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

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

LT. GEN SCOTT A. SPELLMON, et al.,

Federal Defendants,

and

AMERICAN GAS ASSOCIATION, et al.,

Defendant-Intervenors,

and

STATE OF MONTANA,

Defendant-Intervenor.

Case No. 4:21-cv-00047-BMM

Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 44) and in Support of Cross-Motion for Summary Judgment

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INTRODUCTION

This case involves the 2021 Nationwide Permit 12, a U.S. Army Corps of Engineers general permit under Clean Water Act Section 404(e). The Permit authorizes—without the need for a separate individual permit—certain activities in waters of the United States associated with the construction, maintenance, repair, and removal of oil and gas pipelines. Plaintiffs claim the Corps, in issuing the permit, violated Section 404(e), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).

Summary judgment should be granted in favor of Federal Defendants. First, the Corps' long-established implementation and interpretation of Section 404(e) are entitled to deference. Second, the Corps reasonably scoped its review of potential effects under NEPA and properly considered those effects. Third, Plaintiffs do not have standing to pursue their ESA claim. And, even if they did, the Permit does not, standing alone, authorize any activity that might affect a listed species or critical habitat.

BACKGROUND

I. Clean Water Act Section 404(e) General Permits

The Clean Water Act (CWA) is designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C.

§ 1251(a). To that end, CWA Section 404 prohibits the discharge of dredged or fill material into "waters of the United States" without a Corps permit. *See* § 1344(a).

Section 404 originally authorized the Corps to issue only individual permits. Individual permits require a resource-intensive, case-by-case review, including extensive site- and permit-specific documentation and public comment. *See* § 1344(e)(1); 33 C.F.R. pts. 323 and 325. Accordingly, in 1977, Congress added CWA Section 404(e), creating a general permit program for minor, routine activities to avoid imposing unnecessary delay and administrative burdens on the public and the Corps. *See* 33 U.S.C. § 1344(e); *see also* H.R. Rep. No. 95-830, at 38, 98, 100 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424.

Section 404(e) authorizes the Corps to issue general permits "for any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, 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 are valid for no more than five years. § 1344(e)(2). They also must comply with the CWA Section 404(b)(1) Guidelines promulgated by the U.S. Environmental Protection Agency (EPA). § 1344(b)(1).

II. Nationwide Permits

Nationwide permits are general permits that authorize activities on a nationwide basis. 33 C.F.R. § 330.2(b). They advance Congress's goal "to regulate with little, if any, delay or paperwork certain activities having minimal impacts." § 330.1(b).

Nationwide permits are subject to numerous terms, conditions, and limits to ensure that they have minimal adverse environmental effects. 33 C.F.R. pts. 325 and 330; § 330.2(c). In addition, as explained below, Corps divisions and districts have discretionary authority to (among other things) further condition or restrict a nationwide permit based on concerns for the aquatic environment or public interest factors. *See* § 330.1(d).

Nationwide permit activities are reviewed at three levels: (1) nationally, (2) within each Corps geographically-based division, and (3) at the districts within each division. *See* § 330.5; *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 19–22 (D.D.C. 2013). Only the first level (promulgation of the rule at the national level) is directly at issue in this case. Before issuing nationwide permits, the Corps' Chief of Engineers conducts an analysis at the national level to predict whether the individual and cumulative adverse environmental impacts of the category of activities authorized by each proposed permit are no more than "minimal." *See* 33 U.S.C. § 1344(e)(1). At this level, analysis of potential adverse

effects necessarily consists of "reasoned predictions." *Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 501 (4th Cir. 2005). The Corps ensures minimal impact, in part, through "General Conditions," with which authorized activities must comply. *See* 33 C.F.R. § 330.1(c). Some conditions limit the types of activities authorized. *See id.* The Corps seeks public comment, prepares appropriate NEPA documentation, and analyzes a number of factors relevant under the Section 404(b)(1) Guidelines. § 330.5(b)(2), (3); 40 C.F.R. § 230.7(b). The Corps ultimately memorializes its Section 404(b)(1), NEPA, and other national-level environmental analyses in a decision document for each nationwide permit. 33 C.F.R. § 330.5(b)(3).

In addition to the nationwide permit terms and conditions established at the national level, at the second level, each Corps division engineer retains discretionary authority to further modify, suspend, or revoke a nationwide permit for a given geographic area or class of activities or waters. 33 C.F.R. § 330.5(c)(1); *see also* §§ 330.4(e)(1), 330.1(d). Any such action is first subject to public notice and comment, which is conducted concurrently with the national-level notice and comment process for the proposed nationwide permits. *See* § 330.5(b)(2)(ii), (c)(1).

The third level of review occurs in those circumstances in which the nationwide permit or a general or regional condition requires a prospective

permittee to submit to the Corps a pre-construction notice (PCN) seeking verification that the activity complies with the applicable terms and conditions. *Id.* §§ 330.1(e)(1), 330.6(a). In those situations, the district engineer evaluates the proposed activities on a case-by-case basis. 86 Fed. Reg. 2744, 2751 (Jan. 13, 2021). The district engineer "may add activity-specific conditions," such as compensatory mitigation requirements. 33 C.F.R. § 330.1(e)(2), (3); § 330.6(a)(3)(i). If the district engineer determines that "the adverse effects are more than minimal," she "will notify the prospective permittee that an individual permit is required . . . ." § 330.1(e)(3). No additional public comment or NEPA analysis is required for nationwide permit verifications. § 330.6(a); *Sierra Club v. Bostick*, 787 F.3d 1043, 1053 (10th Cir. 2015).

III. Nationwide Permit 12

The Corps issued a set of nationwide permits—including a new NWP 12—in January 2021. 86 Fed. Reg. 2744. As with all the nationwide permits, NWP 12 was subject to public notice and comment, and the Corps' review included an Environmental Assessment (to consider the permit's potential environmental effects), a public interest review, and an analysis under the Section 404(b)(1) Guidelines. *See* NWP000945–1078.[1]

[1] The citations to NWPxxxxxx are to the administrative record. *See* ECF No. 35.

NWP 12 authorizes limited discharges in connection with "activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines associated facilities in waters of the United States." 86 Fed. Reg. 2860. An "oil or natural gas pipeline" is defined as "any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt." *Id.*

By it terms, NWP 12 only applies if "the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project." *Id.* There also "must be no change in pre-construction contours of waters of the United States." *Id.* For pipelines that cross a single or multiple waterbodies[2] several times at "separate and distant locations, each crossing is considered a single and complete project for purposes of [nationwide permit] authorization." 86 Fed. Reg. 2861 (using definition at 33 C.F.R. § 330.2(i)). NWP 12 requires the submission of a PCN "prior to commencing the activity" if, among other reasons, the "discharges [will] result in the loss of greater than 1/10-acre of [CWA] waters of the United States," or a permit is required for crossing a navigable water under

[2] "For purposes of the [nationwide permits], a waterbody is a water of the United States." 86 Fed. Reg. 2877. That is, one that is subject to regulation under CWA Section 404 or Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403.

Section 10 of the Rivers and Harbors Act. 86 Fed. Reg. 2860. Unlike the prior 2017 NWP 12, the 2021 NWP 12 also requires a PCN if the Permit is sought to be used for construction of new pipeline greater than 250 miles in length. *Compare id. with* 82 Fed. Reg. 1860, 1986 (Jan. 6, 2017).

NWP 12 is also subject to thirty-two General Conditions, including General Conditions 15 and 18. *See* 86 Fed. Reg. 2873–75. General Condition 15 prohibits the use of the same NWP "more than once for the same single and complete project" (i.e., for linear projects like pipelines, at each individual waterbody crossing). 86 Fed. Reg. 2868. General Condition 18 prohibits the use of any NWP for activities that is likely to directly or indirectly jeopardize ESA-listed species or adversely modify designated critical habitat for such species. 86 Fed. Reg. 2868–69; *see* 33 C.F.R. § 330.4(f). Nor is any activity authorized under NWP 12 which "may affect" a listed species or critical habitat, unless an ESA section 7 consultation on the proposed activity has been completed. *Id*. If any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, General Condition 18 requires pre-construction notification. 86 Fed. Reg. 2869. If a PCN is required under General Condition 18, prospective permittees may not begin work under authority of the nationwide permit. The district engineer must first notify them that the ESA's requirements have been satisfied and that the activity is authorized. *Id.*; *see* 33 C.F.R. § 330.4(f)(2).

Thus, NWP 12 only authorizes minimal activities in waters of the United States associated with oil and natural gas pipelines without pre-construction notification to the Corps if: the loss at each waterbody crossing is no more than 1/10 of an acre; the waterbody is not a navigable water under Section 10 of the Rivers and Harbors Act; the activity is associated with installation of a pipeline less than 250 miles in length; and the activity is not one that "might affect" a listed species or critical habitat. 86 Fed. Reg. 2860.[3]

STANDARD OF REVIEW

The Administrative Procedure Act authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A court's review is limited to the agency's administrative record. 5 U.S.C. § 706. Further, "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The reviewing

[3] The Army also has announced that, pursuant to Corps regulations, it intends to undertake a formal review of NWP 12 to inform future potential decision-making related to the Permit, including any potential Permit modifications in advance of the Permit's current expiration in March 2026. A notice calling for public comments and announcing several public meetings is expected to appear in the Federal Register on March 28, 2022.

court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. at 416. The same standard applies to claims against federal agencies brought under the ESA's citizen suit provision. *See All. for the Wild Rockies v. Krueger*, 664 F. App'x 674, 675 (9th Cir. 2016).

Review of the Corps' interpretation of its statutory and regulatory authority is governed by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984) (statutory interpretation), and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019) (agency's interpretation of its own regulations).

ARGUMENT

Plaintiffs argue that the Corps' 2021 issuance of NWP 12 violated the CWA, NEPA, and the ESA. Summary judgment should be granted in favor of Federal Defendants on each of those claims.

As an initial matter, and contrary to Plaintiffs' repeated assertions, neither the Corps nor NWP 12 "authorizes" or "approves" oil and gas pipelines. With respect to Section 404(e), the Corps' authority "is limited to regulating discharges of dredged or fill material into waters of the United States" that may be associated with construction, repair, or removal of oil or natural gas pipelines. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 7 (D.D.C.

2016). The Corps was within its discretion to issue NWP 12 as a means for exercising this authority.

I. The Corps' "Minimal Effects" Determination Complies with CWA Section 404(e)

The Corps has concluded that NWP 12's environmental impacts would be minimal within the meaning of CWA Section 404(e). 86 Fed. Reg. 2744. Because this determination required the agency's technical, scientific expertise, the reviewing court must "be at its most deferential." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, *Inc.*, 462 U.S. 87, 103 (1983). Accordingly, to succeed on their CWA claim, Plaintiffs must show that this determination lacks a "substantial basis in fact"—a heavy burden they fail to meet. *Bostick*, 787 F.3d at 1055 (internal quotes and citation omitted).

A. The Corps Did Not Improperly Defer Analysis of Impacts

Plaintiffs argue that the Corps' use of activity-specific review by district engineers fails to ensure that NWP 12 will only have minimal effects under Section 404(e). Pls.' Mem. 60–61. However, this attack strikes at Section 404(e)'s plain language and structure. In effect, Plaintiffs invert the process, requiring the Corps to make a *final* Section 404(e) minimal effects determination for *all* activities that might potentially proceed under the Permit. Such an approach is contrary to Section 404(e) and would be impractical, if not impossible.

Under Section 404(e), the Corps can issue general permits "for any *category of activities* involving discharges of dredged or fill material." 33 U.S.C. § 1344(e)(1) (emphasis added). The statute properly focuses on categories of activities that are reasonably known—not on specific projects which are unknown—at the time that a permit is issued. "[G]iven the inevitable *ex ante* uncertainty the Corps confronts when issuing a nationwide permit, its reliance on post-issuance procedures is a reasonable, if not the only possible, way for it to cement its determination that the projects it has authorized will have only minimal environmental impacts." *Bulen*, 429 F.3d at 501.

The specific projects, and activities associated with those projects, are unknown when a nationwide permit is issued. So, the Corps need only make "reasoned predictions" regarding potential future minimal adverse environmental and cumulative effects. *Id.* at 500–01; *see Bostick*, 787 F.3d at 1058–59. Once those categories of discharges are established, specific activities and specific projects are then subject to additional safeguards at the division and district levels. These account for the details of individual activities and their potential site-specific impacts.

Provided there is at least some analysis of minimal-impact determinations at the issuance of the category-wide permit, the subsequent timing of the activity-specific analysis under the CWA has been repeatedly upheld. *Bostick*, 787 F.3d at

1056; *Bulen*, 429 F.3d at 502; *Sierra Club v. U.S. Army Corps of Eng'rs*, 508 F.3d 1332, 1335–37 (11th Cir. 2007); *Alaska Ctr. for the Env't v. West*, 157 F.3d 680, 683 (9th Cir. 1998); *Black Warrior Riverkeeper, Inc. v U.S. Army Corps of Eng'rs,* 833 F.3d 1274, 1285–89 (11th Cir. 2016).

Plaintiffs cite *Coalition to Protect Puget Sound Habitat v. Army Corps*, arguing that the case found that reliance "on post-issuance procedures to make [a] pre-issuance minimal impact determination[s]" violates the CWA. Pls.' Mem. 61. However, *Puget Sound* instead recognized that "[t]iering the review and decision-making tasks is permissible" provided that there is some pre-issuance analysis of environmental impacts. 417 F. Supp. 3d 1354, 1366 (W.D. Wash. 2019). Here, as in *Bulen*, the Corps undertook a "good-faith, comprehensive, pre-issuance review of the anticipated environmental effects" of the activities authorized by NWP 12. NWP001051–65. The Corps thus acted properly because the promulgated rule includes post-issuance procedures to verify that any impacts are indeed minimal. *Bulen*, 429 F.3d at 502. Even if "inherently speculative," this forecast of potential environmental effects is plainly permissible under Section 404(e). *Bostick*, 787 F.3d at 1059.

Plaintiffs complain that the project-level review is inadequate because, "[i]n many instances, applicants do not submit PCNs and so that review never occurs." Pls.' Mem. 52. Plaintiffs ignore the fact that NWPs require the submission of a

PCN if, among other things, a discharge would result in a loss greater than 1/10 of an acre of waters of the United States, or if any listed species or designated critical habitat might be affected. 86 Fed. Reg. 2860. While a small number of activities covered by NWP 12 do not require a PCN, the Corps estimates that these non-PCN activities would only impact—either permanently or temporarily—17 acres of wetlands (0.02 square miles) throughout the entire country each year.[4] NWP001052.

The Permit was modified to require a PCN if the proposed activity is associated with the installation of a new pipeline longer than 250 miles. 86 Fed. Reg. 2860. If a PCN is required for any reason, a permittee must submit to the district engineer a list of *all* crossings associated with the same proposed project (regardless of whether a given crossing would, on its own, require a PCN). 86 Fed. Reg. 2873 (Condition 32(b)(4)(ii)). The district engineer's ability to review the totality of that information further ensures that all the activities authorized under the Permit for that project will not result in more than minimal individual and cumulative impacts for purposes of Section 404(e). The initial detailed impacts

[4] The permanent impact is significantly lower than 17 acres. Many of the activities that do not require a PCN, such as routine maintenance, result in only temporary impacts. 86 Fed. Reg. 2773. NWP 12 requires any temporary fills to be removed and the affected areas returned to pre-construction elevations. *Id.* at 2860.

review at permit issuance, together with the opportunity for district engineer review of potential project-specific impacts, is entirely consistent with the language and structure of Congressional scheme for general permits and the assessment of cumulative impacts.

B. The Corps' Long-Standing Construction of Section 404(e) to Allow Separate Evaluation of "Separate and Distinct Crossings" Is Permissible Under *Chevron*

Section 404(e) allows the Corps to authorize a "category of activities" if the impact is minimal. But Congress did not define "minimal." 33 U.S.C. § 1344(e)(1). Nor did it specifically address or place any restrictions on the number of times a particular NWP could be used. Because Congress did not address the issue, the proper question for the Court is whether the Corps' interpretation of Section 404(e) is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842–43. It is.

For linear projects that cross a single water body more than one time (or cross multiple waterbodies) the Corps treats each crossing as a "single and complete project" provided that the crossings are at "separate and distant locations . . . ." 86 Fed. Reg. 2861 (Note 2). Plaintiffs suggest that because the Corps does not "impose any spacing requirements," or explicitly require district engineers to make "separate and distant" findings, the Corps' interpretation is arbitrary and capricious. Pls.' Mem. 62.

The Corps did not establish national thresholds for what constitutes a "separate and distant" crossing. This is because "what constitutes separate and distant crossings can vary across the country because of differences in the distribution of waters and wetlands in the landscape, local hydrologic conditions, local geologic conditions, and other factors." 86 Fed. Reg. 2778. Accordingly, Corps districts establish local guidelines to identify "separate and distant" crossings. *Id.*

While Congress could have limited the number of times a particular NWP could be used, or could have defined "minimal" in Section 404(e), Congress instead granted the Corps authority to make those determinations. The Corps did so in 1988, defining "single and complete" in a regulatory guidance, then codifying the definition in 1991 in the Part 330 regulations. *See* Regulatory Guidance Letter 88-06 at 2, 3 (June 27, 1988); 56 Fed. Reg. 59110, 59113 (Nov. 22, 1991). The Corps has not deviated from this approach in the past 34 years.

In *Kisor*, the Supreme Court held that in such instances—when a regulation is "genuinely ambiguous"—an agency has "significant leeway" to "fill out the regulatory scheme Congress has placed under its supervision." 139 S. Ct. at 2417–18. Numerous federal courts have granted deference to the Corps' longstanding interpretation of these regulations defining "single and complete project"—this Court should do the same. *See Optimus Steel, LLC v. U. S. Army Corps of Eng'rs*,

492 F. Supp. 3d 701, 722 (E.D. Tex. 2020); *Sisseton-Wahpeton Oyate of Lake Traverse Res. v. Corps of Eng'rs*, 888 F.3d 906, 920 (8th Cir. 2018).

Plaintiffs' insistence that there is no "mechanism to ensure that crossings are truly 'separate and distant'" (Pls.' Mem. 55) ignores NWP 12's limitations and requirements. First, NWP 12 applies solely to activities that result in less than ½ an acre of loss. For those activities, other permit requirements (including PCNs) ensure any impacts are minimal. Further, Plaintiffs ignore that a PCN must contain information on non-PCN activities. This includes the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters. The district engineer can then evaluate the specific activities for the larger project to ensure that they will have no more than minimal effects under Section 404(e). 86 Fed. Reg. 2873.

The Corps reasonably interprets Section 404(e)'s minimal effects requirement as met without incorporating into NWP 12 an arbitrary limit on the number of "single and complete projects" that may exist within an overall linear project. *Bostick*, 787 F.3d at 1056 (citing *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269–73 (10th Cir. 2004)). The Corps is entitled to "significant leeway to say what its own rules mean" and its reasonable interpretation should be upheld here. *Kisor*, 139 S. Ct. at 2418.

II. The Corps Complied with NEPA

Summary judgment should also be granted in favor of Federal Defendants on the NEPA claim. NEPA focuses governmental and public attention on potential environmental effects from any proposed "major Federal action." *See* 42 U.S.C. § 4332(2)(C); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). But NEPA is "essentially procedural." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). It does not mandate particular results; rather, it prescribes a process to ensure that federal decision-makers consider, and that the public is informed about, potential environmental consequences from federal action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

A major Federal action is "an activity or decision subject to Federal control and responsibility[.]" 40 C.F.R. § 1508.1(q).[5] "Major Federal action does not include . . . (vi) Non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control or responsibility over the outcome of the project." *Id.* § 1508.1(q)(1)(vi).

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[5] Council on Environmental Quality (CEQ) NEPA regulations apply to all federal agencies. *See* 40 C.F.R. pts. 1500–1508. CEQ amended the regulations in July 2020. *See* 85 Fed. Reg. 43304 (July 16, 2020). All citations are to the 2020 regulations.

"[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," the agency may reasonably exclude that effect from its NEPA analysis. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004); 40 C.F.R. § 1508.1(g) (defining "effects").[6]

Here, the major federal action is NWP 12. NWP000945. The Corps therefore undertook an Environmental Assessment (EA) to evaluate the potential impacts from that federal action.[7] The EA detailed (at a national level) the affected environment, summarizing national databases. NWP000987–1016. The EA disclosed the relevant environment's current state, with particular emphasis on water quality impairment and causes. NWP000988–95, NWP001004–16. The EA then evaluated the proposed action's potential impacts. NWP001016–44, NWP001049–65. This included impacts to water quality (NWP001040–41) and

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[6] In October 2021, CEQ noticed a proposed rulemaking to modify its NEPA regulations, including to restore the prior definition of "effects." *See* 86 Fed. Reg. 55757 (Oct. 7, 2021). CEQ's proposal post-dates NWP 12.

[7] An EA is a concise public document that briefly describes the proposal, examines alternatives, and considers environmental effects. 40 C.F.R. § 1508.1(h); *see id.* § 1501.5(c). A more detailed Environmental Impact Statement is not required where an EA leads, as it did here, to a Finding of No Significant Impact. *Id.* §§ 1501.6(a), 1508.1(*l*); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998); NWP001066.

fish and wildlife, including endangered species (NWP001037–38, NWP001044–48).

Plaintiffs argue that the EA failed to adequately assess impacts from pipeline spills; fossil fuel contribution to climate change; so-called "frac outs"; clearing forested wetlands; and cumulative impacts. Pls.' Mem. 27–49. Plaintiffs have failed to demonstrate that the Corps acted arbitrarily or contrary to NEPA.

A. The Corps Reasonably Scoped its Review of Potential Effects

Plaintiffs' argument that the Corps was required to consider pipeline spills and climate impacts from fossil fuels is based on an incorrect assumption about the Corps' authority. *See* Pls.' Mem. 28–34, 46–49. Spill and climate impacts result from pipeline operations and downstream use of the substances that the pipelines transport. NWP 12, however, does not authorize, approve, or regulate oil and gas pipelines, let alone the extraction or combustion of the substances they transport. *See* NWP000945. Indeed, absent a requirement for dredge or fill authority under the CWA or a necessary navigation-based authorization under the Rivers and Harbors Act, "[t]he Corps does not have the authority to regulate operations and maintenance activities." NWP001035. For NEPA purposes, this means that the Corps could reasonably decide not to undertake Plaintiffs' desired analyses. *See Pub. Citizen*, 541 U.S. at 767–70.

The Corps' authority at issue here—and the "major federal action" being analyzed—is not for approval or direct regulation of oil and gas pipelines. It is for a "category of activities involving discharge of dredged or fill material." 33 U.S.C. § 1344(e)(1). As the EA explained: "The Corps does not have the authority to regulate the operation of any oil or natural gas pipeline, or the emissions that result from combustion of oil or natural gas, or from the industrial processes that derive other products from oil or natural gas." NWP000953. Under these circumstances, and in light of the scope of its regulatory authority, the Corps did not act arbitrarily or contrary to law in scoping its NEPA analysis, and in particular in determining what effects had a sufficiently close causal connection to its decision for purposes of its NEPA analysis. *See Selkirk Conservation All. v. Fosgren*, 336 F.3d 944, 962 (9th Cir. 2003) (NEPA scope "is a delicate choice and one that should be entrusted to the expertise of the deciding agency").[8]

Plaintiffs' attempted analogy to *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), only illustrates the Corps' point. *See* Pls.' Mem. 46, 48–49. That case

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[8] Plaintiffs are incorrect in attributing the scope of the NEPA analysis here to the Corps' conclusion that it does not regulate discharges of oil and gas. *See, e.g.,* Pls.' Mem. 30, 32–33, 47–48. It is certainly true that CWA Section 404 does not grant the Corps regulatory authority over those discharges. But the Corps based its scoping decision on its assessment of the attenuated relationship between the minimal wetlands fill authorized under Section 404(e) and pipeline operations. *See* NWP000952; NWP000953; NWP001035.

challenged a Federal Energy Regulatory Commission decision "to approve the construction and operation of three interstate natural-gas pipelines." 867 F.3d at 1363. FERC—unlike the Corps—"has jurisdiction to approve or deny the construction of" such pipelines. *Id.* at 1364 (citing 15 U.S.C. § 717f). FERC approval is necessary "[b]efore any such pipeline can be built." *Id.* (citing 15 U.S.C. § 717f(c)(1)(A)). And FERC can condition its approval on the pipeline operator's compliance with certain terms and conditions necessary to protect public health. *Id.* (citing 15 U.S.C. § 717f(e)). Based upon those authorities, the D.C. Circuit determined that FERC was the "legally relevant cause of the direct and indirect environmental effects of pipelines it approves." *Id.* at 1372–74. The Corps' authority under Section 404(e) is not comparable. *Accord Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 46–48 (D.C. Cir. 2015) (implementation of ESA-related conditions as part of NWP 12 verifications did not expand scope of required NEPA analyses beyond jurisdictional waters).

A better analogy to the Corps' authority rests in the three cases the court distinguished in *Sierra Club v. FERC*. *See* 867 F.3d at 1372–73. In those cases, FERC was not the legally relevant cause of effects from anticipated liquefied natural gas exports because the FERC authority at issue was for licensing terminal upgrades, not approving or regulating exports. *See EarthReports, Inc. v. FERC*,

828 F.3d 949, 956 (D.C. Cir. 2017); *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 59, 68–69 (D.C. Cir. 2016).

Plaintiffs contend that "the Corps can—in fact, it must—decline to reissue NWP 12 if it determines that oil and gas pipelines would have more than minimal environmental effects." Pls.' Mem. 48 (citing 33 U.S.C. § 1344(e)(1)); *see also* Pls.' Mem. 49 (quoting 33 C.F.R. § 320.4(a)(1) reference to "reasonably foreseeable detriments"). The statement presupposes that, under the present circumstances, operational effects fall within the scope of effects the Corps is required to analyze under Section 404(e). What Plaintiffs misunderstand is that the Corps may reasonably exclude effects from its analysis if they are too attenuated to its authority under Section 404(e), which only authorizes the discharge of dredged or fill material. 33 U.S.C. § 1344(e).

Plaintiffs' citations (Mem. 46–47) to cases concluding that NEPA required an agency to consider greenhouse gas emissions are also distinguishable. Each involved an agency action approving or more directly regulating fossil fuel extraction or use. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 731 (9th Cir. 2020) (approval of offshore drilling and production facility); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1180–81 (9th Cir. 2008) (issuance of national fuel economy regulations); *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 3:20-cv-00290, 2021 WL

3667986, at *1–3 (D. Alaska Aug. 18, 2021) (approvals associated with master development plan for oil and gas extraction); *Friends of the Earth v. Haaland*, No. 21-cv-2317 (RC), 2022 WL 254526, at *27–34 (D.D.C. Jan. 27, 2022) (lease sale for offshore oil and gas production).

Plaintiffs' cited cases involving the Corps are similarly off point. Pls.' Mem. 29–30. Each involved Corps individual permits under Section 404(a) or some entirely different authority, rather than general permits under Section 404(e). With an individual permit, the Corps' role may be larger. Thus, it is more likely there would be a "reasonably close causal relationship" between the permit and the operational or other activity leading to the impact in question. *See Ocean Advocates v. U.S. Army Corps Eng'rs*, 402 F.3d 846, 855, 867–68 (9th Cir. 2005) (permit to construct a dock at oil tanker facility); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1039 (D.C. Cir. 2021) (easement for pipeline to cross Corps-managed lands); *Sierra Club v. Sigler*, 695 F.2d 957, 961, 967, 974–75 (5th Cir. 1983) (permit to extend and deepen shipping channel); *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 963 (S.D. Ohio 2002) (proposed impacts exceeding the NWP's criteria, therefore requiring an individual permit); *Columbia Riverkeeper v. U.S. Army Corp of Eng'rs*, __ F. Supp. 3d __, No. 19-cv-6071 RJB, 2020 WL 6874871, at *1 (W.D. Wash. Nov. 23, 2020) (permit for construction of gas export terminal). In any event, even in the context of an

individual permit, NEPA does not require the Corps to consider "tenuously caused" effects. *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1294–98 (11th Cir. 2019); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 115–18 (9th Cir. 2000) *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 603 F.3d 1173 (9th Cir. 2011).

None of the individual permit cases implies that analysis of possible impacts from pipeline spills or downstream fossil fuel consumption is *always* required for a general permit. Plaintiffs proffer that "[s]pills are a direct result of the Corps' issuance of NWP 12 permits for oil and gas pipelines to be built and operated in U.S. waters." Pls.' Mem. 31; *see also id.* at 32 (arguing the Corps must analyze spills solely because pipelines cross waterways); *id.* at 47 (arguing the Corps must analyze climate change because pipelines carry fossil fuels that produce carbon dioxide). The argument, however, overlooks the fact that some effects are too attenuated from the Corps' authority or decision to require analysis, as the Supreme Court held in *Public Citizen*—presently binding case law that Plaintiffs ignore.[9]

[9] Plaintiffs also fail to reconcile their contention that NWP 12 authorizes "pipelines to be built and operated *in* U.S. waters" with the Permit's limiting conditions. *See* Pls.' Mem. 32 (emphasis added).

Plaintiffs argue that the Corps "acknowledges" it "must also consider 'how the authorized activity will be used after the project proponent has completed the construction activities . . . .'" Pls.' Mem. 31 n.14 (quoting NWP000977). But the cited portion of the record says nothing about the Corps' environmental analyses and instead refers to the Corps' ability to structure the categories of nationwide permits "based on how the authorized activity will be used . . . ." NWP000977.

Plaintiffs also cite the concurring opinion in the Tenth Circuit's *Bostick* decision. Pls.' Mem. 49 (quoting 787 F.3d at 1064). But the concurring opinion never addresses the relevant portion of *Public Citizen*, which recognized that agencies can appropriately exclude attenuated effects from their analysis. *See* 787 F.3d at 1063–68. And, even in the context of individual permits, the Ninth Circuit has rejected the premise that the Corps always needs to consider effects from the entirety of a private project where the Corps' authority extends over only one aspect of the project. *See White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1041 (9th Cir. 2009).

Perhaps recognizing the causation flaw in their theory, Plaintiffs retreat into an argument that the Corps must analyze pipeline spills because the EA for NWP 12 is "the *only* NEPA document for many of these projects." Pls.' Mem. 29; *see id.* at 43. The point is irrelevant. The Corps' NEPA responsibility depends on the nature of the Corps' action and the extent of the Corps' authority. *See Pub.*

Citizen, 541 U.S. at 770. The Corps' NEPA obligations do not expand or contract based on the extent to which other federal agencies have concurrent authority over a project. With respect to natural gas pipelines, Plaintiffs' point is also incorrect. FERC holds authority to approve interstate natural gas pipelines and must comply with NEPA in exercising that authority. Congress has not created similar federal authority over interstate oil pipelines.

B. The Corps Properly Considered Effects from HDD and to Forested Wetlands.

Plaintiffs are incorrect that the Corps failed to appropriately assess construction-related effects from the inadvertent return of drilling fluid, which Plaintiffs call "frac-outs." *See* Pls.' Mem. 34–37. At issue is hydraulic direction drilling, or HDD. HDD is a technique used to lay pipe below a given surface object without having to disturb the object or the surface around it. *See* ECF No. 38-6 at 4; 85 Fed. Reg. 57298, 57325 (Sept. 20, 2020) ("[T]here is no ground disturbance except at the entry and exit points or the drilling equipment."). "Frac-Out simply means drilling fluid is released (or there is mud loss) to the ground surface during HDD installation." ECF No. 38-6, at 8. HDD "is an important technique for avoiding and minimizing adverse effects to jurisdictional waters during the construction of utility lines." NWP034732.

Plaintiffs are incorrect in arguing that NWP 12 authorizes Section 404 fill activities that "direct[ly] result" in the potential for inadvertent returns during

HDD. Pls.' Mem. 35. Plaintiffs premise their argument on the idea that inadvertent returns "occur in [the] waterways during pipeline construction." Pls.' Mem. 34 (citing NWP001033). But Plaintiffs again misconstrue what NWP 12 is authorizing. The point of direction drilling would be to lay the pipeline *under*, not in, waters of the United States. Absent the discharge of fill material into waters of the United States at the drill site, CWA Section 404 is not implicated at all. NWP 12 only mentions inadvertent returns because the Permit is intended to provide Section 404 authorization for work that may be necessary to remediate an inadvertent return, should that work require fill to achieve the repair or remediation. NWP000946; NWP000956; NWP001035.[10]

Plaintiffs' citation to the EA's discussion of general environmental concerns associated with oil and gas pipeline construction does not create a causal relationship with NWP 12. *See* Pls.' Mem. 28, 35 (citing NWP001034–35). Despite Plaintiffs' use of the phrase, nowhere does the EA state that inadvertent returns are a reasonably foreseeable effect of NWP 12. *Compare* Pls.' Mem. 35 *with* NWP001035.

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[10] The drilling fluid itself is not considered a discharge of fill material that would require Section 404 authorization. NWP001033; NWP001035. The discharge may be separately actionable under other parts of the Clean Water Act.

Plaintiffs are also incorrect that the EA's assessment of potential impacts on forested wetlands violated NEPA. Pls.' Mem. 37–39. Plaintiffs' concern is those situations in which NWP 12 may authorize work in wetlands that, though not permanently filling the wetlands, removes trees (thus leaving a wetland that is no longer "forested"). Pls.' Mem. 37–38.

As an initial matter, Plaintiffs' argument incorrectly assumes that the removal of trees from a wetland requires a Section 404 authorization. Section 404 would only be implicated if one were to temporarily or permanently place dredged or fill material into the wetland. And, even then, NWP 12 is not available if the fill activity results in changes to the wetland's contours. NWP000945.

Further, the EA addressed the issue. The Corps recognized that, as part of maintaining a pipeline right-of-way, there may be scenarios in which trees are not allowed to regenerate in what had been a forested wetland. NWP001035–36. That scenario "may result in the conversion of forested wetlands to scrub-shrub or emergent wetlands," which could "result in the loss of certain wetlands functions" (the plant community in the wetland would be different). NWP001036.

The Corps disclosed that changes in wetland functions could impact habitat, drainage patterns, and water quality. NWP001036. But the Corps also noted that "[e]mergent and scrub-shrub wetlands perform valued wetland functions, even though those functions differ to some degree from the functions performed by

forested wetlands." NWP000962. The Corps discussed the issue at length in explaining why it had decided to remove a PCN requirement for mechanized land clearing in forested wetlands. NWP000961–64; *see also Sierra Club v. Bostick*, No. 12-cv-742-R, 2013 WL 6858685, *12 (W.D. Okla. Dec. 30, 2013) ("[Defendants'] interpretation of the conversion from forested wetland to another type of wetland, which does not alter the usage of a body of water, is not arbitrary and capricious.") *aff'd*, 787 F.3d 1043 (10th Cir. 2015).

Plaintiffs' argument is effectively that the Corps should have discussed the issue in greater detail. *See* Pls.' Mem. 38. But Plaintiffs ignore that EAs are to "briefly" analyze potential impacts. 40 C.F.R. § 1501.5(c); *see id.* § 1501.5(f) (limiting EAs to seventy-five pages). Plaintiffs also argue that the EA concluded there could be "permanent adverse effect" and "the loss of wetlands functions." Pls.' Mem. 38 (citing NWP000964, NWP001036). As described above, this cherry-picking misconstrues the record. But, even if true, the statements would *comply* with NEPA's public disclosure requirement, not be contrary to it. And Plaintiffs do not challenge the Corps' Finding of No Significant Impact.

Plaintiffs also posit that the EA's assessment was too general and should have focused on specific regions or ecosystems. Pls.' Mem. 38, 39–41. But the Corps' effects analysis is necessarily (and appropriately) general given the nature of the NWP program. *Bulen*, 429 F.3d at 501. Specifics on where, when, and in

what waters authorized activities could occur is unknown at the time of authorization. NWP000988. As NEPA required—and consistent with the rule of reason that governs NEPA analyses—the EA conveyed those circumstances and undertook a national analysis relying on available information. *See* 40 C.F.R. § 1502.21; *League of Wilderness Defs.*, 689 F.3d at 1075.[11]

C. The Corps Properly Assessed Cumulative Impacts.

Plaintiffs also fail in their arguments regarding cumulative impacts. Pls.' Mem. 39–46. The Corps did conduct a cumulative impacts analysis. The EA focuses primarily on potential effects that could occur from fill associated with NWP 12 (including the predicted use of the Permit) and considered those potential effects in the context of historical impacts. NWP001016–32 (also incorporating analyses under section 6 and 8).

Plaintiffs fault the Corps because it conducted its analysis on a national scale, and because the analysis is similar across the various NWPs. Pls.' Mem. 45–46. But Plaintiffs themselves acknowledge that "the cumulative effects

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[11] Contrary to Plaintiffs' argument, the EA's reference to a district engineers' verification of NWP 12 authorizations that require a PCN does not equate to a "deferral" of NEPA review. Pls.' Mem. 38–39, 41, 43. The district engineer's verification is not a "major Federal action" for NEPA purposes. 33 C.F.R. § 330.5(b)(3); *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1158 (9th Cir. 2012); *Sierra Club v. U.S. Army Corps of Eng'rs*, 64 F. Supp. 3d 128, 144–47 (D.D.C. 2014); NWP000971–72.

analysis for NWPs must occur at the national, not project level." Pls.' Mem. 42. And of course the cumulative impact analysis is similar across the various NWPs. The Corps was assessing cumulative effects on the *nation's* aquatic environment, which would include effects from all the *nationwide* permits. Plaintiffs' contention that the different NWPs "authorize vastly different types of activities" again ignores the nature of Section 404(e) permitting. Pls.' Mem. 45. Each NWP authorizes the same thing: the discharge of dredge or fill material into waters of the United States.[12] Summary judgment should be granted in favor of Federal Defendants on the NEPA claim.

III. Plaintiffs Lack Standing for Their ESA Claim.

To establish Article III standing, Plaintiffs must demonstrate an "'injury in fact' that is concrete and particularized," is "fairly traceable to the challenged action," and is "likely" to be redressed by a favorable court decision. *Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *DaimlerChrysler v. Cuno*, 547

[12] Plaintiffs incorrectly rely on the Corps' NEPA regulations in 33 C.F.R. part 325 Appendix B. Pls.' Mem. 45. Part 325 applies to the Corps' review of *individual* permits. *See* 33 C.F.R. § 323.1. The Corps' issuance of *general* permits like NWP 12 is governed by 33 C.F.R. part 330. *See* 33 C.F.R. § 330.1.

U.S. 332, 352 (2006). The requisite evidentiary showing is lacking for Plaintiffs' ESA claim.

Plaintiffs identify only one project that purports to utilize the challenged NWP 12 and that allegedly harms their interests. *See* Decl. of Steve Krum ("Krum Decl."), ECF 45-6.[13] Mr. Krum states that he has an interest in, among other things, protecting "public health and the environment," and that the Corps' verification that activities associated with the Northwestern Energy Byron Pipeline's Yellowstone River crossing in Laurel, Montana, will injure those interests. Krum Decl. ¶ 2; Decl. of Sage Joyce ("Joyce Decl.") ¶ 12 (1,687 feet of pipeline crossing underneath the Yellowstone River). Mr. Krum also states that there are a number of species located in this area, including "deer, bear, moose, bald eagles, and even mountain lions" and he is fearful that the crossing will "eliminate" the sightings of those species. Krum Decl. ¶ 3. Mr. Krum, however, does not identify any interest in ESA-listed species or designated critical habitat, nor does he allege that there are any listed species or critical habitat located near

[13] None of Plaintiffs' other declarations identify a specific project or activity that is authorized by the challenged NWP 12. These declarations seem to rely on a statistical probability that a member's interest in listed species will be harmed by some future NWP 12 authorization. *See* Decl. of Martin J. Hamel, ECF 45-3 (asserting an interest in pallid sturgeon but failing to identify any project using or intending to use the current NWP 12*)*. The Supreme Court has held that this is insufficient to confer standing. *Summers,* 555 U.S. at 497.

his daughter's house in Laurel, Montana. *Id.* Indeed, there are no ESA-listed species or designated critical habitat near the project area. Joyce Decl. ¶ 13.

For an organization to establish standing, it must have an interest that relates to the alleged wrong. *Summers*, 555 U.S. at 498; *see also Lexmark Int'l v. Static Control Components*, 572 U.S. 118, 133 (2014) ("Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits."); *Garcia v. Google*, 786 F.3d 733, 745 (9th Cir. 2015).

With respect to Plaintiffs' ESA claim, the alleged violation is that the Corps failed to engage in ESA Section 7 consultation for the reissuance of NWP 12. Compl. ¶ 139. Section 7's purpose is to ensure that agency actions do not "jeopardize the continued existence of any *endangered species or threatened species*" or critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). Here, Mr. Krum, and by extension Plaintiffs, have not identified any particularized interest in protecting a certain endangered or threatened species in this location, nor can they demonstrate how NWP 12 has harmed such interests. This is fatal to their standing for the ESA claim. *Optimus Steel, LLC v. U.S. Army Corps of Eng'rs*, 492 F. Supp. 3d at 719.

Nor is a general interest in protecting the environment sufficient for an ESA claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) (Plaintiffs must

"submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by . . . [agency] activities . . . but also that one or more of respondents' members would thereby be 'directly' affected apart from their ''special interest' in th[e] subject.'"); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1236–37 (D.C. Cir. 1996). Alleged harms that are not causally related and specific to the ESA-listed species or protections at issue are insufficient to bring ESA claims. *N.C. Fisheries Ass'n, Inc. v. Pritzker*, No. 4:14-CV-138-D, 2015 WL 4488509, at *6 (E.D.N.C. July 22, 2015). Plaintiffs lack standing for their ESA claim.

IV. Even if Plaintiffs had Standing, Summary Judgment Should be Granted in favor of Federal Defendants on the ESA claim.

Not every environmental disturbance affects ESA-listed species. Federal actions can be designed so that they do not affect listed species, or federal actions can be located where they are not in the vicinity of listed species or critical habitat. Consultations under ESA Section 7(a)(2) are not contingent on environmental disturbances generally; they are triggered only if a proposed agency action "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a). The duty to consult is specific to species and critical habitat, not the environment. *Id.* ("Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect *listed species or critical habitat*.") (emphasis added). Where there is no effect on listed species or critical habitat, there is no duty to consult.

Decades of coordination with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Services (NMFS) (collectively "Services") have allowed the Corps to create a general permit with specific and binding conditions that are designed to avoid any effect to listed species or critical habitat. By imposing these specific conditions, like General Condition 18, the Corps incentivizes potential permittees to design projects in such a way to avoid effects to listed species or avoid areas in the vicinity of listed species and their critical habitat. That is, in order to immediately use NWP 12, activities must be specifically designed so that they do not have *any effect* on species or critical habitat, otherwise they must submit a PCN so that the District Engineer may determine whether the proposed activity may need to undergo its own consultation. This is unquestionably beneficial for listed species because adverse effects to listed species—even if there is a Section 7 consultation—are still adverse effects.

Fully cognizant of this Court's previous opinion in *Northern Plains*, the Corps kept an eye towards that opinion in crafting the current NWP 12. The Corps developed a biological assessment explaining how NWP 12's conditions prevent any immediate effect to listed species or critical habitat and thus, issuance of NWP 12 does not trigger the obligation to consult. *See* NWP003564–853. Notably, following the issuance of this biological assessment, the Services did not request a programmatic consultation, despite having the regulatory right to do so. 50 C.F.R.

§ 402.14(a) ("The Director [of both FWS and NMFS] may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation."); NWP000605; NWP010830.

Plaintiffs largely ignore the biological assessment and the Corps' reasoning, suggesting that a previous general permit, with a different administrative record, necessitates the same legal outcome. But that is not how review under the APA works. This Court must review the Corps' present findings supporting the current permit, particularly those in the biological assessment, and defer to those findings unless they are "so implausible that [they] could not be ascribed to a difference in view or the product of agency expertise." *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012).[14]

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[14] Plaintiffs argue that the Corps has already "lost twice" on this issue and that it is beyond "serious dispute" that the Corps must consult on NWP 12. Pls.' Mem. 9-10 (citing *Northern Plains Resource Council v. U.S. Army Corps of Eng'rs*, 454 F. Supp. 3d 985, 994 (D. Mont. 2020) and *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 10–11 (D.D.C. 2005)). Federal Defendants disagree. No appellate court has ever held that the Corps must consult on NWPs. After the Supreme Court stayed, in part, this Court's injunction, the claims in *Northern Plains* became moot, and Federal Defendants will be moving to vacate that district court opinion. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (unlike a court of appeals decision, "a decision of a federal district court judge is not binding precedent . . . even upon the same judge in a different case") (citation omitted). Similarly, in *Brownlee*, the district court evaluated the Jacksonville District's ESA compliance on the 2002 version of NWP 12, four iterations before the permit here, and nothing

A. The Corps' "No Effect" Determination is Entitled to Deference.

The Corps' no effect determination is reviewed under APA standards, which are "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund v. USDA*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotation marks omitted). That standard applies to claims, like Plaintiffs', challenging an agency's no effect determination under the ESA. *Nat'l Fam. Farm Coal. v. U.S. EPA*, 966 F.3d 893, 923 (9th Cir. 2020).

The Ninth Circuit's decision in *National Family* is instructive. That decision recognized that an agency may use mitigation measures to reach a "no effect" determination, provided the measures are the result of "specific and binding plans" and "reasonably certain to occur." *Id.* at 923. The court made clear the action agency, like the Corps here, was entitled to "reach its own 'no effect' conclusion" even though the agency acknowledged that listed species were at potential risk of exposure, if that risk did not rise to the level of "may affect." *Id.* at 924; *Sawtooth Mountain Ranch LLC v. United States,* No. 1:19-CV-00118-CWD, 2022 WL

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in that decision suggests that the 2002 NWP contained the current formulation of General Condition 18, which was developed in part to address the Services' concerns identified during consideration of previous NWPs. *See* 72 Fed. Reg. 11158–11160 (2007 NWPs); 77 Fed. Reg. 10247–10249 (2012 NWPs); 82 Fed. Reg. 1954–1957 (2017 NWPs).

562612, at *1 (D. Idaho Feb. 24, 2022); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 482 (D.C. Cir. 2009).

That is precisely what the Corps has done with NWP 12. Following previous (and voluntary) consultations with NMFS on prior NWPs, the Corps refined NWP 12 so that it authorizes no activity that "may affect" listed species or their critical habit—unless and until consultation addressing the effects of the activity has been completed. NWP00104. In addition to other NWP 12 conditions that ensure is impacts are minimal, General Condition 18 specifically requires prospective permittees to submit 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.* The "'might affect'" threshold is, by design, "more stringent than the 'may affect' threshold" that triggers a consultation requirement under the ESA. *Id.*

General Condition 18 thus ensures that the Corps receives notification of activities potentially making use of NWP 12 that may 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.*; 33 C.F.R. § 330.4(f)(2). If the proposed activity does not meet these

criteria, NWP 12 is unavailable. NWP00003576 ("If the project proponent does not comply with the requirements of NWP general condition 18, or any other NWP general condition, the activity is not authorized by NWP."). Thus, the Corps reasonably concluded reissuance of NWP 12, with General Condition 18, would have no effect on listed species or their critical habitat. This fits precisely within the contours of *National Family*. 966 F.3d at 923.

To further explain this no effect determination, the Corps prepared a voluntary biological assessment. NWP003564–853. The biological assessment first explains what NWPs do and do not authorize. NWP003573–78. It proceeds to evaluate the locations of likely NWP activities based on previously collected data and extrapolation. NWP003578–80. The Corps then reviewed several studies on the location of listed species, finding that there are "hotspots" throughout the country where listed species may more often be present near waters of the United States. NWP003581–82. Based on this data, the Corps analyzed whether the NWPs, with their specific and binding requirements, would affect listed species or critical habitat.

The Corps found that there would be many instances where the use of NWPs would not coincide with, and therefore cannot affect, any listed species. NWP003582 ("Because listed species in the United States tend to be concentrated in specific geographic regions, not all activities that may be authorized by the

NWPs have the potential to affect listed species and designated critical habitat."). In addition, based on its experience with implementing previous NWPs, the Corps is "not aware of *any incidences where effects to listed species or designated critical habitat may have occurred as a result of an NWP activity* without the district engineer initiating formal or informal ESA section 7(a)(2) consultation or determining that the NWP activity was covered by a regional programmatic ESA section 7 consultation." NWP003583 (emphasis added). Throughout thousands of activity-specific consultations and monitoring of NWPs, spanning decades, the Corps is not aware of an instance where NWPs had been used to authorize an activity where there was an effect to a listed species without undergoing consultation. *Id.*

The Corps also examined whether the cumulative effects of NWP activities would affect listed species or critical habitat. NWP003588–93. It first estimated the number of times the NWP is expected to be used, the acreage of permanent and temporary impacts to waters of the United States, and the acreage of any compensatory mitigation. NWP003589. It also recognized that cumulative effects "are evaluated by assessing the direct and indirect effects that those activities have on the current environmental setting." NWP003590. And that "the geographic and temporal scales for cumulative effects analysis are larger than the analysis of the direct and indirect adverse environmental effects caused by specific activities."

NWP003592. The Corps further specified that "[w]hen a division or district engineer determines, using local or regional information, that a watershed or other geographic area is subject to more than minimal cumulative adverse environmental effects due to the use of an NWP, he or she will use the revocation and modification procedure at 33 CFR 330.5." NWP003593. This means that in geographical areas that experience more than minimal cumulative effects, the NWP is either modified by a division engineer with additional regional condition(s), or it is revoked by a division engineer so that it can no longer be used in that geographical area. These safeguards further ensure that immediately-authorized activities under NWP 12 do not cumulatively affect listed species or critical habitat within a geographical area. Notably, Plaintiffs have not challenged any division's ESA-related modifications or revocations.

Based on the analyses in the biological assessment, the Corps concluded that the NWP 12's immediate and cumulative effects would not have an effect on listed species or critical habitat and thus there was no obligation to programmatically consult. NWP003610 (Section 7 consultation not required "because no activities authorized by any NWPs 'may affect' listed species or designated critical habitat without first completing activity-specific ESA Section 7 consultations" under Condition 18 and 33 C.F.R. § 330.4(f)).

This finding comports with the public comments received through the rulemaking process. More precisely, in their submitted comments, Plaintiffs failed to identify any example where activities directly authorized under NWP 12 affected listed species or critical habitat. That is, despite years of similar NWP 12 implementation, as well as monitoring, and opportunity for public comment, neither Plaintiffs nor the Corps are aware of a project proponent purporting to rely on NWP 12 for activities that had an effect on listed species or critical habitat without undergoing an ESA consultation. *Id*.; NWP003596 ("The only activities that are immediately authorized by NWPs are activities proposed by non-federal entities that do not meet the "might affect" threshold of general condition 18 and that are not located in designated critical habitat (or critical habitat proposed for such designation) . . . ."). This factual finding, supported by substantial evidence, warrants deference. *Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1068 (9th Cir. 2005) (upholding Corps' no effect finding for individual 404 permits).

B. Plaintiffs' Arguments Do Not Undermine the Corps' Determination

1. NWP 12 Does Not Affect Listed Species or Critical Habitat

Plaintiffs first take issue with the merits of the Corps' no effect determination and argue that NWP 12 is an "agency action" that "may affect" listed species or their critical habitat. Pls.' Mem. 12, 15. These arguments lack merit.

NWP 12 is certainly an agency action that, in some instances, authorizes ground disturbing activity without further Corps action.[15] That is why the Corps thoroughly analyzed these effects in its decision document. NWP00945–1067. Plaintiffs, however, erroneously conflate effects to the environment with effects to listed species and their critical habitat. While they can be similar in some instances, these effects are not automatically interchangeable.

As Plaintiffs note, the Corps estimated that NWP 12 would be used roughly "50,000 times over the 5-year life of the permit, impacting more than 3,000 acres of jurisdictional waters . . ." Pls.' Mem. 15 (citing NWP001052). And, as the Corps disclosed, these activities may adversely affect the environment, in particular, wetlands. Pls.' Mem. 15. But Plaintiffs' leap—from effects to the environment to effects to listed species and critical habitat—is conclusory and lacks any factual support.

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[15] Plaintiffs also contend that issuance of NWP 12 is a "program." Pls.' Mem. 12. Not so. The Corps' issuance of multiple general permits is more akin to rulemaking than a "program," as that term is construed under the ESA. 50 C.F.R. § 402.02; *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs,* 417 F.3d 1272, 1285–86 (D.D.C. 2005). Moreover, the challenged agency action here, NWP 12, is an authorization to conduct activity-specific work. The Corps agrees that NWP 12 is an agency action within the meaning of the ESA, but it is inaccurate to label this specific general permit as a "program."

Every CWA Section 404 permit—whether an NWP or individual permit—authorizes discharges of dredged or fill material into waters of the United States. 33 U.S.C. §§ 1311(a), 1344(a), (e). This will, of course, have direct and indirect impacts to aquatic resources. But, as the biological assessment explains, NWP 12 will be used in many locations where listed species and critical habitat simply do not exist. NWP003581; NWP003582 (noting "listed species in the United States tend to be concentrated in specific geographic regions"). Effects to the environment, or even aquatic resources, are simply not interchangeable with effects to listed species or critical habitat. Indeed, Plaintiffs' lone specific standing declaration proves this exact point. *See* Krum Decl., ECF 45-6 (detailing concerns with effects to the environment where there are no listed species or critical habitat).

Plaintiffs also rely on previous consultations with the Services to support their contention that NWP 12 "may affect" listed species. Pls.' Mem. 26. The fact that the Corps voluntarily consulted on prior iterations of NWP 12 does not undercut the current "no effect" determination. Agencies are "fully entitled" to "change[ ] their minds . . . as long as the proper procedures were followed." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658–59 (2007). In *Home Builders*, EPA voluntarily initiated consultation on a decision to transfer a CWA permit program to the state of Arizona, before determining that there was no duty to consult because the nondiscretionary decision was not an "action"

triggering Section 7(a)(2)'s consultation requirements. The lower court held that the agency's inconsistent position rendered the decision not to consult arbitrary. The Supreme Court reversed, holding that "federal courts ordinarily are empowered to review only an agency's final action" and that a change of position during the decisionmaking process does not render it arbitrary and capricious. *Id.* (citing 5 U.S.C. § 704).

Here, the situation is even further removed from that in *Home Builders*. The Corps voluntarily completed consultation with NMFS on the 2012 NWPs but determined that the 2017 NWPs and the current NWPs do not trigger the consultation requirement. The Corps' rationale for the 2021 NWPs must be evaluated for its stated reasons, not the agency's prior decisions.[16]

With the benefit of years of litigation, as well as a public comment period, Plaintiffs do not cite any concrete example where a previous NWP 12 authorized an immediate effect to listed species or critical habitat. Yet there is none. This stands in marked contrast to the Corps' factual finding, supported by substantial evidence. NWP003583. The reason for this is simple: General Condition 18

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[16] Plaintiffs also cite a letter from a FWS field office to support their contention. Pls.' Mem. 17 (citing NWP009604). *Home Builders* here again is instructive. The position of a field, or even regional, office does not represent the considered views of an entire agency. 551 U.S. 644, 658–59.

precludes a permittee from immediately relying on NWP 12 for any ground-disturbing activity that might affect listed species or that is in the vicinity of listed species or critical habitat. *See WildEarth Guardians v. U.S. EPA*, 759 F.3d 1196, 1209 (10th Cir. 2014) (for ESA purposes, when "an agency action has clearly defined boundaries, we must respect those boundaries"). The Corps' no effect determination is sound.

2. ESA Regulations Do Not Require Programmatic Consultation on NWP 12

Plaintiffs argue that the Corps should have engaged in a programmatic consultation before the reissuance of NWP 12. Pls.' Mem. 18. Plaintiffs further contend that the Corps' "central rationale" of deferring consultation until a project-specific activity violates the ESA because the "aggregate impacts" from the "program" escape analysis. *Id.* Plaintiffs are incorrect on both accounts and misconstrue the ESA consultation regulations.

The Corps is not relying on subsequent, activity-specific consultations to ensure compliance with ESA Section 7, but rather has fully complied with 50 C.F.R. § 402.14(a)'s plain language. In fact, Plaintiffs readily concede, as they must, that even with "broad federal programs," the duty to consult is triggered only if the program "may affect" listed species or critical habitat. Pls.' Mem. 12 ("For broad federal programs *that may affect listed species*, action agencies and the Services must engage in 'programmatic consultation' . . . .") (emphasis added).

That is precisely what we have here. The Corps' position is not that it is relying on subsequent, activity-specific consultations to ensure compliance with Section 7(a)(2), but rather, reissuance of NWP 12 itself has no effect on listed species or critical habitat. And, as Plaintiffs acknowledge, where there is no effect, program or otherwise, there is no obligation to consult.

Moreover, to the extent Plaintiffs argue that 50 C.F.R. § 402.14(a) was modified by 50 C.F.R. § 402.14(i)(6) so that all agency programs, regardless of whether they may affect listed species, must undergo consultation, such a reading cannot withstand scrutiny. Pls.' Mem. 19. Plaintiffs' so-called "two-step" process only begins if the agency action "may affect" listed species. Indeed, Plaintiffs' reading would render 50 C.F.R. § 402.14(a) largely superfluous, as many activity-specific activities are encompassed within an agency program.

The threshold requirement in 50 C.F.R. § 402.14(a) is eminently logical. Because consultations are specific to listed species, not waters of the United States, or the environment in general, there must be some triggering effect to listed species or critical habitat to require consultation. Otherwise, there would be nothing to analyze. *See* 50 C.F.R. §§ 402.14(g)(3) & (h)(iv)(A). This is why many courts, including the Ninth Circuit, recognize that there must be a predicate effect to listed species in order to proceed with a biological analysis in a Section 7 consultation. *Nat'l Fam.*, 966 F.3d at 927–28 ("a recognition of 'exposure' is not the same as a

recognition of an 'effect.'"); *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs,* 887 F.3d 906, 915, 925–26 (9th Cir. 2018) (listed species exposure to copper through fill materials did not trigger the obligation to consult); *State v. Bureau of Land Mgmt*., No. 18-CV-00521-HSG, 2020 WL 1492708, at *16 (N.D. Cal. Mar. 27, 2020) (repeal of a nationwide rule did not require consultation because site specific measures on lands open for oil and gas development bolstered the agency's no effect finding). The Corps is not "substituting" activity-specific consultations for programmatic consultations. Instead, the obligation to consult was never triggered in the first instance because—even if characterized as a "program"—NWP 12 *prohibits* its invocation for any use with any immediate effect to listed species or critical habitat.

Plaintiffs' related criticism, that programmatic consultations are necessary to address cumulative effects (or what they refer to as "aggregate impacts"), likewise fails to understand the consultation process. Pls.' Mem. 20 ("project-specific reviews cannot address aggregate impacts to species that travel through multiple project areas and even regions.").[17] As a threshold matter, if there are no effects to

[17] There is no such thing as "aggregate impacts" within the ESA. Only "cumulative effects" are assessed during a consultation. *See* 50 C.F.R. § 402.02. These are defined as: "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.* It would be legal error to

listed species from the agency action, there can be no effects in the aggregate or cumulatively from that agency action. Zero plus zero is still zero. And, as discussed above, just because there could be cumulative effects to the environment, that does not mean there are cumulative effects to species, much less an ESA-listed species.

If Plaintiffs' argument is that a programmatic consultation is required because only programmatic consultation would capture NWP 12's cumulative effects or aggregate impacts, this is incorrect. Every consultation, whether it is a regional, programmatic, or activity-specific, takes into account all of the human and natural impacts to listed species by first considering the "status of the species." 50 C.F.R. § 402.14(g)(2) & (4); NWP010140–44 (regional programmatic consultation discussing the cumulative threats to the Preble Mouse). This is an extremely broad inquiry capturing all previous effects to a listed species regardless of the parameters of any action area. *See* Services' ESA Consultation Handbook at 4–19 ("This analysis documents the effects of all past human and natural activities

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require the Services to conduct an analysis beyond their established regulatory inquiry. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) ("Nor may we impose 'procedural requirements [not] explicitly enumerated in the pertinent statutes.'").

or events that have led to the current status of the species.").[18] This includes any effects a listed species experiences while "traveling through multiple project areas and even regions . . . ." Pls.' Mem. 20. And this analysis not only informs the environmental baseline but is also fully integrated into any jeopardy analysis by the Services. 50 C.F.R. § 402.14(g)(4) ("Add the effects of the action and cumulative effects to the environmental baseline *and in light of the status of the species and critical habitat*, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.") (emphasis added).[19] Plaintiffs' insistence that there must be a nationwide programmatic consultation to capture all "aggregate impacts" to a listed species (or critical habitat) is fundamentally incorrect and misunderstands the consultation regulations.

3. General Condition 18 does not "Delegate" the Corps' ESA Duties to Permittees.

Plaintiffs next assert that General Condition 18 improperly delegates to permittees the Corps' duty to determine whether its actions may affect listed

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[18] https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf

[19] The Services' determination also considers the environmental baseline, which requires taking into account "the past and present impacts of *all Federal, State, or private actions* and other human activities in the action area," as well as cumulative effects, which includes "*all future state or private activities* reasonably certain to occur" within the action area. 50 C.F.R. § 402.02 (emphasis added).

species or habitat. Pls.' Mem. 22. The Corps does not "delegate" its ESA responsibilities to permittees and none of the cases cited by Plaintiffs stand for any such proposition. *Id.* (citing *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944 (9th Cir. 2003), and *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002)).

To be sure, General Condition 18 does rely on permittees to comply with the requirement that they submit a PCN for activities that either "might affect" or are "in the vicinity of" listed species or habitat. *See also* 33 C.F.R. § 330.4(f)(2). But this "might affect" or "in the vicinity of" requirement is not an *ESA* standard. It is a *NWP* standard. The general permit requirement ensures that any activities which conceivably could affect species or habitat are brought to the Corps' attention, at which time the Corps itself makes the ESA determination. That is not a delegation under any plausible theory. *See Fund for Animals v. Kempthorne*, 538 F.3d at 133 ("agency delegates its authority when it shifts to another party almost the entire determination of whether *a specific statutory requirement* . . . has been satisfied" (internal quotation marks omitted and emphasis added)).

Plaintiffs also argue that "self-interested permittees" will not abide by General Condition 18 and fail to submit a PCN. Pls.' Mem. 23. There are a number of problems with this argument. Most fundamentally, it has nothing to do with whether General Condition 18 effects an unlawful delegation. Such concerns conflate permit compliance with the activities actually authorized by that permit.

Putting aside that basic defect, it assumes (without evidence) that regulated parties will not comply with the law. But, the Corps takes noncompliance with permit conditions seriously: if a permittee fails to comply with the requirements of General Condition 18, the activity is unauthorized and the Corps has discretion to undertake an enforcement action. NWP003576; NWP003602; 33 C.F.R. § 330.4(a). A permittee who proceeds without submitting a required PCN is potentially subject not only to Corps enforcement action, 33 C.F.R. § 330.1(c), but also to civil or criminal action under either the ESA, 16 U.S.C. § 1540(a)(1), (b)(1), or for unauthorized discharge of dredged or fill material under the Clean Water Act, 33 U.S.C. § 1319, as well as civil actions under the ESA's citizen-suit provision.

Finally, Plaintiffs fail to explain how or why a programmatic consultation would change their concern with a "self-interested permittee" that allegedly refuses to comply with General Condition 18. The possibility for illegal activity exists independent of whether the Corps engages in a programmatic, or even an activity-specific, consultation because it is a NWP requirement, not an ESA requirement. General Condition 18 does not impermissibly delegate the Corps' ESA duties. Even if Plaintiffs had standing for their ESA claim, summary judgment should be granted in favor of Federal Defendants.

V. Plaintiffs' Requested Remedy Is Too Broad.

Even if Plaintiffs were to prevail in some manner, vacatur of NWP 12 would not be appropriate. *See* Pls.' Mem. 4, 55 (requesting vacatur).

First, the circumstances here would warrant remand without vacatur. "Whether agency action should be vacated depends on [1] how serious the agency's errors are and [2] the disruptive consequences of an interim change that may itself be changed." *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (cleaned up). Where "'equity demands, [a] regulation can be left in place while the agency follows the necessary procedures' to correct its action." *Id.*; *see also* Order, *Upper Mo. Waterkeeper v. U.S. EPA*, No.16-cv-52-GF-BMM, ECF No. 184 (D. Mont. July 16, 2019) (Morris, J.) (weighing equities, remanding, and staying vacatur). Even serious errors have been remanded without vacatur when vacatur's consequences would be significant. *See Cal. Cmtys. Against Toxics*, 688 F.3d at 993–94; *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995).

Vacatur of NWP 12 would be extremely disruptive to the Corps and to entities constructing and repairing oil and gas pipeline projects across the country. *See* Decl. of Jennifer Moyer ("Moyer Decl.") ¶¶ 7–15. NWP 12 applies to more than just activities associated with the construction of *new* oil and gas pipelines. *See id.* ¶¶ 8–9. The Permit also authorizes minimal fill associated with

maintenance, repair, and removal of those pipelines. 86 Fed. Reg. 2860. Vacatur would prevent reliance on NWP 12 for those activities. Further, in the absence of NWP 12 or some other applicable general permit, prospective permittees would need to apply for individual permits. Vacatur would thus operate to require a cumbersome individualized Corps permitting process for thousands of projects across the country, contravening the statutory design Congress created in Section 404(e). H.R. Rep. No. 95-830, at 38, 98, 100 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424. That would be the case even for activities that required only a few square feet of fill at a single location. The resulting programmatic impacts on the Corps would be large, and lead to delays in permitting. Moyer Decl. ¶¶ 11–13.

Second, even if vacatur were appropriate, it would need to be limited to the use of NWP 12 that Plaintiffs have shown to be causing them harm. "'[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Town of Chester v. Laroe Estate, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 724 (2008)); *Friends of Santa Clara River*, 887 F.3d at 917. Standing, in turn, requires a plaintiff to show, among other things, an injury-in-fact. *Friends of Santa Clara River*, 887 F.3d at 918. And any remedy awarded to the plaintiff "must be 'limited to the inadequacy that produced his injury in fact.'" *Gill v. Whitford*, 138 S. Ct.

1916, 1930 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)) (brackets omitted). Here, however, Plaintiffs have only submitted facts supporting a potential injury from one identified activity associated with the Northwestern Energy's Byron Pipeline in Laurel, Montana. *See* Krum Decl. ¶¶ 5–13. Any remedy would need to be limited to that alleged harm. But even then, Plaintiffs have not challenged, let alone sought to vacate, the Corps' NWP 12 verification for that pipeline.

In the challenge to the 2017 NWP 12, the Court enjoined and vacated that permit "as it relate[d] to the construction of new oil and gas pipelines." Order Amending S.J. Order 38, *N. Plains Resource Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-44-BMM, ECF No. 151 (May 11, 2020). The Supreme Court stayed this Court's remedy except as to the pipeline upon which the plaintiffs had based their alleged harm. *U.S. Army Corps of Eng'rs v. N. Plains Resource Council*, 141 S. Ct. 190 (2020) (Mem.). If the Court reached the issue, the same conclusion should apply here.

CONCLUSION

Summary judgment should be granted in favor of Federal Defendants.

March 18, 2022

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CERTIFICATION OF SERVICE AND LENGTH

I hereby certify that on March 25, 2022, I filed the foregoing Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 44) and in Support of Cross-Motion for Summary Judgment, along with its attachments, in the Court's CM/ECF system, which will send notice to all counsel of record. I further certify that the brief is 12,993 words, exclusive of the caption, tables, signature block, and certification.

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