

NOS. 20-35412, 20-35414, 20-35415, 20-35432

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

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

v.

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

and

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

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

**MOTION FOR LEAVE TO FILE BRIEF FOR AMICI CURIAE THE
ESSENTIAL INFRASTRUCTURE COALITION SUPPORTING
APPELLANTS AND REVERSAL**

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**ATTORNEYS FOR AMICI CURIAE
THE ESSENTIAL INFRASTRUCTURE COALITION**

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure 26.1, Amici provide the following information:

1. **The Dayton Power and Light Company (“DP&L”)** is a subsidiary of DPL, Inc., which is a subsidiary of AES DPL Holdings, LLC, which is a subsidiary of The AES Corporation. The AES Corporation is publicly traded.

2. **Indianapolis Power & Light Company (“IPLC”)** provides the following information. All of the outstanding common stock of IPLC is owned by IPALCO Enterprises, Inc. IPALCO is owned by AES U.S. Investments, Inc. (82.35%) and CDP Infrastructures Fund G.P. (CDPQ) (17.65%). AES U.S. Investments is owned by AES U.S. Holdings, LLC (85%) and CDPQ (15%). CDPQ is wholly-owned by La Caisse de dépôt et placement du Québec, a public pension fund of the government of Quebec. AES U.S. Holdings, LLC is wholly-owned owned by The AES Corporation, a publicly traded corporation.

3. **Dominion Energy, Inc.** does not have any parent corporation, and no publicly held corporation owns 10% or more of its stock.

4. **CenterPoint Energy, Inc.**, a Texas corporation, is publicly traded and has no parent corporation. No publicly held corporation owns

10% or more of the stock of CenterPoint Energy, Inc.

5. **Idaho Power Company (“IPC”)** is an Idaho corporation. The publicly traded corporation, IDACORP, Inc., an Idaho corporation, owns 100% of the stock of IPC.

6. **Duke Energy Corporation (“Duke”)** is a Delaware corporation having its principal place of business in North Carolina. Duke is an investor-owned public utility holding company. Duke has issued equity and debt securities to the public. Duke does not have a parent company, and no publicly-held company has a 10% or greater ownership interest in Duke.

7. The **Trinity River Authority of Texas** and the **Lower Neches Valley Authority of Texas** are governmental entities rather than corporate entities and do not have shareholders.

Dated: September 23, 2020

Respectfully submitted,

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In accordance with Federal Rule of Appellate Procedure 29, the Essential Infrastructure Coalition (“EIC” or “Amici”)—which includes The Dayton Power and Light Company; Indianapolis Power & Light Company; Dominion Energy, Inc.; CenterPoint Energy, Inc.; Idaho Power Company; Duke Energy Corporation; Trinity River Authority of Texas; and Lower Neches Valley Authority of Texas—respectfully submits this motion for leave to file an amicus brief in support of Appellants.*

The EIC has a substantial interest in this case. EIC members depend on the availability of Nationwide Permit 12 (“NWP 12”) to effectively and efficiently provide critical energy, water, and wastewater infrastructure and service to the American public. EIC members already have been concretely harmed by the remedy ordered by the district court, specifically the vacatur of NWP 12 and the injunction prohibiting the U.S. Army Corps of Engineers from using NWP 12 to authorize any discharge of dredged or fill material into waters of the United States pending completion of an interagency consultation pursuant to the Endangered Species Act. If the Court were to affirm the district court’s ruling and remedy, EIC members could again experience such

* This unopposed motion and accompanying brief are timely, having been filed in accordance with the schedule set forth in the Court’s August 25, 2020 order. Federal Appellants and Intervenor-Appellants have consented to the filing of the EIC’s proposed *amicus curiae* brief. Appellees do not oppose the brief, but indicated that they take no position. *See* 9th Cir. R. 29-3.

harms as EIC members and similarly situated entities suffer unanticipated delays and costs in their existing, pending, and planned essential infrastructure projects and services. Importantly, these and other harms arising from a reinstatement of the district court's order would not be limited to EIC members and similarly situated entities—they would be felt by the public in the form of, among other things, rate increases and degraded reliability in the provision of electricity and other essential services.

Allowing the EIC to participate as amici curiae in these proceedings would ensure that this Court receives critically important information about the scope of harm the district court's order caused and the short- and long-term injuries a reinstatement of the order could have on EIC members and, by extension, the public. EIC members would also provide the Court with important information regarding how the protections for endangered and threatened species built into NWP 12 work in practice; this information should be considered by the Court before it reaches a decision.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant them leave to file the proposed amicus brief.

Dated: September 23, 2020

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ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because this motion contains 432 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word with Georgia 14-point font for text and footnotes.

Dated: September 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I electronically filed the foregoing using the Court's CM/ECF filing system, which will send notification of such filing to all counsel of record.

Dated: September 23, 2020

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2. **Indianapolis Power & Light Company (“IPL”)** provides the following information. All of the outstanding common stock of IPL is owned by IPALCO Enterprises, Inc. IPALCO is owned by AES U.S. Investments, Inc. (82.35%) and CDP Infrastructures Fund G.P. (CDPQ) (17.65%). AES U.S. Investments is owned by AES U.S. Holdings, LLC (85%) and CDPQ (15%). CDPQ is wholly-owned by La Caisse de dépôt et placement du Québec, a public pension fund of the government of Quebec. AES U.S. Holdings, LLC is wholly-owned owned by The AES Corporation, a publicly traded corporation.

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6. **Duke Energy Corporation (“Duke”)** is a Delaware corporation with its principal place of business in North Carolina. Duke is an investor-owned public utility holding company. Duke has issued equity and debt securities to the public. Duke does not have a parent company, and no publicly held company has a 10% or greater ownership interest in Duke.

7. The **Trinity River Authority of Texas** and the **Lower Neches Valley Authority of Texas** are governmental entities rather than corporate entities and do not have shareholders.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici—collectively, the Essential Infrastructure Coalition, EIC, or Amici—include a broad array of businesses and state-government entities dedicated to providing the reliable energy, water, and wastewater infrastructure and services upon which the American public depends every day. Amici include the following entities.¹

1. The mission of the **Dayton Power and Light Company (“DP&L”)** is to improve the lives of the over 550,000 people it serves within a 6,000-square-mile area of West-Central Ohio (including Wright-Patterson Air Force Base) by accelerating a safer and greener energy future. To accomplish this mission, DP&L applies its core values of safety, integrity, agility, and excellence in managing its assets for the public benefit. DP&L owns and maintains 1,724 miles of transmission lines; it regularly must repair, replace, and build new transmission lines and substations.

2. The mission of the **Indianapolis Power & Light Company (“IPL”)** is to improve the lives of the over 490,000 people it serves in Central Indiana by accelerating a safer and greener energy future. IPL’s

¹ No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund the preparation or submission of this brief, and only amici and their counsel did so. *See* Fed. R. App. P. 29(a)(4)(E). Amici lodge this brief along with the accompanying motion for leave to file it. *See* Fed. R. App. P. 29(a)(4)(D), (a)(3).

commitment to the environment, reliability, and its community is widely recognized. IPL owns and maintains 854 miles of transmission lines, and regularly must repair, replace, and build new transmission lines and substations.

3. The mission of **Dominion Energy, Inc. (“Dominion”)** is to build a clean and sustainable future; Dominion has committed to achieving net-zero emissions by 2050. Through its entities across the United States, Dominion supplies over seven million utility and retail customers with electricity and natural gas, and its service areas include parts of Virginia, North Carolina, South Carolina, Utah, Wyoming, West Virginia, Ohio, Pennsylvania, and Georgia. Dominion owns and operates 10,400 miles of electric-transmission lines, 85,000 miles of electric-distribution lines, 14,600 miles of natural-gas transmission, gathering, and storage pipelines, and 103,400 miles of gas-distribution pipelines that it regularly must repair, replace, and expand upon.

4. The **Trinity River Authority of Texas (“TRA”)** was formed in 1955 by the Texas Legislature to address public water supply and water-conservation concerns in the Trinity River Basin. TRA’s jurisdiction extends over 17,965 square miles, including all or part of 17 Texas counties, and TRA provides wholesale services to more than 60 cities in the Trinity River Basin

for the benefit of millions of residents. The majority of TRA's services are devoted to financing, constructing, and operating independent enterprise operations serving various cities and the general public within the Trinity River watershed. The TRA owns and operates four water-treatment and supply facilities, five wastewater-treatment facilities, one reservoir, and one recreation project.

5. The **Lower Neches Valley Authority of Texas ("LNVA")** was established in 1933 by the Texas Legislature to conserve, store, control, preserve, utilize, and distribute the waters within Tyler, Hardin, Liberty, Chambers, and Jefferson Counties, which are located within the Neches River Basin and the Neches-Trinity Coastal Basin. The watersheds of the Neches River and its tributaries occupy an area of approximately 10,300 square miles. The LNVA provides for the present and long-term freshwater needs of municipal, agricultural, and industrial customers; protects water quality in the Neches River and Coastal Basin; ensures affordability of the water supply; and enhances economic development within its jurisdiction. Among other things, the LNVA operates the North Regional Treatment Plant for industrial-waste treatment and the West Regional Water Treatment System for the production and distribution of potable water.

6. The mission of **CenterPoint Energy, Inc. ("CenterPoint")** is

to safely and reliably deliver electricity and natural gas to its over seven million metered customers in Arkansas, Indiana, Louisiana, Minnesota, Mississippi, Ohio, Oklahoma, and Texas. CenterPoint has committed to reduce carbon emissions directly attributable to its operations by 70% from 2005 levels by 2035. CenterPoint owns, operates, and regularly must repair, replace, and build new electric-transmission lines and natural-gas pipelines.

7. The mission of **Idaho Power Company (“IPC”)** is to provide clean, reliable, and affordable energy to its 570,000 customers across a 24,000-square-mile service area in southern Idaho and eastern Oregon. Idaho Power has set a goal of providing 100% clean energy by 2045 while continuing to keep prices low and reliability high. To that end, IPC soon will be building an approximately 300-mile transmission line for its Boardman-to-Hemingway project, which is designed to deliver approximately 1,000 megawatts of clean, affordable energy between the Pacific Northwest and IPC’s service area.

8. **Duke Energy Corporation** is one of the largest energy holding companies in the United States. The Electric Utilities and Infrastructure unit’s regulated utilities serve 7.8 million retail electric customers in North Carolina, South Carolina, Florida, Indiana, Ohio, and Kentucky. The Gas Utilities and Infrastructure unit distributes natural gas to 1.6 million

customers in North Carolina, South Carolina, Tennessee, Ohio, and Kentucky. The Commercial Renewables unit operates wind and solar generation facilities across the U.S., as well as energy storage and microgrid projects. The company plans to at least double its portfolio of solar, wind, and other non-hydroelectric renewables by 2025 and ultimately reduce carbon emissions from electricity generation in the next five years by at least 50% from 2005 levels and to achieve net-zero emissions by 2050.

* * *

Amici, in short, share a commitment and duty to providing essential infrastructure and services to the public. Each must develop and maintain its infrastructure to ensure that it can safely, reliably, and affordably meet public demand for these services. Each must comply with reliability mandates and compliance timetables. Each must respond to service interruptions (and threats of such interruptions) that can arise for reasons ranging from severe weather events and natural disasters to the need to update or replace infrastructure. Each would be significantly harmed by the unavailability of Nationwide Permit 12 (“NWP 12”) should this Court affirm the district court’s ruling below.

INTRODUCTION

The Essential Infrastructure Coalition respectfully submits this amicus

brief in support of Appellants. NWP 12 plays a critical role in the timely provision of critical services to the public. This brief provides concrete examples of how EIC members use NWP 12 to fulfill their missions to provide safe, reliable, and sustainable energy, water, and wastewater services to the public. The brief also describes how the framework of NWP 12 works in practice to protect endangered and threatened species, critical habitat for those species, and the environment generally.

Like all nationwide permits, NWP 12 incorporates multiple limitations and conditions so that activities authorized under this general permit have minimal environmental impacts. By designing their projects to qualify for use of NWP 12 to authorize discharges of dredged or fill material to waters of the United States, EIC members can take advantage of the streamlined processing that NWP 12 provides while minimizing any environmental impacts associated with their projects.

Among the most important of the limitations built into NWP 12 are those related to the protection of species determined to be endangered or threatened under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”).² To comply with NWP 12’s conditions, EIC members must address

² Such species are often referred to collectively as “listed species” because they have been added to the lists of endangered and threatened species as published in the C.F.R. *See* 50 C.F.R. §§ 17.11-.12.

any potential impacts of their proposed activities on listed species. Taking full advantage of NWP 12's streamlined permitting, however, is not possible unless EIC members (or any project proponent) avoid *any* impacts to listed species or their critical habitat. EIC members therefore retain experts to complete relevant analyses and closely work with wildlife agencies, in most cases determining that the activities sought to be authorized under NWP 12 would in fact have no impact on listed species. Where experts determine that a proposed activity may affect ESA-listed species and their habitats, EIC members are quick to adopt mitigation measures—*e.g.*, changes to design, planned operations, construction schedules—to protect ESA-listed species and critical habitat. Where impacts cannot be avoided, appropriate consultation with the U.S. Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service (“NMFS”) (collectively, “the Services”) takes place in accordance with the ESA's requirements.

EIC members' experience thus confirms that the existence of NWP 12 provides a strong incentive for project proponents to avoid any impacts to species or habitat protected by the ESA. It also confirms that the issuance of NWP 12 itself does not affect listed species because in the minority of cases where discharges of dredged or fill material to waters of the U.S. authorized under NWP 12 may have an impact on such species, those impacts are fully

addressed at a project level before the discharges are authorized to occur.

The district court's conclusion to the contrary ignores these practical realities and, in doing so, jeopardizes EIC members' respective abilities to provide uninterrupted essential services to the public, including the provision of electricity from renewable energy sources. The district court's ruling would render NWP 12 unavailable for an unknown period of time while the Corps completes a programmatic ESA Section 7 consultation with the Services. The unavailability of NWP 12 would force EIC members to pursue alternative means of obtaining necessary authorizations from the Corps, which would result in significant delays in renewable energy and other projects through which EIC members provide electricity, water, wastewater, and other services to the public as well as increased costs.

In the meantime, the goal of this programmatic consultation would be to address the cumulative impacts associated with using NWP 12 for projects across the country. However, any potential cumulative impacts from the issuance of NWP 12 identified in such a programmatic consultation would (at best) be entirely speculative because the Corps cannot predict the development or location of new projects that may seek to rely on NWP 12. The statute envisions concrete consultation designed to reach concrete outcomes to protect at-risk species; the district court instead demands an exercise in the

theoretical that would do little or nothing to further the already robust protections for endangered and threatened species that are built into NWP 12. Forcing the Corps to engage in this crystal-ball process would advance the purposes of neither the ESA nor the Clean Water Act (“CWA”)—but the incentives to minimize impacts that are embodied in NWP 12 will be lost in the meantime.

ARGUMENT

NWP 12 is an important part of the Corps’ overall regulatory structure under CWA Section 404. It incorporates provisions that create incentives for project proponents to minimize the potential impacts of their activities on the environment generally. Moreover, it expressly provides only *contingent* authorization for activities that have any potential for affecting listed species. That limitation assures that any such impacts will be addressed before the activity may proceed. The experience of EIC members confirms both that NWP 12 functions as intended to protect listed species and the environment and that NWP 12 remains critical to EIC members’ efforts to provide essential services to the public in a reliable and timely manner. The unavailability of NWP 12 as a result of an affirmance of the district court’s order, by contrast, would undermine their ability to provide those services, with little corresponding benefit to endangered and threatened species.

I. NWP 12 already incorporates effective protections for ESA-listed species and the environment generally.

EIC members rely—often heavily—on NWP 12. When building new infrastructure, or even maintaining or repairing existing infrastructure, EIC members often must discharge dredged or fill material into water bodies or wetlands that qualify as waters of the United States under the CWA. “Waters of the United States” is a broad category,³ making it unsurprising that even ordinary projects routinely touch them, however minutely.

A. NWP 12 is an important part of the Section 404 regulatory program.

Linear projects like transmissions lines are especially likely to require permit approval under CWA Section 404, 33 U.S.C. § 1344, which authorizes the issuance of permits for discharges of dredged or fill material to waters of the U.S. There is often no way to run a transmission line across dozens or sometimes hundreds of miles from Point A to Point B (from a power plant to a community needing electrical service, for example) without crossing over streams or wetland areas. EIC members design their projects to minimize impacts to these aquatic areas, but some discharges of dredged or fill material to these waters are often unavoidable as a practical matter. EIC members

³ Under the current definition of “waters of the United States,” the Corps’ Clean Water Act jurisdiction encompasses streams that flow only intermittently and a wide range of wetlands. *See* 33 C.F.R. § 328.3.

must obtain authorization even for minor discharges under CWA Section 404.⁴ Absent general permits such as the nationwide permits, EIC members would be required to obtain individual Section 404 permits for each and every discharge.

Why doesn't it work that way?, one might ask. It's a fair question—and if Congress actually wanted such a process, then that would be the end of it. But neither the statutory text nor the underlying environmental rationale indicate a legislative intent to require steps that at best are pointless and expensive (to the public, to whom all costs ultimately are passed), and at worst are counterproductive and *undermine* the statute's salutary environmental goals.

The Section 404 permitting process can easily take a year or more *already*,⁵ creating the potential for significant delays in projects and

⁴ In some cases, EIC members must also obtain authorization for work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. NWP 12 authorizes both discharges of dredged or fill material to waters of the U.S. under Section 404 of the CWA and work in navigable waters of the U.S. under Section 10 of the Rivers and Harbors Act as long as the activity meets the conditions of the permit. In this brief the EIC focuses on authorizations under CWA Section 404 because that is the type of authorization that EIC members most commonly need.

⁵ The Corps reported that the average processing time for an individual permit application in FY2018 was 264 days. *See* Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298, 57,300 (proposed Sept. 15, 2020).

corresponding delays in the provision of the attendant essential services. Expanding that process to cover every last discharge contravenes the statutory expectation and would require far more administrative bandwidth. The result would be even further delays—both as to projects where individual Section 404 permits are truly needed and as to those where a general permit can readily achieve a result that minimizes environmental impacts while allowing projects that provide other important societal benefits to proceed without undue delay.

Congress recognized the benefits of general permits by authorizing their issuance under CWA Section 404(e). Like other general permits issued by the Corps, NWP 12 complements and supplements the individual Section 404 permitting process. Through it, EIC members and others can obtain more timely authorization under CWA Section 404 for the construction, maintenance, and repair of utility lines and associated facilities that result in discharges to waters of the U.S. For projects that qualify for coverage under NWP 12, obtaining confirmation from the Corps that NWP 12 applies takes an average of only 45 days, a fraction of the time needed to obtain an individual Section 404 permit.⁶ For projects with particularly minimal impacts on waters of the U.S., a project proponent need not obtain any confirmation

⁶ *See id.*

of NWP 12 coverage from the Corps, essentially eliminating any permitting delay. The availability of this general permit therefore creates a strong incentive for project proponents to ensure that their activities qualify for NWP 12 coverage.

B. NWP 12 incorporates numerous provisions to protect the environment.

This streamlined authorization process is not available just for the asking. Limitations and conditions written into NWP 12 ensure that, consistent with the requirements of Section 404(e), discharges to waters of the U.S. associated with activities authorized by NWP 12 will have only minimal effects on the environment. These limitations and conditions take a variety of forms. For example:

- discharges that are authorized under NWP 12 cannot result in the loss of more than $\frac{1}{2}$ acre of waters of the U.S. for a single and complete project;⁷
- discharges that result in the loss of more than $\frac{1}{10}$ acre of waters of the U.S. and certain other types of impacts (*e.g.*, mechanized land

⁷ See Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). Discharges of dredged or fill material associated with the construction of utility lines often do not result in the permanent loss of waters of the U.S. because many of the impacts to waters of the U.S. associated with such projects are only temporary in nature.

clearing in forested wetlands) trigger closer scrutiny by the Corps to ensure that impacts will be minimal;⁸

- Corps Division Engineers, or state agencies, can impose further categorical limitations to address local conditions;⁹ and
- mitigation is required for impacts to waters of the U.S. in specified circumstances, such as when impacts to wetlands exceed $\frac{1}{10}$ acre.¹⁰

EIC members design their projects to comply with these limitations—and thereby minimize the environmental impacts of their projects—so that they can use NWP 12’s streamlined processing.

⁸ *Id.* at 1986.

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

¹⁰ *See* 82 Fed. Reg. at 2001.

C. NWP 12 includes a detailed system to protect listed species.

Among the provisions built into NWP 12—in fact, incorporated in every nationwide permit—are those specifically designed to protect ESA-listed species and their critical habitats.¹¹ Most notably, the Corps’ regulations—reinforced by General Condition 18—expressly deny authorization under *any* nationwide permit of any activity likely to directly or indirectly jeopardize the continued existence of any listed species or to directly or indirectly adversely modify any designated critical habitat. *See* 33 C.F.R. § 330.4(f); NWP 12, Condition 18, Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1999-2000 (Jan. 6, 2017). The regulations further state that no activity that may affect an endangered or threatened species or critical habitat is authorized under any nationwide permit unless the Corps has consulted with the Services under ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), to address the impacts of the proposed activity on listed species and their critical habitat. 33 C.F.R. § 330.4(f)(2).

In support of these prohibitions, General Condition 18 imposes multiple obligations on those who seek to use NWP 12 to authorize discharges of

¹¹ Under the ESA, the Services designate “critical habitat” for listed species, which generally include areas that are deemed to be essential for the conservation (*i.e.*, the survival and recovery) of the species. 16 U.S.C. § 1532(5)(A).

dredged or fill material to waters of the U.S. First, any company or individual planning to use a nationwide permit to authorize a discharge to waters of the U.S. must notify the Corps before engaging in the activity (through submission of a “pre-construction notification”) if the activity *might* affect a listed species or designated critical habitat. 82 Fed. Reg. at 1999. Work on the activity cannot begin until the Corps in turn notifies the company or individual that the requirements of the ESA have been satisfied. *Id.*

In order to satisfy those ESA requirements, the Corps will determine whether the activity may in fact affect a listed species or critical habitat or will instead have no effect. *Id.* If it makes a “may affect” determination, the Corps will engage in a consultation under ESA Section 7 with the Services—*i.e.*, FWS and/or NMFS as appropriate (depending on the species involved).¹² *Id.* at 1999-2000. In the meantime, the activity is not authorized until the Corps notifies the company or individual that consultation is complete. *Id.* General Condition 18 further specifies that the Corps may add any activity-specific conditions to any given use of a nationwide permit that are necessary in light of the Section 7 consultation. *Id.* at 2000.

In effect, NWP 12 provides only contingent approval for any activities

¹² In general, FWS has jurisdiction over terrestrial and freshwater species, while NMFS has jurisdiction over marine species as well as anadromous species such as salmon.

that might affect listed species or critical habitats. Those activities only become authorized once the requirements of General Condition 18 have been satisfied.

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

EIC members' experience confirms that General Condition 18 works as intended and incentivizes project proponents to plan wisely and avoid impacts to listed species. These incentives are evident in the project planning phase. For any project for which they intend to rely on NWP 12, EIC members take a variety of steps to determine whether there are any listed species or critical habitat in the area that the project might affect.

For example, EIC members generally retain expert consultants to assist their own personnel who are knowledgeable regarding ESA issues. Together, the project team will conduct an investigation to determine whether any ESA-listed species or critical habitat are located within the project area. One common tool used for this purpose is FWS's Information for Planning and Consultation ("IPaC") database, which allows a user to designate a project area anywhere in the country on a map and receive information regarding listed species that are known or expected to be in or near the project

area.¹³ In some cases, project teams may request from the appropriate Service an “official species list” that will identify the species and critical habitat that should be considered in determining whether a Section 7 consultation is required for the project. Where there may be potential for a species to be found in the project area, EIC-member consultants will conduct surveys using accepted protocols. Depending on the circumstances, these surveys may be “presence/absence” surveys to determine whether any listed species are found in the project area or they may be surveys intended to identify habitat for endangered or threatened species.

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

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

¹³ This database is publicly available at <https://ecos.fws.gov/ipac>.

project proponent may be able to avoid the nesting season and eliminate impacts on birds. Where appropriate, EIC members will mitigate remaining impacts to listed species in consultation with the Corps and the Services through any of a variety of measures.

Through this process, NWP 12 leads EIC members, and others similarly situated, to ensure that they do not engage in discharges that could affect listed species or critical habitat without coordinating with the Corps and/or the appropriate Service. This coordination is essentially identical to what would occur if EIC members were applying for individual CWA Section permits. At the same time, the existence of NWP 12 and the prospect of expedited permitting promotes efforts to avoid impacts and therefore promotes the environmental agenda that Congress sought to advance.

Thus, EIC members' experience supports the Corps' conclusion that the issuance of NWP 12 itself has no effect on listed species and critical habitat. In fact, the existence of NWP 12 promotes the avoidance of any impacts to listed species or critical habitats. Where impacts to listed species might occur, the authorization provided by NWP 12 is only contingent, and the permit's provisions, including General Condition 18, ensure that any necessary consultation with the Services occurs on a project-specific basis before any NWP 12 authorization becomes effective.

II. NWP 12 is critical to EIC members' timely provision of essential services.

EIC members provide essential services to the public without delay or interruption—and they rely on NWP 12 to do so. The services at issue touch every moment of daily life. As described above, EIC members provide electricity, natural gas, potable water, and wastewater collection and treatment. These services have the maximum possible reach—to homes, schools, businesses, hospitals, courthouses, churches, and every other imaginable venue. To provide these services on demand and without interruption, EIC members must regularly develop new infrastructure—including new renewable energy infrastructure—and have active programs to maintain and repair existing infrastructure. As everyone who has suffered a power outage knows, this work must be timely and efficient.

To provide critical services without interruption, EIC members use NWP 12 for a wide variety of infrastructure-related activities that go well beyond its use for large oil and gas pipelines such as Keystone XL. For example, EIC members use NWP 12 to facilitate construction, maintenance, and repair of electric transmission and distribution lines and substations; gas transmission, gathering, storage, and distribution pipelines; and pipelines for transporting water and wastewater. That permit is an invaluable and common-sense means for ensuring the availability of critical infrastructure without

significant delay, cost, or public inconvenience.

A. The unavailability of NWP 12 would cause significant disruptions in the provision of essential services.

Disruptions caused by the district court's initial order vacating and enjoining the use of NWP 12 pending completion of an ESA Section 7 consultation between the Corps and the Services had one silver lining—those disruptions illustrate NWP 12's importance. The following are just some examples of the impacts that flowed—and would continue to flow—from the unavailability of NWP 12; amici would gladly provide any further information, at any level of detail, if the Court would find that helpful in its consideration of the case.

1. One EIC member has identified over 200 projects at various stages of completion that NWP 12's disappearance would undermine. These projects include numerous electric transmission and distribution projects and renewable-energy projects, as well as a variety of gas-pipeline projects, ranging from small service lines to interstate pipelines. If NWP 12 became unavailable, these projects would at best be delayed, with attendant increases in cost and inconvenience to the public; other projects would likely be abandoned altogether because they would be unfeasible or unduly costly without NWP 12. These projects facilitate essential public services, but many also provide environmental benefits through the increased availability of and

access to renewable energy.

2. Delays arising from the unavailability of NWP 12 would create particular concerns with respect to solar projects in light of state mandates requiring utilities to obtain 100% of their energy from non-carbon-emitting sources by 2045. To meet this and related requirements, the member must put a significant amount of solar generation in service—the equivalent of approximately 1,000 megawatts of solar power generating capacity every year. (An average of 190 homes can be powered by a megawatt of solar energy generating capacity; 1,000 megawatts of solar capacity would on average power well over 100,000 homes.¹⁴) Without NWP 12, this member’s ability to meet this goal would be, to put it mildly, cast in serious doubt because many of its solar power projects would be delayed. Similarly, delays in transmission projects would affect the member’s ability to meet grid-reliability standards established by the North American Electric Reliability Corporation (“NERC”).

3. Another EIC member frequently relies on NWP 12 in connection with the construction and maintenance of its wastewater-collection system, which includes over 200 miles of interceptor pipes and many miles of collector pipes. This is a gravity-based collection system that requires siting most

¹⁴ See Solar Energy Indus. Ass’n, *What’s in a Megawatt: Calculating the Number of Homes Powered by Solar Energy*, <https://www.seia.org/initiatives/whats-megawatt> (last visited Sept. 23, 2020).

pipes in low-lying areas, which in turn results in the need to cross wetlands, streams, or other water bodies that qualify as waters of the United States. This member also regularly undertakes projects to repair existing pipes and to add new capacity to serve a growing metropolitan area. If NWP 12 were unavailable, this member would be forced to consider redesigns of some projects and would face not only project delays, but also significant cost increases. Notably, some of these projects are driven by the need to address sanitary sewer overflows, and delays in these projects could subject this member to enforcement actions by state regulatory authorities.

4. One EIC member has a 50-mile electric-transmission-line project that is in the permitting stage; construction was slated to begin later this year. The project has already received approval from the state public utility commission as being necessary to respond to growing demand in the project area. This EIC member was one week away from submitting pre-construction notifications (“PCNs”) for the project to the local Corps district office pursuant to NWP 12 when the district court’s initial order issued. As a result, the member was forced to convert its PCN to an application for an individual CWA Section 404 permit. Given the anticipated period of twelve to eighteen months (or possibly more) for processing an application of this type, in the absence of a stay of the district court’s order, the project would not have been

completed within the time period approved by the public utility commission. This member identified fifteen other transmission projects and eleven pipeline projects for which it anticipated using NWP 12 to authorize impacts to waters of the United States. These projects would all be subject to potentially significant delays and attendant cost increases if NWP 12 were not available.

5. Another EIC member routinely relies on NWP 12 for transmission projects necessary to comply with NERC reliability standards. This member currently has six NWP-12 authorizations for new transmission lines, reductoring (upgrading) existing transmission lines, and substation expansion projects. In addition, it has two NWP-12 PCNs under review by the Corps for a new substation and a new transmission-line project. Some of these projects are subject to mandatory timelines, and this member's failure to meet those timelines could subject it to enforcement actions or breach of Regional Transmission Organization agreements. Other potential impacts associated with the unavailability of NWP 12 include field-construction contractors for these planned projects being out of work and a delay in this member's ability to recover the capital costs already expended for these projects.

6. Another member also routinely relies on NWP 12 for transmission projects necessary to comply with NERC reliability standards as well as ongoing major highway-construction projects that result in transmission-line

relocation efforts. This member currently has four such projects that are either undergoing environmental-permitting assessment or in the construction phase utilizing non-reporting NWP 12 with mandatory timelines. Other potential impacts associated with the unavailability of NWP 12 likewise include field-construction contractors being out of work and delay in recovering the capital costs already expended.

7. One EIC member is in the planning stages for an approximately 300-mile electric-transmission line in the Northwest that will allow the member to provide renewable power to help meet customer demand, especially during periods of peak usage during the summer months. Project planning to date has been predicated on the availability of NWP 12 to authorize several crossings of waters of the U.S. associated with access roads and potentially with foundations for transmission structures. An individual CWA Section 404 permit for the project would impose unnecessary cost increases on this important regional project.

This handful of examples offers a mere glimpse of the importance of NWP 12 to the operations of EIC members and their ability to provide needed services to the public, as well as the disruption and injury that has flowed and would continue to flow from the unavailability of NWP 12. Without NWP 12, these harms would affect people across the country and would reverberate

for years as essential infrastructure projects and necessary upgrades and repairs were delayed. The lost time and money from the projects described above would be gone forever. Likewise irreplaceable would be the days or weeks of lost productivity imposed on those whom EIC members serve as a result of inadequate electricity or other essential services. The added costs from these delays would be passed on to ratepayers, many of whom are already struggling in these challenging times. The development of renewable energy would also be delayed.

In short, NWP 12 plays a key role in enabling EIC members to provide essential services to the communities they serve in a timely, reliable and affordable manner. In the process of using NWP 12 to help achieve these ends, members minimize the impacts on the environment associated with providing, maintaining, and repairing the infrastructure that is necessary to deliver these services. In the absence of NWP 12 (or a comparable general permit), these benefits would be lost.

B. A speculative programmatic Section 7 consultation will do little to protect species.

EIC members' experience confirms that the district court was correct in presuming that permittees comply with General Condition 18. *See* 1 Excerpts of Record 57. However, the district court essentially ignored the implications of this presumption in concluding that something more is

required, *i.e.*, a consultation among the Corps, FWS and NMFS regarding the potential impacts of NWP 12 activities to be conducted across the country. This consultation would be undertaken without any information about specific projects to be conducted in the future, specific landscapes to be affected, or particular animals or plants that might be impacted. As the U.S. Court of Appeals for the Fourth Circuit has noted:

the environmental impact of the activities authorized by a general permit depends on factors that, as a practical matter, are outside the Corps' ability to predict with certainty *ex ante*. This uncertainty is especially acute when the Corps issues a *nation-wide* permit . . . because the Corps must attempt to forecast the environmental effects the authorized activities could have if undertaken anywhere in the country under any set of circumstances.

Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 501 (4th Cir. 2005).

In the absence of any specifics, such a consultation could only consider the *process* for addressing potential impacts to listed species. NMFS readily acknowledged this in its 2014 biological opinion regarding the Corps' 2012 reissuance of the nationwide permits.¹⁵ Yet the existing process embodied in

¹⁵ NMFS, Endangered Species Act Section 7 Consultation Biological Opinion and Conference Biological Opinion, at 90 (Nov. 24, 2014), <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/6768> ("programmatic consultations examine the decision-making processes that are integrated into Federal agency programs to determine whether those decision-making processes are likely to comply with the requirements of ESA section 7(a)(2)").

General Condition 18 already ensures that any such impacts will be fully addressed in a manner consistent with the ESA.

Indeed, nothing in logic or experience suggests that forcing the Corps to complete a programmatic ESA Section 7 consultation before allowing activities to proceed under NWP 12 would advance the ESA's purposes—it would not further protect listed species and critical habitat or alter the way the Corps approves PCNs or the methods EIC members use to mitigate potential impacts to ESA-protected species and habitat. As a result, if affirmed, the district court's ruling would significantly disrupt the provision of essential services to communities across the country without providing any meaningful degree of additional protection to listed species or their critical habitat.

CONCLUSION

The judgment below should be reversed.

Dated: September 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(g), the undersigned certifies this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the portions of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,034 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with Georgia 14-point font for text and footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I electronically filed the foregoing using the Court's CM/ECF filing system, which will send notification of such filing to all counsel of record.

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