general condition 14 also ensures compliance with the other NWP general conditions, many of which are designed to protect the environment, as well as any regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. In addition, we do not have the legal authority to regulate the construction, maintenance, or repair of upland segments of pipelines or other types of utility lines. For example, for a recent oil pipeline (e.g., the Flanagan South pipeline), the segments of the oil pipeline that were subject to the Corps' jurisdiction (i.e., the crossings of waters of the United States, including navigable waters of the United States, that were authorized by the 2012 NWP 12) was only 2.3% of the total length of the pipeline; the remaining 97.7% of the oil pipeline was constructed in upland areas outside of the Corps' jurisdiction. Interstate natural gas

Several commenters suggested changing the acreage limit from 1/2-acre to 1 acre. Some commenters said the 1/2-acre limit is too high, and some commenters stated that the 1/2-acre limit is appropriate. A number of commenters recommended imposing an acreage limit that would place a cap on losses of waters of the United States for the entire utility line. A few commenters recommended reducing the 1/2-acre limit to 1/4-acre. One commenter said the 1/2-acre limit should apply to the entire utility line, not to each separate and distant crossing. One commenter recommended establishing an acreage limit based on a county or state. Another commenter suggested applying the acreage limit to a waterbody. One commenter stated that this NWP should not authorize waivers of the 1/2-acre limit. Two commenters said that stream impacts should be limited to 300 linear feet, especially in headwater streams.

We are retaining the 1/2-acre limit for this NWP because we believe it is an appropriate limit for authorizing most utility line activities that have no more than minimal individual and cumulative adverse environmental effects. Division engineers can modify this NWP on a regional level to reduce the acreage limit if necessary to ensure that no more than minimal adverse environmental effects occur in that region. We do not agree that the acreage limit should apply to the entire utility line because the separate and distant crossings of waters of the United States are usually at separate waterbodies scattered along the length of the utility line, and are often in different watersheds especially for utility lines that run through multiple counties, states, or Corps districts. For utility lines that cross the same waterbody (e.g., a river or stream) at separate and distant locations, the distance between those crossings will usually dissipate the direct and indirect adverse environmental effects so that the cumulative adverse environmental effects are no more than minimal. If the district engineer determines after reviewing the PCN that the cumulative adverse environmental effects are more than minimal, after considering a mitigation proposal provided by the project proponent, he or she will exercise discretionary authority and require an individual permit.

The 1/2-acre limit cannot be waived. We do not believe it is necessary to impose a 300 linear foot limit for the loss of stream bed because most utility line crossings are constructed perpendicular, or nearly perpendicular, to the stream. In addition, most utility line crossings consist of temporary impacts. This NWP requires PCNs for proposed utility lines constructed parallel to, or along, a stream bed, and the district engineer will evaluate the adverse environmental effects and determine whether NWP authorization is appropriate.

Several commenters said this NWP does not authorize oil pipelines. One commenter said that the requirement that utility lines result in "no change in pre-construction contours" will not prevent changes in habitats or physical features in some streams, and utility lines may become exposed over time. One commenter objected to the requirement that there must be no change in pre-construction contours, because it is a new requirement and would require the permittee to complete a pre- and post- construction survey. One commenter said this NWP should not authorize mechanized landclearing in forested wetlands or scrub-shrub wetlands. Two commenters supported the addition of "internet" to the list of examples of utility lines. One commenter recommended removal of the reference to "telegraph lines" from the list of types of utility lines covered by this NWP.

(e.g., terrestrial ecosystems, air) that may be directly or indirectly affected by the proposed action and other actions. According to guidance issued by CEQ (1997), a NEPA cumulative effects analysis should focus on specific categories of resources (i.e., resources of concern) identified during the review process as having significant cumulative effects concerns. These cumulative effects analyses also require identification of the disturbances and stressors that cause degradation of those resources, including those caused by actions unrelated to the proposed action. A NEPA cumulative effects analysis does not need to analyze issues that have little relevance to the proposed action or the decision the agency will have to make (CEQ 1997).

The geographic scope of this cumulative effects analysis is the United States and its territories, where the NWP may be used to authorize specific activities that require DA authorization. The temporal scope of the cumulative effects analysis includes past federal, non-federal, and private actions that continue to affect the Nation's wetlands, streams, and other aquatic resources (including activities authorized by previously issued NWPs, regional general permits, and DA individual permits) as well as present and reasonably foreseeable future federal, non-federal, and private actions that are affecting, or will affect, wetlands, streams, and other aquatic resources. The present effects of past federal, non-federal, and private actions on wetlands, streams, and other aquatic resources are included in the affected environment, which is described in section 3.0. The affected environment described in section 3.0 also includes present effects of past actions, including activities authorized by NWPs issued from 1977 to 2012 and constructed by permittees, which are captured in national information on the quantity and quality of wetlands, streams, and other aquatic resources.

In addition to the activities authorized by this NWP, there are many categories of activities that contribute to cumulative effects on wetlands, streams, and other aquatic resources in the United States, and alter the quantity of those resources, the functions they perform, and the ecosystem services they provide. Activities authorized by past versions of NWP 12, as well as other NWPs, individual permits, letters of permission, and regional general permits have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources. Those activities may have legacy effects that have added to the cumulative effects and affected the quantity of those resources and the functions they provide. Discharges of dredged or fill material that do not require DA permits because they are exempt from section 404 permit requirements can also adversely affect the quantity of the Nation's wetlands, streams, and other aquatic resources and the functions and services they provide. Discharges of dredged or fill material that convert wetlands, streams, and other aquatic resources to upland areas result in permanent losses of aquatic resource functions and services. Temporary fills and fills that do not convert waters or wetlands to dry land may cause short-term or partial losses of aquatic resource functions and services. During construction of utility lines, where horizontal directional drilling is used to install or replace the utility line, there is a possibility of inadvertent returns of drilling fluids that could adversely affect wetlands, streams, and other aquatic resources. Those inadvertent returns of drilling fluids are not considered discharges of dredged or fill material that require Clean Water Act section 404 authorization. Activities necessary to remediate these inadvertent returns of drilling fluids may involve activities that require Department of the Army authorization, and

(NRC 1992), because they are affected by activities that occur in those watersheds, including agriculture, urban development, deforestation, mining, water removal, flow alteration, and invasive species (Palmer et al. 2010). Land use changes affect rivers and streams through increased sedimentation, larger inputs of nutrients (e.g., nitrogen, phosphorous) and pollutants (e.g., heavy metals, synthetic chemicals, toxic organics), altered stream hydrology, the alteration or removal of riparian vegetation, and the reduction or elimination of inputs of large woody debris (Allan 2004). Agriculture is the primary cause of stream impairment, followed by urbanization (Foley et al. 2005, Paul and Meyer 2001). Agricultural land use adversely affects stream water quality, habitat, and biological communities (Allan 2004). Urbanization causes changes to stream hydrology (e.g., higher flood peaks, lower base flows), sediment supply and transport, water chemistry, and aquatic organisms (Paul and Meyer 2001). Leopold (1968) found that land use changes affect the hydrology of an area by altering stream flow patterns, total runoff, water quality, and stream structure. Changes in peak flow patterns and runoff affect stream channel stability. Stream water quality is adversely affected by increased inputs of sediments, nutrients, and pollutants, many of which come from non-point sources (Paul and Meyer 2001, Allan and Castillo 2007).

The construction and operation of water-powered mills in the 17th to 19th centuries substantially altered the structure and function of streams in the eastern United States (Walter and Merritts 2008) and those effects have persisted to the present time. In urbanized and agricultural watersheds, the number of small streams has been substantially reduced, in part by activities that occurred between the 19th and mid-20th centuries (Meyer and Wallace 2001). Activities that affect the quantity and quality of small streams include residential, commercial, and industrial development, mining, agricultural activities, forestry activities, and road construction (Meyer and Wallace 2001), even if those activities are located entirely in uplands.

Activities that affect wetland quantity and quality include: land use changes that alter local hydrology (including water withdrawal), clearing and draining wetlands, constructing levees that sever hydrologic connections between rivers and floodplain wetlands, constructing other obstructions to water flow (e.g., dams, locks), constructing water diversions, inputs of nutrients and contaminants, and fire suppression (Brinson and Malvárez 2002). Wetland loss and degradation is caused by hydrologic modifications of watersheds, drainage activities, logging, agricultural runoff, urban development, conversion to agriculture, aquifer depletion, river management, (e.g., channelization, navigation improvements, dams, weirs), oil and gas development activities, levee construction, peat mining, and wetland management activities (Mitsch and Hernandez 2013). Upland development adversely affects wetlands and reduces wetland functionality because those activities change surface water flows and alter wetland hydrology, contribute stormwater and associated sediments, nutrients, and pollutants, cause increases in invasive plant species abundance, and decrease the diversity of native plants and animals (Wright et al. 2006). Many of the remaining wetlands in the United States are degraded (Zedler and Kercher 2005). Wetland degradation and losses are caused by changes in water movement and volume within a watershed or contributing drainage area, altered sediment transport, drainage, inputs of nutrients from non-point sources, water diversions, fill activities, excavation activities, invasion by non-native species, land subsidence, and

pollutants (Zedler and Kercher 2005). According to Mitsch and Gosselink (2015), categories of activities that alter wetlands include: wetland conversion through drainage, dredging, and filling; hydrologic modifications that change wetland hydrology and hydrodynamics; highway construction and its effects on wetland hydrology; peat mining; waterfowl and wildlife management; agriculture and aquaculture activities; water quality enhancement activities; and flood control and stormwater protection.

There is also little national-level information on the ecological condition of the Nation's wetlands, streams, and other aquatic resources, or the amounts of functions they provide, although reviews have acknowledged that most of these resources are degraded (Zedler and Kercher 2005, Allan 2004) or impaired (U.S. EPA 2015) because of various activities, disturbances, and other stressors. These data deficiencies make it more difficult to characterize the affected environment to assess cumulative effects, and the relative contribution of the activities authorized by this NWP to those cumulative effects.

As discussed in section 3.0 of this document there is a wide variety of causes and sources of impairment of the Nation's rivers, streams, wetlands, lakes, estuarine waters, and marine waters (U.S. EPA 2015), which also contribute to cumulative effects to these aquatic resources. Many of those causes of impairment are point and non-point sources of pollutants that are not regulated under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899. Two common causes of impairment for rivers and streams, habitat alterations and flow alterations, may be due in part to activities regulated by the Corps under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Habitat and flow alterations may also be the caused by activities that do not involve discharges of dredged or fill material or structures or work in navigable waters. For wetlands, impairment due to habitat alterations, flow alterations, and hydrology modifications may involve activities regulated under section 404, but these causes of impairment may also be due to unregulated activities, such as changes in upland land use that affects the movement of water through a watershed or contributing drainage area or the removal of vegetation.

Many of the activities discussed in this cumulative effects section that affect wetlands, streams, and other aquatic resources are not subject to regulation under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899.

Estimates of the original acreage of wetlands in the United States vary widely because of the use of different definitions and how those estimates were made (Harris and Gosselink 1990). Dahl (1990) estimates that approximately 53 percent of the wetlands in the conterminous United States were lost in the 200-year period covering the 1780s to 1980s. Much of the wetland loss occurred in the mid-19th century as a result of indirect effects of beaver trapping and the removal of river snags, which substantially reduced the amount of land across the country that was inundated because of beaver dams and river obstructions (Harris and Gosselink 1990). The annual rate of wetland loss has decreased substantially since the 1970s (Dahl 2011), when wetland regulation became more prevalent (Brinson and Malvárez 2002). Between 2004 and 2009, there was no statistically significant difference in wetland acreage in the conterminous United States (Dahl 2011). According to the 2011 wetland

7.2 Evaluation Process (40 CFR 230.7(b))

7.2.1 Description of permitted activities (40 CFR 230.7(b)(2))

As indicated by the text of this NWP in section 1.0 of this document, and the discussion of potential impacts in section 4.0, the activities authorized by this NWP are sufficiently similar in nature and environmental impact to warrant authorization under a single general permit. Specifically, the purpose of the NWP is to authorize discharges of dredged or fill material into waters of the United States for the construction, maintenance, repair, or removal of utility lines and associated facilities. The nature and scope of the impacts are controlled by the terms and conditions of the NWP.

The activities authorized by this NWP are sufficiently similar in nature and environmental impact to warrant authorization by a general permit. The terms of the NWP authorize a specific category of activity (i.e., discharges of dredged or fill material for the construction, maintenance, repair, or removal of utility lines and associated facilities) in a specific category of waters (i.e., waters of the United States). The terms of the NWP do not authorize the construction of utility line substations in tidal waters or in non-tidal wetlands adjacent to tidal waters. The restrictions imposed by the terms and conditions of this NWP will result in the authorization of activities that have similar impacts on the aquatic environment, namely the replacement of aquatic habitats, such as certain categories of non-tidal wetlands, with utility line facilities. Most of the impacts relating to the construction, maintenance, repair, or removal of utility lines will be temporary.

If a situation arises in which the activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

7.2.2 Cumulative effects (40 CFR 230.7(b)(3))

The 404(b)(1) Guidelines at 40 CFR 230.11(a) define cumulative effects as "…the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." For the issuance of general permits, such as this NWP, the 404(b)(1) Guidelines require the permitting authority to "set forth in writing an evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit." [40 CFR 230.7(b)] More specifically, the 404(b)(1) Guidelines cumulative effects assessment for the issuance or reissuance of a general permit is to include an evaluation of "the number of individual discharge activities likely to be regulated under a general permit until its expiration, including repetitions of individual discharge activities at a single location." [40 CFR 230.7(b)(3)] If a situation arises in which cumulative effects are likely to be more than minimal and the proposed activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

Based on reported use of this NWP during the period of March 19, 2012, to March 12, 2015,

the Corps estimates that this NWP will be used approximately 11,500 times per year on a national basis, resulting in impacts to approximately 1,700 acres of waters of the United States, including jurisdictional wetlands. The reported use includes pre-construction notifications submitted to Corps districts, as required by the terms and conditions of the NWP as well as regional conditions imposed by division engineers. The reported use also includes voluntary notifications to submitted to Corps districts where the applicants request written verification in cases when pre-construction notification is not required. The reported use does not include activities that do not require pre-construction notification and were not voluntarily reported to Corps districts. The Corps estimates that 2,500 NWP 12 activities will occur each year that do not require pre-construction notification, and that these activities will impact 50 acres of jurisdictional waters each year.

Based on reported use of this NWP during that time period, the Corps estimates that 9 percent of the NWP 12 verifications will require compensatory mitigation to offset the authorized impacts to waters of the United States and ensure that the authorized activities result in only minimal adverse effects on the aquatic environment. The verified activities that do not require compensatory mitigation will have been determined by Corps district engineers to result in no more than minimal individual and cumulative adverse effects on the aquatic environment without compensatory mitigation. During 2017-2022, the Corps expects little change to the percentage of NWP 12 verifications requiring compensatory mitigation, because there have been no substantial changes in the mitigation general condition or the NWP regulations for determining when compensatory mitigation is to be required for NWP activities. The Corps estimates that approximately 300 acres of compensatory mitigation will be required each year to offset authorized impacts. The demand for these types of activities could increase or decrease over the five-year duration of this NWP.

Based on these annual estimates, the Corps estimates that approximately 69,700 activities could be authorized over a five-year period until this NWP expires, resulting in impacts to approximately 8,900 acres of waters of the United States, including jurisdictional wetlands. Approximately 1,500 acres of compensatory mitigation would be required to offset those impacts. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. [33 CFR 332.2]

Wetland restoration, enhancement, and establishment projects can provide wetland functions, as long as the wetland compensatory mitigation project is placed in an appropriate landscape position, has appropriate hydrology for the desired wetland type, and the watershed condition will support the desired wetland type (NRC 2001). Site selection is critical to find a site with appropriate hydrologic conditions and soils to support a replacement wetland that will provide the desired wetland functions and services (Mitsch and Gosselink 2015). The ecological performance of wetland restoration, enhancement, and establishment is dependent on practitioner's understanding of wetland functions, allowing sufficient time for wetland functions to develop, and allowing natural processes of ecosystem development (self-design or self-organization) to take place, instead of over-