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

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

v.

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

Defendants,

TC ENERGY CORPORATION, et al.,

Intervenor-Defendants,

STATE OF MONTANA,

Intervenor-Defendant,

AMERICAN GAS ASSOCIATION, et al.,

Intervenor-Defendants.

CV 19-44-GF-BMM

Plaintiffs' Opposition to Motion of Edison Electric Institute, Utility Water Act Group, and International Brotherhood of Electrical Workers for Leave to File Amicus Brief

INTRODUCTION

The Court should deny the motion to file an amicus brief filed by the Edison Electric Institute ("EEI"), Utility Water Act Group ("UWAG"), and International Brotherhood of Electrical Workers ("IBEW") (together, "Electric Utility Amici"). EEI & UWAG Mot., ECF No. 79 ("Mot."); IBEW Mot., ECF No. 84. The interests of the Electric Utility Amici are adequately represented by the four groups of existing parties on Defendants' side of the case; indeed, Intervenor-Defendant National Rural Electric Cooperative Association is a member of UWAG. Furthermore, the Electric Utility Amici's participation in the case will not provide any additional useful information to the Court, but rather would prejudice Plaintiffs by adding yet another duplicative brief supporting Defendants.

As Plaintiffs have previously made clear, timely resolution of this case before construction on the Keystone XL pipeline begins in 2020 is essential. A fifth set of duplicative briefs on the defendants' side would add no value to the Court's consideration of this matter; instead, it would further complicate an already complex case and increase the risk of delay, to Plaintiffs' prejudice. The Court should therefore deny the Electric Utility Amici's motion.

BACKGROUND

This case challenges the U.S. Army Corps of Engineers' ("Corps") issuance of Nationwide Permit 12 ("NWP 12"), a streamlined permitting process for oil

pipelines and other utility projects nationwide, as violating the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA"), and the Endangered Species Act ("ESA"). The case also challenges the Corps' application of NWP 12 to the Keystone XL pipeline in violation of NWP 12, the CWA, and the ESA. Plaintiffs seek declaratory relief and a remand as to NWP 12 itself, and declaratory relief, vacatur, and injunctive relief as to the Corps' use of NWP 12 to approve the Keystone XL pipeline. First Am. Compl. 87-88, ECF No. 36.

The Court has already granted intervention to TC Energy (the proponent of Keystone XL), the State of Montana, and a group of five national energy organizations. Order Granting Mot. to Intervene by TC Energy Corp., ECF No. 20; Order Granting Mot. to Intervene by State of Montana & NWP 12 Coalition, ECF No. 59 (hereinafter "Intervention Order"). The Electric Utility Amici now seek to file a fifth brief on the defendants' side of the case. As explained below, the participation of the Electric Utility Amici is unnecessary, would prejudice Plaintiffs, and should be denied.

ARGUMENT

I. Participation by Electric Utility Amici is unwarranted

While "[n]o statute, rule, or controlling case defines a federal district court's power to grant or deny leave to file an *amicus* brief," courts generally look to whether the brief would be "timely and useful." *U.S. ex rel. Gudur v. Deloitte*

Consulting LLP, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007), *aff'd sub nom. U.S. ex rel. Gudur v. Deloitte & Touche*, No. 07-20414, 2008 WL 3244000 (5th Cir. Aug. 7, 2008); *see also* Local Rule 7.5(b)(2)(D) (instructing movants to "state why an amicus brief is desirable and relevant, including why the parties cannot adequately address the matter").[1] Here, the Electric Utility Amici's participation would not be useful to the Court, as their stated interests in the application of NWP 12 to electric utility projects is not the focus of the litigation, and any relevant interests they do have are adequately represented by existing parties. Because Electric Utility Amici's proposed amicus brief would be duplicative, compound the complexity of the case, and prejudice Plaintiffs, their motion should be denied.

A. This case focuses on the use of NWP 12 for oil pipelines, making the information Electric Utility Amici seek to introduce irrelevant

This case concerns the Corps' use of NWP 12 to fast-track the approval of oil pipelines, which pose risks (e.g., from oil spills) not pertinent to other uses of NWP 12. Accordingly, Plaintiffs do not seek to have NWP 12 broadly enjoined; rather, they seek narrowly tailored relief that will ensure adequate environmental review of oil pipelines, especially Keystone XL.

In nonetheless arguing that their interests are relevant, Electric Utility Amici misconstrue the focus of this litigation. Electric Utility Amici are correct that

[1] Plaintiffs do not contest the timeliness of Electric Utility Amici's motion.

Plaintiffs assert that the Corps failed to consider cumulative impacts and climate change impacts, failed to complete programmatic ESA consultation on NWP 12, and failed to ensure that applications of NWP 12 have only minimal impacts. Mot. at 6. However, as Plaintiffs' opening summary judgment brief demonstrates, the focus of these challenges is on the specific harms that oil pipelines will cause to the surrounding environment as a result of the Corps' unlawful actions. *See, e.g.*, Pls.' Mem. in Supp. of Mot. for Partial Summ. J. at 11-17, ECF No. 73 (discussing the Corps' failure to evaluate oil spills and frac-outs in the Environmental Assessment for NWP 12); *id.* at 17-20 (arguing that the Corps was required to adequately assess climate change impacts because it is "reasonably foreseeable that oil transported by pipelines like Keystone XL will be burned, and that such burning will contribute to climate change" (citation and internal quotation marks omitted)); *id.* at 20-27 (arguing that the Corps failed to evaluate the cumulative effects *of oil pipelines* and describing such potential effects). Electric utility line projects—which Electric Utility Amici claim is the basis of their interest in this case—do not often present the same concerns. Therefore, the information Electric Utility Amici seek to introduce on the "types of projects that electric utilities conduct under the auspices of NWP 12," Mot. at 8, and an explanation of the significance of the differences between oil pipelines and electric utility projects, *id*. at 12, is inapposite and will not be useful to the Court.

Electric Utility Amici also intend to provide information on the "conditions that are specific and important to the electric power industry [to] meet the statutory minimal effects standard" under the CWA, *id.*, and a discussion of the fact that "[m]any of NWP 12's provisions were developed specifically to address electric utility lines and ensure their minimal impact on environmental resources," *id.* at 1. That information, however, has no bearing on whether NWP 12's application to oil pipelines is lawful and is simply irrelevant to the present case, which does not involve a facial challenge to a statute or implementing regulation, where the existence of any lawful applications could bear on the validity of the agency action. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 301 (1993) (holding that to prevail on a facial challenge to an agency regulation as inconsistent with the agency's authorizing statute, plaintiffs "must establish that no set of circumstances exists under which the [regulation] would be valid" (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *but see Sierra Club v. Bosworth*, 510 F.3d 1016, 1023-24 (9th Cir. 2007) (casting doubt on the applicability of the "no set of circumstances" test to APA-based challenges to agency regulations).

Rather, Plaintiffs here challenge the Corps' issuance of a *general permit* pursuant to CWA Section 404(e) authorizing the construction of a broad category of activities, including oil pipelines, usually with no further project-level review by the Corps. That there may be *some* NWP 12 projects that would have only minimal

effects is irrelevant to the question of whether the Corps complied with the CWA, NEPA, and ESA in issuing NWP 12 for the entire category. *See Sierra Club, Inc. v. Bostick*, No. 12-cv-742, 2013 WL 6858685, at *5 (W.D. Okla. Dec. 30, 2013) (declining to apply the "no set of circumstances" test to a facial challenge to earlier version of NWP 12, instead stating "either the Corps complied with NEPA or it did not, and failure to comply will be sufficient to invalidate NWP 12"). The information Electric Utility Amici seek to introduce regarding electric utility projects would therefore not provide useful information for the Court's consideration of whether the Corps' reissuance of NWP 12 violated the CWA, NEPA, and ESA.

In short, Electric Utility Amici's stated interests in NWP 12's applicability to electric utility projects are not the focus of the litigation. And, in any event, those interests are adequately represented by the existing parties, as discussed below.

B. The interests of the Electric Utility Amici are adequately represented by existing parties

Even assuming the Electric Utility Amici have a relevant interest in this litigation, they have failed to show that the existing parties would not adequately represent that interest, and therefore that their participation would be useful to the Court.

Electric Utility Amici state that they, unlike any other party, will focus on "*electric* utility interests." Mot. at 12. Contrary to their assertion, existing parties adequately represent the interests of the electric power sector. For example, the State of Montana intervened to defend its stated interest in ensuring that NWP 12 can be used for the repair and replacement of "aging electric transmission lines." Montana Mot. to Intervene at 9, ECF No. 43. The five national energy organizations likewise intervened to protect their stated interests in building and maintaining linear pipelines and "electrical transmission and distribution lines." NWP 12 Coalition Mot. to Intervene at 4, ECF No. 49. In fact, one of those organizations, the National Rural Electric Cooperative Association ("NRECA"), is a member of proposed Amicus UWAG. Decl. of Jared M. Margolis ¶ 4. It can therefore represent the Electric Utility Amici's interests and is capable of making the same arguments. *See* NWP 12 Coalition Mot. to Intervene at 12-14 (describing NRECA's activities and related interest in NWP 12).

Regardless, Electric Utility Amici's electricity-specific interest in NWP 12 is encompassed by the existing parties' broader interests in defending NWP 12. Electric Utility Amici seek to protect their "ability to continue relying on NWP 12 to construct or work on their distribution and transmission lines." Mot. at 7. That goal is shared by the federal government and the three other sets of existing parties that have intervened to defend NWP 12. *See, e.g.*, Montana Mot. to Intervene at 8

(intervening to "ensur[e] that NWP 12 continues to provide streamlined regulatory approval of linear infrastructure"); NWP 12 Coalition Mot. to Intervene at 2 (intervening to "ensur[e] the continued availability of NWP 12" for various utility projects).

Thus, Electric Utility Amici's concerns about, for example, the potential repercussions of this case, will be addressed by the existing parties. *Compare, e.g.*, Mot. at 9 (expressing concern about "the need for lengthy and expensive individual CWA section 404 permit proceedings, which could significantly hinder utility customers' accessibility to reliable and secure energy services at a reasonable cost"), *with* NWP 12 Coalition Mot. to Intervene at 3 ("If NWP 12 is found unlawful, the Coalition's members may be forced to engage in lengthy and expensive individual CWA permit processes to undertake time-sensitive construction, maintenance, and repair activities on utility lines. . . ."). In other words, the existing parties' defense of NWP 12 will be in all material respects identical to the Electric Utility Amici's defense of their interests in utilizing NWP 12. Indeed, this Court granted Montana and NWP 12 Coalition intervention on a permissive basis only, in part because it found that their stated interests in this case were *already* adequately represented by Federal Defendants and TC Energy. Intervention Order at 4-6. In light of the fact that all four of these groups are now parties to the case, the same must be true for Electric Utility Amici.

NRECA and the other NWP 12 Coalition intervenors are capable of making—and are likely to make—any arguments the Electric Utility Amici might make. Furthermore, the Electric Utility Amici do not offer any necessary elements to the proceeding that other parties would neglect. This case already includes the federal government (the Corps), a state government that has espoused similar interests in the future use of NWP 12 as the Electric Utility Amici, several industry groups (including a member of proposed Amici UWAG), and the private project proponent. It is difficult to imagine any further value to the Court from a fifth set of briefs that would duplicate these parties' arguments in defense of NWP 12.

Because the Electric Utility Amici cannot show that their proposed brief "is desirable and relevant," or that their interests are not "adequately address[ed]" by the parties already in this case, the participation by Electric Utility Amici is unnecessary and their motion should be denied. *See* Local Rule 7.5(b)(2)(D); *see also Merritt v. McKenney*, No. 13-cv-01391, 2013 WL 4552672, at *4 (N.D. Cal. Aug. 27, 2013) (denying motion to file amicus brief where proposed brief would "not provide the Court with any unique information or a unique perspective on the issues raised in th[e] case"); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 59 (D.D.C. 2019) (denying motion to file amicus brief where proposed brief would not "present[] arguments that are not already found in the parties' briefs").

C. Participation by Electric Utility Amici will prejudice Plaintiffs

Plaintiffs oppose Electric Utility Amici's participation because it will be duplicative and will delay the proceedings, to Plaintiffs' prejudice. As with motions to intervene, the court must consider whether the participation by amici will unduly delay or prejudice the adjudication of the original parties' rights. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) (providing that "in a complex case . . . a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference").

Time is of the essence in this case: TC Energy has stated its intention to begin construction of Keystone XL in the spring of 2020. *See* Status Report at 2, ECF No. 38. Thus, timely resolution of this case is critical so that Plaintiffs are not forced to seek a preliminary injunction. If the Electric Utility Amici motion is granted, it could delay the proceedings by adding to the number of pages Plaintiffs and the Court must review before resolving the case.[2] It could also muddle the issues at stake and inject irrelevant or tangential considerations into the litigation.

This delay and added complexity would be entirely without purpose, as the Electric Utility Amici's interests are not the focus of this litigation and their brief

[2] The combined word count of Defendants' and Defendant-Intervenors' forthcoming briefs is already 29,500 words. *See* ECF No. 68 at 2; Local Rule 7.1(d)(2)(A).

will almost certainly be duplicative of the other parties' briefs in this case. As explained above, it is difficult to imagine what unique, legally relevant arguments the Electric Utility Amici would present that would not already be covered by existing parties. Allowing Electric Utility Amici to file a fifth set of briefs on the side of Defendants is unwarranted, and the motion should therefore be denied. *Cf. Lelsz v. Kavanagh*, 98 F.R.D. 11, 26 (E.D. Tex. 1982) (denying permissive intervention where the "participation of duplicative parties" would "unduly complicate and delay" the case, "thereby prejudicing the interests of the original parties").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Electric Utility Amici's motion to participate as amici.

Dated: December 13, 2019

Respectfully submitted,

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

/s/ Cecilia D. Segal
Cecilia D. Segal (*pro hac vice*)
Natural Resources Defense Council
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100
csegal@nrdc.org
Attorney for Bold Alliance and Natural Resources Defense Council

/s/ Jared Margolis
Jared Margolis (*pro hac vice*)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
(503) 283-5474
jmargolis@biologicaldiversity.org
Attorney for Center for Biological Diversity and Friends of the Earth

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

WORD COUNT CERTIFICATION

I certify that the foregoing response contains 2,514 words, as counted with Microsoft Word's "word count" tool, and excluding material Local Civil Rule 7.1(d)(2)(E) omits from the word-count requirement.

/s/ Cecilia D. Segal

CERTIFICATE OF SERVICE

I certify that I served the foregoing brief on all counsel of record via the Court's CM/ECF system.

/s/ Cecilia D. Segal