Nos. 20-35412, 20-35414, 20-35415, and 20-35432

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, et al.,
Plaintiffs/Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,
Defendants/Appellants,

and

TC ENERGY CORPORATION, et al.,
Intervenor-Defendants/Appellants.

Appeal from the United States District Court for the District of Montana
No. 4:19-cv-00044 (Hon. Brian Morris)

FEDERAL APPELLANTS' MOTION TO VACATE DECISIONS BELOW

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INTRODUCTION[1]

Plaintiffs brought this action to prevent the U.S. Army Corps of Engineers (Corps) from authorizing the construction of portions of the Keystone XL pipeline under a nationwide utility-line general permit known as Nationwide Permit 12 (NWP 12), which the Corps re-issued in January 2017. Plaintiffs expressly and repeatedly sought injunctive relief and vacatur directed only at Keystone XL—seeking vacatur of NWP 12 as applied to verifications that proposed Keystone XL crossings comported with NWP 12. The district court nevertheless vacated NWP 12 and enjoined its use for *all* new oil and gas pipelines across the country.

Federal Appellants have explained in their briefs their disagreement with the district court's merits holding and overbroad remedies. But these appeals are now moot. The Supreme Court has stayed the district court's injunction and vacatur except as to Keystone XL, and Plaintiffs now "seek to maintain only the Keystone XL-specific portion of the vacatur." The potential applicability of NWP 12 to Keystone XL alone, however, no longer creates an Article III case or controversy, even if it once might have. The agency action Plaintiffs challenged in this case—

[1] Montana states that it agrees that the cases are moot as a result of the reissuance of Nationwide Permit 12 published in the Federal Register on January 13, 2021 and agrees that, on that basis alone, the district court's decisions should be vacated and the cases remanded with instructions to dismiss. Plaintiffs oppose the motion. The NWP 12 Coalition and TC Energy reserve taking a position on mootness at this time but agree that the district court's decisions and orders should be vacated if the cases are deemed moot.

the 2017 re-issuance of NWP 12—has been superseded by a new nationwide permit, which took effect last month. President Biden has also since revoked the 2019 permit authorizing the Keystone XL project proponent (TC Energy) to build and operate the segment of the pipeline that crosses the U.S.-Canada border. TC Energy subsequently announced that it was suspending advancement of the Keystone XL project. The Corps thus could not now verify that the Keystone XL's proposed crossings qualify for use under the 2017 NWP 12. And TC Energy submitted an individual permit application in June 2020 that is awaiting a decision from the Corps.

These appeals are thus no longer justiciable. And even if an Article III controversy continued to exist, the appeals are at least prudentially moot. The Court should vacate the district court's orders as moot and remand with instructions to dismiss the case. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

BACKGROUND

Federal Appellants' opening brief sets forth the legal and factual background of these cases in detail, but we describe context relevant to this motion briefly here.

I. Nationwide Permits

The Corps authorizes discharges of dredged or fill material into waters of the United States through individual and general permits under the Clean Water Act (CWA). 33 U.S.C. §§ 1344(a), (e). An individual permit generally may be issued only after the applicant submits site-specific documentation and the Corps then

provides an opportunity for public comment. But the CWA also authorizes general permits for categories of activities similar in nature that the Corps determines will have minimal separate and cumulative adverse environmental effects. 33 U.S.C. § 1344(e)(1). Nationwide permits—the type of general permit at issue here—are "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). Nationwide permits may authorize some activities without any notification to the Corps, while other activities require pre-construction notice (PCN) to the Corps and in some cases verification from the Corps that activities qualify for a nationwide permit.

In issuing nationwide permits, the Corps must comply with applicable statutes, including the ESA. Section 7(a)(2) of the ESA requires each federal agency, "in consultation with" the Services, to "insure that any action authorized, funded, or carried out" 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 designated critical habitat. 16 U.S.C. § 1536(a)(2). If the so-called "action agency" determines that its action "may affect" endangered or threatened species (listed species), it must pursue either informal or formal consultation with the National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service (collectively, the Services). 50 C.F.R. §§ 402.13, 402.14(b)(1). If the action agency determines that the proposed action is "likely to adversely affect"

listed species or designated critical habitat, the agency must engage in formal consultation. *Id.* §§ 402.13(a), 402.14(a)-(b). But if the action agency determines that its action will have "no effect" on a listed species or designated critical habitat, "the consultation requirements are not triggered." *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 913 (9th Cir. 2018).

II. 2017 version of Nationwide Permit 12

The 2017 version of NWP 12 challenged in this case, which is no longer in effect (the 2017 Permit), applied to "the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States." 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). The 2017 Permit allowed certain activities to go forward without notification to the Corps but also required prospective permittees to submit a PCN under certain circumstances seeking verification that a proposed activity complied with the permit. Among other such circumstances, a PCN was required if the "discharges [would] result in the loss of greater than 1/10-acre of waters of the United States." *Id.* at 1986. The 2017 Permit was also subject to a General Condition (applicable to other permits as well) requiring a PCN "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." *Id.* at 1999. The Corps explained that it settled on this "might affect" standard because it is a

broader standard (encompassing more activities) than the "may affect" threshold triggering Section 7(a)(2) consultation. *Id.* at 1873.

III. Prior Proceedings

This suit challenging the 2017 Permit concerns the Keystone XL pipeline. *See* Opening Brief at 14-15 (discussing history and scope of the project). Plaintiffs filed their operative amended complaint on September 10, 2019. *See* 3-ER-486.[2] That Complaint challenges the Corps' issuance of the 2017 Permit as violating the National Environmental Policy Act (NEPA), the CWA, and the ESA. The Complaint also challenged purported Corps verifications under NWP 12 for crossings in construction of the Keystone XL pipeline. 3-ER-563-66, 570-72. Those latter counts are stayed by court order pending further action by the Corps. As the Corps has explained elsewhere, Plaintiffs' complaint and summary judgment filings consistently sought vacatur and injunctive relief limited to Keystone XL, and did not attempt to establish injury from any other project. *See* Opening Brief at 15-17.

The district court ultimately granted summary judgment to Plaintiffs on their ESA claim, ruling that NWP 12 "may affect" listed species or critical habitat and, therefore, programmatic consultation with the Services was required. 1-ER-47-59 (April 15, 2020 Decision). Rather than merely enjoin and vacate the 2017 Permit as

[2] Citations to the excerpts of record refer to the excerpts filed with Federal Appellants' Opening Brief on August 26, 2020.

applied to Keystone XL (as Plaintiffs requested), the district court instead vacated and enjoined the permit in its entirety. 1-ER-64. In response to Defendants' motions for a stay of the district court's order pending appeal—which, among other things, pointed out that the order was contrary to Plaintiffs' numerous representations and the court's own prior statements—the district court amended its order but only in part (May 11, 2020 Decision), vacating NWP 12 "as it relates to the construction of new oil and gas pipelines" and enjoining its use to authorize "any dredge or fill activities for the construction of new oil and gas pipelines." 1-ER-38.

The Corps, TC Energy, and the other two intervenor-defendants in these appeals (the State of Montana, and the NWP 12 Coalition) appealed and (with the exception of Montana) filed motions for a stay pending appeal. Two Judges in this Court denied a stay in a brief order. 2-ER-79. The Corps then sought a stay from the Supreme Court. In July 2020—without any noted dissent—that Court granted a stay in substantial part, staying the district court's order granting partial vacatur and an injunction of NWP 12 except as it applies to Keystone XL. 2-ER-65. In recognition of the Supreme Court's stay order—as well as the Corps' then-pending decision on whether to replace the 2017 Permit—Plaintiffs' answering brief expressly abandons any defense of the district court's injunction and vacatur extending beyond Keystone XL, and declines to address "the arguments about relief as to" other pipelines as "unnecessary." Answering Brief at 49.

IV. Further developments

On June 1, 2020—shortly after this Court denied Defendants' motion to stay the district court's order—TC Energy submitted an application for an individual permit covering the crossings it had previously sought to be verified under NWP 12. Attachment A. That application acknowledged the Corps' inability in light of the injunction to approve TC Energy's proposed crossings as verifications under NWP 12. *See id.* at 13 (page 15 of PDF). The Corps received a completed application in July 2020. *See* https://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/Oil-and-Gas-Development/KXL/, as visited on May 4, 2021.[3] The Corps held three public hearings on TC Energy's individual permit application in September and October 2020, as well as a public comment period that expired on October 13, 2020. *Id.* The Corps has not yet reached a decision on the application. No PCNs for the Keystone XL project are currently pending before the Corps.[4]

As the Government has previously flagged for the Court, since the filing of the parties' opening briefs the Corps finalized a rule re-issuing twelve existing nationwide permits (including NWP 12) as well as issuing four new ones; that rule was published in the Federal Register on January 13, 2021. *See* 86 Fed. Reg. 2744

[3] TC Energy also submitted PCNs for these crossings in 2017 but it withdrew those PCNs in 2019 and the Corps suspended its verification of them. 3-ER-557-58.

[4] On May 3, 2021, TC Energy asked the Corps to suspend consideration of its application, stated that it would provide an update on its position in early June, and committed not to advance the project during any administrative suspension.

(Jan. 13, 2021); Federal Reply Brief at 1 n.1. Among other steps, the rule replaces the 2017 Permit with a new version of NWP 12 (2021 Permit) that is limited to oil or natural gas pipeline activities; and two new nationwide permits that separately authorize electric utility line and telecommunications activities as well as utility line activities for water and other substances. 86 Fed. Reg. at 2769. The 2021 Permit also adds a new PCN threshold for new oil or natural gas pipelines that are greater than 250 miles in length, to address stakeholder concerns about cumulative adverse environmental effects. *Id.* at 2775-2776. The 2021 Permit continues to require a PCN for, inter alia, discharges that will result in the loss of greater than 1/10-acre of waters of the United States. And similar to the 2017 Permit, the 2021 Permit requires a PCN "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." *Id.* at 2869; *see also* Opening Brief at 10-11 (discussing General Condition 18). The rule has become effective. *See* ECF No. 147 (March 17, 2021 Notice). Accordingly, the agency action at issue here (the 2017 Permit) is no longer operative.

In the meantime, President Biden was sworn into office on January 20, 2021. On his first day in office, President Biden issued Executive Order 13990. *See* 86 Fed. Reg. 7,037 (Jan. 20, 2021). In Section 6 of that Executive Order, President Biden revoked a previous 2019 permit (separate from the CWA authorizations at issue here) issued by President Trump, which had authorized TC Energy to

"construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada." 84 Fed. Reg. 13,101, 13,101 (Mar. 29, 2019). In revoking that permit, President Biden found that the Keystone XL Pipeline "disserves the U.S. national interest" because the "United States and the world face a climate crisis." 86 Fed. Reg. at 7,041 ("The Permit is hereby revoked in accordance with Article 1(1) of the Permit."). TC Energy then announced that "advancement of the project will be suspended." Attachment B at 2.

ARGUMENT

As discussed below, Plaintiffs' challenge is now moot, and this Court should accordingly follow the "established practice" when a case becomes moot on appeal by vacating the district court's April 15, 2020 and May 11, 2020 Decisions and orders, and remanding the matter to the district court with instructions to dismiss the cases. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997).

I. These cases are moot.

A federal court has jurisdiction only to address actual "Cases" or "Controversies." U.S. Const. Art. III, § 2, cl. 1. If a case becomes moot while on appeal, this Court may not render a judgment on the merits. *In re Burell*, 415 F.3d 994, 998 (9th Cir. 2005). Under the combined circumstances presented here, these appeals are now moot.

Initially, Plaintiffs have mooted out much of these appeals and the underlying case and orders below by expressly disclaiming almost all of the relief the district court granted. *See Frank v. Minnesota Newspaper Association*, 490 U.S. 225, 227 (1989) (case moot in light of concession that plaintiff was willing to forego relief sought in complaint). As noted above, the district court's order as modified prohibited use of NWP 12 for new oil and gas pipeline construction. *See supra* p. 6. The Supreme Court stayed the court's vacatur and injunction except with respect to Keystone XL, and Plaintiffs then stated in their answering brief that they "seek to maintain only the Keystone XL-specific portion of the vacatur." Answering Brief at 49. Plaintiffs did not seek anything more than that until the district court expanded the case in its April 15, 2020 Decision. *See supra* p. 5. But in any event, Plaintiffs' express disclaimer in this Court moots any controversy extending beyond Keystone XL. *Shinault v. Hawks*, 782 F.3d 1053, 1060 n.7 (9th Cir. 2015) (dismissing claim because plaintiff "disclaimed an injunctive remedy during oral argument"); *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1097 (9th Cir. 2001) (case moot notwithstanding theoretical possibility of damages claim where, among other things, plaintiff did not assert damages claim in initial appellate briefing).

Moreover, any desire Plaintiffs might assert to maintain the district court's orders with respect to Keystone XL alone would not create a continuing controversy. For one, the agency action Plaintiffs challenged in this case—the 2017 Permit—is

no longer operative. *See supra* p. 7. As a long line of cases from the Supreme Court, this Court, and other courts makes clear, a challenge to a regulation or other agency action at least ordinarily becomes moot when that agency action is repealed or replaced. *See, e.g.*, *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (challenge to a university regulation was moot because, inter alia, the regulation had been substantially amended); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) (issuance of superseding biological opinion mooted challenge to previous biological opinion); *American Rivers v. National Marine Fisheries Service*, 126 F.3d 1118, 1123 (9th Cir. 1997) (same); *Idaho Department of Fish & Game v. National Marine Fisheries Service*, 56 F.3d 1071, 1074 (9th Cir. 1995) (same); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111-12 (10th Cir. 2010) (same); *Akiachak Native Community v. U.S. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (describing as "a perfectly uncontroversial and well-settled principle of law" that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot"); *Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017) (collecting cases for the proposition that "[w]hen a plaintiff's complaint is focused on a particular statute, regulation, or rule and seeks only prospective relief, the case becomes moot when the government repeals, revises, or replaces the challenged law and thereby removes the complained-of defect").

Consistent with these cases, the replacement of the 2017 Permit alone would moot Plaintiffs' challenge under the circumstances here. Even if Plaintiffs' arguments had merit, this Court could not grant effective relief on Plaintiffs' challenge to the 2017 Permit because that Permit has been superseded. *American Rivers*, 126 F.3d at 1123 ("If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed.").

To be sure, Federal Appellants acknowledge that a superseding regulation may not moot out a case if that regulation "differs only in some insignificant respect" from the prior regulation. *Ne. Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993). The 2021 Permit, however, is not a "mirror image" of the 2017 Permit. *Rio Grande Silvery Minnow*, 601 F.3d at 1111; *see also* Answering Brief at 49 (noting "significant modifications" to NWP 12 in then-proposed rule). The 2021 Permit adds new PCN requirements for large-scale pipelines (i.e., new oil or natural gas pipelines that are greater than 250 miles in length). *See supra* p. 8. The prospect of such projects was central to the district court's vacatur analysis. *See* 1-ER-15-16 (contending that impacts "would be particularly severe when constructing large-scale oil and gas pipelines" and discussing "large-scale oil and gas pipelines [that] may extend many hundreds of miles across dozens, or even hundreds, of waterways and require the creation of

permanent rights-of-way"); 2-ER-108 (Plaintiffs' district court remedies briefing similarly expressing concern about such large-scale projects).

More fundamentally, in issuing its decision, the district court purported to find "resounding evidence" in the record of the 2017 Permit's supposed effect on listed species, and Plaintiffs defend that ruling on appeal. Answering Brief at 35-40; *see also id.* at 17, 41 (Plaintiffs' discussion of email from a Corps employee in the record for the 2017 Permit). The government has rebutted Plaintiffs' and the district court's analysis of these issues. *See* Reply Brief at 17-20, 25-26. But however this Court might have analyzed these issues—based on the record accompanying the 2017 Permit—simply does not extend to the 2021 Permit. To the extent some of Plaintiffs' legal arguments might continue to be relevant in any future challenge to application of the 2021 Permit—such as their claims that programmatic consultation is *always* required for the nationwide permit program, or that General Condition 18 impermissibly delegates the Corps' ESA duties to permittees, *see* Reply Brief at 8-15 (responding to these arguments)—Plaintiffs' remedy is not continuing this appeal but filing a new suit challenging an application of the 2021 Permit if and when such an application of the Permit inflicts an actual or certainly impending Article III injury on them—and indeed, Plaintiffs have *attempted to bring* such a lawsuit.[5] *See Akiachak*, 827 F.3d at 113 ("[I]f the agency promulgates a new regulation contrary

[5] *See* No. 4:21-cv-00047-BMM, ECF No. 1 (D. Mont. May 3, 2021).

to one party's legal position, that party may cure its mootness problem by simply starting over again by challenging the regulation currently in force.").

This Court, however, need not determine whether the replacement of the 2017 Permit *by itself* moots this case. That is because, under the circumstances here, there is no basis for concluding that the Corps would approve Keystone XL's proposed crossings under NWP 12 (either the 2017 version of NWP 12 or the current version). As noted above, TC Energy submitted an individual permit request after the district court's order. *See supra* p. 7. Moreover, President Biden has since revoked the cross-border permit for Keystone XL,[6] and TC Energy has announced that the project has been suspended. *See supra* pp. 8-9. TC Energy's completed individual permit application has now been under consideration for approximately ten months. *See supra* p. 7. The Corps is not in a position to know TC Energy's intentions. But even if TC Energy attempted to pursue verifications under the current version of NWP 12 even though its individual permit is at an advanced stage of consideration, the Corps has the discretionary authority to require the applicant to seek authorization under an individual permit. *See* 33 C.F.R. § 330.4(e)(2). Although the Corps will not pre-judge a hypothetical submission, under the circumstances here—where the Corps has already invested substantial resources to process the

[6] The United States has moved to dismiss as moot the appeal and case challenging the cross-border permit. *See* Federal Appellees' Motion to Dismiss Appeal, No. 20-36068, *Indigenous Environmental Network v. Biden* (9th Cir. Feb. 24, 2021).

individual permit application—it is unlikely the Corps would abandon that process at this late stage. And again, even if this constellation of unlikely events were to create a new controversy concerning the 2021 Permit's application to Keystone XL, Plaintiffs' remedy would be to challenge that application in a separate lawsuit.

Finally, at the very least these appeals are *prudentially* moot. *See, e.g.*, 13C Fed. Prac. & Proc. Juris. § 3533.10.1 (3d ed.) ("A court may conclude that an action is not moot, apparently in the sense that there is sufficient remaining life to satisfy Article III, but also rule that there is no remaining remedial justification to decide the dispute. Such remedial mootness may justify vacating the trial-court judgment, just as Article III mootness may."). "The doctrine of prudential mootness permits a court to dismiss an appeal not technically moot if circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief." *Deutsche Bank National Trust Company v. F.D.I.C.*, 744 F.3d 1124, 1135 (9th Cir. 2014) (quotation marks omitted). To be sure, this Court has "not extensively applied the prudential mootness doctrine *per se*." *Id.* But if this Court were to conclude that these appeals (barely) present a continuing case or controversy in the Article III sense pertaining to the Keystone XL pipeline—this suit is indisputably moot as to other pipelines because Plaintiffs have withdrawn their challenge to any such projects—vacatur of the orders below in their entirety on prudential mootness grounds would nonetheless be appropriate. As these appeals are now before the

Court, Plaintiffs' challenges concern application of a superseded permit, limited to a project that has been suspended, and hypothetical PCNs that are exceedingly unlikely to be submitted and which, even if verified, would be verified under a different permit. Even if there were a case or controversy remaining to that limited extent, any such controversy would be "so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." *Chamber of Commerce v. Department of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980).

II. No exception to mootness applies.

Although courts recognize exceptions to mootness, none apply here. It is "well settled," for example, "that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). But this Court "treat[s] the voluntary cessation of challenged conduct by government officials with more solicitude than similar action by private parties." *Board of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc) (cleaned up). This presumption applies equally to the Executive Branch. *See Oregon Natural Resources Council v. Grossarth*, 979 F.2d 1377, 1379-80 (9th Cir. 1992) (no "reasonable expectation" that timber sale would recur once the agency had halted it, and the mere possibility of a future sale was not enough to

avoid mootness); *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1094-96 (9th Cir. 2003) (challenge to a Forest Service policy was moot once the agency had issued an official clarification). "At least in the absence of overwhelming evidence (and perhaps not then), it would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose." *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (en banc).

No evidence rebuts the presumption here. Neither the Corps' issuance of new nationwide permits nor the revocation of Keystone's cross-border permit was driven by any manipulative purpose and, indeed, neither decision was driven by this litigation. The Corps' plan to modify and re-issue the 2017 nationwide permits was announced long before the district court's April 15, 2020 Decision; it was included on the Fall 2019 unified agenda,[7] as well as the Spring and Fall 2018 and Spring 2019 agendas. And the Corps announced that changes to certain 2017 nationwide permits (including NWP 12) were being considered in October 2017.[8] Similarly, President Biden's decision to revoke the cross-border permit has nothing to do with

[7] *See* Reissuance and Modification of Nationwide Permits, RIN: 0710-AA84, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=0710-AA84.

[8] *See* https://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/1353578/us-army-corps-of-engineers-issues-report-on-nationwide-permits/.

this litigation. And of course, Plaintiffs' own decision to abandon most of the relief the district court improvidently awarded them is not attributable to the Corps at all.

This is also not the type of case that is "capable of repetition while evading review." *Public Utilities Commission v. FERC*, 100 F.3d 1451, 1459-60 (9th Cir. 1996). This exception applies in "exceptional circumstances," *id.* at 1459, and only where there is both (1) "a reasonable expectation that the same complaining party will be subject to the same injury again," and (2) an injury that is so "inherently limited in duration" that "it is likely always to become moot before federal court litigation is completed," *Center for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007) (cleaned up). Neither requirement is met here. For reasons previously discussed, there is no "reasonable expectation" that the Corps will approve Keystone XL crossings under the current NWP 12 (let alone under the superseded NWP 12 Plaintiffs challenged). And neither the 2021 Permit (which does not expire until 2026) nor the revocation of the cross-border permit (which has no expiration date at all) is the type of action so "inherently limited in duration" that it would evade review. *See, e.g.*, *Idaho Department of Fish & Game*, 56 F.3d at 1075 (four years is "more than enough time for litigants to obtain judicial review").

III. The Court should vacate the decisions below and remand with instructions to dismiss the case.

When a case becomes moot on appeal, the "established practice" is to reverse or vacate the decision below. *Arizonans for Official English*, 520 U.S. at 71. Vacatur

under these circumstances "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. Vacatur is generally "automatic" when a case becomes moot on appeal for reasons other than voluntary action of the appellant. *Public Utilities Commission*, 100 F.3d at 1461.

Vacatur of the decisions below (the April 15, 2020 Decision and the May 11, 2020 Decision) is warranted under these principles. In the first place, this case was indisputably mooted with respect to all oil and gas pipelines other than Keystone XL by Plaintiffs' express abandonment of any request for relief as to such pipelines. And as for Keystone XL, even assuming that executive action could be exempt from the *Munsingwear* rule under certain circumstances (although *Munsingwear* itself involved Executive action), *see Humane Society of U.S. v. Kempthorne*, 527 F.3d 181, 187 (D.C. Cir. 2008) (declining to decide this question), this Court has treated as "happenstance"—and thus falling within *Munsingwear*—action by the appellant mooting the appeal where that action "was wholly unrelated to th[e] lawsuit and would have occurred in the absence of th[e] litigation." *Dilley v. Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995). The circumstances giving rise to mootness here are either unrelated to this lawsuit or not attributable to the Corps. *See supra* pp. 17-18. And even if the Government's decisions fell into an exception to *Munsingwear* (which they do not), any vacatur request by TC Energy, Montana, or the NWP 12

Coalition should be granted because none of these parties took actions causing these cases to become moot. *See, e.g.*, *Akiachak*, 827 F.3d at 115 (granting vacatur because of Intervenor's request when the Department of Interior rescinded a rule).

CONCLUSION

This Court should vacate the district court's April 15, 2020 and May 11, 2020 decisions and orders, and remand with instructions to dismiss.[9]

Dated: May 4, 2021.

Respectfully submitted,

s/ *Andrew M. Bernie*

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[9] Several counts that remain pending in district court are not technically before this Court. *See* Opening Brief at 16. But those claims—challenging purported Corps verifications of Keystone crossings under NWP 12, and Plaintiffs' challenges to Keystone under NEPA and the CWA—are moot for the same reasons discussed above. This Court thus may order the entire cases dismissed. *See, e.g.*, *Jordahl v. Brnovich*, 789 F. App'x 589, 590 (9th Cir. 2020); *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001). This Court could remand with instructions to dismiss the entire case, or the Court could explain why the case is moot but allow the district court to implement that reasoning with respect to the remaining claims.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the length limitation of Circuit Rule 27-1(1)(d) because it does not exceed 20 pages.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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