No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

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

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PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are the U.S. Army Corps of Engineers and Lieutenant General Todd T. Semonite, in his official capacity as Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers.

The respondents (plaintiffs-appellees below) are Northern Plains Resource Council; Bold Alliance; Natural Resources Defense Council; Sierra Club; Center For Biological Diversity; and Friends of the Earth.

The following parties also participated in the proceedings below as intervenor-defendants: TransCanada Keystone Pipeline, LP; TC Energy Corp.; the State of Montana; American Gas Association; American Petroleum Institute; Association of Oil Pipe Lines; Interstate Natural Gas Association of America; and National Rural Electric Cooperative Association.

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Northern Plains Res. Council v. United States Army Corps of Eng'rs, Nos. 20-35412, 20-35414, and 20-35415 (May 28, 2020)

Northern Plains Res. Council v. United States Army Corps of Eng'rs, No. 20-35432 (docketed May 5, 2020)

United States District Court (D. Mont.):

Northern Plains Res. Council v. United States Army Corps of Eng'rs, No. 19-cv-44 (Apr. 15, 2020)

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Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the U.S. Army Corps of Engineers (the Corps) and Lieutenant General Todd T. Semonite, Chief of Engineers, respectfully applies for a stay of the April 15, 2020, order issued by the United States District Court for the District of Montana (as amended May 11), pending the consideration and disposition of the consolidated appeals from that order to the United States Court of Appeals for the Ninth Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

The district court initially vacated in its entirety a nationwide permit issued by the Corps under the Clean Water Act, 33 U.S.C. 1251 et seq., to authorize the discharge into waters of the United States of dredge and fill materials from activities that are necessary for the construction, repair, and maintenance of utility lines, including oil and gas pipelines. The court also entered a nationwide injunction forbidding the Corps from relying on that permit -- Nationwide Permit 12 (NWP 12) -- to authorize any further activities. The court granted those sweeping remedies after erroneously concluding that the Corps had violated the Endangered Species Act of 1973 (ESA), Pub. L. No. 93-205, 87 Stat. 884 (16 U.S.C. 1531 et seq.), by not engaging in "programmatic" consultation with the relevant federal wildlife agencies before re-issuing NWP 12 in 2017. A version of NWP 12 has been in effect continuously since the late 1970s, and the Corps and private parties rely on it for thousands of activities annually.

Under Article III of the Constitution and background principles of equity, a federal court may not award equitable relief -- including vacatur or an injunction -- except to the extent necessary to redress a concrete and particularized injury suffered by the plaintiff in suit. In many recent cases, the United States has invoked those principles to challenge the increasingly common problem of "nationwide" or "universal" injunctions issued by district courts at the behest of individual

plaintiffs to halt the application of a federal law or policy to all persons everywhere. The equitable relief granted in this case, however, went several steps beyond even that.

Here, the plaintiffs (respondents in this Court) brought this action to challenge the Corps' alleged use of NWP 12 to authorize dredge and fill activities necessary for the construction of the proposed Keystone XL pipeline, an 882-mile project that would cross waters of the United States numerous times. Respondents repeatedly disclaimed any request for vacatur of NWP 12, or an injunction, extending beyond Keystone XL itself; respondents made no meaningful effort to establish Article III standing to challenge the potential application of NWP 12 to crossings by any other specific proposed pipelines; and the district court relied on respondents' disclaimers in limiting the ability of other parties to intervene in the litigation.

At summary judgment, the district court nonetheless granted the global equitable relief that respondents had disclaimed. The Corps promptly sought a stay pending appeal. In response, respondents proposed yet a new remedy: vacatur of NWP 12 with respect to the construction of new oil and gas pipelines and an injunction limited to Keystone XL. Respondents also submitted 14 new declarations, purportedly showing harm from other proposed pipelines. The court accepted those belated submissions and amended its order to vacate NWP 12, and to enjoin the Corps from

relying on it, as to "the construction of new oil and gas pipelines." App., infra, 42a.

The amended order would not survive this Court's review and should be stayed pending appeal. The district court had no warrant to set aside NWP 12 with respect to Keystone XL, let alone for the construction of all new oil and gas pipelines anywhere in the country. First, the order grants nationwide equitable relief that is inconsistent with Article III and traditional principles of equity. Second, the order was issued without fair notice that the court itself would unilaterally grant relief beyond the equitable remedies that respondents had sought. Third, the order lacks any sound basis in the ESA. The Corps reasonably determined that merely re-issuing NWP 12 would have no effect on listed species or critical habitat -- and therefore did not trigger any consultation requirement under the ESA -- because the regulatory scheme and conditions in NWP 12 ensure that any necessary consultation occurs on an activity-specific basis.

If the district court's order is not stayed pending appeal, it will cause irreparable harm to the Corps and the public. In the absence of NWP 12 or another applicable general permit, the Corps would be unable to authorize dredge or fill activities for the construction of new oil or gas pipelines except through an expensive and time-consuming individual permitting process, involving site-specific review and a public comment period -- even

if the project proponent intentionally designed the activities so that they would have minimal environmental impact. The order will affect not just large-scale projects like Keystone XL but also the many minor activities routinely authorized under NWP 12. See App., infra, 79a-82a (Moyer Decl. ¶¶ 5-9). And the order would impose those harms for little if any countervailing benefit. At a minimum, this Court is likely to conclude that the order is overbroad and should be limited to Keystone XL, as respondents themselves had requested before belatedly changing course.

STATEMENT

1. a. The Clean Water Act prohibits the discharge of any "pollutant" into "navigable waters" without a permit. 33 U.S.C. 1311(a), 1362(12). The term "navigable waters" means the waters of the United States, including certain tributaries and wetlands. 33 U.S.C. 1362(7); see 33 C.F.R. 328.3(a). The term "pollutant" includes materials dredged from waters and "fill" materials placed in waters to create dry land (e.g., for construction). 33 U.S.C. 1362(6); see 33 C.F.R. 323.2. The Clean Water Act authorizes the Secretary of the Army, acting through the Corps, to issue permits for the discharge of such "dredged or fill material." 33 U.S.C. 1344(a) and (d).

The Corps may issue an individual permit for a particular project or a "general permit" on a state, regional, or nationwide basis for a category of projects. 33 U.S.C. 1344(a) and (e). An

individual permit generally may be issued only after the applicant submits extensive, site-specific documentation and the Corps provides an opportunity for public comment. See 33 C.F.R. Pt. 325 (permitting process). General permits, by contrast, enable the Corps to streamline the regulatory approval process for categories of activities that have minimal environmental impacts, individually and cumulatively. See 33 C.F.R. 330.1(b) (explaining that the purpose of nationwide permits is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts"); S. Rep. No. 370, 95th Cong., 1st Sess. 74 (1977) (Senate Report) (describing general permits as "a mechanism for eliminating * * * delays and administrative burdens"). In particular, the Corps may issue a general permit for any category of activities "similar in nature" that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. 1344(e)(1). General permits may be issued only after notice and an opportunity for public comment and may remain valid for up to five years. 33 U.S.C. 1344(e)(1) and (2).

Nationwide permits, such as NWP 12, are issued by the Chief of Engineers after making the minimal-impact determinations described above. 33 C.F.R. 330.1(b). The Chief of Engineers ensures that activities encompassed by a nationwide permit will have no more than a minimal environmental impact in part by

imposing "General Conditions" that apply to every nationwide permit, as well as additional specific terms and conditions in each nationwide permit. An activity is authorized under a nationwide permit "only if that activity and the permittee satisfy all of the [permit's] terms and conditions." 33 C.F.R. 330.1(c).

The Corps' regulations also create additional local and project-specific safeguards to ensure that activities authorized by a nationwide permit will have only minimal impact. First, the regulations anticipate that regional officials, known as division engineers, may determine that the application of a nationwide permit to a specific geographic area, class of activities, or class of waters "would result in more than minimal adverse environmental effects either individually or cumulatively." 33 C.F.R. 330.4(e)(1). If a division engineer makes such a determination, the division engineer may "modify, suspend, or revoke" the nationwide permit authorization with respect to the specific area, activities, or waters at issue. 33 C.F.R. 330.5(c)(1).

Second, each nationwide permit specifies certain conditions under which a prospective permittee must submit a pre-construction notification to the Corps to verify that a proposed activity will comply with the nationwide permit. A pre-construction notification is a site-specific notice to the Corps about the potential effects of a proposed activity at a specific crossing of navigable waters. Upon receipt of such a notification, the

district engineer must evaluate the proposed activity. If "the adverse effects are more than minimal," the district engineer must "notify the prospective permittee that an individual permit is required." 33 C.F.R. 330.1(e)(3). For activities that do not require pre-construction notification, a prospective permittee may assess that the activity is covered by a nationwide permit without involving the Corps or providing notice to the Corps.

b. Nationwide Permit 12 applies to "[a]ctivities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United State, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project." 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). For utility lines that cross covered waters in more than one place, each crossing is a single "project." Id. at 1986. NWP 12 defines the term "utility line" to include not only electrical and communications wires, but also oil and gas pipelines. Id. at 1985. The permit specifies several conditions that require a prospective permittee to submit a pre-construction notification to the Corps, including if the project would "result in the loss of greater than 1/10-acre of waters of the United States." Id. at 1986.

Like other nationwide permits, NWP 12 is subject to a number of General Conditions to which permittees must adhere. General Condition 18 addresses the potential impact of activities on

species listed under the ESA. It provides that "[n]o activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species * * * or which will directly or indirectly destroy or adversely modify the critical habitat of such species." 82 Fed. Reg. at 1999. It also requires permittees (other than federal agencies) to submit a pre-construction notification to the Corps "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." Ibid.; accord 33 C.F.R. 330.4(f)(2). In those circumstances, a prospective permittee may not "begin work on the activity" until notified by the Corps that the activity is authorized. 82 Fed. Reg. at 1999.

The Corps first issued a nationwide utility line permit in 1977, see 42 Fed. Reg. 37,122, 37,146 (July 19, 1977), and it issued the most recent version of NWP 12 on January 6, 2017, after notice and comment, see 82 Fed. Reg. at 1862. Since 2017, the Corps has received and verified more than 38,000 pre-construction notifications for projects under NWP 12. Moyer Decl. ¶ 4.

c. Section 7(a)(2) of the ESA requires each federal agency to ensure that any action authorized by the 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 [critical] habitat of such species." 16 U.S.C.

1536(a)(2); see 50 C.F.R. 402.02 (agency action includes "the granting of * * * permits"). When an agency proposes to take an action, it must first determine whether such action "may affect" a listed species or designated critical habitat for a listed species. 50 C.F.R. 402.14(a). Unless the agency then determines that the action "is not likely to adversely affect" a listed species or critical habitat, it generally must engage in formal consultation with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on the species involved. 50 C.F.R. 402.14(b)(1). Formal consultation results in a "biological opinion," prepared by FWS or NMFS, that addresses whether the proposed action is likely to jeopardize the continued existence of any listed species or is likely to result in the destruction or adverse modification of any designated critical habitat. 50 C.F.R. 402.14(h)(1)(iv).

The Corps engaged in consultation with FWS and NMFS before re-issuing NWP 12 and other nationwide permits in 2007 and 2012, on the express understanding by the Corps that the consultation was not required by the ESA. See 81 Fed. Reg. 35,186, 35,194 (June 1, 2016). As to the 2012 re-issuance, FWS did not conclude the consultation, and NMFS ultimately issued a biological opinion in 2014 concluding that those nationwide permits were not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Gov't C.A. Stay

App. 430. The Corps declined to engage in voluntary consultation again before re-issuing NWP 12 and other nationwide permits in 2017, but it maintained all of the feasible protective measures identified in NMFS's 2014 biological opinion. See id. at 427-428.

In the 2017 re-issuance, the Corps explained that issuing the nationwide permits themselves has no effect on listed species or critical habitat -- and therefore does not trigger any consultation requirement -- because the regulatory scheme and the permits are designed to ensure that any necessary consultation occurs on an activity-specific basis. In particular, the Corps explained that General Condition 18 and 33 C.F.R. 330.4(f)(2) require prospective permittees to provide the Corps with pre-construction notification of any activity that "might affect" a listed species or critical habitat, which is a broader standard (encompassing more activities) than the "may affect" threshold for potentially triggering Section 7(a)(2) consultation. 82 Fed. Reg. at 1873. When the Corps receives such a notification, it determines whether the consultation threshold is met on an activity-specific basis. Ibid. The Corps also explained that it had coordinated with FWS and NMFS officials in establishing regional permitting conditions, including additional pre-construction notification requirements "in areas inhabited by listed species or where designated critical habitat occurs." Ibid.

2. Respondents -- regional and national environmental groups -- brought this suit against the Corps and the Chief of Engineers in July 2019 to challenge the Corps' alleged "approval of the Keystone XL pipeline using [NWP] 12." Am. Compl. ¶ 1; see App., infra, 69a-70a. The proposed Keystone XL oil pipeline would enter the United States from Canada near Morgan, Montana, and would continue for approximately 882 miles to Steele City, Nebraska, where it would connect to an existing pipeline. See U.S. Dep't of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project, Vol. I, at S-1 (Dec. 2019) (State 2019 EIS). In 2017, the project's proponent, TC Energy, submitted pre-construction notifications to the Corps for all of Keystone XL's proposed crossings of covered waters. Am. Compl. ¶ 153. TC Energy later withdrew those notices, and the Corps suspended its verifications that the proposed activities were authorized under NWP 12. Id. ¶ 189. In 2020, TC Energy again submitted pre-construction notifications for the proposed crossings for the pipeline. The 2020 notifications remain pending before the Corps. See D. Ct. Doc. 113, at 1-2 (Feb. 19, 2020).

As relevant here, respondents alleged that the Corps had violated the ESA by re-issuing NWP 12 in 2017 without "initiat[ing] formal programmatic consultation" with FWS and NMFS, and that any approval of Keystone XL under NWP 12 was therefore "not in accordance with law and must be set aside" under the Administrative

Procedure Act (APA), 5 U.S.C. 701 et seq. Am. Compl. ¶ 10, 217. Respondents further alleged that their members were harmed by this putative violation because they "live, work, and recreate in places threatened by Keystone XL." Id. ¶ 23. Respondents requested that the district court declare NWP 12 unlawful and remand it to the agency for compliance with the ESA, "[v]acate all Corps verifications or other approvals of Keystone XL under NWP 12," and enjoin the Corps "from using NWP 12 to authorize" Keystone XL. Id. at 87-88 (Prayer for Relief). Respondents did not allege any concrete injury relating to any other pipeline, nor did they request any injunctive relief beyond Keystone XL. Indeed, respondents' amended complaint refers to the Keystone XL project more than one hundred times and does not mention a single other ongoing pipeline activity.[1]

TC Energy intervened as a defendant. D. Ct. Doc. 20 (July 23, 2019). When Montana and a coalition of energy-industry groups sought to intervene, respondents opposed those requests, arguing that any concerns about the continued availability of NWP 12 for other utility-line projects were misplaced because respondents "do not seek to vacate NWP 12, but rather seek vacatur and injunctive

[1] As respondents recognized (see Am. Compl. ¶¶ 139-141), the Keystone XL project itself was already the subject of consultation with FWS, initiated by the Department of State with the Corps' participation. The State Department also issued an environmental impact statement for Keystone XL in 2014, which was later supplemented in light of certain revisions to the proposed pipeline. See State 2019 EIS S-2 (timeline).

relief only as to Keystone XL approvals." D. Ct. Doc. 52, at 3 (Oct. 29, 2019); see also D. Ct. Doc. 50, at 3 (Oct. 18, 2019) (respondents' earlier statement that they "have not sought to have NWP 12 broadly enjoined" but rather "seek narrowly tailored relief to ensure adequate environmental review of oil pipelines, especially Keystone XL"). The district court allowed Montana and the industry coalition to intervene in a limited capacity. App., infra, 69a-76a. In limiting those intervenors' participation, the court recognized that respondents "do not ask the [c]ourt to vacate NWP 12," and the court assured Montana and the industry groups that they "could still prospectively rely on [NWP 12] until it expires on its own terms in March 2022, even if [respondents] prevail on the merits." Id. at 72a-73a.

At summary judgment, respondents again disclaimed any request for "broad relief that might impact other uses of NWP 12." D. Ct. Doc. 107, at 56 (Jan. 29, 2020). Respondents maintained that, "from the outset" of the litigation, they had asked the district court to declare that issuance of NWP 12 violated the ESA and other statutes and to remand NWP 12 to the Corps for compliance with those laws, but only to "vacate the Corps' use of NWP 12 to approve Keystone XL[] and enjoin activities in furtherance of Keystone XL's construction." Id. at 56-57.

3. a. On April 15, 2020, the district court granted partial summary judgment to respondents on their claim for failure

to consult under Section 7(a)(2) of the ESA, while declining to decide respondents' other pending claims. App., infra, 43a-68a. The court concluded that certain general prior statements by the Corps about the environmental impact of NWP 12-authorized activities, together with two declarations submitted by respondents, furnished "'resounding evidence' * * * that the Corps' reissuance of NWP 12 'may effect' listed species and their habitat." Id. at 53a (citation omitted).[2]

The district court rejected the Corps' reliance on General Condition 18 and project-level review. App., infra, 58a. In its view, the Corps had an obligation to "consider the effect of the entire agency action" at a programmatic level. Ibid. The court also observed that General Condition 18 relies on prospective permittees to determine that a given activity might affect a listed species or critical habitat. Id. at 61a. Although the court "presume[d] that * * * permittees will comply" with that obligation, it nonetheless faulted the Corps for "delegat[ing]" to permittees the Corps' responsibilities under the ESA. Ibid.

As a remedy, the district court remanded NWP 12 to the Corps for compliance with the ESA. App., infra, 68a. Notwithstanding respondents' repeated prior representations about the limited

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[2] The declarations on which the district court relied argued that Keystone XL might harm two listed species, the pallid sturgeon and the American burying beetle; they did not address any other pipeline. See App., infra, 53a-58a; D. Ct. Doc. 73-4, at 3-5 (Nov. 22, 2019); D. Ct. Doc. 73-1, at 2-5 (Nov. 22, 2019).

scope of equitable relief they were seeking, the court also -- without any explanation -- vacated NWP 12 in its entirety "pending completion of the consultation process" and "enjoined [the Corps] from author[iz]ing any dredge or fill activities under NWP 12 pending completion of the consultation process." Ibid.

b. On April 27, 2020, the Corps requested that the district court stay its order vacating and enjoining NWP 12 pending appeal. D. Ct. Doc. 131, at 1; see 28 U.S.C. 1292(a)(1). The Corps observed that respondents had expressly disclaimed the very relief that the court had granted, and that the court had endorsed those disclaimers earlier in the case. In light of the court's unexplained departure from its prior position, the Corps delayed filing a notice of appeal to ensure that the court retained jurisdiction to revise its order. D. Ct. Doc. 131, at 2.

Respondents did not meaningfully defend the district court's injunction. Instead, respondents proposed a new remedy: vacating NWP 12 as to "the construction of new oil and gas pipelines" and "narrowing the injunction to enjoin the Corps from authorizing any dredge or fill activities for Keystone XL under NWP 12." D. Ct. Doc. 144, at 2 (May 6, 2020). Respondents claimed that this new remedy was consistent with the boilerplate request in their amended complaint for "such other relief as the [c]ourt deems just and appropriate," and that their prior focus on Keystone XL had been merely "illustrative." Id. at 21, 25 (citation omitted).

Respondents also submitted 14 new declarations identifying other pipelines for the first time and addressing purported harms from those pipelines. See id. at 27.

c. On May 11, 2020, the district court modified its prior order and declined to stay the modified order pending appeal. App., infra, 5a-42a. Specifically, the court vacated NWP 12 "as it relates to the construction of new oil and gas pipelines pending completion of the consultation process," while leaving NWP 12 in effect "insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects." Id. at 42a. The court also enjoined the Corps "from author[iz]ing any dredge or fill activities for the construction of new oil and gas pipelines under NWP 12" -- not just Keystone XL, as respondents had requested -- "pending completion of the consultation process" on NWP 12. Ibid. The court did not address whether the amended order would permit new construction with respect to existing pipelines.

In refashioning its order, the district court stated that granting "broad programmatic relief" to "a single plaintiff with a successful [APA] claim" was the "routine[]" course in the Ninth Circuit, without requiring the plaintiff to show "harms stemming from each unlawful application" of the challenged agency action. App., infra, 9a. Consistent with that view, the court found that respondents were likely to suffer irreparable harm absent an

injunction without identifying any concrete injury they might suffer with respect to any proposed pipeline other than Keystone XL. See id. at 24a-27a; cf. id. at 37a (stating that respondents "easily satisfied the irreparable injury requirement" because "an increase in the number and size of pipelines increases the risk of an accident or harm to the environment").

4. The Corps, TC Energy, Montana, and the coalition of energy-industry intervenors noticed appeals from the district court's injunction and (with the exception of Montana) all filed emergency motions for a stay pending appeal. A variety of national business groups supported that request as amici curiae, as did 18 States concerned with what they described as the court's unilateral transformation of this case from one "challenging application of [NWP 12] to one pipeline project into an opportunity to issue a nationwide injunction affecting new oil and gas pipelines in every State -- no matter their length, purpose, or minimal environmental effects." States' C.A. Amici Br. 1; see, e.g., American Fuel & Petrochemical Mfrs. C.A. Amicus Br. 1-2 (stating that the district court's injunction "was a surprise to * * * countless stakeholders that were not involved in the litigation but are suffering immediate and adverse consequences").

The court of appeals consolidated the three appeals in which a stay was sought, see C.A. Order (May 14, 2020), and denied a stay in a brief order issued by two judges assigned to the court's

monthly motions panel, without hearing argument, see App., infra, 1a-4a. In its entirety, the court's explanation of its reasoning consisted of the following: "Appellants have not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal." Id. at 3a.

ARGUMENT

The government respectfully requests that this Court stay the district court's order pending appeal and, if necessary, pending further proceedings in this Court. Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals. In deciding whether to issue such a stay, the Court or a Circuit Justice considers whether four Justices are likely to vote to grant certiorari if the court of appeals ultimately rules against the applicant; whether five Justices would then likely conclude that the case was erroneously decided below; and whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or the public. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). Here, all of those factors counsel strongly in favor of a stay. The district court lacked any sound basis in the ESA to vacate NWP 12 and enjoin the Corps from relying on it to authorize the Keystone XL project. And compounding that error, the court's order is vastly overbroad

by extending beyond the Keystone XL pipeline to the construction of every new oil and gas pipeline in the country.

1. If the Ninth Circuit affirms the district court's order, this Court is likely to grant review. The district court initially vacated NWP 12 and enjoined the Corps from relying on it to authorize dredge or fill activities in covered waters anywhere in the country. The court did so despite the express disclaimer by respondents of any request for vacatur or injunctive relief extending beyond the Keystone XL project, and despite the failure by respondents to even assert, let alone demonstrate, any Article III injury that would support the sweeping relief the court granted concerning other utility lines. When the government identified those errors in the course of requesting a stay pending appeal, the court backtracked, but only in part -- amending its prior order to limit the vacatur and nationwide injunction of NWP 12 to "the construction of new oil and gas pipelines." App., infra, 42a.

Whether the Corps violated the ESA by re-issuing NWP 12 without programmatic consultation, and whether the district court erred in granting a nationwide vacatur and injunction of the permit as to the construction of all new oil and gas pipelines, are questions of exceptional importance that would warrant this Court's review. Sup. Ct. R. 10(c). The district court's erroneous finding of an ESA violation led it to partially vacate and enjoin a permit that has been in effect in some form for more than 40

years and that the Corps relies on annually to approve thousands of projects. The court's order would frustrate the Corps' administration of its permitting programs. It also threatens to cause immediate and ongoing harm to the Nation's energy industry and to the many public and private entities and individuals who rely on oil and gas pipelines. See pp. 34-37, infra.

More broadly, this case presents in stark fashion the recurring and important question whether a district court may award equitable remedies that extend beyond the injuries asserted by the plaintiff. Members of this Court have expressed concerns about the rising tide of "universal" injunctions, issued by single district court judges to halt the application of a challenged federal policy to anyone, anywhere. DHS v. New York, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring in the grant of stay); see Trump v. Hawaii, 138 S. Ct. 2392, 2424-2425 (2018) (Thomas, J., concurring). Here, the district court entered a nationwide injunction at the behest of plaintiffs who had repeatedly told the court that they were not seeking one (until changing course after the court entered the very relief they had disclaimed). And the court's order had the effect not only of granting relief to some non-parties, who perhaps could have but had not challenged other pipelines, but also of harming other non-parties -- namely, pipeline sponsors who had relied on the continuing availability of NWP 12 for activities related to pipeline construction. The

constitutional, statutory, and equitable issues arising from such an extraordinary order would warrant this Court's review.

2. A stay is also warranted because, if the Ninth Circuit affirms the district court's order and this Court grants review, there is at least a "fair prospect" that this Court will vacate the order in whole or in part. Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). The Corps did not violate the ESA in re-issuing NWP 12 in 2017; therefore, the district court lacked any basis to vacate the permit and enjoin the Corps from relying on it with respect to Keystone XL, let alone all construction of new oil and gas pipelines. At a minimum, this Court would likely narrow the scope of the vacatur and injunction.

a. "Article III of the Constitution limits the exercise of the judicial power to 'Cases' and 'Controversies.'" Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (citation omitted). Under that limitation, a federal court may entertain a suit only by a plaintiff who demonstrates Article III standing, including the "[f]oremost" requirement of "injury in fact." Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018). And any remedy awarded to the plaintiff "must be 'limited to the inadequacy that produced his injury in fact.'" Id. at 1930 (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996)) (brackets omitted). The plaintiff must demonstrate Article III standing "for each form of relief that is sought." Town of Chester, 137 S. Ct. at 1650 (citations

omitted). Thus, the Court has narrowed injunctions that extended beyond preventing specific harms to "any plaintiff in th[e] lawsuit." Lewis, 518 U.S. at 358.

Principles of equity reinforce those limitations. A court's equitable authority to award relief is generally confined to relief "traditionally accorded by courts of equity" in 1789. Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999). And it is a longstanding principle that injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979); see Hawaii, 138 S. Ct. at 2427 (Thomas, J., concurring) (explaining that English and early American "courts of equity" typically "did not provide relief beyond the parties to the case"). In a properly certified class action, relief may extend to the class. Califano, 442 U.S. at 702. And some injuries can be remedied only in ways that incidentally benefit nonparties. See, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414 (1977) (school-desegregation remedy). But even in those cases, courts are adjudicating only the rights of the parties before them, not passing as a general matter on government policies to the extent they address the rights and obligations of other parties.

The district court's order cannot be reconciled with those principles. If a federal court may not award a remedy actively

sought by a plaintiff unless the plaintiff demonstrates that the remedy is necessary to redress the particular injury that the defendant's action caused the plaintiff to incur, see Town of Chester, 137 S. Ct. at 1650 (collecting cases), then a fortiori the court cannot award a remedy that the plaintiff expressly disclaims -- as occurred here. And even if respondents had requested vacatur and an injunction beyond Keystone XL, the court would have had no basis for ordering such relief because respondents lacked standing and any basis cognizable in equity to challenge the application of NWP 12 to any other pipelines. At summary judgment, for example, respondents submitted more than a dozen declarations, only one of which even referred to other pipelines (which, as the declaration explained, had already been constructed). See D. Ct. Doc. 73-2, at 3-4 (Nov. 22, 2019).

To be sure, after the district court vacated NWP 12 and entered the broad injunction that respondents had previously denied seeking, respondents reversed course and supported the somewhat narrower order that the court ultimately entered, targeting "the construction of new oil and gas pipelines." App., infra, 42a. Respondents did not, however, rely on the existing record for that newly conceived remedy; instead, they submitted an additional 14 declarations purporting to identify harms to their staff and members from proposed pipelines other than Keystone XL. Allowing respondents to attempt to backfill the record in that

manner was itself improper. See Summers v. Earth Island Inst., 555 U.S. 488, 495 n.* (2009) ("If respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively."); pp. 27-28, infra.

Respondents' belated submission was also plainly insufficient to support the district court's order, even as modified. Respondents identified only a handful of additional pipelines and thus fell far short of demonstrating the requisite "concrete and particularized" injury, Gill, 138 S. Ct. at 1929 (citation omitted), with respect to all water-crossing activities associated with the construction of all new oil and gas pipelines. Even as to the identified pipelines, respondents did not attempt to establish that any particular activities in covered waters would potentially harm endangered species or critical habitat, let alone that such harms would impact respondents' asserted interests. And two of the other pipelines respondents identified are already the subject of litigation elsewhere -- including in this Court (although not on ESA issues). See United States Forest Serv. v. Cowpasture River Pres. Ass'n, No. 18-1584 (June 15, 2020); Gov't C.A. Stay Mot. 44-45 (collecting cases). Thus, like global injunctions generally, the district court's order threatens to undercut the "airing of competing [judicial] views." DHS, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay).

Respondents contended below that this case is distinguishable from others involving impermissible nationwide injunctions because the district court also partially vacated NWP 12 -- an equitable remedy that respondents argued was, in any event, justified under the APA. Resp. C.A. Stay Opp. 46; see id. at 30-47; cf. App., infra, 11a. That contention is unfounded. The APA states that a reviewing court shall "set aside agency action" found to be unlawful. 5 U.S.C. 706(2)(A). But the only "agency action" that respondents had Article III standing to challenge was the Corps' purported use of NWP 12 to verify the Keystone XL project. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990) (NWF) (an APA plaintiff generally must allege "some concrete action applying [a] regulation to the claimant's situation in a fashion that harms or threatens to harm him"). Moreover, the APA does not state that a reviewing court must "set aside" a challenged agency action, like a rule, universally, rather than as applied to the parties. Instead, the "set aside" language in Section 706 is best read to "direct[] the court not to decide [a case] in accordance with [an unlawful] agency action." 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).[3] In short, "[n]othing in the language of the APA"

[3] https://www.yalejreg.com/bulletin/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies/

requires an unlawful regulation to be enjoined or vacated "for the entire country." Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 394 (4th Cir. 2001). This Court is likely to set aside both the district court's injunction and its partial vacatur of NWP 12, and both should be stayed pending appeal.

b. This Court is also likely to vacate the district court's order in whole or part because it was entered without fair notice. See Fed. R. Civ. P. 65(a)(1); Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, 415 U.S. 423, 434 n.7 (1974). Indeed, the court granted the very remedy -- vacatur and a nationwide injunction of NWP 12 across the board -- that it had previously assured would not be granted.

Respondents contended below (Resp. C.A. Stay Br. 58-61) that this error was harmless because the parties had the opportunity to contest the scope of relief after the fact, which caused the district court to narrow its vacatur and injunction. But that course of events only underscores the irregularity of the order. After the court had already adjudicated respondents' failure-to-consult claim and had granted sweeping nationwide relief, respondents submitted (and the court relied on) new and untested declarations regarding the purported environmental risks of "large-scale oil and gas pipelines" generally. App., infra, 19a-20a. Because respondents made those assertions only in response to the government's motion for a stay, no party had a meaningful

opportunity to contest them. See Summers, 555 U.S. at 495 n.* (declining to consider standing affidavits submitted after decision as part of opposition to a motion to stay); id. at 508 (Breyer, J., dissenting); see also NWF, 497 U.S. at 894-895 (affirming exclusion of similarly belated affidavits).

The substance of the district court's order reflects the deficient process through which it was crafted. The order fails to specify whether it applies to the construction of new crossings for a pipeline that already exists, which arguably involve "new * * * pipeline construction" (App., infra, 21a) but not the "construction of new * * * pipelines" (id. at 40a) -- terms the court used seemingly interchangeably. Likewise, although the order permits "routine maintenance" on "existing NWP 12 projects," id. at 42a, it does not define or explain those terms. Those oversights are as predictable as they are regrettable. As a result of the limited nature of respondents' challenge, the court had before it no evidence concerning the universe of potential pipeline activities or the consequences of eliminating NWP 12 as a source of authorization for them. For this reason as well, it had no basis to reach out to vacate and enjoin NWP 12 broadly with respect to the construction of all new oil and gas pipelines.

c. Finally, this Court is likely to conclude that the district court erred in finding a violation of Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), and thus in ordering any remedy at

all. Section 7(a)(2) and its implementing regulations do not require consultation unless an agency at least first determines that its proposed action "may affect listed species or critical habitat." 50 C.F.R. 402.14(a). The Corps reasonably determined that, in light of the regulatory scheme and permitting conditions, the mere re-issuance of NWP 12 itself would have "no effect" on protected species or critical habitat. 82 Fed. Reg. at 1873.

In doing so, the Corps relied principally on General Condition 18, which requires prospective permittees to give the Corps pre-construction notification of a proposed project "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." 82 Fed. Reg. at 1999. The "'might affect'" threshold is, by design, "more stringent than the 'may affect' threshold" that triggers a consultation requirement under the ESA. Id. at 1873. General Condition 18 thus ensures that the Corps receives notification of projects that potentially require consultation, allowing the Corps to determine whether consultation is in fact required on an activity-specific basis. And the prospective permittee may not begin construction until it receives authorization from the Corps, either because the Corps has made a "no effect" determination or because any consultation requirement has been satisfied. Id. at 1999; see 33 C.F.R. 330.4(f)(2).

The district court erred in concluding that the Corps also had an obligation to consult "at the programmatic level" about the potential effects of NWP 12 in the abstract. App., infra, 58a. Programmatic consultation about an agency action may be appropriate when a proposed agency action "provid[es] a framework for future proposed actions." 50 C.F.R. 402.02. But as the FWS and NMFS guidance cited by the court makes clear, the ESA does not require consultation for any "framework programmatic action that has no effect on listed species or critical habitat." 80 Fed. Reg. 26,832, 26,835 (May 11, 2015); see App., infra, 52a. The Corps made such a "no effect" determination here.

The district court stated that the Corps' approach failed to capture the potential effects of NWP 12 "in its entirety." App., infra, 60a. But when any particular proposed ground-disturbing activity triggers a formal consultation requirement, the effects of the proposed action must be measured against the "environmental baseline" for the listed species or critical habitat, 50 C.F.R. 402.14(g)(2) and (4) -- a term of art that requires taking account of "the past and present impacts of all Federal, State, or private actions and other human activities in the action area," 50 C.F.R. 402.02. The regulations also require considering "cumulative effects," 50 C.F.R. 402.14(g)(3) and (4), which are defined to include certain anticipated future State or private activities, 50 C.F.R. 402.02. In relying on activity-specific review, the Corps

therefore did not "circumvent" (App., infra, 58a) any requirement to consider the cumulative impacts of NWP 12-authorized activities. It simply determined, entirely reasonably, that the mere re-issuance of NWP 12 did not trigger any consultation requirement and that it could instead defer consideration of issues under Section 7 of the ESA to the concrete context of an actual proposed activity at a specific crossing.

That approach does not impermissibly "delegate" to non-federal permittees the duty to determine whether consultation is required, as the district court asserted. App., infra, 62a. Under General Condition 18, the Corps requires prospective permittees to provide it with pre-construction notification of any activity that "might affect" listed species or critical habitat. The "might affect" threshold deliberately encompasses more proposed activities than the threshold for triggering any consultation requirement under the ESA. See p. 11, supra. The latter determination is always made by the Corps, not by the prospective permittee. 82 Fed. Reg. at 1955. A prospective permittee that fails to comply with General Condition 18 would not be authorized to undertake the activity at all, 33 C.F.R. 330.1(c), and would be liable for sanctions for unpermitted discharges into covered waters or violations of the ESA. See 82 Fed. Reg. at 1873; cf. 16 U.S.C. 1540; 33 U.S.C. 1319.

General Condition 18 is also far from the only safeguard built into the regulatory scheme, as the Corps explained in making its "no effect" determination. Prospective permittees must provide the Corps with pre-construction notification for a variety of other reasons; for example, NWP 12 requires a prospective permittee to provide such a notice if discharges from a proposed activity will "result in the loss of greater than 1/10-acre of waters of the United States." 82 Fed. Reg. at 1986. Historically, approximately 80% of activities authorized by NWP 12 have required pre-construction notification. Moyer Decl. ¶ 3. And when the Corps receives a pre-construction notification, it may determine that consultation is required even if the notification was not triggered by General Condition 18. See 82 Fed. Reg. at 1873. In addition, NWP 12 requires that any pre-construction notice for a linear project identify (and the district engineer review) all the NWP-authorized activities for that line regardless of whether those other activities would independently require pre-construction notice. Id. at 1986. Regional conditions further restrict the use of nationwide permits in order to protect listed species and critical habitat. Id. at 1873; see 33 C.F.R. 330.5(c).[4]

[4] The Corps engaged in voluntary consultation before the issuance of NPW 12 and other nationwide permits in 2012, and NMFS responded by issuing a biological opinion in 2014 finding "no jeopardy" from those permits. See pp. 10-11, supra. FWS did not issue a biological opinion in that process. The Corps maintained the feasible protective measures from the NMFS opinion when it re-issued NWP 12 and other nationwide permits in 2017.

Lastly, the district court's order lacks any sound basis in the record. In ruling that Section 7(a)(2) required programmatic consultation, the court relied on highly generalized prior statements by the Corps about the potential effects of NWP 12-authorized activities on the environment and on two declarations submitted by respondents. See App., infra, 53a-57; see, e.g., id. at 54a (relying on past statements by the Corps "examin[ing] the effect of human activity on the Earth's ecosystems"). None of those materials discussed General Condition 18; regional permitting conditions, including the actual regional permitting conditions that exist for the listed species addressed in the declarations; or the other provisions of NWP 12 that may trigger site-specific review. And neither declaration addressed any proposed pipeline other than Keystone XL.

3. The balance of equities favors a stay. The district court's order causes direct, irreparable injury to the interests of the government and the public -- which "merge" here, see Nken v. Holder, 556 U.S. 418, 435 (2009). And it does so for little if any countervailing benefit to respondents' asserted interests. At a minimum, the lopsided balance of stay equities demonstrates that the order is overbroad and should be stayed to the extent it reaches beyond the Keystone XL project itself. See, e.g., United States Dep't of Def. v. Meinhold, 510 U.S. 939, 939 (1993).

a. The district court's order eliminates the ability of the Corps, State and local governments, and private parties to rely on NWP 12 for the "construction of new oil and gas pipelines" anywhere in the country. App., infra, 42a. NWP 12 has been in effect in some form since 1977, and the Corps relies on it annually to verify thousands of projects. See Moyer Decl. ¶¶ 3, 9; 42 Fed. Reg. at 37,146. Since the current version of NWP 12 went into effect in 2017, the Corps has verified more than 38,000 pre-construction notifications under it. Moyer Decl. ¶ 4. Based on recent data, the Corps estimates that approximately 58% of the verifications that it issued under NWP 12 since the 2017 re-issuance were for oil and gas pipeline activities. Id. ¶ 5. The Corps further estimates that approximately 3200 pre-construction notifications for such activities were pending as of the district court's April 15 order and that, but for the order, the agency would have gone on to authorize more than 16,000 such activities until the expiration of the current version of NWP 12 in 2022. Ibid.

To be sure, some portion of the projects described above do not involve "construction of new * * * pipelines" or involve activities that could reasonably be considered "routine maintenance, inspection, [or] repair activities on existing NWP 12 projects." App., infra, 42a. But the district court did not define or elaborate upon those terms. The order's lack of clarity is itself an additional reason to grant a stay.

At times, the district court suggested that it was addressing primarily "large-scale" pipelines involving "hundreds" of crossings of navigable waters. App., infra, 19a-20a. In fact, the court's order contains no such limiting language. By its terms, the injunction applies regardless of the length or diameter of the pipeline or its intended purpose. The order thus operates to prevent authorization under NWP 12 even of the construction of new small-scale pipelines that may impact less than 1/10 an acre of waters of the United States, such as the installation of a new community gas line for residential heating. See Moyer Decl. ¶ 7.

The district court dismissed the Corps' practical concerns in light of the "continued availability of the ordinary individual permit process." App., infra, 20a. But "[i]ndividual permits require a resource-intensive, case-by-case review, including extensive, site-specific documentation, public comment, and a formal determination on the permit application." Moyer Decl. ¶ 8. Congress authorized the Corps to issue general permits precisely to "eliminat[e] the delays and administrative burdens" associated with individual permits, Senate Report 74, for activities having "minimal" impact, 33 U.S.C. 1344(e)(1). Under the district court's order, however, the Corps would instead be required to devote substantial time and resources to evaluating individual permit applications even for routine pipeline construction projects, which in turn would reduce the agency's "ability to devote

appropriate resources to evaluating activities that have greater adverse environmental effects." Moyer Decl. ¶ 15. And reassigning Corps personnel or workloads to address a large new volume of individual permit applications for oil and gas pipelines would reduce the Corps' ability to process other verifications or applications, at least absent new appropriations. Ibid.

If the district court's order is not stayed, the partial invalidation of NWP 12 will cause extraordinary project delays. In 2018, the average time to receive a standard individual permit from the Corps was 264 days, while the average time to receive an NWP verification was only 45 days. Moyer Decl. ¶ 13. This disparity does not even account for the additional individual permit applications that the Corps would be required to process under the court's order. The Corps estimates that, at current workforce levels, it would take approximately 11 months to process all of the new applications it anticipates receiving -- if the personnel familiar with NWP 12 focused solely on new oil and gas pipeline permit applications and nothing else. Id. ¶ 16. And the project delays would compound in other predictable ways. For example, the Clean Water Act generally precludes applicants from obtaining an individual permit without a state water quality certification. See 33 U.S.C. 1341(a)(1).[5] The State amici below estimated that the certification process currently takes an

[5] For NWPs, States can provide such certification for the NWP as a whole. See 82 Fed. Reg. at 2002 (General Condition 25).

average of 130 days, see States' C.A. Amici Br. 8, even without the "surge in workload" that the Corps predicts would occur as a result of the district court's order, Moyer Decl. ¶ 17. Some proposed activities are also subject to time-of-year limitations for construction; if such an activity misses its seasonal construction window because of delays in obtaining an individual permit, the activity may need to be delayed until the following year. See id. ¶ 11; NWP 12 Coalition C.A. Br. 14.

As the Corps observed in a decision document for NWP 12, oil and pipeline construction activities permitted by NWP 12 have positive local, regional, and national economic impacts; ensure energy supplies for those served by pipelines; and support jobs and revenue for employers, including businesses that are not directly involved in construction but that provide needed supplies and services. See Moyer Decl. ¶ 18. The district court's order threatens to undercut those benefits.

b. The disruptiveness of the district court's order will not be offset by any demonstrated environmental benefits. As explained above, NWP 12 already contains a number of safeguards to ensure that environmentally sensitive projects receive additional review, including a General Condition prohibiting activities that might affect endangered species or critical habitat. And by halting all reliance on NWP 12 to authorize new oil pipeline construction, the district court's order may have the perverse

consequence of encouraging oil to be transported by other means that are subject to less stringent environmental-protection requirements. See Moyer Decl. ¶ 19; cf. Alexandra B. Klass & Danielle Meinhardt, Transporting Oil and Gas: U.S. Infrastructure Challenges, 100 Iowa L. Rev. 947, 1019-1025 (2015) (discussing environmental concerns for rail transport).

A stay pending appeal will also not harm any cognizable equities that respondents may have. To reiterate, respondents repeatedly disclaimed any request for broad equitable relief and sought to vacate and enjoin the use of NWP 12 only with respect to the Keystone XL project. Respondents themselves have therefore effectively acknowledged that a broader remedy is unnecessary to protect their asserted interests. At a minimum, respondents would not suffer any plausible harm from staying the district court's order while it is under appellate review.

The additional materials that respondents submitted during the district-court stay briefing do not show otherwise. The pipeline projects beyond Keystone XL that respondents belatedly purported to challenge have hardly escaped notice. For example, respondents' new declarations repeatedly referred to the Atlantic Coast Pipeline (which was at issue in Cowpasture River Pres. Ass'n, supra) and the Mountain Valley Pipeline. See D. Ct. Doc. 144, at 27. The Federal Energy Regulatory Commission prepared environmental impact statements for each of those pipelines, one

of which has already been upheld by the D.C. Circuit, see Appalachian Voices v. FERC, No. 17-1271, 2019 WL 847199 (Feb. 19, 2019) (per curiam). The Fourth Circuit, by contrast, held that NWP 12 did not cover the proposed Mountain Valley Pipeline construction and vacated the Corps' authorization, see Sierra Club v. United States Army Corps of Eng'rs, 909 F.3d 635, 655 (2018), and the Corps thereafter withdrew its authorization of the Atlantic Coast Pipeline on the same grounds. Even if NWP 12 were to remain in effect pending appeal, therefore, it would not presently authorize construction of those two pipelines.

The Permian Highway Pipeline and the Dakota Access Pipeline -- other projects identified in respondents' belated declarations, see D. Ct. Doc. 144, at 27, 32 -- are the subject of ongoing litigation. See City of Austin v. Kinder Morgan Texas Pipeline, LLC, No. 20-cv-138 (W.D. Tex. filed Feb. 5, 2020); Sierra Club v. United States Army Corps of Eng'rs, No. 20-cv-460 (W.D. Tex. filed Apr. 30, 2020); Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, No. 16-cv-534, 2020 WL 1441923 (D.D.C. Mar. 25, 2020). Other pipeline projects identified by respondents have been subject to similarly extensive environmental review. See, e.g., Gov't C.A. Stay App. 176 (Southgate Project).

In short, these other pipeline projects have received and will continue to receive extensive scrutiny, including in the courts. The district court's nationwide injunction is not only

improper under Article III and background equitable principles, but also serves no additional environmental purpose and is directly contrary to the comity that should be accorded to the litigation being conducted in other courts. Cf. DHS, 140 S. Ct. at 600-601 (Gorsuch, J., concurring in the grant of stay).

Nor, finally, would respondents' asserted interests be harmed by a stay of the vacatur and injunction with respect to the Keystone XL pipeline itself. The Department of State, with the Corps' participation, already engaged in Section 7 consultation for the Keystone XL project -- leading to a 2013 biological opinion from FWS, now superseded by an updated 2019 opinion after further analysis. See p. 13 n.1, supra; see also State 2019 EIS S.7-16 (noting updated biological opinion). If the Corps verifies the pre-construction notifications for Keystone XL that are currently pending before the agency, respondents will be free to revive their claims challenging those specific verifications.

CONCLUSION

The district court's order of April 15, 2020, as amended May 11, 2020, should be stayed pending appeal and, if the Ninth Circuit affirms the order, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

Respectfully submitted.

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