

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

STATE OF MONTANA
Intervenor-Defendants/Appellants.

Appeal from the United States District Court for the
District of Montana

No. 4:19-cv-00044 (Hon. Brian Morris)

STATE OF MONTANA'S OPENING BRIEF

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INTRODUCTION

A Nationwide Permit (NWP) is a type of general permit issued by the U.S. Army Corps of Engineers (Corps) on a nationwide basis for authorizing activities with minimal impacts under the Corps' jurisdiction under the Clean Water Act (CWA), involving the deposit of dredge or fill material into waters of the United States. This case concerns Nationwide Permit 12 ("NWP 12"), which specifically applies to "the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States." 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). "Utility line" is defined to include electric, telephone, internet, radio, and television cables, lines, and wires, as well as oil or gas pipelines. 82 Fed. Reg. at 1985.

In reissuing NWP 12 in 2017, the Corps estimated that the permit would be relied on 14,000 times per year throughout the Nation. 2 ER 259. This includes the efficient repair and construction of utility lines in Montana to improve the safety and well-being of its citizens. Mont. Suppl. ER 10.

Plaintiffs in this case (collectively, "NPRC") seek to prevent TC Energy, Corp. from constructing the Keystone XL Pipeline

(“Keystone”) from the U.S. border near Morgan, Montana to Steele City, Nebraska. Because Keystone has relied on this streamlined process for some of its water crossings, NWP 12 is now ensnared in this litigation. But because NWP 12 does not just apply to Keystone, NPRC’s broad arguments have already borne (and will continue to bear) unintended consequences for unrelated projects and industries.

STATEMENT OF JURISDICTION

Montana agrees with the Federal Appellants’ statement of jurisdiction.

STATEMENT OF THE ISSUES

Montana agrees with Federal Appellants’ statement of issues.

STATUTORY ADDENDUM

Pursuant to Circuit Rule 28-2.7, all applicable statutes, etc., are contained in the addendum of the Federal Appellants.

STATEMENT OF THE CASE

I. Montana’s petition for intervention

Montana intervened in this case, in part, to ensure that service providers in the State could continue to rely on NWP 12 to repair and build critical infrastructure. Mont. Suppl. ER 1. This is especially important because Montana is a state with low population density and

a large geographic area. *See, e.g., id.* at 12–13 (in Montana “electric cooperatives average only three members and four meters per mile of line.”).

NPRC objected to Montana’s motion for intervention by right, erroneously stating:

this case would not limit Montana’s ability to build or repair other types of utility projects, such as broadband cable, transmission lines, or wind energy projects, as it concerns only the Corps’ use of NWP 12 to fast-track the approval of oil pipelines, which pose risks (i.e., from oil spills) that are not pertinent to other uses of NWP 12. Indeed, Plaintiffs have not sought to have NWP 12 broadly enjoined; rather, they seek narrowly tailored relief to ensure adequate environmental review of oil pipelines, especially Keystone XL.

3 ER 447.

Montana responded by identifying the wide breadth of the declaratory relief requested in NPRC’s first amended complaint.

Mont. Suppl. ER 2–3. Montana also pointed out that NPRC had alleged that the electricity transmission lines authorized by NWP 12 to service Keystone would cause environmental harm. *Id.*; *see also* 3 ER 567 (¶ 221) (alleging that “NWP 12 allows activities that result in . . . power line collisions”).

In limiting Montana to permissive intervention, the district court initially articulated this view of NPRC's requested relief:

The action's disposition as currently pled by Plaintiffs proves unlikely to impair or impede Montana or the Coalition's abilities to rely on NWP 12. Plaintiffs do not ask the Court to vacate NWP 12. Plaintiffs seek instead declaratory relief as to NWP 12's legality. Montana and the Coalition could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits.

3 ER 457 (citations omitted).

II. NPRC's and Federal Appellants' motions for summary judgment

On the merits, Montana continued to question the scope of NPRC's requested relief because it continued to argue about the environmental impacts of electric transmission lines serving Keystone. Mont. Suppl. ER 4–9; *see also* 2 ER 326 (NPRC again arguing in the brief in support for partial summary judgment “NWP 12 authorizes activities that cause impacts to listed species from . . . avian power line collisions”).

In the district court's summary judgment order, Montana's concerns regarding the overbroad scope of NPRC's requested relief proved valid. In finding the Corps failed to conduct Section 7 consultation under the ESA in reissuing NWP 12, the district court

vacated NWP 12 in its entirety impacting projects not just in Montana but across the United States. 1 ER 64.

III. Motions for stay

At the district court, Montana filed a brief in support of the Federal Appellants' motion for stay. Because of its rural characteristics, Montana argued that the district court's overly broad grant of relief would make the already challenging task of building infrastructure in Montana even more difficult. Mont. Suppl. ER 10. Further, this initial order unnecessarily subjected Montanans to additional danger and risk by delaying necessary repairs and construction of critical infrastructure. *Id.* One utility headquartered in Montana anticipated it had at least 10 projects that the district court's order would impact. *Id.* at 11. The Montana Electric Cooperatives' Association estimated that the district court's initial order could impact thousands of its members' transmission and distribution lines at water crossings, especially once storms and wildfires occurred requiring repair of these lines. *Id.* at 12–13.

Based on NPRC's recommendation, the district court limited its relief of vacatur to new construction of gas and oil pipelines. 1 ER 38.

The United States Supreme Court further limited vacatur to Keystone XL. 2 ER 65.

SUMMARY OF THE ARGUMENT

As demonstrated by the procedural history in this case, Montana's concerns about the scope of NPRC's requested relief were justified. NPRC's overbroad arguments concerning NWP 12, coupled with its request for "such other relief as the Court deems just and appropriate," 3 ER 573, was enough, in the district court's view, to justify full vacatur of the permit, 1 ER 3. This set off widespread disruption of the construction and repair of linear infrastructure unrelated to pipelines requiring intervention by the Supreme Court.

At bottom, NPRC's arguments are too broad to avoid such disruption. Because they make a facial challenge to a regulation relied upon by a wide array of industries, the resulting order impacted unrelated industries far beyond Keystone. The simple solution is to view NWP 12's General Condition 18 as satisfying the Corps' Section 7 obligations. Such approach targets review to particular aspects of a project with specific species in mind and reduces the likelihood that the court's order will result in unintended consequences.

Finally, even though the Supreme Court limited the district court's vacatur to Keystone, other projects relying on NWP 12 are vulnerable to attack in future litigation. The district court's reasoning cannot be cabined to just Keystone or gas and oil pipelines because it identifies an alleged procedural defect that undergirds all of NWP 12. This is particularly important to the renewable energy industry because of its dependence of electricity transmission lines.

ARGUMENT

I. NPRC's arguments concerning NWP 12 and the ESA are overly broad.

The fundamental problem with NPRC's argument (*i.e.*, that NWP 12 was improperly reissued) is disproportionate to the activities it putatively seeks to prevent (*i.e.*, the construction of the Keystone XL pipeline). General Condition 18 avoids this problem, and provides the remedy NPRC seeks, by enabling project specific ESA consultation. The federal appellants correctly note, "General Condition 18 expressly excludes from its authorization any activity which is likely to jeopardize the continued existence of an ESA listed species or destroy or adversely modify designated critical habitat." Doc. 20 at 70.

The district court adopted an overly-broad and hyper-procedural view on the application of ESA Section 7(a)(2) to NWP 12. Under 50 C.F.R. § 402.14, “[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” The district court found that, because activities authorized by NWP 12 “will result in a minor incremental contribution to the cumulative effects to wetlands, streams, and other aquatic resources in the United States” and “‘may affect’ listed species and critical habitat,” the Corps should have engaged in programmatic consultation in reissuing NWP 12. 1 ER 51.

As evidenced by the district court’s initial relief, this reasoning is directed at NWP 12 rather than any theoretical harm caused by Keystone. The district court’s error led it to reflexively vacate NWP 12 in its entirety. Later, NPRC suggested that vacatur should apply only to new construction of gas and oil pipelines without expressing any principled basis for its recommended narrowing of relief, and instead asserted that’s the relief its members want. *See* 2 ER 118 (citing members’ declarations). While noting NPRC had raised a facial challenge to NWP 12 (making it “improper to single out Keystone XL”),

the Court nevertheless limited its relief to new construction of oil and gas pipelines under the same reasoning that “[t]he Corps should have initiated § 7 ESA consultation before it reissued NWP 12 in 2017.”
1 ER 22–23.

The wide-ranging and disruptive relief granted by the district court was improper, and this Court should narrow the scope of the Corps’ consultation obligation under ESA Section 7 for NWP 12. That narrowing already occurs through General Condition 18. The belt and suspenders approach adopted by the district court makes no sense when only one entity—here, Keystone—is the intended target of this review.

Notably, one of the cases the district court’s order heavily-relied on, *Nat’l Wildlife Fed’n v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005), anticipated these potential problems. In *Brownlee*, the district court found that the reissuance of a nationwide permit requires programmatic consultation. *Id.* at 9. But in doing so, it said:

FWS is required to consider ‘cumulative’ effects when it engages in a site-specific consultation. The relationship between that site-specific consideration and the overall consultation that is the subject of this suit *remains to be worked out*, but, from where this Court sits, it would seem

that site-specific consultations might appropriately cross-reference or incorporate by reference information developed in an appropriate overall consultation.

Id. at 10, n.16 (emphasis added). In the present case, this approach has not “worked out.” Instead, it has required the Supreme Court’s intervention to stay the district court’s disruptive and overly-broad relief.

Additionally, in *Brownlee*, the district court left the appropriate level of relief to another day rather than reflexively vacating the nationwide permit. *Id.*, 402 F. Supp. 2d at 11 (“What injunctive relief is appropriate, if any, will be the subject of a hearing to be held hereafter”).¹ Before the district court could hold its hearing on the proper relief, the Corp moved for voluntary remand and the district court found “[r]emand without vacatur is appropriate.” Dkt. 87 at p. 3, *Nat’l Wildlife Fed’n v. Brownlee*, No. 03-1392 (D.D.C. Aug. 25, 2005). While *Brownlee* still ignores the benefits of the targeted consultation process available in General Condition 18, at least the district court’s

¹ Notably, the NWP 12 Coalition requested additional opportunity to address the issue of remedy if the district court disagreed on the merits. 2 ER 278 (n.2) (“The NWP 12 Coalition reserves the right to address remedies, if that stage is reached.”). The district court did not fulfill this request and issued its initial relief without any specific briefing or other process from the parties.

remedy of remand without vacatur avoids the awkward posture of this case in which the district court struggled to find the appropriate contours for equitable relief.

The recent case *Sierra Club v. United States Army Corps of Engineers* contrasts with both *Brownlee* and the district court's order below in that it gives effect to General Condition 18 of NWP 12. No. 1:20-CV-460-RP, 2020 U.S. Dist. LEXIS 156337 (W.D. Tex. Aug. 28, 2020). Despite acknowledging that the district court in the present case had found that "substantial evidence requires the Corps to initiate consultation under ESA Section 7(a)(2) to ensure that the discharge activities authorized under NWP 12 comply with the ESA," *id.* at 4, n.2, the district court found that, because the Corp had complied with General Condition 18, it "initiated the formal consultation process with the Service, as required under Section 7" of the ESA.

As a result of this targeted approach, the Corps examined 129 water crossings that might jeopardize "the Houston toad, Tobusch fishhook cactus, Barton Springs salamander, Austin blind salamander, or golden-cheeked warbler." *Id.* at 10–12, 35. Giving effect to General Condition 18, and viewing it as fulfilling the Corps' Section 7

obligations, entirely avoids the temptation or perceived necessity of vacating NWP 12 in its entirety, while ensuring adequate environmental review of any project that might rely on NWP 12.

II. Even though the relief initially provided by the district court has been paired down, other industries remain vulnerable to challenge.

As described above, the district court's order describes an alleged deficiency with all of NWP 12. Left unchecked, nothing is stopping a future litigant from asserting that another project relying on NWP 12 must be enjoined in light of the alleged procedural deficiency identified by the district court. Tellingly, in claiming the Corps violated Section 7 of the ESA, NPRC argued, "NWP 12 authorizes activities that cause impacts to listed species from . . . avian power line collisions." 2 ER 326.

The renewable energy industry is particularly vulnerable to the redeployment of these arguments in future litigation. Unlike oil producers, who have multiple means to deliver their product, renewable energy developers are entirely dependent on linear infrastructure (*i.e.*, electric transmission and distribution lines) to get their product to market. *See* Fed. Energy Reg. Comm'n, *Energy Primer: A Handbook of*

Energy Market Basics, 47, 109–10 (2015) (“FERC Energy Primer”).²

Montana is emblematic of the transmission challenges facing renewable energy because “Montana has some of the best utility-scale wind power potential in the nation.” U.S. Energy Information Administration, *Montana: State Profile and Energy Estimates* (2020).³ Yet, Montana has a small population and, like many other locations that are suitable for wind development, can only use so much of this potential electricity within its borders. FERC Energy Primer at 48. Thus, wind developers depend on adequate electricity transmission lines (which in turn rely on NWP 12) to deliver their electricity to more populated areas of the United States and beyond. *Id.* at 50 (“Because the best wind resources are often far from load centers, obtaining sufficient transmission presents a challenge to delivering its output.”).

Further, renewable energy like wind is an intermittent generation resource meaning it fluctuates throughout the day. *Id.* at 8. Grid operators use geographic diversity of renewable energy generators to smooth out these fluctuations. *See, e.g.*, Jonathan Naughton, U. of Wyo.

² <https://www.ferc.gov/sites/default/files/2020-05/energy-primer.pdf>.

³ <https://www.eia.gov/state/analysis.php?sid=MT>.

Wind Energy Res. Ctr., *Wind Diversity Enhancement of Wyo./Cal. Wind Energy Projects: Phase 2*, i (2015) (“Due to the geographical difference in renewable energy resource availability, high Wyoming wind energy production often occurs during periods when California renewable energy production is low.”).⁴ This requires transmission lines that can move electricity over long distances.

Simply put, “[p]roponents of a cleaner energy system have more to gain from considering energy transport methods together and aligning them, rather than by attacking the system piece-meal.” James W. Coleman, *Pipelines & Power-lines: Building the Energy Transport Future*, *supra*, at 292–93.⁵ This is especially true when the challenged regulation applies to a wide array of industries including renewable energy developers.

⁴ https://www.ourenergypolicy.org/wp-content/uploads/2015/08/WIAWYCADivStdyPhsII_final.pdf

⁵ https://scholar.smu.edu/cgi/viewcontent.cgi?article=1037&context=law_faculty.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's order.

Respectfully submitted this 16th day of September, 2020.

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FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s) 20-35412, 20-35414, 20-35415, and 20-35432.

I am the attorney or self-represented party.

This brief contains 2,627 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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