

Case Nos. 20-35412, 20-35414, 20-35415 & 20-35432

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**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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NORTHERN PLAINS RESOURCE COUNSEL, ET AL.,  
*Plaintiffs-Appellees,*

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,  
*Defendants-Appellants,*

TC ENERGY CORPORATION, ET AL.,  
*Intervenor-Defendants-Appellants,*

STATE OF MONTANA,  
*Intervenor-Defendant-Appellant,*

and

AMERICAN GAS ASSOCIATION, ET AL.,  
*Intervenor-Defendants-Appellants.*

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On Appeal from the United States District Court  
for the District of Montana  
No. 4:19-cv-00044-BMM

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**BRIEF OF APPELLANTS TC ENERGY CORPORATION AND  
TRANSCANDA KEYSTONE PIPELINE LP**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, TC Energy Corporation and TransCanada Keystone Pipeline, LP make the following disclosures:

TC Energy Corporation is a Canadian public company organized under the laws of Canada. No publicly held corporation owns 10% or more of TC Energy Corporation's stock.

TransCanada Keystone Pipeline, LP is a Delaware limited partnership wholly owned by TransCanada Keystone Pipeline, LLC and TransCanada Keystone Pipeline GP, LLC, which are indirectly wholly owned by TC Energy Corporation.

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## INTRODUCTION

This case raises important questions concerning the steps the U.S. Army Corps of Engineers (Corps) must take to comply with the Endangered Species Act (ESA) when it reissues a long-extant nationwide permit under the Clean Water Act (CWA). The case also raises critical questions about the remedy a court may order if it finds that reissuance of such a permit violates the ESA. The lower court's resolution of both issues was deeply flawed and should be reversed.

The CWA prohibits discharge of dredged or fill material into navigable waters except in accordance with an individual or general permit from the Corps. The ESA requires the Corps to ensure, in consultation with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), that actions it authorizes are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species ....” 16 U.S.C. § 1536(a)(2).

For individual permits, the Corps complies with the ESA by performing a project-specific review to determine whether the proposed activities may affect species or critical habitat. If so, the Corps consults

with the FWS or NMFS, depending on the species, to determine whether the project will adversely affect protected species or destroy critical habitat and, if so, whether those effects are likely to jeopardize the species' continued existence.

A general permit allows the discharge of dredged or fill materials for certain categories of activities, provided that the activities are similar and have only minimal adverse environmental effects, both separately and cumulatively. *See* 33 U.S.C. § 1344(e)(1). First issued in 1977, Nationwide Permit 12 (NWP 12) is a general permit that authorizes such discharges for construction, maintenance, and repair of utility lines, including oil pipelines. Like all general permits, NWP 12 is designed to automatically authorize certain dredge or fill activities.

Critically, however, this automatic authorization ceases if a use of NWP 12 “*might*” affect or is “in the *vicinity* of” ESA-protected species or critical habitat. In that circumstance, General Condition 18 of the permit states that use of NWP 12 is *not* authorized until the Corps determines that the proposed activity “will have ‘no effect’ on listed species or habitat,” or consults with the Services about the activity’s adverse effects on, and potential jeopardy of, protected species or critical

habitat. Thus, NWP 12 does not itself authorize any activity that may affect protected species or habitat; under General Condition 18, such activities can proceed only after completion of project-specific consultations. Accordingly, the Corps concluded that the mere reissuance of NWP 12 would have “no effect” on protected species or critical habitat.

Despite the obvious logic behind that conclusion—and the deference owed to it—the district court rejected the Corps’ position as arbitrary and capricious. The court’s principal reason for doing so was its belief that project-specific review cannot prevent piecemeal destruction of endangered species, and that the Corps therefore should have undertaken “programmatic review”—*i.e.*, it should have consulted with the Services about the potential ESA-related impacts of all foreseeable uses of NWP 12 over the permit’s five-year life. But the supposedly defective project-level review that NWP 12 relies on is *the same review the Corps has long used when issuing individual permits*. Thus, under the district court’s reasoning, all individual CWA permits fail to comply with the ESA because (per the district court) they all fail to prevent the piecemeal destruction of protected species. As this

obvious incongruity illustrates, the lower court did not understand how project-level review actually works, and why its use under NWP 12 ensures compliance with the ESA.

Because the finding of an ESA violation should be reversed, this Court need not address the district court's remedy. Here too, however, the lower court erred. Indeed, not only is the lower court's injunction (and related vacatur) improper for all of the reasons recited in the Corps' brief, it suffers from another, equally fatal defect: enjoining and vacating *any* use of NWP 12 is inconsistent with the equitable principles that govern injunctions and vacatur.

Plaintiffs failed to show that use of NWP 12—including use for the Keystone XL pipeline—would cause any irreparable harm. Because plaintiffs submitted declarations only to establish standing, they provided no evidence—and the district court made no finding—that use of NWP 12 during the pendency of a remand would create a definitive threat of harm to any particular species in any specific location. Instead, the court simply presumed that irreparable injury would follow from the Corps' asserted procedural violation—in square contravention

of this Court's precedent. *See Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1089 (9th Cir. 2015).

And plaintiffs could not have established that use of NWP 12 *for Keystone XL* would cause any irreparable harm. The Corps and other federal agencies have already engaged in extensive consultations with FWS about the project. FWS issued a biological opinion finding that Keystone XL would *not* adversely affect any protected species except the American burying beetle, and that the project would *not* jeopardize that species' continued existence. Plaintiffs' failure to challenge those conclusions before the district court precluded a finding below that Keystone XL's use of NWP 12 will cause irreparable harm.

Plaintiffs and the district court tried to brush aside these problems by asserting that vacatur is the presumptive remedy when an agency's decision is erroneous. But vacatur is also governed by equitable principles, and under the two-part test this Court applies, it was clearly inequitable to order such relief here. The Corps' asserted error was not "serious" within the meaning of this test, because the Corps could substantiate reissue NWP 12 following consultations on remand. And the lower court was flatly wrong in reasoning that it could

essentially ignore the disruptive consequences of vacatur on third-parties like TC Energy, which has invested hundreds of millions in Keystone XL.

As explained in greater detail below, the district court's decision on the merits and its remedial order should be reversed and vacated.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 28 U.S.C. § 1331 because plaintiffs' claims arose under the ESA, 16 U.S.C. §§ 1531-1544, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The district court's interlocutory orders are appealable, because they grant or modify an injunction. This Court has jurisdiction under 28 U.S.C. §§ 1292(a)(1). The district court's order granting the injunction was entered on April 15, 2020 (ER39-64), and the order modifying the injunction was entered on May 11, 2020 (ER1-38). TC Energy filed a notice of appeal on May 13, 2020. TC Energy Supplemental Excerpts of Record (SER) SER624-36. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

## STATEMENT OF THE ISSUES

1. Whether the Corps’ conclusion that reissuance of NWP 12 would have “no effect” on protected species or critical habitat was arbitrary and capricious, when General Condition 18 of that permit authorizes only activities that have no effect on protected species and critical habitat, and any dredge or fill activities by utilities that “may affect” such species or habitat require *separate authorizations* derived from section 7 consultations.

2. Whether the district court erred in vacating NWP 12 and enjoining its use for the construction of new oil and gas pipelines during remand where plaintiffs submitted no evidence that such use of NWP 12—including use for the Keystone XL project—is likely to cause irreparable harm to protected species and critical habitat, the Corps could reissue NWP 12 in the same form following a remand, and vacatur is highly disruptive to TC Energy and others.

## PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Addendum to this brief and in the Addendum to the Federal Appellants’ Opening Brief.

## STATEMENT OF THE CASE

### I. Statutory and Regulatory Background

#### A. Endangered Species Act

Section 7(a)(2) of the ESA requires federal agencies to ensure, “in consultation with and with the assistance of” the Services, that actions they authorize are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species ....” 16 U.S.C. § 1536(a)(2). If an agency determines that a proposed action “may affect listed species or critical habitat,” it typically must engage in formal consultation with the Service having jurisdiction over the species. 50 C.F.R. § 402.14(a).<sup>1</sup>

At the conclusion of the consultation, the Service will issue a “biological opinion” (BiOp) stating “whether or not” the agency’s proposed action “is likely to jeopardize the continued existence of a

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<sup>1</sup> The agency need not initiate formal consultation if (1) it consulted informally with the Service or prepared a biological assessment and determined, with the written concurrence of the Service, that its “proposed action is not likely to adversely affect any listed species or critical habitat,” or (2) the Service has already issued a BiOp addressing the effects of the action at issue. 50 C.F.R. § 402.14(b).

listed species or result in the destruction or adverse modification of critical habitat.” *Id.* § 402.02. If the Service determines that the proposed action *is* “likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat,” the BiOp will specify the “reasonable and prudent alternatives, if any,” that the agency could take to avoid violating section 7(a)(2) of the ESA. *Id.* § 402.14(h)(2); *see also* 16 U.S.C. § 1536(b)(3)(A). If the Service determines that the proposed action is *not* likely to cause such harm, the BiOp will include an “incidental take” statement that sanctions the incidental taking of the protected species by the action approved by the agency. *See* 50 C.F.R. § 402.14(i); 16 U.S.C. § 1536(b)(4).

## **B. Section 404 of the Clean Water Act**

Under section 404 of the CWA, no one can discharge dredged or fill material into “navigable waters” without approval from the Corps under an individual or general permit. *See* 33 U.S.C. § 1344(a), (e).

### **1. Individual permits**

Individual permits are granted following “a costly review process.” *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 663 F.3d

470, 472 (D.C. Cir. 2011). The governing regulations require a detailed evaluation of the probable impact, including cumulative impacts, of the proposed activity, 33 C.F.R. § 325.2(c)(1), and are based on “the precept that dredged or fill material should not be discharged into the aquatic ecosystem” unless the “discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern,” 40 C.F.R. § 230.1(c).

The Corps’ regulations also require compliance with section 7(a)(2) of the ESA. The Corps must review individual permit applications to determine whether the proposed activity may affect listed species or critical habitat. 33 C.F.R. § 325.2(b)(5). If the Corps “determines that the proposed activity would not affect listed species or their critical habitat,” it must “include a statement to this effect in the public notice” of the permit application. *Id.* This notice is forwarded to FWS and NMFS so they can provide “information on whether any listed or proposed to be listed endangered or threatened species may be present

in the area which would be affected by the proposed activity.” *Id.*

§ 325.2(b)(5).

If the Corps “finds the proposed activity may affect an endangered or threatened species or their critical habitat,” it “will initiate formal consultations” with FWS or NMFS pursuant to the “consultation procedures” in the Services’ ESA regulations. *Id.* The Service then reviews “all relevant information provided by [the Corps] or otherwise available,” and may conduct an on-site inspection of the action area. *Id.* § 402.14(g)(1). The Service engages in a three-step analysis that culminates in the issuance of a BiOp.

First, it evaluates “the current status and environmental baseline of the listed species or critical habitat.” *Id.* § 402.14(g)(2).

“Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences” caused by the proposed action. *Id.* § 402.02. It “includes past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of

State or private actions which are contemporaneous with the consultation in process.” *Id.*

Second, the Service evaluates “the effects of the action” and “the cumulative effects on listed species or critical habitat,” *id.*

§ 402.14(g)(3), which “are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action.”

*Id.* § 402.02. “Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.” *Id.* And “[c]umulative effects are 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.*

Third, the Service adds “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[s] 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.” *Id.* § 402.14(g)(4).

After completing this analysis, the Service sets forth its findings in a BiOp. *Id.* § 402.14(g)(5). If the Service makes a “jeopardy” finding, it identifies any “reasonable and prudent alternatives” that can be taken to prevent the jeopardy and “avoid violation of section 7(a)(2).” *Id.*; *see also id.* at 402.14(h)(2). But even without a jeopardy finding, the Service may develop “discretionary conservation recommendations” to assist the Corps “in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.” 50 C.F.R. § 402.14(g)(6).

Following receipt of the BiOp, the Corps decides whether to grant or deny the individual permit. It may grant the permit but add “special conditions” as “necessary to satisfy legal requirements” in the ESA “or to otherwise satisfy the public interest requirement” of the CWA. 33 C.F.R. § 325.4(a).

## **2. General permits**

In some situations, a party can forgo the individual permit process and proceed under a general permit. The Corps issues general permits

for a “category of activities ... [that] are similar in nature [and] will cause only minimal adverse environmental effects.” 33 U.S.C.

§ 1344(e)(1). Typically, general permits “allow parties to proceed with much less red tape” than is involved with individual permits. *Nat’l Ass’n of Home Builders*, 663 F.3d at 472.

Nationwide permits are a type of general permit. *See* 82 Fed. Reg. 1860, 1860 (Jan. 6, 2017). They are issued after notice and public comment, must be “based on” the EPA guidelines that govern issuance of individual permits, and must “set forth the requirements and standards which shall apply to any activity authorized by [the] general permit.” 33 U.S.C. § 1344(e)(1). They are valid for five years and must thereafter be reissued. *Id.* § 1344(e)(2).

### **C. Nationwide Permit 12**

The Corps first promulgated NWP 12 and several other nationwide permits in 1977, and it has revised and reissued NWP 12 multiple times since, most recently in the 2017 rulemaking challenged here. *See* 82 Fed. Reg. at 1883-84.

## 1. Terms and Conditions of NWP 12

NWP 12 “authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines,” if they satisfy many conditions to ensure that the activities authorized by NWP 12 have no more than minimal adverse environmental impacts. *Id.* at 1860, 1985. Some of the conditions are “general conditions” applicable to all nationwide permits. *Id.* at 1998-2004. Some conditions are specific to NWP 12. *Id.* at 1985-86. And some conditions apply only within a particular region of the country. *See, e.g.*, SER1059-75 (conditions within the Corps’ Omaha District, where Keystone XL will be constructed).

The many requirements designed to ensure that use of NWP 12 does not result in undue environmental harm are set forth in the Corps’ brief, and will not be repeated here. *See* Federal Appellants’ Opening Br., Dkt.Entry 70, at 10-11, 27-28. Another set of requirements—specified in General Condition 18—ensured that the reissuance of NWP 12 complied with section 7(a)(2) of the ESA. It states that “[n]o activity is authorized under any NWP which is likely to directly or indirectly

jeopardize the continued existence of a threatened or endangered species” (or one “proposed for such designation”), or “which will directly or indirectly destroy or adversely modify the critical habitat for such species.” 82 Fed. Reg. at 1999; *see also* 33 C.F.R. § .330.4(f) (same language in regulations governing the nationwide permit program). And, most pertinently here, General Condition 18 provides that “[n]o activity is authorized” that “‘may affect’ a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed.” 82 Fed. Reg. at 1999.

To enable that consultation to occur, a utility seeking to use NWP 12 “must submit a pre-construction notification” (PCN) to the Corps “if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat.” *Id.* This standard “is more stringent than the ‘may effect’ threshold for section 7 consultation” in the Services’ regulations, and thus ensures that the Corp will be notified of activity that requires consultation. *Id.* at 1955.

The PCN must identify all of a project’s water crossings, regardless of whether those other crossings require a PCN. *Id.* at 1890.

When the Corps receives the PCN, it must “determine whether the proposed activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation.” *Id.* at 1954. If the Corps makes a “may affect” determination, “the activity is *not authorized by NWP* until the [Corps] completes ESA section 7 consultation.” *Id.* at 1955-56 (emphasis added). The utility “shall not begin work on the activity until notified by the [Corps] that the requirements of the ESA have been satisfied and that the activity is authorized.” *Id.* at 1999; *see also* 33 C.F.R. § 330.4(f)(2) (same).

The consultation process is governed by the ESA and implementing regulations, just as it is when the Corps consults about individual permits. *See* 82 Fed. Reg. at 1955. Here, too, consultation concludes when FWS or NMFS issues a BiOp or provides “written concurrence” with the Corps’ biological assessment. *See* 16 U.S.C. § 1536(b)(1); 82 Fed. Reg. at 1955. Following the consultation, the Corps will add conditions to the NWP authorization necessary to avoid the likelihood of adverse effects on listed species or critical habitat. *See* 82 Fed. Reg. at 1956; ER590-91.

If a utility fails to submit a PCN required by General Condition 18 or submits a PCN but takes action before its activity is authorized, “then the activity is not authorized by NWP. The [Corps] will take appropriate action for the unauthorized activity.” 82 Fed. Reg. at 1955; *see also id.* at 1954.

## **2. The Rulemaking To Reissue NWP 12**

As the Corps explained in the rulemaking, General Condition 18 (and similar restrictions in 33 C.F.R. § .330.4(f)) ensure that all activity authorized by NWP 12 complies with section 7 of the ESA, so the Corps was not required to initiate programmatic consultations with the Services before it reissued NWP 12 or any other NWP. *See* 81 Fed. Reg. 35186, 35192-93 (June 1, 2016) (proposed rule); 82 Fed. Reg. at 1873-74 (final rule). The “only activities that are immediately authorized” by NWP 12 are those that have “no effect” on listed species or critical habitat, so the issuance of the NWP itself “has ‘no effect’ on listed species or critical habitat.” 81 Fed. Reg. at 35193. Activities that “may affect’ listed species or critical habitat” cannot occur until the Corps has completed “Section 7 consultations with the Services” about those

activities, “as required by general condition 18 and 33 C.F.R. 330.4(f).”

*Id.*

The Corps acknowledged that it had engaged in programmatic consultations when it issued the NWP in 2007 and 2012. *Id.* at 35194. But it did so voluntarily, not because it believed they were required by section 7. *Id.* at 35193-94; *see also* SER1005-12 (legal opinion written by Chief Counsel of the Corps in 2012). FWS did not issue a BiOp following the voluntary consultation on the 2012 NWP. 81 Fed. Reg. at 35194. NMFS issued two BiOps after completing the consultation.

NMFS’ 2012 BiOp concluded that a *proposed* version of the nationwide permits “failed to insure” that authorized activities “are not likely to jeopardize the continued existence of endangered or threatened species under the jurisdiction of NMFS.” SER961. The Corps objected that NMFS ignored changes made during the rulemaking process. Following further consultations, NMFS issued a 2014 BiOp that took account of improvements made in the rulemaking and consultation process and concluded that the NWP “place the Corps in a position to prevent adverse effects to endangered or threatened species under

NMFS' jurisdiction or critical habitat that has been designated for such species." SER997-98; *see also* SER1001 (similar).

In 2016, the Corps notified NMFS that it would not be initiating formal consultation for the 2017 NWP, but planned to retain most of the protective measures from the 2012 NWP that were discussed in the 2014 BiOp. ER603.<sup>2</sup> The Corps also circulated a draft notice of the proposed reissuance of the NWP explaining the Corps' view that the reissuance would have "no effect" on listed species or critical habitat and the agency therefore would not initiate formal consultations. FWS did not object to the draft proposal, but NMFS did. *Id.*; *see also* SER983.

The Office of Management and Budget (OMB) brokered a resolution of this inter-agency dispute, *see* ER602-603, ER593. The Corps retained most of the protective measures from the 2012 NWP as it had proposed, and committed to collaborate with NMFS at the regional level while the 2017 NWP is in effect. ER593-96. The Corps then published its proposal to reissue the NWP without formal

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<sup>2</sup> The only measures it did not plan to retain were for "tracking and reporting additions to impervious surface cover," which the "Corps has little legal authority to control" and "are due primarily to activities in uplands that the Corps does not regulate." ER604.

consultation, *see* 81 Fed. Reg. at 35193-94, and reiterated its position in the final rule, without objection from NMFS, that reissuance of the NWP would have “no effect” on protected species or critical habitat. *See* 82 Fed. Reg. at 1873-74.

## **II. Keystone XL Pipeline**

The Keystone XL pipeline will transport oil from Canada across the U.S. border in Montana to Nebraska, where it will connect to the existing Keystone pipeline system. Only 19.7 miles, roughly 2.2 percent of the project, will traverse U.S. waters.

Environmental impact statements analyzing Keystone XL were issued in 2011, 2014, and 2019.<sup>3</sup> The Corps and other federal agencies have also engaged in extensive consultations with FWS about Keystone XL pursuant to ESA section 7. *See* SER692-97; SER641. As a result, a Biological Assessment (“BA”) and a BiOp were prepared for the Project. SER637-879.

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<sup>3</sup> U.S. Dep’t of State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project* (Dec. 2019) (2019 Final SEIS), <https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=286595>

The BA evaluated protected species that may be affected by Keystone XL, SER716-859, and found that only the American burying beetle (ABB) “is likely to [be] adversely affect[ed]” by Keystone XL, SER812 (emphasis omitted). FWS concurred with the BA’s assessment that other protected species were not likely to be adversely affected and issued the BiOp for the ABB, concluding that Keystone XL “is not likely to jeopardize [its] continued existence.” SER674.

### **III. Proceedings Below**

Plaintiffs brought facial and as-applied challenges to reissuance of NWP 12 under the ESA, the CWA, and the National Environmental Policy Act (“NEPA”). ER558-72. Plaintiffs alleged that the Corps violated the ESA by failing to engage in programmatic consultation before reissuing NWP 12 in 2017. Plaintiffs also challenged the Corps’ verifications of PCNs that TC Energy submitted in 2017 in order to comply with the requirements of General Condition 18. *Id.* The court stayed plaintiffs’ as-applied challenges as unripe. SER963-64.<sup>4</sup>

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<sup>4</sup> TC Energy had withdrawn the 2017 PCNs and the Corps rescinded its verifications after the court concluded, in earlier litigation, that there were deficiencies in an earlier BiOp issued by FWS and in the NEPA analysis done in connection with TC Energy’s application for a Presidential Permit for Keystone XL to cross the U.S./Canada border.

On April 15, 2020, the court granted plaintiffs summary judgment on their ESA facial challenge. It held that the Corps’ “no effect” determination” was “arbitrary and capricious,” and that the “Corps should have initiated ESA Section 7(a)(2) consultation before it reissued NWP 12.” ER59. Citing statements that the Corps made when it reissued NWP 12 in 2017, as well as declarations submitted to establish plaintiffs’ standing, the district court concluded that there was “resounding evidence” that reissuance of NWP 12 “may affect” listed species and their critical habitat. ER49.

The court rejected the Corps’ conclusion that General Condition 18 ensured that reissuance of NWP 12 would not affect listed species and their critical habitat. The court “presume[d] that the Corps, the Services, and permittees will comply with all applicable statutes and regulations.” ER57. But it thought the requirement that a utility submit a PCN if “its activity ‘might’ affect listed species or critical

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*See* SER966-67. After those counts were stayed, the federal agencies issued a revised BA and BiOp (discussed above) along with a new NEPA analysis. In light of these new analyses, TC Energy submitted new PCNs, but the Corps has not acted on them and cannot do so now in light of the ruling below.

habitat” was an improper “delegat[ion]” of the Corps’ duty to determine “whether its actions ‘may affect’” those species or habitat. *Id.*

The court also found that “[p]rogrammatic review” is needed “to avoid piecemeal destruction of species and habitat” because (in its view) “[p]roject-level review, by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat.” ER56. Instead, “the *only* way to avoid piecemeal destruction of listed species and habitat” is through “[p]rogrammatic review of NWP 12 in its entirety.” *Id.* (emphasis added).

The court therefore “remand[ed] NWP 12 to the Corps for compliance with the ESA,” “vacate[d] NPW 12 pending completion of the consultation process,” and “further enjoin[ed] the Corps from authorizing any dredge or fill activities under NWP 12.” ER59.

The government and TC Energy sought a stay of the injunction and vacatur. Montana and the NWP 12 Coalition, intervenors below, supported those motions. On May 11, the court issued an amended Order. It vacated NWP 12 “as it relates to the construction of new oil and gas pipelines pending completion of the consultation process,” but

left NWP 12 in place “insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects.” ER38. It also enjoined the Corps from authorizing “activities for the construction of new oil and gas pipelines under NWP 12.” *Id.*

The government, TC Energy, and the NWP 12 Coalition filed notices of appeal and moved for a stay in this Court, which was denied. The Supreme Court subsequently stayed the portion of “the district court’s May 11, 2020 order granting partial vacatur and an injunction ..., except as it applies to the Keystone XL pipeline,” pending disposition of this appeal and a timely petition for certiorari. ER65.<sup>5</sup>

## SUMMARY OF THE ARGUMENT

I. The Corps reasonably concluded that it was not required to engage in formal consultations with the Services before it reissued NWP12, because the permit authorizes only activities that have no

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<sup>5</sup> To maximize its ability to engage in construction during the 2021 construction season, TC Energy has applied for an individual permit while continuing to appeal the invalidation of NWP 12. *See* U.S. Army Corps of Engineers, et al., *Joint Notice of Permit Pending*, <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/15088>

effect on protected species and critical habitat. Any dredge or fill activities that may affect such species or habitat require *separate authorization* from the Corps, which can be given only *after* the Corps consults with the Services.

No “resounding” evidence showed that reissuance of NWP 12 would affect listed species or critical habitat. The Corps acknowledged only that NWP 12 would result in a *minor incremental* contribution to cumulative *environmental* effects on wetlands, streams, and aquatic resources. It nowhere conceded that reissuance of NWP 12 would affect *protected species* or their habitat. The court also considered declarations submitted by plaintiffs, but those declarations were submitted to establish plaintiffs’ standing to sue; they were not in the administrative record; and they ignored the fact that NWP 12 does not authorize activities that may affect protected species or critical habitat. *See infra* § I.A.

The district court also thought that programmatic consultations are the only way to prevent piecemeal destruction of endangered species. But it relied principally on a regulation and Ninth Circuit cases that address the scope and adequacy of the consultative review that

must be done once an agency determines that its actions “may affect” protected species or critical habitat. Those authorities do not address the validity of an agency’s antecedent decision that its action does *not* affect such species or habitat, which is the question presented here.

Moreover, the district court ignored that NWP 12 uses the same project-level review that is used for individual permits. That review looks at the effects of the proposed action (including cumulative effects) and adds them to the “environmental baseline” of the listed species or critical habitat to determine the effect of the proposed action. The environmental baseline is updated each time an activity is approved, so protected species will not be destroyed by a series of activities with individually modest impacts. *See Infra* § I.B.2.

Finally, the district court erred in saying that the Corps failed to initiate programmatic consultations even though it knew they were required. The Corps had consulted with the Services about the NWPs issued in 2012, but those consultations were voluntary. The Chief Counsel had written an opinion in 2012 concluding that formal consultations were not required, and the Corps relied on that opinion in deciding not to initiate consultations about the reissuance of the NWPs

in 2017. The Corps’ “no effect” determination thus cannot be dismissed as a “scheme” concocted by the Corps’ regulatory manager in an email in 2014. Nor can it be rejected on the ground that the Services had a different view. Although NMFS initially disagreed with the “no effect” determination, it receded from that position in inter-agency discussions before the notice to reissue NWP 12 was published in the Federal Register. Moreover, it is the Corps, not NMFS, that had ultimate responsibility to make a “no effect” decision. *See infra* § I.C.

**II.** Even if its finding of an ESA violation is upheld, the district court’s remedial order should be reversed. It was inequitable to enjoin the use of NWP 12 and to vacate the permit in any respect, and it was particularly improper to do so with respect to the Keystone XL pipeline.

The district court reasoned that an injunction should issue because (1) the Corps should have engaged in programmatic consultation because discharges authorized by NWP 12 “may affect” listed species and critical habitat; and (2) irreparable injury is therefore “*likely*” if new oil and gas pipelines are constructed before the consultations are completed. ER123. That reasoning simply presumes that irreparable harm will flow from the lack of consultation—in

contravention of the rule that there “is no presumption of irreparable injury where there has been a procedural violation in ESA cases.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). *See infra* § II.A.1.

The district court particularly erred in enjoining use of NWP 12 for Keystone XL. The Corps and other federal agencies have engaged in extensive consultations with FWS, and issued a BA explaining that no Keystone XL will *not* adversely affect any protected species except the ABB. FWS agreed and issued a BiOP finding that Keystone XL is *not* likely to threaten the continued existence of the ABB. Plaintiffs did not challenge the BA or BiOp below, and that failure precludes a finding that Keystone XL’s use of NWP 12 will cause irreparable harm. *See infra* § II.A.2.

The district court likewise misapplied the two-part test for determining whether NWP 12 should be vacated during remand to the Corps.

The “seriousness” prong of the test focuses not on the severity of the procedural error, but on whether the agency can correct the error and issue the same rule on remand. *See Pollinator Stewardship Council*

*v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). That prong cuts against vacatur here. Following consultations, the Services could conclude that NWP 12, with General Condition 18 and its other protective conditions, is not likely to adversely affect any protected species or critical habitat, and the Corps could then reissue NWP 12 without change.

The district court further erred in thinking that the “disruptiveness” prong of the test required a focus on the environmental consequences, but not on the economic costs of vacating NWP 12 for oil and gas pipelines. Vacatur is an equitable remedy, and equity requires the court to weigh the balance of harms. TC Energy submitted evidence that the delay caused by vacatur of NWP 12 would cost it hundreds of millions of dollars. That evidence—and the facts that the Corps could reissue NWP 12 following consultation and that Keystone XL’s use NWP 12 will cause no irreparable harm—demonstrate that vacatur was inequitable. *See infra* § II.B.

## ARGUMENT

### I. THE CORPS DID NOT VIOLATE THE ESA WHEN IT REISSUED NATIONWIDE PERMIT 12.

To prevail on their ESA claim, plaintiffs had to demonstrate that the Corps’ “no effect” determination was “arbitrary and capricious.” *W.*

*Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2010).

Under this deferential standard, the “[c]ritical ... inquiry is whether there is ‘a rational connection between the facts found and the conclusions made’ in support of the agency’s action.” *Id.* The Corps’ “no effect” decision readily satisfies this test.

Under General Condition 18, any dredge or fill activities that “might affect” or are “in the vicinity of” protected species or critical habitat cannot be authorized by NWP 12 alone. Instead, such activities are authorized only if the Corps either (a) determines that those activities will have no effect on such species/habitat, or (b) completes section 7 consultations. Thus, NWP 12 authorizes only those activities that, by definition, have no effect on protected species and critical habitat. Any dredge or fill activities that “may affect” such species or habitat require *separate authorizations* from the Corps after the completion of section 7 consultations—*i.e.*, either a Service’s concurrence in a Corps’ BA or issuance of a BiOp. *See* ER587-90; *see also* SER980 (“only ‘no effect’ activities may be immediately authorized”). Indeed, plaintiffs tacitly concede this, by arguing that

NWP 12 authorized all water crossings for Keystone XL that do *not* require PCNs. *See* ER321.

The Corps' conclusion that reissuance of NWP 12 would have "no effect" on protected species or critical habitat is thus plainly rational. None of the reasons the district court relied on for rejecting that conclusion withstands scrutiny.

**A. The Evidence The District Court Identified Does Not Demonstrate That The Corps' "No Effect" Decision Was Arbitrary.**

The district court asserted, first, that there was "resounding evidence" that "reissuance of NWP 12 'may affect' listed species and their habitat." ER49. That assertion is incorrect.

The court cited statements by the Corps about how the cumulative effects of activities authorized by prior versions of NWP 12, and of human activities in general, affect rivers, streams, and wetlands. ER49-51. It emphasized the Corps' statement that activities authorized under NWP 12 "will result in a minor incremental contribution to the cumulative effects to wetlands, streams, and other aquatic resources in the United States." ER51 (emphasis deleted). Based on these statements, the court assumed that discharges authorized under NWP

12 “may affect” protected species and habitat. *Id.* That assumption is unfounded.

In the statements the court quoted, the Corps simply acknowledged that activities authorized under NWP 12 may affect the *environment*. It did not concede that NWP 12 authorized activities that may affect *protected species or critical habitat*. To the contrary, activities that “may affect” protected species or habitat cannot occur as a result of the reissuance of NWP 12 alone. Such activities can occur only as a result of additional authorizations derived from section 7 consultations. *See* ER587-88. Thus, the district court impermissibly failed to account for the fact that, under General Condition 18, reissuance of NWP 12 alone does not permit activities that “may affect” protected species or critical habitat.

The court also relied (ER52-53) on two declarations that plaintiffs submitted to establish Article III standing. ER307-08. Plaintiffs themselves did not cite these declarations to support their ESA claims, and for good reason: they are outside the administrative record and do not, in any event, establish any flaw in the Corps’ decision.

Under the APA’s deferential standard of review, courts must consider whether an agency’s conclusion “runs counter to the evidence *before the agency*.” *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1257 (9th Cir. 2017) (emphasis added). Cases arising under section 7 of the ESA involve “record review.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc), and agencies cannot fairly be faulted for failing to account for evidence that was not in the record.

The district court thought *Kraayenbrink*, 632 F.3d at 497, authorized it to look outside the administrative record, but the facts there fell within one of the APA’s limited exceptions to on-the-record review. *See All. for Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1196-97 (D. Mont. 2019), *appeal dismissed*, No. 19-360001 (9th Cir. June 10, 2020).<sup>6</sup> Here, plaintiffs moved to add other materials to the record, *see* ER279-91, but did not move to add these declarations, much less argue

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<sup>6</sup> One APA exception is bad faith. In *Kraayenbrink* the BLM had deleted, without explanation, the conclusion in a draft environmental impact statement (DEIS) that BLM’s actions would affect wildlife and biodiversity and had ignored the views of its own scientists that the “may affect” decision was a “no-brainer.” 632 F.3d at 479, 497.

that an APA exception permitted the court to consider them as evidence bearing on the propriety of the Corps' reissuance decision.

In all events, these declarations do not support the district court's reasoning. The court relied on statements that the types of construction activities or drilling methods permitted under NWP 12 can harm the ABB, and cause increased sedimentation, which can pose a threat to pallid sturgeon. *See* ER52-53. Neither declarant acknowledged, however, that NWP 12 itself authorizes only activities that have no effect, and requires additional authorizations for any activity that "may affect" protected species or critical habitat. Instead, both relied on their erroneous "understanding" that construction of Keystone XL in areas containing ABB and pallid sturgeon would proceed without further analysis. *See* ER349, ER372-73.<sup>7</sup>

In short, none of the supposedly "resounding evidence" the district court cited demonstrates that the Corps' "no effect" determination "runs counter to the evidence before [it] or is so implausible that it

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<sup>7</sup> In fact, shortly after plaintiffs' submissions, the Corps and other agencies issued the BA and BiOp discussed earlier, which provided the very analysis the declarants wrongly assumed would not occur.

could not be ascribed to a difference in view or the product of agency expertise.” *Zinke*, 856 F.3d at 1257. Indeed, the district court borrowed the “resounding evidence” phrase from *Kraayenbrink*, but that case illustrates just how lacking the evidence was here. In *Kraayenbrink*, BLM was amending regulations governing grazing on federal land that was inhabited by over 300 special status species. BLM claimed the amendments would have “no effect” because they were merely “administrative.” 632 F.3d at 495. But as this Court stressed, the amendments eliminated enforceable standards that lessees had to follow and “substantially delay[ed] enforcement” of other standards. *Id.* at 481; *see also id.* at 498. Moreover, BLM’s “own scientists advised the agency that Section 7 consultation was necessary”; FWS “concluded that the 2006 Regulations *would* affect status species and their habitat”; and a former BLM biologist who helped draft the agency’s DEIS stated that “cumulative effects resulting from all these [proposed regulatory] changes will be significant and adverse for wildlife and biological diversity in the long-term.” *Id.* at 496-98. Those facts are not remotely comparable to this case, where NWP 12 does not authorize any

activity that “may affect” a listed species or critical habitat, and instead requires additional authorizations before such activities can occur.

**B. The District Court Erred In Ruling That Only Programmatic Review Can Avoid Piecemeal Destruction Of Protected Species and Habitat.**

The district court also ruled that project-level analysis under General Condition 18 “cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat.” ER56. This conclusion rests on a misreading of regulations and case law, the court’s failure to apply the APA’s deferential standard of review, and its fundamental misunderstanding of the ESA.

**1. Programmatic Review Was Not Required As a Matter of Law.**

In ruling that programmatic review was required, the district court repeatedly conflated two distinct issues: the validity of an agency’s decision that its action does not meet the “may affect” threshold for consultation (the issue here), and the adequacy of the consultative review that must be performed after it is determined that an agency action *does* cross the “may affect” threshold. *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (ESA “consultation

requirements are not triggered” if agency makes a “no effect” determination).

The district court quoted language from an ESA regulation which states that a request for formal consultation “may encompass ... a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan,” but that such a request does “not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.” ER54 (quoting 50 C.F.R. § 402.14(c)(4)). That regulation, however, concerns the scope of the consultation that must occur “[i]f” an agency determines that its action “may affect protected species or critical habitat.” 50 C.F.R. § 402.14(a) (emphasis added). It does not address the antecedent question of *whether* an agency’s action “may affect” protected species or critical habitat. It thus does not establish that adoption of a framework for future actions meets the “may affect” threshold for consultation even when the framework *prohibits* activities that “may affect” such species and habitat—unless and until they are separately authorized following section 7 consultations.

The same error infects the district court's reading of various cases. In *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), BLM sold over 700 oil and gas leases in national forests that were home to protected species. Although some of the leases forbade occupancy or use of the leased land, others did not, and the parties *agreed* that formal consultation was required. 848 F.2d at 1453. This Court thus did not address a "no effect" decision, but rather concluded that the scope of the consultation the agencies performed was inadequate, because FWS had engaged in "incremental-step consultation" instead of preparing a comprehensive BiOp. *Id.* at 1455. In *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248 (W.D. Wash. 2007), the agencies also agreed that formal consultation was required, *id.* at 1260; the Court held that the Services' BiOps were insufficient because they deferred the required comprehensive analysis to the project level. *Id.* at 1266-67. And in *Cottonwood Environmental Law Center*, this Court overturned the Forest Service's refusal to *reinitiate* formal consultation; the regulatory standard governing such decisions considers whether the agency retains discretionary involvement or control in an activity that previously triggered

consultations. 789 F.3d at 1086-88. None of these cases, therefore, addressed the validity of an agency’s “no effect” decision. Accordingly, none holds that an agency crosses the “may affect” threshold when it adopts a framework that permits only “‘no effect’ activities.” SER980.

*Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992), is also inapposite. There, BLM claimed that its strategy for logging old growth forests inhabited by endangered spotted owls was merely a “policy statement,” not agency “action,” and it therefore engaged in formal consultation only for sales implementing the strategy. *Id.* at 293. This Court ruled, however, that BLM’s strategy was “agency action,” and that this action clearly “may affect” a listed species or critical habitat, “since it sets forth criteria for harvesting owl habitat.” *Id.* at 294.

Thus, BLM’s logging strategy established criteria for activities that would *inescapably* affect critical habitat; yet, by treating that strategy as a “policy statement,” BLM would analyze the impact of those criteria on protected species only a piecemeal basis. Here, NWP 12 establishes criteria that authorize only activities that have no effect on protected species and habitat. Activities that may affect such species

and habitat are authorized by decisions the Corps makes following consultation with the Services under the ESA's standards.

Finally, the lower court relied heavily on *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005). But this out-of-circuit district court decision, like the decision below, rests on a misunderstanding concerning the activities that NWP 12 does—and does not—authorize. In *Brownlee*, as here, the Corps argued that, in light of the procedures ensuring consultation on specific projects, its “decision to implement NWP[] 12 ... with the general conditions ... was not *itself* an action that may affect species for purposes of triggering ESA Section 7 consultation.” *Nat’l Wildlife Fed’n v. Brownlee*, No. 03-1392-JR, Doc. 47-1 at 39 (filed Sept. 24, 2004) (emphasis added). The Corps acknowledged that certain projects conducted under NWP 12 “‘may affect’ the [endangered] Florida Panther,” but stated that “the point at which the NWP[] might have an effect is when the Corps verifies that [the] NWP is applicable to a specific project,” *id.* at 43—*i.e.*, after a PCN was submitted because protected species “might be affected” by the project, in which case activities that may affect

protected species or critical habitat will be authorized following consultations.

The *Brownlee* court, however, mistakenly read these statements as *conceding* that mere reissuance of NWP 12 met the “may affect” threshold for consultation. *See Brownlee*, 402 F. Supp. 2d at 10 (citing page 43 of the Corps’ brief and stating that the Corps does “not deny that some activities authorized under the [2002] NWPs ‘may affect’ [endangered] panthers”). Based on that mistaken view, the court then relied on this Court’s decision in *Jamison* (where the “may affect” threshold was indisputably satisfied) to rule that the Corps should have conducted “a cumulative analysis of the program as a whole.” *Id.* Like the decision below, therefore, *Brownlee* failed to recognize that only “no effect” activities are authorized by the mere reissuance of NWP 12, and that any activities that “may affect” protected species require additional authorizations.

## **2. The District Court Improperly Deemed the Protections of General Condition 18 Inadequate.**

The flipside of the district court’s conclusion that programmatic review was required was its conclusion that project-level evaluation is inadequate as a matter of law. The latter conclusion was also mistaken.

First, the court ruled that, by requiring permittees to submit PCNs if their activities “might” affected protected species or habitat, NWP 12 improperly delegates to private parties the Corps’ duty to determine “whether its actions ‘may affect listed species or critical habitat.’” ER57 (quoting 50 C.F.R. § 402.14(a)). This is plainly incorrect. As the Corps explained, the “might affect” standard is broader than the “may affect” standard, because the word “might” requires “less probability or possibility’ than the word ‘may.’” 82 Fed. Reg. at 1873. Accordingly, NWP 12 expressly requires *the Corps* to determine which activities captured by the broader “might affect” standard actually meet the “may affect” standard. *Id.*

Because NWP 12 so clearly requires the Corps to make the “may affect” decision, the district court’s “improper delegation” theory would be plausible only if one assumes that permittees will not comply with General Condition 18. But the court declined to make that assumption (ER57), and rightly so. If permittees fail to comply with the requirements of General Condition 18, the activity is “unauthorized and the Corps will take appropriate action.” 82 Fed. Reg. at 1954; *see also* 33 U.S.C. § 1319 (civil and criminal penalties for unauthorized discharge of

dredged or fill material); 16 U.S.C. § 1531(civil and criminal penalties for harming protected species).

The district court also asserted that programmatic review is “the only way to avoid piecemeal destruction of species and habitat.” ER56. But the Corps has long used project-level review to comply with the ESA when issuing individual permits. The court did not even discuss the mechanics of project-level review. It thus failed to identify any substantive defect in project-level review, much less explain why such review complies with the ESA when used for individual permits, but will cause “piecemeal destruction of species and habitat” when used as part of a nationwide permit.

As noted, project-level review involves formal consultation with the Services, unless the Services agree, after informal consultation, that the proposed activity is not likely to adversely affect listed species or critical habitat. Thus, one or both Services must establish the current status and environmental baseline of the listed species or critical habitat within the broadly defined “action area”; determine the effects of the proposed action (including the cumulative effects); and add those effects to the baseline to determine the effect of the action on listed

species and critical habitat. *See supra* at 10-12. This process ensures that species are *not* “gradually destroyed, so long as each step on the path to destruction is sufficiently modest.” *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 523 (9th Cir. 2010). To the contrary, as the baseline for a particular area is successively updated, review of each subsequent proposed project will identify when activities that previously might have had only negligible effects begin to threaten protected species and must be modified or prohibited altogether. *See* Endangered Species Consultation Handbook (“ESA Handbook”) at 4-1 (1998), available at [https://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) (“a series of biological opinions can be used like building blocks to first establish a concern, then warn of potential impacts, and finally result in a jeopardy call”).

Plaintiffs claimed below that, for endangered migratory birds, project-level review “will not take into account the loss or contamination of habitat outside the project area, and so will not consider the cumulative effects of NWP 12-authorized activities across the full migration route.” ER334. Plaintiffs failed to demonstrate that this alleged defect was raised in comments before the agency, *see Portland*

*Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (“waiver rule protects the agency’s prerogative to apply its expertise, to correct its own errors, and to create a record for our review”), and the contention is incorrect in any event. The Services consider the overall population trends and distribution of a species “throughout their range,” not just within the action area, and then evaluate the effects of the proposed action on the species’ population size, genetic variability, sensitivity to change, resilience, and rate of recovery. ESA Handbook at 4-21, 4-24, 4-30 – 40-31. Thus, impacts on birds that occur elsewhere in the migration route and reduce population size or otherwise affect a species’ resilience and rate of recovery *are* accounted for under project-level review, and will dictate greater protections within the project area.

**C. Plaintiffs Failed To Make The Strong Showing Necessary To Establish That The Corps’ “No Effect” Decision Was Pretextual.**

Finally, in rejecting the Corps’ “no effect” determination, the district court relied, in part, on documents that, according to plaintiffs, showed that the Corps knew that it had “to undertake programmatic consultation,” but “purposefully avoid[ed] doing so.” ER331. But neither

plaintiffs nor the lower court acknowledged that the deference owed to the Corps' "no effect" decision can be overcome only by a "strong showing of bad faith or improper behavior." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019). The "evidence" plaintiffs cited to try to show that the Corps "concocted [a] scheme specifically to bypass programmatic consultation," SER938, did not remotely satisfy this stringent standard, and thus could not provide a basis for rejecting the Corps' "no effect" decision.

The district court stated that the Corps was "well aware" that it had to engage in formal consultation because it did so "when it reissued NWP 12 in 2007 and continued that consultation during the 2012 reissuance." ER58. But an agency's prior actions cannot constitute evidence of "bad faith or improper behavior," because agencies are legally "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. 664, 658-59 (2007). Here, moreover, the Corp's Chief Counsel had written to the Services in October 2012—over four years before the 2017 reissuance of NWP 12—and explained that its consultations for the 2012 NWPs had been done voluntarily, and not

because the Corps thought they were legally required. SER1005-12. In light of that assertion, no inference of bad faith can properly be drawn from the Corps' decision not to engage in formal consultations in 2017.

In that same 2012 letter, the Chief Counsel explained that it was the Corps' position that reissuance of the NWP "as governed by NWP general condition 18 ... results in 'no effect' to listed species or critical habitat, and therefore does not require [ESA] Section 7 consultation," because the "only activities immediately authorized by the 2012 NWPs are 'no effect' activities." SER1005-06. Thus, the Corps' "no effect" position was its official position at least as early as 2012, and not, as plaintiffs claimed, a "scheme" "concocted" in a January 2014 email written by the Corps' Regulatory Program Manager, David Olson. ER32.<sup>8</sup> Moreover, plaintiffs' sinister interpretation of Olson's email is unwarranted.<sup>9</sup> And, more importantly, he was not the Corps' ultimate

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<sup>8</sup> In fact, as noted above, the Corps took this same position in its 2004 brief in *Brownlee*.

<sup>9</sup> In his email, Olson noted that NMFS' then-operative 2012 BiOp would be valid until the 2012 NWPs expired and that, "[i]n the meantime, if we modify any of those NWPs at the national level, *that* would be a trigger for re-initiating consultations. So for the 2017 NWPs we would have to do a new consultation." SER1013 (emphases added). Thus, although the point could have been phrased more clearly, the use of

decision-maker. Thus, whatever its meaning, his January 2014 email cannot establish that the “no effects” position the Corps announced three years later (in 2017) was a mere pretext, particularly when it was the same position the Corps’ Chief Counsel had propounded in 2012. *Compare Department of Commerce*, 139 S. Ct. at 2575 (finding pretext where Department’s decision “cannot be adequately explained in terms of” its stated rationale, and evidence showed that the head of the Department wanted to reach the decision for other reasons).

Finally, plaintiffs’ reliance on statements by FWS and/or NMFS is misplaced. For starters, even if the Services disagreed with the Corps’ “no effect” position, that is not evidence that the Corps’ position is pretextual. But plaintiffs’ claims of disagreement are overblown.

In the 2015 rulemaking plaintiffs cited, the Services stated that future actions may be developed under a federal program that “are authorized, funded, or carried out *and subject to section 7 consultation requirements at a later time as appropriate.*” 80 Fed. Reg. 26832, 26835

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conditional language indicates that the duty to consult was conditional—*i.e.*, consultations on the 2017 NWP were required if the Corps triggered them by modifying the 2012 NWPs before they expired.

(May 11, 2015) (emphasis added). The Services thus recognized that, even under a programmatic framework, it may be “appropriate” for section 7 consultations to occur “at some future time,” *i.e.*, when specific actions under the framework are “authorized, funded, or carried out.” Indeed, the Services stressed that their proposed rule did “not imply that section 7 consultation was required for a framework programmatic action that has no effect on listed species or critical habitat.” *Id.*

Second, while NMFS initially objected to the Corps’ “no effect” position in the 2016 draft notice of proposed rulemaking, it later receded from that position. Subsequent emails and correspondence reflect the Corps’ understanding of NMFS’ modified view, *see* SER977, SER976, ER597, SER974; plaintiffs cited no evidence showing that NMFS disputed the Corps’ understanding; and the Corps’ “no effect” position was included in the notice. 81 Fed. Reg. at 35193. The record reflects no disagreement by FWS with the Corps’ position. And neither Service asked the Corps to enter into formal consultations, which either could have done. *See* 50 C.F.R. § 402.14(a).

Ultimately, it was up to the Corps—not the Services—to make the “no effect/may affect” decision. *See* 51 Fed. Reg. 19926, 19949 (June 3,

1986) (Services’ recognition that the action agency “makes the final decision on whether consultation is required”). Its decision is subject to deferential review, and none of the evidence plaintiffs cite remotely justifies the conclusion that the Corps’ “no effect” decision was a “concocted” sham.

## **II. THE DISTRICT COURT’S REMEDIAL ORDER IS IMPROPER AND SHOULD BE REVERSED.**

Because there was no valid basis for rejecting the Corps’ “no effect” decision, this Court should reverse the finding of an ESA violation and vacate the lower court’s remedial order. But even if the Court were to uphold the finding of an ESA violation, the lower court’s injunction and vacatur are improper. The Corps’ brief explains at length why equitable principles bar the nationwide relief the district court ordered. TC Energy will elaborate here on the other part of the Corps’ argument—*i.e.*, that it was inequitable to enjoin any use of NWP 12 and to vacate that permit in any respect.

### **A. The District Court’s Injunction Is Unjustified.**

Enjoining any use of NWP 12 during a remand was improper because plaintiffs failed to show that they would suffer irreparable harm from such uses. The injunction is particularly improper with

respect to the Keystone XL project. Plaintiffs nowhere explained how use of the permit for construction of Keystone XL could cause irreparable harm in light of the BA and BiOp prepared for that pipeline, which plaintiffs did not challenge below.

**1. Plaintiffs Failed to Demonstrate That They Would Suffer Irreparable Harm From Use of NWP 12 During a Remand.**

There is “no presumption of irreparable injury where there has been a procedural violation in ESA cases.” *Nat’l Wildlife Fed’n*, 886 F.3d at 818. Instead, plaintiffs “must demonstrate that irreparable injury ‘is *likely* in the absence of an injunction.’” *Id.* Such a showing requires “a definitive threat of future harm to protected species, not mere speculation.” *Id.* at 819. And “harm” requires either (1) a showing of a “*significant impairment* of the species’ breeding or feeding habits and [proof] that the habitat degradation prevents, or possibly, retards, recovery of the species,” *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1513 (9th Cir. 1994), or (2) a “concrete showing of probable deaths during the interim period and of how these deaths may impact the species,” *Water Keeper All. v. U.S. Dep’t of Def.*, 271 F.3d 21, 34 (1st Cir. 2001). Plaintiffs did not even attempt to make such showings.

In the summary judgment briefing, plaintiffs discussed “irreparable harm” in a single paragraph of their reply brief. They asserted—without citation to *any* factual evidence—that they would suffer irreparable harm from “environmental degradation associated with construction [of Keystone XL] and the risk that ‘bureaucratic momentum’ could ‘skew’ the Corps’ future analysis and decision-making regarding the project.” ER276. For its part, the district court initially enjoined all uses of NWP 12 without even mentioning irreparable harm—or any other standard for injunctive relief.

In response to the stay motions, plaintiffs cited the two declarations the district court had relied on to find that reissuance of NWP 12 “may affect” protected species. Specifically, plaintiffs cited the declarants’ assertions that activities approved by NWP 12 “*can* cause harm to protected species such as the American burying beetle,” that such activities, “and Keystone XL in particular, ‘*pose* a significant threat to the imperiled pallid sturgeon populations,’” and that “[p]ipelines carrying tar sands, such as Keystone XL, *pose* significant *risks* to the [American burying beetle].” ER122 (emphases added, second brackets in original). Each assertion is simply a form of

speculation about “risks,” “threats” or what “can” happen. *See Idaho Rivers United v. U.S. Army Corps of Eng’rs*, 156 F. Supp. 3d 1252, 1262 (W.D. Wash. 2015) (words like “can” or “potential” connote possibilities insufficient to justify injunctive relief). Plaintiffs made no “concrete showing of probable deaths during the interim period and of how these deaths may impact the species”—a showing that requires plaintiffs to “quantify any impact” on protected species or critical habitat during the period of a remand. *S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, No. 2:13-cv-00059, 2013 WL 4094777, at \*7 (E.D. Cal. Aug. 13, 2013). Nor could they do so for Keystone XL, in light of the BA and BiOp prepared for the project. *See infra* § II.A.2.<sup>10</sup>

Indeed, the inadequacies of this “evidence” are particularly striking in view of the fact NWP 12 has been used for over two decades. If project-level review cannot prevent piecemeal destruction of protected species and critical habitat, plaintiffs should have been able to offer evidence of how the tens of thousands of uses of NWP 12 in the past

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<sup>10</sup> Plaintiffs submitted new “standing” affidavits to try to justify vacatur of NWP 12 for other oil and gas pipelines. ER118-19 (citing same). But as the Corps has explained, Br. at 50, these declarations are even vaguer.

have led to deaths jeopardizing such species, or to significant impairments of the species' habitat impeding their recovery. Yet plaintiffs offered none. *Cf. Nat'l Wildlife Fed'n*, 886 F.3d at 820-21 (citing evidence that challenged dam operations "account[ed] for most of the mortality of [migrating] juveniles" of protected salmonids).

The district court's rationale for its injunction suffers from the same shortcomings. After reciting the ESA's purposes and the bases for its finding of an ESA violation, the court asserted that (1) "the types of discharges that NWP 12 authorizes 'may affect' listed species and critical habitat," (2) the Corps therefore "should have initiated § 7 ESA consultation before it reissued NWP 12 in 2017," and (3) "irreparable injury 'is *likely*' if developers continue to build new, large-scale oil and gas pipelines." ER23. This conclusory rationale is inadequate as a matter of law.

The court simply equated its (erroneous) finding that reissuance of NWP 12 "may affect" protected species with a finding of irreparable harm—in clear contravention of the rule that there is "no presumption of irreparable injury where there has been a procedural violation in ESA cases." *Nat'l Wildlife Fed'n*, 886 F.3d at 818. The ESA is designed

to ensure that agencies do not take or authorize actions “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). While an extinction-level threat to listed species is not required before an injunction can issue, *Nat’l Wildlife Fed’n*, 886 F.3d at 818, a mere finding that activities during a remand “may affect” such species or their habitat—even if correct—cannot constitute the “definitive threat of future harm” necessary to justify injunctive relief. To hold otherwise would simply re-adopt the impermissible presumption of irreparable harm from a procedural violation. The injunction should be overturned for this reason alone.

**2. There is No Basis to Enjoin use of NWP 12 for Keystone XL During a Remand.**

Beyond the foregoing errors, the district court plainly erred in enjoining use of NWP 12 for Keystone XL. As noted, the Corps and other federal agencies engaged in extensive consultations about the project with FWS. The Service agreed that no protected species were likely to be adversely affected except the ABB, and it issued a BiOp which found that Keystone XL was not likely to jeopardize the ABB’s

continued existence. *See* SER716-859; SER674. These findings were published over a month before plaintiffs filed the reply brief in which they first raised their claim of irreparable harm. Yet plaintiffs did not even mention these findings, much less explain why they do not preclude any claim that use of NWP 12 for Keystone XL will cause irreparable harm.

Instead, in opposing the motion to stay in the district court, plaintiffs argued that reliance on consultations concerning Keystone XL ignores the lower court’s “key holding” that “project-specific consultation cannot adequately consider the cumulative impacts of NWP 12 activities.” ER123. But plaintiffs must show a “‘sufficient causal connection’ between the alleged irreparable harm and *the activity to be enjoined*.” *Nat’l Wildlife Fed’n*, 886 F.3d at 819 (emphasis added). Because FWS has concluded that construction and operation of Keystone XL will not cause any irreparable harm to protected species or critical habitat, the necessary causal connection cannot be established with respect to that activity.

Plaintiffs also argued that FWS found that Keystone XL would result in take of ABB. ER123. But the Service found that such take is

not likely to jeopardize the ABB's continued existence. SER674.

Plaintiffs nowhere explained how non-jeopardizing take will cause any irreparable injury. *See Idaho Rivers United*, 156 F. Supp. 3d at 1265 (rejecting claim of irreparable harm from permitted take where plaintiffs failed to challenge the BiOp); *cf. Nat'l Wildlife Fed'n*, 886 F.3d at 819 (plaintiffs can rely on permitted take to show irreparable where BiOp is invalid).

Plaintiffs also claimed that the BA for Keystone XL found a "high likelihood" of oil spills in pallid sturgeon habitat over the 50-year life of the pipeline, which may have toxicological effects on that species. ER123. That is not correct. The BA explained that a spill entering a river, which is where pallid sturgeon live, was an "*unlikely* event" and that effects on pallid sturgeon were also "*unlikely*." SER772 (emphases added).

In short, on the record before it, the district court clearly abused its discretion by enjoining use of NWP 12 for Keystone XL.

But an injunction as to Keystone XL is improper for yet another, independently dispositive reason. The district court acknowledged that developers like TC Energy "remain able to pursue individual permits"

for oil pipelines. ER29. And in granting individual permits, the Corps relies on the same project-level review used under NWP 12. ER588. Indeed, the only difference plaintiffs have identified between project-level review under NWP 12 and in the individual permit process is that the latter provides for public participation. *See* Pls. 9th Cir. Opp. to Mot. for Stay, Dkt.Entry 45-1, at 72 n.34.

At bottom, therefore, plaintiffs' defense of the district court's injunction rests on the untenable theory that plaintiffs will suffer irreparable harm if the Corps conducts project-level review of Keystone XL without public participation (under NWP 12) but not if the public participates in project-level review (in the individual permit setting). In other words, plaintiffs speculate that, but-for the participation of the public, the Corps will authorize dredge and fill activities for Keystone XL that will cause irreparable harm. An injunction, however, cannot be based on "mere speculation," *Nat'l Wildlife Fed'n*, 886 F.3d at 819, particularly speculation that contravenes a court's duty to presume that officials "obey the law and do their duty." *United States v. Norton*, 97 U.S. 164, 168 (1887). For this reason as well, the district court abused its discretion in enjoining use of NWP 12 for Keystone XL.

**B. The District Court’s Vacatur Ruling Should Be Reversed.**

The district court also erred in vacating NWP 12 for construction of new oil and gas pipelines. Although “vacatur of an unlawful agency action normally accompanies a remand,” a court “‘is not required to set aside every unlawful agency action,’ and the ‘decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity.’” *All. for the Wild Rockies v. U.S. Fish & Wildlife Servs.*, 907 F.3d 1105, 1121 (9th Cir. 2018). *See also ASARCO, Inc. v. Occupational Safety & Health Admin.*, 647 F.2d 1, 2 (9th Cir. 1981) (per curiam) (“we may adjust our relief to the exigencies of the case in accordance with the equitable principles governing judicial action”); 5 U.S.C. § 702 (APA does not affect the “power or duty of the court” to deny relief on any “appropriate legal or equitable ground”). Here, vacating NWP 12 for construction of new oil and gas pipelines, including Keystone XL, has the same effect as enjoining the Corps from authorizing the use of NWP 12 for such construction.<sup>11</sup> And, as just shown, the equitable principles

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<sup>11</sup> Vacatur deprives the permit of legal effect, so a vacated permit can neither empower the Corps to verify any PCNs nor independently authorize any future dredge or fill activities.

that govern injunctive relief weigh decisively against such relief here. Application of the relevant equitable principles makes clear that vacatur of NWP 12 during remand was also improper.

In determining whether to remand without vacatur, this Court applies the two-part test propounded in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). *See Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012). Under *Allied-Signal*, a court must consider (1) “the seriousness” of the agency’s error, and (2) “the disruptive consequences” of vacatur. *See* 988 F.2d at 150-51. The district court misunderstood and misapplied both prongs.

The court deemed the asserted ESA violation “serious” because, in its view, only programmatic review can ensure that use of NWP 12 will not jeopardize listed species. ER9. To bolster this view, the court pointed to plaintiffs’ assertions of harms from use of that permit, and relied on the ESA’s “institutionalized caution” mandate.” ER10. This reasoning is misplaced.

The “seriousness” prong does not turn on a subjective assessment of how “bad” an agency’s procedural violation is (or how important the underlying procedure is). Instead, this prong focuses on whether the

agency can correct its error and reinstate the same rule on remand. As this Court has explained, courts look “at whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt *the same rule on remand*, or whether such fundamental flaws in the agency’s decision make it unlikely that the same rule would be adopted on remand.” *Pollinator Stewardship Council*, 806 F.3d at 532 (emphasis added). *See also Allied-Signal*, 988 F.2d at 151 (declining to vacate because there was “at least a serious possibility that the [agency would] be able to substantiate its decision on remand”).

Here, there is “at least a serious possibility that” the Corps could reissue the same version of NWP 12 following a remand. It could do so by engaging in informal consultations to confirm that reissuance of NWP 12 will is not likely to adversely affect protected species or critical habitat. Indeed, as noted above, there is ample reason to believe that the Services would concur in that conclusion: NMFS’ 2014 BiOp concluded changes in the NWPs enabled the Corps “to prevent adverse effects to endangered or threatened species under NMFS’ jurisdiction or [their] critical habitat,” SER997-98; the record reflects that NMFS

receded from its initial objection to the Corps' 2016 "no effect" position; FWS apparently raised no objection to it; and neither Service asked for formal consultations. Whether the Corps ultimately reissues NWP 12 without change is not dispositive. The "seriousness" prong involves a prospective inquiry about what the agency *could* do on remand. See *Pollinator Stewardship Council*, 806 F.3d at 532 (whether agency "could adopt the same rule on remand") (emphasis added). See also Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 379 n.392 (2003) (relevant inquiry is not "what the agency *will* do," but whether its action "seems *potentially* salvageable").<sup>12</sup>

With respect to *Allied-Signal's* "disruptive consequences" prong, the lower court reasoned that a "court largely should focus on potential environmental disruption, as opposed to economic disruption." ER11. That is simply wrong. In *Cal. Cmty. Against Toxics*, this Court mentioned that vacatur might result in blackouts," which in turn could

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<sup>12</sup> On September 15, 2020, the Corp proposed to reissue the nationwide permits without engaging in informal consultations. See 85 Fed. Reg. 57298 (Sept. 15, 2020).

“necessitate the use of diesel generators that pollute the air,” 688 F.3d at 994, but it did not rely on this risk “*as opposed to*” the harms of economic disruption. To the contrary, the Court stressed that vacatur would “be economically disastrous,” because it would halt construction of “a billion-dollar venture employing 350 workers.” 699 F.3d at 994. And in *Pollinator*, the Court did not state (or indicate) that the disruption inquiry “*centers on* ‘whether vacating a faulty rule could result in potential environmental harm,’” as the district court claimed. ER13 (emphasis added). Instead, environmental harm from leaving a rule in place is a factor to “consider.” 806 F.3d at 532.

Moreover, the lower court’s effort to limit the disruption prong to environmental harms cannot be squared with the principles of equity that govern vacatur. The D.C. Circuit—which confronts the question of vacatur on a regular basis—considers the disruptive impact on agencies and private parties, as equity requires.<sup>13</sup> And equity likewise requires a court to weigh the relative balance of harms here.

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<sup>13</sup> See, e.g., *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019) (remanding without vacatur because vacatur would be “quite disruptive” given that the pipeline at issue “is currently operational”); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 652 (D.C. Cir. 2016) (per

In its submissions on the stay applications, TC Energy explained how the delays caused by vacatur of NWP 12 will cost it hundreds of millions of dollars. *See* SER880-84; SER620-23. By contrast, for all the reasons discussed above, plaintiffs made no showing that “significant harm would result” if TC Energy uses NWP 12 for Keystone XL while the Corps addresses the district court’s finding of an ESA violation.

Finally, the ESA does not override these principles and “tip[] the scales” in favor of vacatur. ER10. In *TVA v. Hill*, 437 U.S. 153 (1978), the Supreme Court cited Congress’ “policy” of “institutionalized caution” in explaining why courts lack discretion to deny an injunction where it was undisputed that the federal action would “eradicate” an endangered species. *Id.* at 156, 194. But there has been no showing that use of NWP

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curiam) (remanding without vacatur because “vacating the decision would be unnecessarily disruptive for synthetic boiler operators who, in the interim, would not know whether they needed to begin the expensive, time-consuming process of obtaining a Title V permit”); *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (remand without vacatur because of “the obvious hardship that vacating the rule would impose on the agency”). *See also Vacation at Sea*, 53 Duke L.J. at 381-82 (“balancing the equities,” as in the preliminary injunction standard, should guide vacatur decision and agency rule is properly left in place “where the benefit of vacation to the challenging party is less evident”).

12 will cause the eradication of any endangered species, and especially not use by Keystone XL. As noted, the Services have already determined that Keystone XL is *not* likely to threaten the continued existence of any protected species or habitat. Moreover, it is now settled that there is “no presumption of irreparable injury where there has been a procedural violation in ESA cases.” *Nat’l Wildlife Fed’n*, 886 F.3d at 818. It necessarily follows that there is no presumption in favor of vacatur where a rule rests on an asserted procedural violation; instead, the same equitable principles that govern injunctive relief for such a violation likewise apply to the decision whether to vacate during remand. Those principles dictate reversal of the vacatur here, where (1) the Corps could reissue NWP 12 following informal consultations, (2) plaintiffs failed to show that they would suffer irreparable harm from Keystone XL’s use of NWP 12 during remand—and plainly could not do so based on their failure to challenge the BA and BiOp for that project—and (3) TC Energy has suffered significant financial and logistical harms as a result of vacatur.

## CONCLUSION

For the reasons stated above, the Orders entered by the district court on April 15 and May 11, 2020 should be reversed and vacated.

## STATEMENT OF RELATED CASES

TC Energy is not aware of any cases pending in this Court that are “related cases” within the meaning of Circuit Rule 28-2.6 other than the appeals from the district court’s orders that have already been consolidated in this Court.

Dated: September 16, 2020

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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## **ADDENDUM**

33 C.F.R. § 325.2.....ADD-1

50 C.F.R. § 402.14.....ADD-2

### **33 C.F.R. § 325.2 Processing of Applications**

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**(b)** .....

**(5) Endangered Species.** Applications will be reviewed for the potential impact on threatened or endangered species pursuant to section 7 of the Endangered Species Act as amended. The district engineer will include a statement in the public notice of his current knowledge of endangered species based on his initial review of the application (see 33 CFR 325.2(a)(2)). If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds the proposed activity may affect an endangered or threatened species or their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity, pursuant to section 7(c) of the Act. References, definitions, and consultation procedures are found in 50 CFR part 402.

## **50 CFR § 402.14 Formal consultation.**

**(a) Requirement for formal consultation.** Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director 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. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

### **(b) Exceptions.**

**(1)** A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

**(2)** A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

.....

**(g) Service responsibilities.** Service responsibilities during formal consultation are as follows:

**(1)** Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

**(2)** Evaluate the current status and environmental baseline of the listed species or critical habitat.

**(3)** Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

**(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.

**(5)** Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

**(6)** Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

**(7)** Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

**(h) Biological opinions.**

(1) The biological opinion shall include:

- (i) A summary of the information on which the opinion is based;
- (ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;
- (iii) A detailed discussion of the effects of the action on listed species or critical habitat; and
- (iv) The Service's opinion on whether the action is:
  - (A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a “jeopardy” biological opinion); or
  - (B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a “no jeopardy” biological opinion).

(2) A “jeopardy” biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

- (i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.