

Steve Wade
Brian P. Thompson
BROWNING KALECZYC BERRY
& HOVEN, P.C.
800 N. Last Chance Gulch, Suite 101
PO BOX 1697
Helena, MT 59624-1697
Tel. (406) 443-6820
Fax (406) 443-6883
steve@bkbh.com
brian@bkbh.com

Thomas C. Jackson (pro hac vice)
BAKER BOTTS L.L.P.
700 K Street, N.W.
Washington, DC 20001
Tel. (202) 639-7000
Fax (202) 639-7890
thomas.jackson@bakerbotts.com

*Counsel for Amicus Curiae Edison
Electric Institute*

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.,

Defendants,

AMERICAN GAS ASSOCIATION, *et
al.*,

Intervenor-Defendants,

STATE OF MONTANA,

Intervenor-Defendant.

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

**BRIEF OF EDISON ELECTRIC
INSTITUTE AS AMICUS CURIAE**

TABLE OF CONTENTS

	Page
INTRODUCTION AND INTEREST OF AMICUS CURIAE.....	1
BACKGROUND.....	4
ARGUMENT	8
I. Limits on the availability of nationwide permits would impede the clean energy transition. ..	9
A. Nationwide permits play a key role in allowing the power sector to quickly develop clean energy projects.	9
B. Plaintiffs’ attacks on NWP 12 could imperil the NWP program as a whole.	12
C. Without nationwide permits, EEI members may not be able to make timely progress in adding renewable energy capacity.	14
II. NWP 12, like other nationwide permits, already incorporates effective protections for ESA-listed species.....	17
A. The NWP program includes a carefully constructed system to protect listed species.....	17
B. General Condition 18 is effective in protecting listed species.	19
CONCLUSION	22

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>National Wildlife Refuge Ass’n v. Rural Utilities Serv.</i> , Case No. 3:21-cv-306, 2022 WL 136829 (W.D. Wisc. Jan. 14, 2022).....	13
<i>Northern Plains Resource Council v. U.S. Army Corps of Engineers</i> , Case No. CV 19-44-GF-BMM (D. Mont.).....	5
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006).....	11
STATUTES	
16 U.S.C. §§ 1531-1544.....	12
16 U.S.C. § 1532(5)(A).....	17
16 U.S.C. § 1536.....	12, 13, 18, 19
16 U.S.C. § 1536(a)(2).....	17
33 U.S.C. § 403.....	5
33 U.S.C. § 1311.....	4, 5, 9, 10, 11
33 U.S.C. § 1344.....	4
33 U.S.C. § 1344(e).....	1, 4, 6, 12
42 U.S.C. § 4332.....	12
REGULATIONS	
33 C.F.R. § 330.4(c).....	7
33 C.F.R. § 330.4(f).....	17
33 C.F.R. § 330.4(f)(2).....	17
33 C.F.R. § 330.5(c).....	7
OTHER AUTHORITIES	
80 Fed. Reg. 64,661 (Oct. 23, 2015).....	2
86 Fed. Reg. 2,744 (Jan. 13, 2021).....	6, 7, 10, 17, 18

Cal. Water Bds., Reg. Meas. 411836, *State Water Board Certification of the 2017 NWP's 13* (Mar. 17, 2017)..... 7

Clean Energy States Alliance, *100% Clean Energy Collaborative – Table of 100% Clean Energy States* 14

EIA, *Annual Energy Outlook 2022: With Projections To 2050 - Narrative* (Mar. 3, 2022) 3

EIA, *Annual Energy Outlook 2022: Reference Case Projections Tables - Table 16. Renewable Energy Generating Capacity and Generation* (Mar. 3, 2022) 3

Electric Power Monthly: with Data for December 2021 (Feb. 2022)..... 2

Eric Larson et al., *Net-Zero America: Potential Pathways, Infrastructure, and Impacts - Final Report Summary* (Oct. 29, 2021) 15, 16

Michael Greenstone, et al., *Assessing the Costs and Benefits of Clean Electricity Tax Credits, Build Back Better Act Policy Memo*, Energy Policy Institute, University of Chicago, and Rhodium Group (Feb. 9, 2022)..... 3

State of California Executive Department, *Executive Order B-55-18 to Achieve Carbon Neutrality* (Sept. 10, 2018)..... 14

U.S. Army Corps of Eng'rs, *Los Angeles District Final Regional Conditions for the 2017 NWP's*7

U.S. Department of Energy, *Solar Futures Study* (Sept. 8, 2021) 14, 16

U.S. Fish and Wildlife Service, *Information for Planning and Consulting*..... 19

The White House, *Executive Order on Tackling the Climate Crisis at Home and Abroad*, (Jan. 27, 2021)..... 13

INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Edison Electric Institute (“EEI”) respectfully submits this amicus brief in support of Federal Defendants’ cross-motion for summary judgment and opposition to Plaintiffs’ motion for summary judgment.

Plaintiffs challenge the reissuance of Nationwide Permit 12 (“NWP 12”) by the U.S. Army Corps of Engineers (“Corps”) on January 13, 2021 pursuant to Section 404(e) of the Clean Water Act (“CWA”), 33 U.S.C. § 1344(e). In its reissued form, NWP 12 covers discharges of dredged or fill material to waters of the United States associated with the construction, repair, maintenance, or removal of oil and natural gas pipelines. However, a number of the arguments made by Plaintiffs in seeking to vacate NWP 12 could strike at the foundations of the nationwide permit program as a whole if interpreted broadly and therefore threaten other nationwide permits on which EEI members rely to construct and maintain the infrastructure necessary to provide increasingly clean electricity to power the nation.

EEI is the national association of all investor-owned electric companies. EEI’s members are companies that develop, own, operate, and maintain infrastructure that provides essential power to the public, including reliable electricity for consumption in homes, businesses, courthouses, churches, schools, and every other venue that uses electricity. Collectively, EEI members provide electricity and related services to more than 220 million Americans and operate in all 50 states and the District of Columbia.

EEI members are leading the clean energy transformation and are united in their commitment to provide reliable and affordable low- and zero-emission energy expeditiously. EEI members have undertaken a wide range of initiatives to reduce the industry's carbon dioxide ("CO₂") emissions, with impressive results. Fifty EEI members have announced carbon reduction goals; over two-thirds of these members intend to achieve net-zero CO₂ emissions or equivalent by 2050 or sooner. Indeed, EEI members already had achieved *more* GHG reductions than the Obama administration's Clean Power Plan¹ would have required *before* the Plan was scheduled to take effect.

Electric companies are making significant investments to make the energy grid smarter, cleaner, more dynamic, more flexible, and more secure to integrate and deliver a diverse mix of central and distributed energy resources to continue and enhance this transition. In 2021, renewables² represented approximately twenty-one percent of total U.S. electricity generation,³ and in total, approximately forty percent of America's electricity came from clean, carbon-free resources, including nuclear energy, hydropower, solar, and wind.⁴ Renewable energy deployments will continue. By 2025,

¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

² As used in this brief, the term "renewables" includes wind, hydroelectric, solar, biomass, and geothermal energy.

³ See Energy Information Administration, Electric Power Monthly: with Data for December 2021, at Table ES1.A (Feb. 2022), https://www.eia.gov/electricity/monthly/current_month/february2022.pdf.

⁴ See *id.*

EIA projects approximately 125 gigawatts of renewables capacity to materialize.⁵ Further, the Energy Information Administration projects that in the United States, the share of renewables in the electricity generation mix will more than double by 2050.⁶

While focused on NWP 12, Plaintiffs' challenges may have broader repercussions for the nationwide permit program on which EEI members rely. The ability of EEI members to build and operate clean energy projects requires them to regularly develop new infrastructure and to maintain and repair existing infrastructure in a timely fashion. To do so, EEI's members rely heavily on the regulatory streamlining provided by nationwide permits, which is an invaluable means for accomplishing these critically important ends in an environmentally sustainable manner without significant delay, cost, or public inconvenience. Rulings that would undermine

⁵ See EIA, *Annual Energy Outlook 2022: Reference Case Projections Tables – Table 16. Renewable Energy Generating Capacity and Generation* (Mar. 3, 2022), <https://www.eia.gov/outlooks/aeo/data/browser/#/?id=16-AEO2022&cases=ref2022&sourcekey=0>.

⁶ See EIA, *Annual Energy Outlook 2022: With Projections To 2050 – Narrative*, 17 (Mar. 3, 2022), https://www.eia.gov/outlooks/aeo/pdf/AEO2022_Narrative.pdf. EIA estimates are intentionally conservative, focusing on policies currently on the books and not other potential drivers of increased renewable energy deployment, including a suite of clean energy tax credits currently being considered by Congress. These credits will drive reductions in the costs of a range of clean energy sources, increasing both deployment and emissions reductions relative to the EIA base case. See, e.g., Michael Greenstone, et al., *Assessing the Costs and Benefits of Clean Electricity Tax Credits, Build Back Better Act Policy Memo*, Energy Policy Institute, University of Chicago, and Rhodium Group (Feb. 9, 2022), <https://rhg.com/research/assessing-the-costs-and-benefits-of-clean-electricity-tax-credits/#:~:text=Building%20on%20previous%20modeling%20conducted,a%20scenario%20without%20these%20policies>.

the framework of the nationwide permit program could impede or even eliminate the ability of EEI members and others to obtain timely approval for critical infrastructure projects with minimal impacts on waters of the United States and thereby slow this essential clean energy transition.

EEI thus has a strong interest in this case and urges the Court to grant Federal Defendants' motion for summary judgment so as not to jeopardize the nationwide permit system as a whole, and along with it a timely transition to a clean energy economy.

BACKGROUND

The Clean Water Act prohibits discharges of pollutants to waters of the U.S. that are not authorized by permit. *See* 33 U.S.C. § 1311. Section 404 of the Act, 33 U.S.C. § 1344, authorizes the Corps to issue permits for a particular category of pollutants, i.e., discharges of dredged or fill material. However, the process for obtaining an individual Section 404 permit can be long and cumbersome.

Recognizing this, Congress also authorized the Corps to issue general permits for discharges of dredged or fill material to waters of the U.S. that have minimal impacts on the environment both individually and cumulatively. *See* 33 U.S.C. § 1344(e). The most common type of general permit, nationwide permits are designed to provide timely authorization under Section 404 for discharges with minimal impacts. The existence of this streamlined permitting mechanism provides an incentive for project proponents to design their projects in a way that minimizes impacts to waters of the U.S. so as to

qualify for coverage under a nationwide permit, benefitting both project proponents and the environment.

Plaintiffs challenge NWP 12, which, in its current form, authorizes discharges of dredged or fill material into waters of the U.S. necessary for the construction, maintenance, repair, and removal of oil and gas pipelines.⁷ However, NWP 12 is just one of 59 nationwide permits issued by the Corps that cover a wide variety of activities involving discharges of dredged or fill material into waters of the U.S.⁸ Other nationwide permits include NWP 57, which covers discharges associated with construction and maintenance of electric utility lines and telecommunications cables; NWP 51, which covers discharges associated with the construction of land-based renewable energy generation facilities (such as land-based wind and solar energy facilities); NWP 52, which is similar to NWP 51 but covers water-based renewable energy generation facilities (such as off-shore wind); NWP 58, which covers discharges associated with construction and maintenance of utility lines for water and other substances; and NWP 3, which authorizes discharges associated with the repair, rehabilitation, or replacement of previously authorized and currently serviceable

⁷ The version of NWP 12 that was in effect prior to 2021 was the subject of previous litigation before this Court. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Case No. CV 19-44-GF-BMM (D. Mont.).

⁸ NWP 12 also authorizes work in navigable waters of the United States, which is regulated pursuant to Section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403. For the sake of simplicity, EEI—like the parties—will focus on authorization of activities pursuant to Section 404 of the CWA.

structures. Many discharges authorized pursuant to these nationwide permits are temporary in nature.⁹

EI members rely on these and other nationwide permits in seeking to build and maintain electric generating facilities and the transmission lines needed to convey electricity to customers. This critically important permitting tool makes manageable the otherwise unwieldy regulatory approval process necessary for the construction of new energy infrastructure projects—which are increasingly renewable energy projects—and continued operation of existing energy facilities.

The streamlined permitting process made possible through the nationwide permit program features strong environmental guardrails. Limitations and conditions written into these permits ensure that, consistent with the requirements of Section 404(e), discharges to waters of the U.S. associated with activities authorized by the NWP program will have only minimal effects on the environment. These limitations and conditions take a variety of forms. For example, the conditions for using NWPs to authorize a discharge include:

⁹ For example, many of the discharges authorized under NWP 57 are associated with digging of trenches for laying of wires and cables for transmission of electricity. In these situations, the disturbed areas are restored to their original contours and allowed to revegetate.

- limitations on the amount of waters of the U.S. that can be lost as a result of a discharges, with the typical limit being no more than ½ acre of waters of the U.S. for a single and complete project;¹⁰
- discharges that result in the loss of more than ¼ acre of waters of the U.S. and certain other types of impacts (*e.g.*, mechanized land clearing in forested wetlands) typically trigger closer scrutiny by the Corps to ensure that impacts will be minimal;¹¹
- Corps Division Engineers, or state agencies, can impose further categorical limitations to address local conditions;¹² and

¹⁰ See *e.g.*, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744, 2,866 (Jan. 13, 2021) (setting forth limitations for NWP 57). Discharges of dredged or fill material associated with the construction of utility lines often do not result in the permanent loss of waters of the U.S. because many of the impacts to waters of the U.S. associated with such projects are only temporary in nature.

¹¹ *Id.* at 2860, 2865.

¹² 33 C.F.R. §§ 330.4(c), 330.5(c). For example, within the Corps' Los Angeles District NWP 12 (and other specified NWPs) cannot be used to authorize discharges of dredged or fill material that would result in the loss of wetlands, mud flats, vegetated shallows, or riffle and pool complexes. See U.S. Army Corps of Eng'rs, *Los Angeles District Final Regional Conditions for the 2017 NWPs*, https://www.spl.usace.army.mil/Portals/17/docs/regulatory/Permit_Process/FINAL%202017%20SPL%20regional%20conditions.pdf?ver=2017-03-15-140838-737. Within the state of California, use of NWP 12 is prohibited in the Lake Tahoe area and along the Truckee River and Little Truckee River. See Cal. Water Bds., Reg. Meas. 411836, *State Water Board Certification of the 2017 NWPs 13* (Mar. 17, 2017), https://www.spl.usace.army.mil/Portals/17/docs/regulatory/Permit_Process/SWRQB%20401%20certification%20for%20the%20State%20of%20California.pdf?ver=2017-03-20-112941-033.

- mitigation is required for impacts to waters of the U.S. in specified circumstances, such as when impacts to wetlands exceed $\frac{1}{10}$ acre.¹³

EEI members design their renewable projects to comply with nationwide permit limitations—and thereby minimize the environmental impacts of their projects—so that they can use this invaluable, streamlined process.

ARGUMENT

Were they to be extended to nationwide permits generally, Plaintiffs' theories could have serious consequences for the clean energy transformation. To make progress toward federal and state climate goals that call for significant CO₂ reductions across the economy, the electric sector must continue to expand its renewable generation resources and transmission capacity on an equally aggressive schedule. In other words, policies must allow for the permitting of renewable energy projects at a faster, not slower, rate. Any ruling that calls into question environmental conditions that apply to all nationwide permits—including NWPs used for renewable energy projects—would cast a shadow over the entire program at a time when it is urgently needed and would leave any of the nationwide permits or the program as a whole vulnerable to attack.

Such outcomes are entirely unnecessary because the nationwide permit program in fact rests on sound footing. In particular, all nationwide permits incorporate provisions that provide protections for endangered and threatened species. In fact,

¹³ See 86 Fed. Reg. at 2870-71.

nationwide permits expressly provide only *contingent* authorization for activities that have any potential for affecting listed species. That limitation assures that any such impacts will be addressed before the activity may proceed. EEI members' experience confirms that nationwide permits in general function as intended to protect listed species and the environment. The potential unavailability of nationwide permits as a result of a ruling in favor of Plaintiffs, by contrast, would provide few environmental benefits while undermining EEI members' ability to provide renewable energy and to build and maintain critical energy infrastructure.

I. Limits on the availability of nationwide permits would impede the clean energy transition.

EEI members regularly utilize nationwide permits that incorporate the same standard conditions that apply to NWP 12. These permits help ensure that clean energy projects can be built in an expeditious manner so as to fulfill company-wide, state, and federal renewable energy goals. In order for EEI members to continue playing a leading role in the clean energy transition, they must have access to the streamlined permitting the nationwide permits provide.

A. Nationwide permits play a key role in allowing the power sector to quickly develop clean energy projects.

EEI members frequently require authorization under Section 404 for both new infrastructure projects and maintenance and repair of existing facilities. This is true for both traditional facilities (such as gas-fired generating facilities) and renewable

projects. Solar and wind energy facilities play a key role in reducing GHG emissions, but construction of such facilities often requires at least some discharges of dredged or fill material to waters of the U.S., necessitating authorization under Section 404.

Projects essential to expanding renewable energy access such as transmission lines are especially likely to require permit approval under Section 404. It is often impossible to run a transmission line across dozens or sometimes hundreds of miles (from a solar field or wind turbine array to a community needing electrical service, for example) without crossing over streams or wetland areas. EEI members design their projects to minimize impacts to these areas, but some discharges of dredged or fill material to these waters are often unavoidable as a practical matter. Like all members of the regulated community, EEI members must obtain authorization even for minor discharges under Section 404.

Because of the nationwide permit program, EEI members and others can obtain more timely authorization under Section 404 for the construction, maintenance, and repair of crucial renewable energy projects that result in limited discharges to waters of the U.S. For projects that qualify for coverage under a nationwide permit, obtaining confirmation from the Corps that the permit applies takes an average of only 45 days, a fraction of the time needed to obtain an individual Section 404 permit.

Absent general permits such as nationwide permits, EEI members would be required to obtain individual Section 404 permits for every project involving a discharge to waters of the U.S., no matter how small the discharge or how minimal the impact on

the environment. This is no small task. The Section 404 individual permitting process can easily take a year or more *already*, creating the potential for significant delays in renewable projects and corresponding delays in the provision of the attendant essential services.¹⁴ As the Supreme Court noted, even 16 years ago the average applicant for an individual CWA Section 404 permit “spen[t] 788 days and \$271,596 in completing the process.” *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality op.) (adding that more than “\$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits”). Delays of this magnitude threaten to significantly impede renewable energy projects and other new project development and, in some cases, could prevent EEI members from being able to take timely action necessary to maintain or repair energy infrastructure in wetlands in preparation for, or as a result of, natural disasters like wildfires, hurricanes, and floods. Furthermore, if a renewable project is intended as a replacement for a fossil fuel-based facility, such as a coal plant, then this delay will needlessly result in additional tons of CO₂ emissions that a more efficient permitting process could have avoided, thereby exacerbating climate change.

Drawing out this individual permitting process to cover every single discharge that may result from limited construction activities with minimal—even temporary—impact contravenes Congress’ statutory intent in providing for streamlined permitting

¹⁴ The Corps reported that the average processing time for an individual permit application in FY2018 was 264 days. *See* 86 Fed. Reg. at 2745.

programs and would require far more administrative bandwidth. This would result in even further permitting delays for all projects, particularly those where a general permit can readily achieve a result that minimizes environmental impacts, and in the case of renewables and related transmission infrastructure, has important environmental benefits.

B. Plaintiffs' attacks on NWP 12 could imperil the NWP program as a whole.

Plaintiffs urge the Court to vacate NWP 12 on three grounds: (i) alleged violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), (ii) alleged violations of Section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332; and (iii) alleged violations of Section 404(e) of the CWA. Many of the arguments Plaintiffs make could be interpreted as applying beyond NWP 12, potentially extending to all nationwide permits.

This is particularly true of the arguments Plaintiffs make with respect to the Corps' alleged noncompliance with the ESA. Among other things, Plaintiffs take issue with the Corps' reliance on project-specific consultation with the U.S. Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service (“NMFS”) to satisfy its obligations under Section 7 of the ESA to consult regarding the potential impacts of its actions on species listed as endangered or threatened under the ESA, arguing that such reliance is inconsistent with the requirements of the statute. That approach to ESA compliance is incorporated in General Condition 18, which applies to all nationwide

permits. Therefore, a ruling by the Court that the procedures established by General Condition 18 are inadequate to achieve compliance with ESA Section 7 would potentially impact the nationwide permit program as a whole.

Similarly, Plaintiffs argue that in reissuing NWP 12, the Corps violated the ESA by unlawfully delegating the initial determination of whether a project affects listed species to the project proponent, a determination that Plaintiffs argue must be made by the Corps itself. Again, this process for ESA compliance is set forth in General Condition 18 and is applicable to all nationwide permits, including those on which EEI members depend.

Given these arguments by Plaintiffs, a ruling that the Corps violated Section 7 of the ESA when it reissued NWP 12 could have repercussions beyond that nationwide permit. While Plaintiffs have focused their arguments on a nationwide permit covering oil and gas pipelines, other parties with different concerns could cite a ruling in favor of Plaintiffs as precedent in seeking to invalidate other nationwide permits, including those on which EEI members rely. *See., e.g., National Wildlife Refuge Ass'n v. Rural Utilities Serv.*, Case No. 3:21-cv-306, 2022 WL 136829 (W.D. Wisc. Jan. 14, 2022) (challenge to federal agency approval of transmission line project designed to increase usage of renewable energy based in part on alleged improper verification by Corps of eligibility for nationwide permit).

C. Without nationwide permits, EEI members may not be able to make timely progress in adding renewable energy capacity.

Plaintiffs' arguments could imperil the entire nationwide permit program, and by extension, make it more challenging for electric utilities to make timely progress in adding capacity for generation of renewable energy in response to climate change goals as well as enhance the reliability and resilience of the nation's electric grid. Electric companies spend more than \$120 billion annually to make the grid stronger, smarter, and more resilient to better support customers, who are ever more reliant on electricity to power modern life. Moreover, the federal government has set a goal of achieving a carbon pollution-free electricity sector by 2035 and a net-zero emissions economy by 2050.¹⁵ At least 20 states that EEI members operate in have established similar targets.¹⁶ For example, California has a target of reaching net-zero emissions statewide by 2045.¹⁷ Similarly, under HB 2021 in Oregon, investor-owned electric companies must achieve net-zero emissions by 2040.¹⁸ In response to these ambitious goals, fifty

¹⁵ The White House, *Executive Order on Tackling the Climate Crisis at Home and Abroad*, §§ 201, 205(b)(i), (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

¹⁶ Clean Energy States Alliance, *100% Clean Energy Collaborative – Table of 100% Clean Energy States*, <https://www.cesa.org/projects/100-clean-energy-collaborative/guide/table-of-100-clean-energy-states/>.

¹⁷ State of California Executive Department, *Executive Order B-55-18 to Achieve Carbon Neutrality*, (Sept. 10, 2018), <https://www.ca.gov/archive/gov39/wp-content/uploads/2018/09/9.10.18-Executive-Order.pdf>.

¹⁸ Or. HB 2021, § 3(c).

EEI members have announced carbon-reduction goals, with over two-thirds of those members aiming to achieve net-zero CO₂ emissions or equivalent by 2050 or sooner.

However, achieving such goals is by no means a given. Success in meeting these ambitious targets in a timely manner will require increasing amounts of renewable energy generating capacity. For instance, the U.S. Department of Energy's *Solar Futures Study* found that solar power could potentially serve forty percent or more of U.S. electricity demand.¹⁹ However, the agency estimates that getting to this point "will require annual solar deployment (in terms of [gigawatts] installed per year) to double during the early 2020s and as much as quadruple during the late 2020s, compared with solar deployment in 2020."²⁰ The study also concluded that "[h]igh deployment rates would be necessary for wind and energy storage as well."²¹ Similarly, Princeton University's *Net Zero America* study estimates that to achieve economy-wide net-zero emissions by 2050, the United States will need to install 1.3 to 5.9 gigawatts of solar and wind, up from 0.2 gigawatts in 2020.²²

New generating capacity from renewable sources will be useless if the energy can't be delivered to where it's needed. Therefore, the clean energy transition will

¹⁹ U.S. Department of Energy, *Solar Futures Study*, 1 (Sept. 8, 2021), <https://www.energy.gov/sites/default/files/2021-09/Solar%20Futures%20Study.pdf>.

²⁰ *Id.* at 2.

²¹ *Id.*

²² Eric Larson et al., *Net-Zero America: Potential Pathways, Infrastructure, and Impacts – Final Report Summary*, 17 (Oct. 29, 2021), [https://netzeroamerica.princeton.edu/img/Princeton%20NZA%20FINAL%20REPORT%20SUMMARY%20\(29Oct2021\).pdf](https://netzeroamerica.princeton.edu/img/Princeton%20NZA%20FINAL%20REPORT%20SUMMARY%20(29Oct2021).pdf).

require significant amounts of additional and upgraded transmission lines. Expanding transmission allows for a flexible grid that can more easily integrate renewable resources. For example, solar or wind energy can be curtailed because of an oversupply of such energy at one location where there is not enough transmission capacity to move the clean energy elsewhere. Transmission expansions allow renewable energy that is abundant in one area to be moved to satisfy demand in a geographically remote area. Such expansions also can further extend the grid to renewables-rich regions that are geographically isolated from load centers. Notably, the *Solar Futures Study* estimates that achieving deep decarbonization in the power sector will require a ninety percent expansion of the existing U.S. transmission network.²³ Likewise, the *Net-Zero America* study predicts the U.S. will have to expand its transmission network by two to five times.²⁴

In order to build the required infrastructure to achieve these goals on the timelines envisioned, EEI members will need to have the benefit of an efficient permitting system. The electric sector will surely not be able to achieve these ramp-ups of clean energy capacity and transmission if it suddenly faces a regressive, cumbersome permitting scheme that will impede the required clean energy transition.

²³ U.S. Department of Energy, *Solar Futures Study*, at 10.

²⁴ Larson et al., *Net-Zero America: Potential Pathways, Infrastructure, and Impacts – Final Report Summary*, at 17.

II. NWP 12, like other nationwide permits, already incorporates effective protections for ESA-listed species.

Plaintiffs raise the specter of widespread impacts to endangered and threatened species resulting from discharges authorized under NWP 12. However, nationwide permits, including NWP 12, already contain multiple protections for ESA-listed species and the environment in general. Through the operation of this system, the Corps ensures that activities conducted pursuant to the NWP program which might affect listed species will not proceed absent review by the Corps in consultation—where appropriate—with FWS and/or NMFS. This regulatory structure has proven to be effective over the course of many years in protecting endangered and threatened species and critical habitat.

A. The NWP program includes a carefully constructed system to protect listed species.

Among the provisions built into every nationwide permit—including NWP 12—are those specifically designed to protect ESA-listed species and their critical habitats.²⁵ Most notably, the Corps’ regulations—reinforced by General Condition 18—expressly deny authorization under *any* nationwide permit of any activity likely to directly or indirectly jeopardize the continued existence of any listed species or to directly or indirectly adversely modify any designated critical habitat. *See* 33 C.F.R. § 330.4(f); 86 Fed. Reg at 2844. The regulations further state that no activity that may affect an

²⁵ Under the ESA, the Services designate “critical habitat” for listed species, which generally include areas that are deemed to be essential for the conservation (*i.e.*, the survival and recovery) of the species. 16 U.S.C. § 1532(5)(A).

endangered or threatened species or critical habitat is authorized under any nationwide permit unless the Corps has consulted with the Services under ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), to address the impacts of the proposed activity on listed species and their critical habitat. 33 C.F.R. § 330.4(f)(2).

In support of these prohibitions, General Condition 18 imposes multiple obligations on those who seek to use nationwide permits to authorize discharges of dredged or fill material to waters of the U.S. First, any company or individual planning to use a nationwide permit to authorize a discharge to waters of the U.S. must notify the Corps before engaging in the activity (through submission of a “pre-construction notification”) if the activity *might* affect a listed species or designated critical habitat. 86 Fed. Reg at 2844. Work on the activity cannot begin until the Corps in turn notifies the company or individual that the requirements of the ESA have been satisfied. *Id.*

In order to satisfy those ESA requirements, the Corps will determine whether the activity may in fact affect a listed species or critical habitat or will instead have no effect. *Id.* If it makes a “may affect” determination, the Corps will engage in a consultation under ESA Section 7 with the Services—*i.e.*, FWS and/or NMFS as appropriate (depending on the species involved).²⁶ *Id.* In the meantime, the activity is not authorized until the Corps notifies the company or individual that consultation is

²⁶ In general, FWS has jurisdiction over terrestrial and freshwater species, while NMFS has jurisdiction over marine species as well as anadromous species such as salmon.

complete. *Id.* General Condition 18(d) further specifies that the Corps may add any activity-specific conditions to any given use of a nationwide permit that are necessary in light of the Section 7 consultation. *See id.* at 2868–69.

In effect, nationwide permit provides only contingent approval for any activities that might affect listed species or critical habitats. Those activities only become authorized once the requirements of General Condition 18 have been satisfied. As a result, the issuance of a nationwide permit per se does not authorize any impacts on listed species.

B. General Condition 18 is effective in protecting listed species.

EEI members’ experience confirms that General Condition 18 works as intended and incentivizes project proponents to plan wisely and avoid impacts to listed species. These incentives are evident in the project planning phase. For any project for which EEI members intend to rely on a nationwide permit, they take a variety of steps to determine whether there are any listed species or critical habitat in the area that the project might affect. For example, EEI members generally retain expert consultants to assist their own personnel who are knowledgeable regarding ESA issues. Together, the project team will conduct an investigation to determine whether any ESA-listed species or critical habitat are located within the project area. One common tool used for this purpose is FWS’s Information for Planning and Consultation (“IPaC”) database, which allows a user to designate a project area anywhere in the country on a map and receive

information regarding listed species that are known or expected to be in or near the project area.²⁷

In some cases, project teams may request from the appropriate Service an “official species list” that will identify the species and critical habitat that should be considered in determining whether a Section 7 consultation is required for the project. Where there may be potential for a species to be found in the project area, EEI-member consultants will conduct surveys using accepted protocols. Depending on the circumstances, these surveys may be “presence/absence” surveys to determine whether any listed species are found in the project area, or they may be surveys intended to identify habitat for endangered or threatened species.

Typically, these efforts lead an EEI member to confirm that the project area does not include listed species or critical habitat that the proposed discharge might affect. But when a project as originally designed might affect an endangered or threatened species, the member typically will consider design modifications—rerouting transmission lines, for instance—to avoid impacts to the species.

When relocating the project would not work, EEI members notify the Corps and often coordinate directly with FWS and/or NMFS. In these cases, the member will examine other means to minimize or avoid any impacts to the species. For example, by restricting the times of year for tree clearing, a project proponent may be able to avoid

²⁷ This database is publicly available at <https://ecos.fws.gov/ipac>.

the nesting season and eliminate impacts on birds. Where appropriate, EEI members will mitigate remaining impacts to listed species in consultation with the Corps and the Services through any of a variety of measures.

Through this process, nationwide permits lead EEI members, and others similarly situated, to ensure that they do not engage in discharges that could affect listed species or critical habitat without coordinating with the Corps and/or the appropriate Service. This coordination is essentially identical to what would occur if EEI members were applying for individual CWA Section permits. At the same time, the existence of nationwide permits and the prospect of expedited permitting conducted in an environmentally sound manner promotes efforts to avoid impacts and therefore promotes both the economic and environmental agenda that Congress sought to advance.

Thus, EEI members' experience supports the Corps' conclusion that the issuance of nationwide permits, in itself, has no effect on listed species and critical habitat. In fact, the existence of the entire nationwide permit program promotes the avoidance of any impacts to listed species or critical habitats. Where impacts to listed species might occur, the authorization provided by a nationwide permit is only contingent, and the permit's provisions, including General Condition 18, ensure that any necessary consultation with the Services occurs on a project-specific basis before any permit authorization becomes effective.

CONCLUSION

In order to ensure the electric sector can continue to lead the transformation to clean energy through the timely construction and maintenance of renewable energy infrastructure, Federal Defendants' cross-motion for summary judgment should be granted and Plaintiffs' motion for summary judgment should be denied.

Dated: April 1, 2022

Respectfully submitted,

By: /s/ Brian P. Thompson
Brian P. Thompson

BROWNING KALECZYC
BERRY & HOVEN, P.C. –
HELENA

-AND-

Thomas C. Jackson (*pro hac vice*)
BAKER BOTTS L.L.P.

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

The undersigned, Brian P. Thompson, certifies that the Brief of Edison Electric Institute as Amicus Curiae complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 5118 words, excluding the caption, and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

Dated: April 1, 2022

Respectfully submitted,

By: /s/ Brian P. Thompson
Brian P. Thompson

BROWNING KALECZYC BERRY &
HOVEN, P.C.

CERTIFICATE OF SERVICE

I hereby certify that, on the 1st day of April, 2022, an accurate copy of the foregoing Brief of Edison Electric Institute as Amicus Curiae was served via ECF to the parties of record.

Dated: April 1, 2022

Respectfully submitted,

By: /s/ Brian P. Thompson
Brian P. Thompson

BROWNING KALECZYC BERRY &
HOVEN, P.C.