Consolidated Case 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,

TRANSCANADA KEYSTONE PIPELINE, LP, *et al.*,
Intervenor-Defendants-Appellants,

AMERICAN GAS ASSOCIATION, *et al.*,
Intervenor-Defendants-Appellants,

and

STATE OF MONTANA,
Intervenor-Defendant-Appellant.

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

PLAINTIFFS' ANSWERING BRIEF

DOUG HAYES
ERIC HUBER
Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
Boulder, CO 80301
(303) 449-5595
doug.hayes@sierraclub.org
eric.huber@sierraclub.org

Counsel for Sierra Club and Northern Plains Resource Council

JACLYN H. PRANGE
CECILIA SEGAL
ALEXANDER TOM
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100
jprange@nrdc.org
csegal@nrdc.org
atom@nrdc.org

Counsel for Natural Resources Defense Council and Bold Alliance

JARED MARGOLIS
Center for Biological Diversity
2852 Willamette St. # 171
Eugene, OR 97405
(971) 717-6401
jmargolis@biologicaldiversity.org

ERIC GLITZENSTEIN
Center for Biological Diversity
1411 K Street, NW, Suite 1300
Washington, DC 20005
(202) 849-8401
eglitzenstein@biologicaldiversity.org

Counsel for Center for Biological Diversity and Friends of the Earth

TIMOTHY M. BECHTOLD
Bechtold Law Firm, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Counsel for all Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION

The district court correctly held that Section 7 of the Endangered Species Act ("ESA") required the U.S. Army Corps of Engineers to initiate consultation before it reissued Nationwide Permit 12 in 2017. Nationwide Permit 12 ("NWP 12" or "the Permit") is used approximately 14,000 times per year to authorize discharges of dredged and fill material from pipelines and other utility projects into our nations' rivers, streams, and wetlands. Because those discharges "may affect" species listed as endangered or threatened under the ESA, the Corps' reissuance of NWP 12 required programmatic consultation with the expert wildlife agencies—the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") (collectively, the "Services").

The Corps does not dispute that many NWP 12-authorized activities "may affect" listed species, and thus meet the low threshold for consultation. It nonetheless insists that consultation on the Permit as a whole is unnecessary. The Corps' argument against programmatic consultation is a legal one: the reissuance of NWP 12 itself has no effect on listed species because the agency undertakes project-specific consultation on individual activities. But this ignores the plain language of the Services' regulations and this Court's precedent, which clearly contemplate consultation for both programs *and*

projects carried out under those programs. In fact, programmatic consultation plays a distinct and crucial role in ensuring that agency actions establishing broad programs, such as NWP 12, do not cause the piecemeal destruction of habitat or jeopardize listed species through death by a thousand cuts. The Corps is not entitled to deference for unlawfully evading its ESA duties, especially when its legal justification is premised on a faulty reading of *other* agencies' regulations.

The district court also correctly determined that NWP 12 violates the ESA because it delegates the initial determination of whether a project affects species to the project proponent. The Corps—not private parties—must decide whether a project triggers the ESA's requirements for project-specific consultations.

Due to the gravity of the Corps' violations, the district court vacated and enjoined the use of NWP 12 for the construction of new oil and gas pipelines. As explained below, Plaintiffs now seek to maintain only the district court's declaratory relief and remand of NWP 12, and its vacatur of the Permit insofar as it applies to the Keystone XL pipeline.

Defendants cannot show that vacatur as to Keystone XL was an abuse of discretion. The ESA's statutory scheme and this Court's precedent make clear that the Corps committed serious error by refusing to initiate programmatic

consultation on NWP 12. Defendants' attempt to treat consultation as a technical formality overlooks consultation's vital role in enforcing the ESA's substantive mandate against jeopardy and the record in this case.

Keystone XL's developer, TC Energy, contends that remand without vacatur is nevertheless required to avert construction delays and increased costs. But delay alone cannot support such a remedy here, given the Corps' serious ESA violation. Moreover, these claims of disruption are now stale, and the extent and cause of any further disruption are speculative. In no event do they excuse noncompliance with the ESA. The Court should affirm the district court's declaratory relief, remand of NWP 12, and vacatur of NWP 12 insofar as it applies to Keystone XL.

STATEMENT OF JURISDICTION

Plaintiffs do not dispute Defendants' statements of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the Corps' issuance of NWP 12, a general permit that authorizes the dredge and fill of tens of thousands of waterway crossings, "may affect" protected species and critical habitat, thereby requiring programmatic ESA Section 7 consultation.

2. Whether the district court correctly concluded that NWP 12 improperly delegates the initial decision about whether a project affects species to applicants in violation of the ESA.

3. Whether the district court reasonably concluded that the extraordinary remedy of remand without vacatur was not warranted for NWP 12's application to the Keystone XL pipeline.[1]

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum to this brief or, where indicated, in Federal Defendants' Addenda.

BACKGROUND

I. Statutory framework

A. Endangered Species Act

To stem the ongoing extinction of species, Congress enacted ESA Section 7, a vital safeguard that requires each federal agency, in consultation with the Services, to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2); *see also* 50

[1] Although Federal Defendants' and TC Energy's statements reference questions implicated by vacatur extending beyond Keystone XL and injunctive relief, *see* Fed. Br. 4, TC Br. 7, those questions are no longer at issue in these appeals.

C.F.R. § 402.01(b) (stating that the Services are charged with administering the ESA).[2]

The Services' implementing regulations establish a detailed consultation process to carry out this aim. Under it, an agency must engage in consultation with the Services for *every action* that "may affect" a federally listed species or critical habitat in any manner, 50 C.F.R. § 402.14(a), (g), including "all activities or programs of any kind authorized, funded, or carried out," *id.* § 402.02 (defining "action"). Unless the agency determines—through a biological assessment or informal consultation with the Services—that the action "is not likely to adversely affect" any listed species or critical habitat, and the Services issue a written concurrence in that determination, then the agency must initiate the formal consultation process. *Id.* § 402.14(b)(1).

Formal consultation culminates in a biological opinion that sets out the Services' determination as to whether the action is likely to jeopardize listed species or adversely modify critical habitat, and prescribes measures for avoiding or mitigating such effects. *Id.* § 402.14(h). In evaluating a specific action's effects on species, the Services consider "cumulative effects" from state or private activities and the species' "environmental baseline," but only

[2] All citations to the Code of Federal Regulations are to the version in effect in 2017.

within the "action area." *Id.* §§ 402.02 (defining "effects of the action"), 402.14(g)(2)-(4). Where an action will result in the "incidental take" of listed species, the Services will also provide an incidental take statement with the biological opinion, authorizing a certain extent of such take and imposing various conditions. *Id.* § 402.14(i); *see also* 16 U.S.C. § 1532(19) (defining "take"); 50 C.F.R. § 17.3 (defining "incidental").

For programmatic actions, the focus of consultation is different. The Services' regulations recognize that certain programmatic actions "approve[] a framework for the development of future action(s)," and thus, "any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out." 50 C.F.R. § 402.02 (defining "framework programmatic action"). Accordingly, "an incidental take statement is not required at the programmatic level," *id.* § 402.14(i)(6), but rather is issued during subsequent project-specific consultation. Such project-specific consultation, however, "does not relieve the Federal agency of the requirements for considering the effects of the action as a whole." *Id.* § 402.14(c). That is because programmatic consultation allows "a broad-scale examination of a program's potential impacts on a listed species and its designated critical habitat—an examination that is not as readily conducted when the later, action-specific consultation occurs on a subsequent action

developed under the program framework." 80 Fed. Reg. 26,832, 26,836 (May 11, 2015).

B. Clean Water Act

The Clean Water Act ("CWA") prohibits the discharge of any pollutant—including dirt or other fill material—into waters of the United States without a permit. *See* 33 U.S.C. § 1311(a). Under Section 404, the Corps may issue such permits on either an individual or general basis. *Id.* § 1344(a), (e). General permits may be issued on a state, regional, or nationwide basis for a category of activities if the Corps finds that those activities are "similar in nature" and will cause "only minimal adverse environmental effects," separately and cumulatively. *Id.* § 1344(e)(1).

The Corps' Nationwide Permit ("NWP") program includes over 50 permits for various categories of activities. *See* 82 Fed. Reg. 1860, 1860 (Jan. 6, 2017). Each permit can remain in effect for up to five years. 33 U.S.C. § 1344(e)(2). The Corps periodically reviews these permits to determine whether to modify, revoke, or reissue them when they expire. 33 C.F.R. § 330.6(b). In practice, the Corps has generally examined all of its NWPs at the same time and made those determinations in a single reissuance. *See, e.g.*, 77 Fed. Reg. 10,184 (Feb. 21, 2012); 82 Fed. Reg. at 1860.

II. Factual background

This case challenges the Corps' 2017 issuance of NWP 12, which authorizes the construction of pipelines and other utility projects. SER-7. The Corps has estimated that NWP 12 will be used 14,000 times annually, impacting 8,900 acres of U.S. waters over a five-year period. SER-11.

A. Nationwide Permit 12's terms and conditions

NWP 12 authorizes the discharge of dredged or fill material associated with linear utility projects, including pipelines, so long as each "single and complete project"—defined to mean *each individual water crossing*, 33 C.F.R. § 330.2(i); 82 Fed. Reg. at 2007—will not result in the loss of more than half an acre of U.S. waters. 82 Fed. Reg. at 1985.

"In most cases," projects meeting NWP 12's terms and conditions may be constructed without any further action by, or notification to, the Corps. 33 C.F.R. § 330.1(e)(1); *see also id.* § 330.1(c). But when a project meets certain criteria, the applicant must submit a preconstruction notification ("PCN") to a Corps district engineer for "verification" that the project complies with the Permit. *See id.* §§ 330.1(e)(1), 330.6(a)(1). As relevant here, General Condition 18 provides for submission of a PCN if a project "might affect" listed species or critical habitat. *See* 82 Fed. Reg. at 1888, 1999-2000. The district engineer then evaluates the PCN to determine whether project-specific consultation under

the ESA is necessary, and to otherwise determine whether the project complies with NWP 12's terms and conditions. *See id.* at 1986, 1999-2000, 2004-05. If the project does not meet those terms and conditions, the district engineer must deny verification; the applicant may then seek an individual permit instead. *See* 33 C.F.R. § 330.6(a)(2).

B. The Corps' consultation on prior iterations of Nationwide Permit 12

In 2005, a district court ruled that the Corps violated the ESA by reissuing several NWPs, including NWP 12, without undertaking Section 7 consultation. *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 10-11 (D.D.C. 2005). In subsequent proposals to reissue the NWPs, the Corps acknowledged the court's holding that the agency was "obligated to consult . . . on the effects of the NWPs" and explained that the Corps had initiated programmatic consultation with the Services on the proposed reissuances. 76 Fed. Reg. 9174, 9176-77 (Feb. 26, 2011); *see also* 71 Fed. Reg. 56,258, 56,261 (Sept. 26, 2006).

Most recently, the Corps engaged in formal consultation with NMFS on the 2012 reissuance of the NWP program, including NWP 12. *See* 76 Fed. Reg. at 9176. In February 2012, NMFS issued a biological opinion (the "2012 BiOp") concluding that the Corps' implementation of the program *was* jeopardizing the continued existence of listed species under NMFS's jurisdiction. SER-67. The Corps subsequently reinitiated formal consultation,

during which the agency agreed to adopt a series of mitigation, data collection, monitoring, and reporting measures at the national level. SER-35, -36–38. Based on these measures, NMFS issued a new biological opinion (the "2014 BiOp") concluding that the NWP program—while adversely affecting endangered and threatened species—was not likely to jeopardize listed species within NMFS's jurisdiction. SER-35, -59, -60, -61.

C. The Corps' 2017 reissuance of Nationwide Permit 12

In 2016, the Corps began a process to once again reissue the NWP program. But despite its prior consultations with NMFS and the *Brownlee* decision, the Corps refused to engage in any Section 7 consultation. The agency instead asserted that the NWPs themselves would have "no effect" on listed species or critical habitat and declined to initiate programmatic consultation on that basis. *See* 82 Fed. Reg. at 1873-74.

As pertains to NWP 12, the Corps did not dispute NMFS's prior determination that NWP 12-authorized activities adversely affect listed species. Nor did it provide any reasons why those effects would no longer result from a new iteration of the Permit. In fact, the Corps projected that usage of NWP 12 would increase by more than 77 percent—from 7,900 annual uses under the 2012 Permit, SER-69, to 14,000 annual uses under the 2017 Permit, SER-10–11. The agency nonetheless contended that consultation was

unnecessary because any effects to listed species or critical habitat would be analyzed on a project-specific basis under General Condition 18. 82 Fed. Reg. at 1873-74.

The Corps' regulatory program manager evidently recognized the vulnerability of the agency's legal position. *See* 3-ER-605. Yet he recommended that the Corps make a "national 'no effect' determination for each NWP reissuance until it is challenged in federal court and a judge rules against the Corps," reasoning that if the agency "lose[s] in federal court, then [it] would start doing the national programmatic consultations again." *Id.*

D. The Keystone XL pipeline's use of Nationwide Permit 12

Keystone XL is a pipeline that would transport up to 830,000 barrels per day of tar sands crude oil—one of the dirtiest and most destructive fuels on the planet—from Alberta, Canada, to Steele City, Nebraska. 1-TC_ER-647. If built, the pipeline would stretch over 882 miles within the United States. *Id.*

Keystone XL requires several federal and state approvals before it can be built,[3] including a CWA Section 404 permit. TC Energy intended to satisfy its

[3] In connection with these permits, the U.S. Department of State conducted environmental reviews of the pipeline, including a project-specific ESA consultation. Ruling on legal challenges brought by Plaintiffs and others, a district court determined, among other things, that the ESA analysis was inadequate and vacated the underlying documents. *Indigenous Env't Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 590-91 (D. Mont. 2018). President

Section 404 obligations using NWP 12. In May 2017, TC Energy submitted PCNs for the project, but for only five out of approximately 688 water crossings. The Corps verified the use of NWP 12 for two of the waterways in 2017, later suspending those verifications at TC Energy's request. *See* 2-TC_ER-966–67. According to the Corps, the hundreds of remaining water crossings not requiring a PCN were "already authorized" under the Permit and, hence, TC Energy could begin construction on those crossings "without the need for any Corps verification or other project-level approval" and despite the Corps' withdrawal of the existing verifications. 2-TC_ER-967.

III. Procedural history

Plaintiffs, a coalition of non-profit conservation groups, filed suit in July 2019 to challenge the Corps' issuance of NWP 12 under the ESA, CWA, and the National Environmental Policy Act ("NEPA"). *See* 3-ER-486 (amended complaint); 3-ER-606 (docket sheet). As relevant to this appeal, Plaintiffs contended that the Corps' "no effect" determination and ensuing failure to

---

Trump subsequently reissued the underlying permit, rendering the court's ruling moot. *See Indigenous Env't Network v. U.S. Dep't of State*, No. 18-36068, 2019 WL 2542756, at *1 (9th Cir. June 6, 2019). The U.S. Bureau of Land Management and other federal agencies nonetheless engaged in a new ESA Section 7 consultation for Keystone XL. 1-TC_ER-691–92. Several Plaintiffs from this litigation have challenged the adequacy of this revised project-specific consultation. *See* Compl. ¶¶ 122-32, *Bold All. v. U.S. Dep't of the Interior*, No. 20-cv-59 (D. Mont. July 14, 2020).

initiate programmatic consultation on NWP 12 were arbitrary and capricious and violated the ESA. 3-ER-566–69. Plaintiffs also challenged the application of NWP 12 to Keystone XL, including the lack of a valid project-specific ESA consultation to support the Corps' verifications. 3-ER-570–72. TC Energy, the State of Montana, and the NWP 12 Coalition intervened alongside Federal Defendants.

Following the Corps' withdrawal of the verifications, Plaintiffs agreed to stay their two claims challenging those verifications and proceed with their facial challenge to NWP 12. 2-TC_ER-963, -966–68. Plaintiffs then moved for partial summary judgment on their facial ESA, CWA, and NEPA claims. *See, e.g.*, 2-ER-323–24, -27.

On April 15, 2020, the district court ruled for Plaintiffs on their ESA claim. The court found "substantial evidence" that NWP 12 "may affect" listed species, and held that the Corps violated the ESA by failing to consult with the Services prior to issuing the Permit and relying on project-specific consultations instead. 1-ER-54–59. Accordingly, the court remanded NWP 12 to the Corps, vacated the Permit pending compliance with the ESA, and

enjoined the Corps from authorizing any dredge or fill activities under the Permit in the meantime. 1-ER-59, -63–64.[4]

Defendants filed motions for a stay pending appeal of the vacatur and injunction before the district court, with Federal Defendants also suggesting that the court narrow the relief ordered. *See* 1-ER-2. On May 11, 2020, the district court amended its vacatur and injunction to cover only the use of NWP 12 for the construction of new oil and gas pipelines. 1-ER-38. The court denied Defendants' stay motions in light of that modification. 1-ER-24–38.

Federal Defendants, TC Energy, and the NWP 12 Coalition next filed motions in this Court to stay the partial vacatur and parallel injunction. This Court denied the stay motions, finding that Defendants had "not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal." 2-ER-79.

Federal Defendants then sought a stay of the district court's orders from the Supreme Court. On July 6, 2020, the U.S. Supreme Court granted a stay in part, ordering that "[t]he district court's May 11, 2020 order granting partial vacatur and an injunction is stayed, except as it applies to the Keystone XL

[4] The court denied without prejudice the parties' cross-motions for summary judgment on the merits of Plaintiffs' CWA and NEPA claims, anticipating that ESA consultation might bear on the Corps' determinations under those statutes. 1-ER-60–64.

pipeline." 2-ER-65. The order did not stay the district court's declaratory relief or remand.

Following the Supreme Court's order, the Corps announced on August 3, 2020, that it intended to reissue all of the NWPs, well in advance of their March 18, 2022 expiration. *See* Fed. Br. 9 n.1. Among other modifications, the Corps proposed dividing NWP 12 into three separate permits, with one such permit covering only oil and gas pipelines. 85 Fed. Reg. 57,298, 57,298 (Sept. 15, 2020). The public comment period closed on November 16, 2020. *Id.*

SUMMARY OF ARGUMENT

This case concerns a straightforward application of Section 7 of the ESA to the facts in the record. NWP 12 is used tens of thousands of times each year to authorize discharges into U.S. waters, SER-11, and Defendants do not dispute that many NWP 12-authorized projects, like the Keystone XL pipeline, adversely affect listed species. Accordingly, the district court found "resounding evidence" that the Corps' issuance of NWP 12 "may affect" listed species and, hence, that the Corps' failure to initiate Section 7 consultation was unlawful. 1-ER-53–56.

Defendants' contrary position rests on a legal interpretation that makes a mockery of the ESA's core protections. Under Defendants' view, the issuance of NWP 12 has "no effect" on listed species because there will be project-

specific review at a later time. But that interpretation ignores the plain language of the Services' regulations, which make clear that consultation is necessary for programmatic actions. *See* 50 C.F.R. § 402.02; *see also id.* § 402.14(c). Thus, pursuant to the two-step system created by those regulations, consultation is necessary both for the issuance of NWP 12 *and* for project-specific actions under the Permit that may affect listed species.

Programmatic consultation implements the ESA's goal of preventing jeopardy by allowing the agency and the Services to analyze the aggregate impacts of multiple projects operating under a single program. This ensures that appropriate program-wide criteria and safeguards are in place for tracking, avoiding, minimizing, and mitigating such impacts. Deferring consultation on a programmatic action to scattered project-specific reviews instead, as Defendants suggest, would fail to guarantee that the program as a whole will not jeopardize listed species or destroy critical habitat. Numerous decisions of this Court have confirmed this principle. *See Lane Cnty. Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994); *Conner v. Burford*, 848 F.2d 1441, 1453-58 (9th Cir. 1988); *cf. Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082 (9th Cir. 2015). And the only court—besides the district court in this

case—to address this exact issue with respect to NWP 12 found the same. *Brownlee*, 402 F. Supp. 2d at 10-11.

The Corps is not entitled to deference for its unlawful "no effect" determination and refusal to consult on NWP 12. Its legal position is contrary to the plain language of the regulations, and the Corps would not receive deference regarding the *Services'* regulations in any event. *See Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981). Further, as the district court correctly noted, the Corps was "well aware that its reauthorization of NWP 12 required Section 7(a)(2) consultation." 1-ER-58; *see also* 1-ER-28; 3-ER-605 (Corps' regulatory program manager suggesting that the Corps refrain from engaging in such consultation unless ordered otherwise).

For their part, the Services have made clear that programmatic consultation is necessary on NWP 12. In 2012, NMFS determined that NWP 12, along with other NWPs, was jeopardizing listed species. SER-67. The Corps was able to proceed with the program only after it agreed to adopt additional protective measures at the national level. SER-36–38, 57–58. But even though that prior consultation is now stale, and does not reflect FWS's views, the Corps refuses to update its analysis in a new consultation. NMFS has also stated that the Corps' "no effect" determination is inconsistent with the ESA, 2-TC_ER-983, and, in issuing regulations concerning programmatic

consultations in 2015, the Services specifically used the Corps' NWP program as an example of a federal program subject to such consultation. *See* 80 Fed. Reg. at 26,835-36. The district court did not err in finding that programmatic consultation is necessary for NWP 12.

Nor did the district court err when it determined that the Corps violated the ESA by delegating the initial Section 7 effects determination to applicants. Under General Condition 18, an applicant must submit a PCN to the Corps for "verification" if the applicant determines the project "might affect" listed species or critical habitat. *See* 82 Fed. Reg. at 1888, 1999-2000. Only then will agency staff review the project to determine whether it "may affect" listed species and thus require project-specific consultation. The district court properly found that "General Condition 18 fails to ensure that the Corps fulfills its obligations under ESA Section 7(a)(2)," because it "turns the ESA's initial effect determination over to non-federal permittees, even though the Corps must make that initial determination." 1-ER-57.

As to remedy, this Court previously determined that Defendants were unlikely to succeed on their arguments that the district court's remedies were an abuse of discretion. But given subsequent developments, including the Supreme Court's partial stay, Plaintiffs are narrowing the relief they seek to maintain on appeal. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512

(1989). Plaintiffs request that the Court affirm the district court's declaratory relief and remand, which no party has colorably challenged. And, consistent with the Supreme Court's partial stay, this Court should affirm the district court's vacatur insofar as it applies to the Keystone XL pipeline.

Defendants argue that remand without vacatur was warranted as to Keystone XL, but both equitable factors set forth in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), confirm that vacatur was not an abuse of discretion. First, the Corps committed "serious error" in refusing to undertake programmatic consultation on NWP 12, which is essential to ensuring compliance with the ESA's "important substantive mandate that threatened and endangered species shall not be placed in jeopardy." *Conner*, 848 F.2d at 1458 n.40. Defendants' attempt to downplay that consultation as a technical formality overlooks consultation's critical role in enforcing the ESA's strict substantive provisions, as well as the record of this case.

Second, Defendants have not shown any disruptive consequences that would demand remand without vacatur as to Keystone XL. TC Energy's assertions of delays and increased costs cannot support remand without vacatur here, because the ESA establishes that the equitable balance favors protecting listed species. *See Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d 803, 817

(9th Cir. 2018). Even if considered, those alleged economic harms are entitled to little weight. TC Energy tacitly acknowledges that its inability to conduct construction during the 2020 season was assured once its stay requests were denied. Any future disruption is speculative, particularly given the Corps' (presumably) ongoing remand process and TC Energy's pending application for an individual CWA Section 404 permit. In short, given the serious ESA violation and the speculative harms alleged by Defendants, vacatur as to Keystone XL is clearly proper.

ARGUMENT

I. The district court correctly held that the Corps violated the ESA

A. The Corps' issuance of Nationwide Permit 12 was an agency action that required programmatic consultation

In view of the plain terms and purpose of ESA Section 7, this Court's precedent, and the extensive administrative record, the Court should uphold the decision below.

The Corps' failure to undertake consultation on the 2017 iteration of NWP 12 was a clear and egregious violation of one of the ESA's most vital safeguards for imperiled species. "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978); *see also Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc) (observing that compliance

with ESA's procedural requirements is critical to effectuating its substantive protections). Section 7 states that "[e]ach Federal agency shall, in consultation with and with the assistance of [the Services], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). This "mandate applies to *every discretionary agency action*—regardless of the expense or burden its application might impose." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 671 (2007) (emphasis added).

Defendants do not dispute that the Corps' issuance of NWP 12 is an "action" under the ESA, nor could they. The ESA's implementing regulations broadly define "action" to mean "all activities or *programs of any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies," including the "promulgation of regulations," the "granting of . . . permits," and "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (emphasis added). NWP 12 constitutes *both* a "permit" used for thousands of individual projects each year, *and* a "program" establishing a nationwide scheme for CWA compliance. *Id.* Thus, it requires consultation at the *programmatic* level when issued by the Corps.

Defendants, however, argue that the potential for later project-specific review negates the need for such consultation. Not so. Applicable regulations and binding precedent make clear that programmatic consultation must occur regardless of subsequent project-specific consultations. Furthermore, it is evident that NWP 12 triggers the ESA's low "may affect" threshold. Indeed, as the district court found, the Corps was well aware of the need to consult on the issuance of NWP 12, yet avoided its ESA duties with an unsupportable "no effect" determination that is not entitled to any deference. Therefore, programmatic consultation is required, which will allow the Services to undertake a broad-scale examination of the Permit's potential impacts and establish nationwide criteria to ensure against jeopardy to listed species from thousands of NWP 12-authorized activities each year.

1. The Corps' reliance on project-specific consultation to avoid programmatic review violates the plain language of the Services' regulations

Defendants' *sole* rationale for avoiding programmatic consultation is that such consultation is unnecessary because the Corps undertakes project-specific consultation for NWP 12-authorized activities that "may affect" species. According to Defendants, issuance of NWP 12 itself therefore has "no effect." Fed. Br. 25-29, 31-35; TC Br. 31-32; Coal. Br. 25-27.

To the contrary, the Services' regulations explicitly contemplate programmatic consultation even where individual actions taken pursuant to a program may undergo project-specific review. The Corps' flawed legal position regarding the Services' regulations "is not entitled to deference." *Whaley*, 663 F.2d at 873; *accord Soc. Sec. Admin. v. Fed. Labor Rels. Auth.*, 201 F.3d 465, 471 (D.C. Cir. 2000) (reviewing de novo "interpretation of a regulation promulgated by another agency"); *infra* pp. 40-44.

While the Services' regulations provide that requests for formal consultation "may encompass . . . a number of similar individual actions within a given geographical area or a segment of a comprehensive plan," they make clear that this "does not relieve the Federal agency of the requirements for considering the effects of the action as a whole." 50 C.F.R. § 402.14(c).[5] The regulations accordingly set forth procedures for consultation on a "framework programmatic action," which is defined as "a Federal action that approves a framework for the development of future action(s) that are

[5] TC Energy argues that the Services' regulations at 50 C.F.R. § 402.14 apply only once an agency engages in formal consultation. TC Br. 38. However, formal consultation is required for any agency action—including programmatic actions—that "may affect" listed species *unless* the FWS and/or NMFS concurs in writing that the action is "not likely to adversely affect" the species. *Id.* § 402.14(a), (b)(1). There has been no such concurrence here. *See also* 80 Fed. Reg. at 26,833 ("Framework programmatic actions will trigger *formal* consultation if the action may affect listed species or their designated critical habitat." (emphasis added)).

authorized, funded, or carried out at a later time." 50 C.F.R. § 402.02. For such programmatic actions, consultation on "future action(s)" is still required because incidental take statements are not provided at the programmatic level, but rather are "addressed in subsequent section 7 consultation, as appropriate," *id.* § 402.14(i)(6)—here, the use of NWP 12 for individual projects. As the Services explained when revising their consultation regulations in 2015:

> For purposes of a biological opinion on a framework programmatic action, the Services typically evaluate the potential implementation of the program as ''effects of the action.'' The Services can legitimately draw a distinction between ''effects'' of the program and the purpose of a biological opinion on that program and ''take'' and the purpose of an incidental take statement in the *subsequent consultation on later actions carried out under the program*.

80 Fed. Reg. at 26,836 (emphasis added). In other words, the Services' regulations provide a two-step process for programs, which requires an analysis of the overall effects of the program first, and then project-specific evaluations and incidental take coverage, as appropriate, second.

The Services' regulations thus contemplate that programmatic consultations and project-specific consultations work in tandem, with each playing a vital role in protecting imperiled species. *See id.*; 84 Fed. Reg. 44,976, 44,997 (Aug. 27, 2019) (preamble to Services' 2019 ESA regulations reiterating that, "[a]s explained in the 2015" regulations, the ESA "still requires a programmatic consultation to meet the requirements of section 7(a)(2)[,]" even

if "specific projects . . . developed in the future . . . are subject to site-specific stepped-down, or tiered consultations where incidental take is addressed").

Defendants' argument that programmatic consultation is not required where project-specific consultations will occur is incompatible with these governing regulations. Indeed, if the Court were to accept the Corps' flawed reasoning, then there would never be *any* need for programmatic consultation because *all* programmatic actions *also* require project-specific review for actions undertaken pursuant to the program. *See* 80 Fed. Reg. at 26,835 ("[A] second consultation and an action-specific incidental take statement still need to be provided when later actions are authorized under the program."). That would impermissibly render the regulation "entirely superfluous." *Nat'l Ass'n of Home Builders*, 551 U.S. at 668-69.

In sum, the plain language of the regulations—as well as the Services' explanation of the regulatory scheme—removes any doubt as to whether project-specific review may relieve the Corps of the need to undertake programmatic consultation on NWP 12.

2. Programmatic consultation is vital to ensure that Nationwide Permit 12 does not jeopardize listed species

Flouting the plain language of the applicable regulations, Defendants ignore the crucial role that Section 7 consultation plays for programmatic actions: analyzing the full impacts of agency programs and ensuring that

appropriate program-wide criteria and safeguards are in place for tracking, avoiding, minimizing, and mitigating such impacts. *See supra* pp. 4-7; 80 Fed. Reg. at 26,836 (programmatic consultation enables the Services "to determine whether a program and its set of measures intended to minimize impacts or conserve listed species are adequately protective" to satisfy Section 7). The programmatic consultation must assess how the program *overall* will track and address adverse impacts—particularly aggregate impacts from multiple projects under the program—and establish national standards and best management practices to prevent jeopardy. *See id*.

The Corps itself has acknowledged that programmatic consultation provides "tools that districts can use to better address potential impacts to the endangered and threatened species." 72 Fed. Reg. 11,092, 11,096 (Mar. 12, 2007) (2007 reissuance of NWPs); *see also* 85 Fed. Reg. at 57,346 (stating, in its 2020 proposal to subdivide NWP 12, that doing so could allow the Corps to "add various national standards and best management practices"). The Corps has similarly acknowledged the need for and value of national-level review under NEPA. *See* 82 Fed. Reg. at 1866-67. It makes little sense for the Corps to refuse to programmatically consult with the expert wildlife agencies, while simultaneously acknowledging the importance of national-level review.

In fact, this is precisely the vital role that programmatic consultation has performed for past iterations of NWP 12. In 2012, NMFS determined that the NWP program, including NWP 12, *was* jeopardizing listed species. NMFS was able make a no-jeopardy determination in 2014 only after the Corps agreed to adopt additional protective measures *at the national level*—such as ongoing monitoring, data collection, and corrective action plans, with semi-annual reporting requirements to ensure that aggregate incidental take does not occur at unsustainable levels. *See supra* pp. 9-10; SER-39–43. These prior consultations with NMFS refute Defendants' insistence, Fed. Br. 35, 53-54, that programmatic consultation is somehow unhelpful or inconvenient. *See also* 80 Fed. Reg. at 26,836 ("Conducting an effects analysis on a framework programmatic action that examines the potential effects of implementing the program is fully consistent with the purposes of a biological opinion.").

Since the Corps refused to consult on the 2017 reissuance of NWP 12, there has been no effort to assess the efficacy of the measures included in the 2014 BiOp, which, in any event, are now outdated and cannot substitute for Section 7 consultation on the Permit presently in effect—particularly given the ESA's "best available" science mandate. 16 U.S.C. § 1536(a)(2). Additionally, the measures covered only species within NMFS's jurisdiction; yet, many NWP 12-authorized projects, such as fossil fuel pipelines, are located well

inland, crossing waterways that provide habitat for species within FWS's jurisdiction. These facts underscore the need for programmatic consultation on the 2017 iteration of the Permit, with both NMFS *and* FWS. *Cf. W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011) (finding agency's "no effect" determination arbitrary, particularly given programmatic consultation on previous iteration of challenged regulations).

Programmatic consultation is particularly vital for NWP 12 because the Permit is used an estimated 14,000 times annually, an increase of more than 77 percent since the 2012 issuance. *See supra* p. 10. The Corps has admitted that more than 3,400 activities authorized by the 2017 Permit required project-specific ESA review. 2-ER-260. While these activities may be unlikely to jeopardize the continued existence of listed species when a particular water crossing, or even a single project, is reviewed in isolation, such reviews fail to fully capture the *aggregate* impacts to listed species from *all* NWP 12-authorized activities. Those aggregate impacts can be analyzed and meaningfully addressed only through programmatic consultation, to ensure the effects of the Permit program as a whole do not jeopardize listed species through death by a thousand cuts.

The only other court to consider this issue reached the same conclusion. *See Brownlee*, 402 F. Supp. 2d at 3-4, 9-11. It held that programmatic

consultation on NWP 12 is necessary to avoid piecemeal destruction of species and habitat. Federal Defendants fail to mention that case, let alone distinguish it. Other Defendants' proffered distinctions are unpersuasive. *See* TC Br. 41-42 (arguing *Brownlee*, of which no party maintained an appeal, was wrongly decided); Coal. Br. 38 (attempting to distinguish *Brownlee* on factual grounds). And, while courts have rejected challenges to NWP 12 under other statutes, *see* Fed. Br. 28-29, those cases are not relevant to the ESA issue here.

This Court has ruled similarly in analogous situations. *See, e.g.*, *Lane Cnty.*, 958 F.2d at 294 (holding that a broad "strategy" for actions that may affect listed species must undergo programmatic consultation, even if individual actions taken under that program would be subject to project-specific consultations); *Pac. Rivers Council*, 30 F.3d at 1055-56 (similar); *Conner*, 848 F.2d at 1453-58 (rejecting Services' deferral of comprehensive impacts analysis to project-specific stage); *cf. Cottonwood*, 789 F.3d at 1082 (recognizing that "project-specific consultations do not include a unit-wide analysis comparable in scope and scale to consultation at the programmatic level").

Although these decisions did not involve "no effect" determinations, they are still relevant here. *Contra* TC Br. 39-40. These cases establish that an agency may not avoid its ESA Section 7 duties for programmatic actions by relying on future, project-specific consultations. That is true whether the

agency invokes those later consultations to support a "no effect" determination or to limit the scope of informal or formal consultation. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1095 (N.D. Cal. 2007) (stating the court was unable to find *any* Ninth Circuit caselaw affirming a "no effect" determination where the agency relied on project-specific consultation to support that determination for a programmatic action (citing *Pac. Rivers Council*, 30 F.3d at 1050, 1055)).

Indeed, contrary to TC Energy's mischaracterization and Federal Defendants' feeble attempt to distinguish it, TC Br. 40; Fed. Br. 35-36 n.4, the Court's decision in *Lane County* is squarely on point. In that case, the Bureau of Land Management established criteria for selecting millions of acres of land for logging. 958 F.2d at 291. The Court held that the strategy "may affect" a listed species, and thus that the agency's failure to consult "before" the strategy could "be implemented through the adoption of individual sale programs" violated the ESA, despite the agency's consultation with FWS on individual timber sales. *Id.* at 294.

Much like the logging strategy in *Lane County*, NWP 12 establishes criteria for activities that "may affect" listed species because it specifically allows and regulates activities that result in the loss and degradation of habitat. Accordingly, as in *Lane County*, the Corps must consult before the NWP 12

program is implemented through project-specific approvals. Relying instead on project-specific review would result in an illegal piecemeal analysis of those impacts. *See id.*

Conner is also instructive. There, the Bureau of Land Management and FWS argued that they need not address impacts to listed species from oil and gas exploration at the lease-sale stage in part because each lease required consultation before moving forward. 848 F.2d at 1452. The Court disagreed, holding that agencies could not defer the wholesale analysis of impacts to the project-specific stage. *Id.* at 1453-58. The Court reasoned that "the ESA on its face requires the [agency] . . . to consider all phases of the agency action," and refused to "carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion . . . be completed before initiation of the agency action." *Id.* at 1453, 1455. That the agencies lacked precise information on all post-leasing activities did not provide a reasonable basis for deferring the analysis that *could* be undertaken because "Congress, in enacting the ESA, did not create an exception to the statutory requirement of a comprehensive biological opinion on that basis." *Id.* at 1454.

Like the lease stipulations requiring project-specific consultation in *Conner*, here General Condition 18 will not ensure against jeopardy from NWP 12's aggregate impacts at the national level. *See id.* at 1458 n.41 (explaining

that "[a]lthough agencies may include in their [framework] programs additional safeguards . . . such safeguards cannot substitute for an initial, comprehensive biological opinion" on the program as a whole). That can be accomplished only through programmatic review. *Contra* Fed. Br. 35 n.4. And, like the leasing program in *Conner*, NWP 12 lacks the particular statutory "checks and balances" found in the Outer Continental Shelfs Lands Act that have led other courts to reach different results. 848 F.2d at 1455-57 (distinguishing *N. Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980)).[6]

Precedent thus establishes the need for programmatic review. Defendants nonetheless insist that project-specific reviews are an adequate substitute for programmatic consultation because they incorporate a "cumulative effects" analysis. Fed. Br. 34-35; TC Br. 44-45. But even when project-specific consultations occur, the cumulative effects analysis is narrowly

[6] The NWP 12 Coalition's reliance on *Center for Biological Diversity v. U.S. Department of the Interior*, Coal. Br. 27-28, a case involving the Outer Continental Shelf Lands Act, is thus misplaced. Additionally, in that case, the court found that impacts to listed species from the multi-stage leasing program at issue were entirely speculative because "the proposed leases in these areas might never come to pass." 563 F.3d 466, 483 (D.C. Cir. 2009). In contrast here, NWP 12 is plainly relied on by thousands of projects. The Coalition's reliance on *NRDC v. U.S. Department of the Navy*, Coal. Br. 28, is also misplaced because there the court determined that there was no programmatic planning document at issue, but merely "general planning" that did not necessitate programmatic consultation. No. 01-cv-07781, 2002 WL 32095131, at *16, *24 (C.D. Cal. Sept. 17, 2002).

limited to the "action area" for a particular project and so does not and cannot consider the aggregate effects of NWP 12, which covers waters and wetlands throughout the country. *Compare* 50 C.F.R. § 402.02 (defining "cumulative effects" as "those effects . . . that are reasonably certain to occur within the action area"), *with* SER-45 (2014 BiOp defining action area for programmatic consultation as consisting of all jurisdictional waters within the United States); *see also Conner*, 848 F.2d at 1453 (noting obligation "to analyze the effect of the *entire* agency action"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 482 F. Supp. 2d 1248, 1266-67 (W.D. Wash. 2007) (explaining that, for programmatic actions, deferring consultation "improperly curtails the discussion of cumulative effects" for the program as a whole).

For example, as the district court found project-specific reviews cannot address aggregate impacts to species that travel through multiple project areas and even regions. *See* 1-ER-3; *see also California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 912 (N.D. Cal. 2006) (explaining that programmatic consultation could illuminate "the potential impact on endangered and threatened species that range broadly . . ."), *aff'd*, 575 F.3d 999 (9th Cir. 2009). Keystone XL is a case in point. Migratory birds, such as whooping cranes, traversing the length of the pipeline corridor would suffer significant collective effects from habitat loss associated with Keystone XL and

other NWP 12-authorized projects; yet, under the Corps' approach, these aggregate effects will never be analyzed in a biological opinion to ensure against jeopardy, as the ESA requires. *See* 1-TC_ER-715 (indicating that cumulative effects analysis in Keystone XL's 2019 biological assessment was limited to that project's action area).[7]

Project-specific reviews do not even ensure an analysis of the cumulative impacts of projects within the same geographic vicinity. The Mountain Valley and Atlantic Coast pipelines are illustrative. Although both pipelines were proposed at roughly the same time and in the same region (Virginia and West Virginia), and both would adversely affect the endangered Roanoke logperch, the project-specific analysis "for each pipeline ignores the adverse effect of the other when assessing jeopardy." Defs. of Wildlife et al. Amicus Br. Opposing Stay Pending Appeal 5, ECF No. 51-2; *see also id.* at 2-8 (explaining how the narrow definition of "action area" produces that result). Consequently, as a legal and practical matter, project-specific reviews *cannot* substitute for consultation on NWP 12 as a whole.[8]

---

[7] Likewise, regional conditions by their nature cannot account for NWP 12's aggregate impacts nationally or even across regions. *Contra* Fed. Br. 33.

[8] Defendants argue that individual CWA Section 404 permits have "no added layer of nationwide programmatic review," Fed. Br. 35; *see* TC Br. 44-45, but that argument is circular. Programmatic consultation is not required *in the absence* of a programmatic action. NWP 12 is a permit as well as a program

3. Nationwide Permit 12 meets the ESA's low "may affect" threshold for consultation

Stripped of its faulty legal argument that the issuance of NWP 12 has "no effect" because of project-specific review, the Corps cannot seriously dispute that the Permit "may affect" listed species and so requires consultation. In fact, Federal Defendants' concession that thousands of NWP 12-authorized activities must undergo project-specific consultation precisely because they "may affect" listed species or critical habitat, Fed. Br. 13, confirms that the Permit as a whole meets the "low" threshold for consultation. *See Kraayenbrink*, 632 F.3d at 496 (formal consultation is triggered by "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character" (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986))).

It is no surprise, then, that the district court found "resounding evidence" that the Corps' issuance of NWP 12 "may affect" listed species and their habitat. 1-ER-49–51. In rejecting the same arguments Federal Defendants rehash here, the district court explained that the Permit "authorizes actual discharges . . . into jurisdictional waters," 1-ER-53 (citing 82 Fed. Reg. at 1985); that such discharges "permanently may convert wetlands, streams, and other aquatic resources to upland areas, resulting in permanent losses of

---

for CWA compliance, requiring programmatic consultation, whereas individual 404 permits are merely permits.

aquatic resource functions and services" of value to species, 1-ER-50; that the Corps itself conceded that "past versions of NWP 12 'have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources,'" *id.* (citation omitted); and that the Corps has acknowledged that activities frequently authorized under the NWP program are a "common cause[] of impairment for rivers and streams, habitat alterations and flow alterations," 1-ER-51 (citation omitted).

While Defendants assert that the district court erroneously relied on general statements made by the Corps about NWP 12's environmental effects, Fed. Br. 18; TC Br. 32-33, that is incorrect. Rather, the district court supported its determination by describing harm to specific listed species from NWP 12-authorized activities based on an extensive review of the record. The court found, for example, that NWP 12 "would result in increased sedimentation and turbidity, which would affect aquatic biota such as pallid sturgeon and the species sturgeon rely on as food sources." 1-ER-53 (relying on expert declaration); *see also* 1-ER-52 (finding that "[p]allid sturgeon remain susceptible to harm from pollution and sedimentation in rivers and streams because pollution and sedimentation can bury the substrates on which sturgeon rely for feeding and breeding," and that construction activities that increase sediment loading (like NWP 12-authorized activities) "pose a significant threat to the

pallid sturgeon populations in Nebraska and Montana"). The court likewise found that activities "approved by NWP 12 . . . can cause harm to species such as the American burying beetle." 1-ER-53.

Defendants contend—without support—that the district court should not have considered Plaintiffs' declarations regarding harm to species. Fed. Br. 18; TC Br. 23. This is meritless. Plaintiffs' Section 7 claim against the Corps is an ESA citizen suit claim and hence may be resolved based on "any admissible evidence and is not limited to the administrative record." *Native Fish Soc'y v. NMFS*, 992 F. Supp. 2d 1095, 1106 (D. Or. 2014) (citing, *inter alia*, *Kraayenbrink*, 632 F.3d at 481, and *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1029-30 (9th Cir. 2005)).

Regardless, even if the Court were to disregard the declarations, indisputable record evidence—including statements made by NMFS, the expert agency—establish that NWP 12 "may affect" myriad listed species. Indeed, NMFS made it quite clear that the Permit "may affect" listed species when it issued a *jeopardy determination* for the NWP program in 2012, confirming that such activities not only "may affect," but in many cases are "likely to adversely affect" and even jeopardize listed species absent adequate protective measures at the national level. *See* SER-62, -68; *supra* pp. 9-10.

In its 2014 BiOp, NMFS pointed to several ways in which NWP 12—which was responsible for 28 percent of all NWP activities—could adversely affect listed species. *See* SER-49, -51–56 (discussing disruption of essential life functions, habitat degradation "contributing to the decline and ESA listing" of several species, and effects on marine invertebrates). NMFS detailed how the NWPs, including NWP 12, have produced aggregate impacts "sufficiently large to change the flow regimes and physical structure of river systems and simplify or degrade aquatic ecosystems," resulting in "declines in the abundance of endangered or threatened species." SER-48; *see also* SER-50 (stating that the "aggregate impacts" of NWP 12 "have the potential to contribute to changes that correspond to large scale hydrologic phenomena that are critical to the survival and recovery of threatened and endangered species . . . ."). NMFS found that these "aggregate impacts" are "not immediately evident on a case-by-case basis." SER-50. NMFS also listed NWP 12 among the NWPs most likely to involve activities that may impact listed species. SER-46, -48. Given these findings by the expert agency, the Corps' determination that NWP 12 has "no effect" whatsoever on listed species is factually as well as legally groundless.[9]

[9] The record further shows that NWP 12-authorized activities harm listed species due to habitat loss and fragmentation, power line collisions,

The district court further bolstered its holding with an analysis of this Court's precedent, including *Kraayenbrink*. 1-ER-49–50. In that case, the Bureau of Land Management declined to engage in consultation when it amended national grazing regulations because it viewed the amendments as "purely administrative," with no independent effect on listed species. 632 F.3d at 498. The Court disagreed. It found that the amendments would have a substantive effect on listed species, requiring programmatic consultation. *Id.* The Court reasoned that given the "sheer number of acres affected" by the Bureau's regulations and the number of listed species present on those lands, the regulatory amendments "handily" met the ESA's "minimum threshold" for triggering consultation. *Id.* at 496; *see also* 1-ER-26, -55 (discussing similar decision in *Lane County*, 958 F.2d 290).

So too here. As discussed above, the record demonstrates that NWP 12 has a substantial effect on listed species. Moreover, the Corps estimated that the 2017 iteration of the Permit would be used approximately 14,000 times per year, evidencing a similarly significant impact to the hundreds of listed species that rely on wetlands, streams, and rivers across the country. *See* SER-11.

---

sedimentation and contamination of waters from spills, and indirect impacts associated with climate change. SER-8, -9; SER-31–32, -33; SER-12, -13–16, -17–20, -21–23. For example, pipelines authorized by NWP 12 can leak and spill oil into the Corps' jurisdictional waterways, with disastrous impacts on aquatic resources. *See, e.g.*, SER-24–30 (discussing several pipeline spills).

Recognizing these facts, the district court properly held that NWP 12 "may affect" listed species, and that the Corps "must consider the effect of the entire agency action." 1-ER-54.

Simply put, there is no factual support for the Corps' "no effect" determination for NWP 12. It is undisputed that the tens of thousands of activities authorized under the Permit "may affect" listed species, thus requiring programmatic consultation. Fragmented, project-specific review is no substitute.

B. The Corps is not entitled to deference for unlawfully evading its known ESA duties

The Corps is not entitled to deference for its unlawful "no effect" determination and refusal to consult on NWP 12.

As an initial matter, the district court correctly found that the Corps was "well aware that its reauthorization of NWP 12 required Section 7(a)(2) consultation," and yet improperly avoided doing so through a legally unsupportable "no effect" determination. 1-ER-58; *see also* 1-ER-28. When asked whether the Corps would consult with NMFS again for the 2017 NWPs, the Corps' Regulatory Program Manager stated that "for the 2017 NWPs, we would have to do a new consultation." 3-ER-605. But he went on to recommend that rather than fulfill that obligation, the Corps should "make a 'no effect' determination," and then "continue to make" such a determination

"for each NWP reissuance until it is challenged in federal court and a judge rules against the Corps." *Id.* He concluded: "If we lose in federal court, then we would start doing the national programmatic consultations again." *Id.* That anticipated scenario has now come to pass. *See* 1-ER-28 ("The Court ruled against the Corps, just as the Corps anticipated.").

The admission by the Corps' Regulatory Program Manager is not irrelevant, as Defendants argue. Fed. Br. 36-37; TC Br. 46-47. Rather, it undermines Defendants' suggestion that the Court should defer to the Corps' "no effect" conclusion. *See* TC Br. 28; Fed. Br 30-31, 38; Coal. Br. 22. That determination was not based on any agency expertise warranting deference, but rather on the Corps' erroneous legal position. *See Ctr. for Biological Diversity v. Bernhardt*, --F.3d--, No. 18-73400, 2020 WL 7135484, at *9 (9th Cir. Dec. 7, 2020) (declining to defer to agency on matters outside its area of expertise).[10]

In any event, it is the Services—not the Corps—that Congress entrusted to administer the ESA. *See* 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(b); *Nat'l Ass'n of Home Builders*, 551 U.S. at 672 (deferring to FWS and NMFS as "the

[10] This distinguishes cases such as *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 924-26 (9th Cir. 2018), *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601-02 (9th Cir. 2014), and *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1446 (9th Cir. 1996), where the court deferred to the agency based on scientific determinations within the agency's expertise. *See* Coal. Br. 22; Edison Elec. Inst. et al. Amicus Br. 15-16, ECF No. 95-2.

two agencies primarily charged with administering § 7(a)(2) and the drafters of the regulations implementing that section"); *Brownlee*, 402 F. Supp. 2d at 11 (declining to defer to Corps' determination that it was not required to conduct programmatic consultation before issuing NWPs). And here, the Services have made clear that, in their expert opinion, consultation *is* required for NWP 12.

In fact, when the Services issued regulations concerning programmatic consultations in 2015, they specifically used the Corps' NWP program as an example of a federal program subject to such consultation. *See* 80 Fed. Reg. at 26,835 ("Examples of Federal programs that provide such a framework include . . . the U.S. Army Corps of Engineers' Nationwide Permit Program."). Notably, the Services promulgated those regulations in 2015, *following* the Corps' issuance of a letter from its Chief Counsel defending the agency's "no effect" position, *see* TC Br. 47-48, as well as the Corps' 2012 and 2014 programmatic consultations with NMFS. Thus, the Services were well aware of the Corps' position, yet continued to believe in the value and suitability of consultation for the NWP program. The expert agencies' acknowledgment that programmatic consultation is required for the NWPs is certainly more deserving of deference than the Corps' misguided—and illegal—attempt to avoid ESA review. *See Kraayenbrink*, 632 F.3d at 497 (finding it "significant that FWS," the agency with "the more appropriate expertise," concluded that

the regulations at issue "*would* affect status species and their habitat" (citation omitted)).

Defendants' reliance on a subsequent sentence in the preamble to the 2015 regulations, stating that consultation is not required for framework programmatic actions that have no effect on listed species, misses the point. Fed. Br. 34 n.3; TC Br. 49-50. Whereas framework programmatic actions that truly have no effect on listed species (e.g., a National Forest plan for lands where no listed species are present) would not require such consultation, NWP 12 clearly *does* affect listed species. *See supra* pp. 35-40.

Likewise, Defendants' contention that the Services implicitly or explicitly approved the Corps' "no effect" determination is wrong. Fed. Br. 14, 38; TC Br. 50. The record contains no support for these assertions. Instead, it shows that NMFS was unequivocal in its objection to the Corps' "no effect" determination, stating that it was "not consistent with the [Corps'] legal obligations" and that "such a conclusion *is not supportable* under the ESA." 2-TC_ER-983 (emphasis added). There is no evidence that NMFS changed its mind on this legal point.

And while FWS provided a letter *acknowledging* that the Corps had made a "no effect" determination, it never *endorsed* that position. Rather, FWS distanced itself by making clear that it was the *Corps'* determination that

foreclosed any Section 7 consultation. SER-34 (noting, without judgment, the Corps' position and clarifying that because of the Corps' determination "the Corps and Service are not in consultation on the proposed issuance or reissuance of the NWPs"). Such silence cannot be taken as consent; until "an action agency requests consultation, [the Services] have no obligation to consult, and in fact cannot engage in consultation, even if they believe the 'no effect' determination was erroneous." *Sierra Forest Legacy v. U.S. Forest Serv.*, 598 F. Supp. 2d 1058, 1067 (N.D. Cal. 2009). Given the Corps' stubborn refusal to initiate consultation—even after NMFS made clear that the Corps' position was unjustified—any request from FWS would have been futile. *Contra* TC Br. 50.

In sum, both the law and the facts show that the Corps' erroneous "no effect" determination—which the Corps made in defiance of the expert agencies' opinions and its own knowledge of the contrary legal requirements—is not entitled to deference.

C. The district court properly found that General Condition 18 unlawfully delegates the Corps' ESA duties to permittees

Defendants contend that the district court erred when it determined that the Corps violated the ESA by delegating the initial Section 7 effects determination to the permittee for project-specific consultations. Fed. Br. 29; TC Br. 43. Even if valid, this argument has no bearing on whether the Corps

violated the ESA through its failure to undertake programmatic consultation on NWP 12. The notification requirement of General Condition 18 triggers only project-specific review, which is inherently insufficient for the Corps to meet its ESA duties for the Permit as a whole. *See supra* pp. 20-44.[11]

In any case, the district court was correct that the delegation to permittees compounded the Corps' violation of its Section 7 duties. By authorizing a self-interested permittee to determine whether its own project will affect a listed species or critical habitat, the Corps has failed even to ensure that project-specific consultations will occur for *all* NWP 12-authorized activities that may adversely affect listed species. This reinforces the vital importance of consultation at the programmatic level, including to ensure that mechanisms are in place to monitor and modify permittee behavior as necessary. *See* SER-44 (listing this as a purpose of the programmatic consultation for the 2012 NWPs).

As the Corps acknowledges, it relies entirely on permittees to submit a PCN to the Corps when the *permittees themselves* acknowledge that their activities "might affect" listed species, 82 Fed. Reg. at 1999-2000—a

[11] For that reason, Montana's argument that General Condition 18 provides a "simple solution" to the issues facing this Court, MT Br. 6, is likewise groundless.

determination that could result in project delays.[12] If the permittee, for whatever reason, fails to so inform the Corps, that is the end of the matter. In other words, project proponents can proceed under NWP 12 without notifying the Corps if they unilaterally—albeit incorrectly—decide their project would not affect listed species, in which case no consultation would occur. And even when PCNs are submitted, the Corps does not undertake consultation on water crossings that do not trigger the PCN requirement because, according to the Corps, these are "already authorized without the need for any Corps verification or other project-level approval." 2-TC_ER-967.

As the district court explained, however, the Corps *itself* has a duty to determine "at the earliest possible time" whether any actions it authorizes require consultation. *See* 50 C.F.R. § 402.14(a). The court thus found that "General Condition 18 fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it . . . turns the ESA's initial effect determination over to non-federal permittees, even though the Corps must make that initial determination." 1-ER-57–58; *cf. Selkirk Conservation All. v.*

[12] Defendants' claim that this "might affect" threshold is somehow stricter than the ESA's "may affect" threshold is meritless, as the words are synonymous. *See May*, Merriam-Webster Online Dictionary (stating that "may" is "sometimes used where *might* would be expected"). But even if there were some meaningful distinction between "might" and "may," the fact remains that the Corps delegates the critical threshold finding to a self-interested, non-federal entity.

Forsgren, 336 F.3d 944, 955 (9th Cir. 2003) ("[F]ederal agencies cannot delegate the protection of the environment to public-private accords."); *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) (FWS may not "delegate its responsibility to the regulated party").

Federal Defendants attempt to undermine these concerns by arguing that Plaintiffs provide no examples of permittees who failed to submit a PCN where General Condition 18 required one. Fed. Br. 26. That makes little sense, as Plaintiffs are not in a position to even *know* about situations in which a permittee should have submitted a PCN but did not.

In any event, NMFS has also expressed skepticism over the Corps' decision to entrust threshold effects determinations to private permittees. In the 2012 BiOp, NMFS stated that "it would be an error" to assume that all permittees have "sufficient knowledge" of the ESA's requirements or "of the presence or absence" of listed species and critical habitat within a project area, or the "technical knowledge necessary to determine if their activity might have direct or indirect effects" on such species or habitat. SER-64. NMFS further found that the Corps' "limited review schedules" preclude agency staff from verifying whether conclusions about listed species are "well-reasoned" and "based on the best scientific and commercial data available, as required by [Section 7]." SER-66. Indeed, it found that the Corps "does not review

significant percentages of PCNs to insure they are complete and the information is correct." SER-65; *see also* SER-47 (reiterating finding in 2014). Once again, that is exactly the kind of problem with the *program* that a consultation at the programmatic level could address.

The Court should affirm that NWP 12's delegation to permittees to determine whether a project may affect listed species violates the ESA.

II. The Court should affirm the district court's remand and vacatur of Nationwide Permit 12 insofar as it applies to Keystone XL

Plaintiffs request that this Court affirm the portions of the district court's remedy order (1) declaring NWP 12 unlawful and remanding to the Corps to initiate programmatic ESA Section 7 consultation on NWP 12 and (2) vacating NWP 12 insofar as it applies to the Keystone XL pipeline.

A. Plaintiffs are narrowing the relief sought

As Plaintiffs previously explained to this Court, the district court did not abuse its discretion in issuing a partial vacatur of NWP 12 barring its use for the construction of new oil and gas pipelines. *See, e.g.*, Pls.' Opp'n Mots. Stay Pending Appeal 38-44, 48-64, ECF No. 45-1. The district court was entitled to fashion this remedy after Plaintiffs prevailed on their facial challenge to NWP 12. *See Empire Health Found. v. Azar*, 958 F.3d 873, 886 (9th Cir. 2020) (the "ordinary result" when a court holds agency regulations unlawful "is that the rules are vacated—not that their application to the individual petitioners is

proscribed" (citation omitted)); 1-ER-15–19 (tailoring remedy in response to primary disruptions of which Defendants complained and Plaintiffs' specific concerns (citing *Allied-Signal*, 988 F.2d at 150-51)). And, contrary to Defendants' attempts to portray the litigation below as procedurally irregular, "agency vacatur determinations are unusually well-suited to post-judgment briefing." *AARP v. EEOC*, 292 F. Supp. 3d 238, 242 (D.D.C. 2017).

Nonetheless, Plaintiffs acknowledge that the Supreme Court stayed the district court's relief except as to Keystone XL, pending disposition of this appeal and any further Supreme Court proceedings. 2-ER-65. In addition, the Corps has since proposed, and taken comment on, reissuing NWP 12 well ahead of its expiration date in 2022—and with significant modifications. *See* Fed. Br. 9 n.1; *supra* p. 15.

Given these developments, Plaintiffs seek to maintain only the Keystone XL-specific portion of the vacatur. *See Webster*, 492 U.S. at 512 (recognizing that plaintiff-respondents are empowered to make "a decision to no longer seek" certain relief obtained below because they "are masters of their complaints and remain so at the appellate stage of a litigation"). Because Plaintiffs' decision makes resolution of the arguments about relief as to oil and gas pipelines besides Keystone XL unnecessary, Plaintiffs do not brief those issues here. *See id.* at 512-13.

Plaintiffs likewise do not seek any injunctive relief, including as to Keystone XL. The Corps and TC Energy have acknowledged that the district court's vacatur alone precludes authorization of Keystone XL under NWP 12. *See* 2-ER-251; TC Br. 22-23 n.4; SER-6. Further enjoining the Corps from doing so is unnecessary in this case. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).[13] Plaintiffs thus have no objection to lifting the injunction now.

B. There is no basis for finding that the district court abused its discretion in vacating Nationwide Permit 12 as to Keystone XL

As to the relief that Plaintiffs do seek to maintain—declaratory relief, remand of NWP 12, and vacatur as applied to Keystone XL—nothing in Defendants' arguments requires reversal. Indeed, this Court previously concluded that Defendants were not likely to establish that the district court abused its discretion in issuing its vacatur, 2-ER-79, and the Supreme Court similarly declined to stay vacatur as to Keystone XL, 2-ER-65—clearly signaling that it *is* appropriate to grant relief against Keystone XL in this case. The Court should reach the same result now.

[13] Plaintiffs initially asked the district court to maintain an injunction against authorization of Keystone XL, given uncertainty about how the parties would proceed in the wake of the court's initial order. 2-ER-120–24. At this stage, no injunction is necessary given the representations cited above.

Vacatur is the "[t]ypical[]" remedy for the Corps' violation of the ESA and APA. *Defs. of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005), *rev'd on other grounds sub nom. Nat'l Ass'n of Home Builders*, 551 U.S. 644; *accord* 5 U.S.C. § 706(2)(A). In evaluating whether to depart from the presumptive remedy of vacatur, courts generally look to two factors: (1) "the seriousness" of an agency's errors; and (2) "the disruptive consequences" that would result from vacatur. *Allied-Signal*, 988 F.2d at 150-51; *accord Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020).

As set forth below, the district court acted well within its discretion in concluding that Defendants did not carry their burden to "overcome the presumption of vacatur" as to Keystone XL. *All. for Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018) (emphasis omitted); *cf. Acosta v. City of Costa Mesa*, 718 F.3d 800, 828 (9th Cir. 2013) ("The district court's decision to deny equitable relief is reviewed for an abuse of discretion."). Neither *Allied-Signal* factor demands otherwise.

1. The Corps' violation of Section 7 was serious

The district court did not abuse its discretion in finding that the Corps committed serious error by failing to consult with the Services prior to issuing NWP 12. 1-ER-9–11.

Federal Defendants provide no authority to the contrary; instead, they simply retreat to their merits position regarding the adequacy of project-specific consultation. Fed. Br. 53-54. But even if the project-specific review for Keystone XL complied with the ESA, which it does not, that is legally irrelevant to this appeal about programmatic consultation. *Contra* Fed. Br. 54.[14]

TC Energy likewise errs in contending that the violation is not serious because the Corps could comply with Section 7's procedures and then reissue NWP 12 without change. TC Br. 61-63. As an initial matter, TC Energy has not argued that the Corps could offer a new rationale to substantiate its "no effect" determination, and the district court's conclusion that the Corps should have initiated consultation, 1-ER-59, -64, forecloses that possibility.[15]

Further, TC Energy's focus on whether NWP 12 itself would change misses the point of programmatic consultation, which evaluates the Corps'

---

[14] As noted above, a court previously ruled that Keystone XL's initial project-specific consultation violated the ESA, and Plaintiffs have sued over the revised consultation in separate litigation. *Supra* pp. 11-12 n.3. TC Energy's suggestion that Plaintiffs have "fail[ed] to challenge" that consultation, TC Br. 66, is false.

[15] Federal Defendants briefly take issue with that portion of the remand, Fed. Br. 39 n.5, but they forfeited that argument by failing to raise it below, *see Conservation Nw. v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013). In any event, the district court possessed well-established authority to conclude that NWP 12 "may affect listed species and their critical habitats" and, therefore, that the Corps "was required to engage in consultation." *Lockyer*, 575 F.3d at 1019; *see also W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1323-24 (D. Idaho 2008) (similar), *aff'd in relevant part*, 632 F.3d 472 (9th Cir. 2011).

implementation of the Permit. Indeed, programmatic consultation on NWP 12 with NMFS in 2012 and 2014 led not to alterations of the Permit itself, but to additional protective measures implemented by the Corps at the national level. *See* SER-36–38, -57–58. But the Corps did not carry over all of NMFS's protective measures to the 2017 Permit, and the remaining measures are outdated, given the dramatic increase in NWP 12's usage since 2012, among other things. *Supra* pp. 27-28. And, notably, the Corps has never completed consultation with FWS. Thus, it is clear that "on remand, a different result may be reached," *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015), namely, meaningful changes to the Corps' implementation of NWP 12 to protect species.

More fundamentally, the ESA's statutory scheme and this Court's precedent make clear that wholesale violations of Section 7 are serious errors. The duty to prevent jeopardy is the "heart of the ESA." *Karuk Tribe*, 681 F.3d at 1019 (quoting *Kraayenbrink*, 632 F.3d at 495). With Section 7, Congress "spoke[] in the plainest of words, making it abundantly clear" that it intended to "afford[] endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Cottonwood*, 789 F.3d at 1091 (quoting *Hill*, 437 U.S. at 194). Section 7 consultation, in turn, ensures compliance with the ESA's "important substantive mandate that threatened

and endangered species shall not be placed in jeopardy." *Conner*, 848 F.2d at 1458 n.40.

Given consultation's critical role in effecting the ESA's substantive protections, there is no question that the Corps' "failure to initiate ESA section 7 consultation is a serious deficiency" weighing in favor of vacatur. *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014); *see also Defs. of Wildlife*, 420 F.3d at 978 (declining remand without vacatur where agency failed to initiate Section 7 consultation).[16] The Corps' violation is particularly severe given that NWP 12 authorizes tens of thousands of water crossings each year. *See supra* p. 28; 1-ER-35 (noting Corps had already issued more than 38,000 verifications since March 2017).[17]

---

[16] Indeed, in affirming injunctive relief, this Court recently emphasized that the ESA's substantive mandate applies with equal force to remedying "procedural violations of section 7(a)(2)" because courts must focus "on the underlying substantive policy the process was designed to effect." *Nat'l Wildlife Fed'n*, 886 F.3d at 819 (citation omitted).

[17] As the district court recognized, Plaintiffs' pending NEPA and CWA challenges to NWP 12 further exacerbate the seriousness of the Corps' error. *See* 1-ER-9. The district court deferred ruling on those other claims because it "anticipate[d]" that the Corps' Section 7 consultation on remand would "further inform" the Corps' analysis under those other statutes. 1-ER-61, -63. Where, as here, plaintiffs "advance other colorable claims" that the same action is unlawful, "leaving [that action] in place during remand would ignore [those] potentially meritorious challenges" as well. *Cap. Area Immigrants' Rts. Coal. v. Trump*, --F. Supp. 3d--, No. 19-cv-2117, 2020 WL 3542481, at *22 (D.D.C. June 30, 2020) (second quoting *NRDC v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007)).

TC Energy's attempt to treat consultation as a procedural formality overlooks consultation's role in implementing the ESA's substantive provisions. And even where agencies have committed purely procedural violations, courts still regularly deem such errors serious. For example, a violation of the APA's notice-and-comment procedures "is a 'fundamental flaw' that almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (citation omitted). And courts "routinely" vacate actions pending compliance with NEPA, emphasizing the "seriousness" of such violations. *Cheyenne River Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-cv-1534 (JEB), 2020 WL 3634426, at *5 (D.D.C. July 6, 2020) (collecting cases), *stay pending appeal denied in relevant part*, Order 2, No. 20-5201 (D.C. Cir. Aug. 5, 2020). This caselaw confirms the severity of the error here. In contrast to the procedural requirements of NEPA or the APA, "the strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements." *Conner*, 848 F.2d at 1458 n.40 (citation omitted).

TC Energy's authorities, TC Br. 62, do not counsel otherwise. To be sure, *Pollinator* stated that, in deciding whether to vacate, this Court considers whether an agency could reach the same result after "offer[ing] better reasoning" or "complying with procedural rules." 806 F.3d at 532 (citing *Allied-Signal*, 988 F.2d at 151). But *Pollinator* vacated the challenged action

based on defects in the agency's supporting evidence—it did not consider a "procedural rule[]." *Id.* Thus, *Pollinator*'s general statement offers no guidance regarding the severity of any particular procedural violation, let alone the Corps' Section 7 violation here.

The facts of *Allied-Signal* do not help TC Energy either. There, the only error that the D.C. Circuit addressed was the agency's inadequate explanation. *Allied-Signal*, 988 F.2d at 151. Since then, the D.C. Circuit has repeatedly recognized that—"in contrast" to an agency's inadequate explanation, which may be curable in some instances—violations of "essential procedural safeguard[s]" weigh heavily in favor of vacatur. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009); *accord NRDC v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020).[18] As explained above, the Corps' violation of the ESA's fundamental procedural safeguard—inextricably tied to the Act's substantive provisions—easily clears this bar.

[18] Of course, an agency's inadequate explanation may *also* support the usual remedy of vacatur. *See, e.g.*, *Cigar Ass'n of Am. v. FDA*, 436 F. Supp. 3d 70, 89 (D.D.C. 2020) (observing that D.C. Circuit has "repeatedly vacated agency actions" that failed to address "an important aspect of the problem").

2. Any interim disruption to Keystone XL does not outweigh the Corps' serious error

None of the disruptive consequences cited by Defendants support remand without vacatur as to Keystone XL, particularly given the Corps' serious error. Federal Defendants (along with some Defendant-Intervenors and Amici) cite consequences stemming from the broader relief stayed by the Supreme Court—namely, the costs and delays of having to apply for individual permits for other affected pipelines. *See, e.g.*, Fed. Br. 55. Given Plaintiffs' more limited request to maintain vacatur as to Keystone XL, however, those concerns are now irrelevant. The Corps' inability to use NWP 12 to authorize a single project cannot plausibly strain the agency's resources or cause widespread permitting delays to other pipelines.

TC Energy, meanwhile, contends that delays and increased costs to Keystone XL alone warrant remand without vacatur. TC Br. 65. But as this Court has recognized, "courts do not have discretion to balance the parties' competing interests in ESA cases because Congress 'afford[ed] first priority to the declared national policy of saving endangered species.'" *Cottonwood*, 789 F.3d at 1090 (alteration in original) (quoting *Hill*, 437 U.S. at 185). In other words, the ESA's limits on "equitable discretion" require courts to presume "that the balance of interests weighs in favor of protecting endangered species." *Nat'l Wildlife Fed'n*, 886 F.3d at 817. Accordingly, TC Energy's

asserted monetary harms cannot carry its burden to demonstrate that "equity demands" remand without vacatur as to Keystone XL. *All. for the Wild Rockies*, 907 F.3d at 1121.

Furthermore, there is no basis for TC Energy's suggestion that Congress's equitable judgments, as embodied in the ESA, are limited to instances where extinction is imminent. TC Br. 65-66. "The ESA accomplishes its purpose in incremental steps" by protecting listed species and their habitat well before they reach the brink of extinction. *Nat'l Wildlife Fed'n*, 886 F.3d at 818; *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 523 (9th Cir. 2010) (rejecting approach under which "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest," as "one of the very ills the ESA seeks to prevent" (citation omitted)). TC Energy's extreme position is thus squarely foreclosed by this Court's precedent. *See Nat'l Wildlife Fed'n*, 886 F.3d at 818 (restating principle that "the balance of interests weighs in favor of protecting endangered species," even though district court did not find a "short-term extinction-level threat"); *Cottonwood*, 789 F.3d at 1078-79, 1091 (citing principle regarding failure to reinitiate consultation on prior no-jeopardy biological opinion).

TC Energy also contends that there is no presumption of irreparable injury in seeking an injunction for violations of the ESA, and therefore "no

presumption in favor of vacatur." TC Br. 66. That is a red herring. Vacatur is the default remedy for unlawful agency action "whether or not [a party] has suffered irreparable injury." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also, e.g.*, *Empire Health Found.*, 958 F.3d at 886 (granting vacatur without any showing of irreparable injury); *Pollinator*, 806 F.3d at 532 (same). Because irreparable injury is not a prerequisite for vacatur in the first place, the existence of a presumption regarding injury has no bearing on the appropriateness of vacatur.

Even considering TC Energy's alleged economic harms, those assertions do not compel remand without vacatur as to Keystone XL. Repeating claims from its unsuccessful stay applications, TC Energy contends that delays caused by the district court's vacatur will increase Keystone XL's construction costs. TC Br. 65. But those costs are based on TC Energy's inability to rely on NWP 12 for the 2020 construction season. 1-TC_ER-621–22, -881–82. And as TC Energy has explained, it needed authorization under the Permit by early July 2020, 1-TC_ER-881–82, or early August 2020, to "complete meaningful pipeline construction" during that season, 1-TC_ER-621–22. Accordingly, those costs were locked in after this Court and the Supreme Court denied TC Energy's requests for a stay.

As to future disruption, it is far from clear that an affirmance by this Court would have any determinative impact on the 2021 construction season or beyond. First, the Corps has now had ample time to initiate consultation on NWP 12 and to make substantial progress on, or even complete, the Section 7 process. Eight months have elapsed since the district court's April 15, 2020 order remanding for compliance with the ESA, and no court has issued a stay of the remand. It previously took the Corps eight months to complete its 2012 consultation with NMFS on *all 50* NWPs, including NWP 12. SER-62–63. Federal Defendants have not explained why that timeframe is not replicable, *cf.* SER-5, and regardless, have remained conspicuously silent as to *any* steps the Corps has taken to implement the remand.

Second, and independent from the Corps' progress on NWP 12 consultation, TC Energy is also pursuing an individual CWA Section 404 permit for Keystone XL. The Corps received the complete permit application in July 2020, and finished taking public comment on October 13, 2020.[19] By the time this Court hears argument and resolves these appeals, the Corps may well have completed the remand or issued an individual permit.

[19] *See* TC Br. 25 n.5; *Keystone XL Project*, U.S. Army Corps of Eng'rs, https://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/Oil-and-Gas-Development/KXL/ (last visited Dec. 11, 2020).

Even if the Court's decision were to impact Keystone XL's construction, TC Energy's claims of increased costs merit little weight. TC Energy contends that it must incur those costs in accelerating construction to maintain its preferred timeline. 1-TC_ER-622. But applicants "possess no inherent right to maximize revenues by using a cheaper, quicker permitting process," 1-ER-34, or to adhere to their initial construction timeline rather than comply with federal law. *Cf. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017) (reasoning that "lost profits and industrial inconvenience" are "the nature of doing business, especially in an area fraught with bureaucracy and litigation"). Otherwise, applicants and agencies could circumvent environmental safeguards by "devot[ing] as many resources as early as possible to a challenged project—and then claim[ing] disruption in light of such investments." *Id.* at 106. Crediting such claims rewards parties for "invest[ing] heavily in potentially-illegal projects upfront." *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1088 (D. Idaho 2020), *stay pending appeal granted in part,* No. 18-cv-00187-REB, 2020 WL 2462817 (D. Idaho May 12, 2020).

Here, TC Energy assumed the risk that the project—which had already been denied approval twice, *see Indigenous Env't Network*, 2017 WL 5632435, at *2, and then later had a permit and environmental reviews set aside, *supra*

pp. 11-12 n.3—might again be denied or delayed. Having "chose[n] to gamble" yet again on the adequacy of the environmental reviews, TC Energy cannot rely on investments made to fulfill a schedule that the company adopted "with full awareness" of the risk involved. *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988).

Similar considerations govern any secondary economic benefits associated with construction. *See* 1-TC_ER-622–23, -883–84. Keystone XL's authorization is contingent on the company's and the government's compliance with the law. If the project moves forward—as TC Energy insists it will—those secondary benefits will still be realized, albeit in future years. As such, any harm from this "temporary delay" of "moving . . . jobs and tax dollars to a future year" is unpersuasive. *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014); *see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Pena*, No. 12-cv-02271-HZ, 2015 WL 1567444, at *6 (D. Or. Apr. 6, 2015) (applying same equitable analysis to *Allied-Signal* framework).

Finally, even if taken at face value, TC Energy's asserted harms do not support remand without vacatur. The district court concluded that disruptive consequences to *all* new oil and gas pipeline construction, including delays and increased costs, required vacatur in light of the Corps' serious error, 1-ER-15–

18—a conclusion that applies with equal or greater force to Keystone XL alone. Defendants mainly complain that the district court focused on environmental interests over economic disruption. TC Br. 63-64; Fed. Br. 55 n.7; Coal. Br. 56. But as explained above, *supra* pp. 57-58, the ESA's equitable constraints required the district court to tip the balance in favor of listed species. And even if those constraints did not apply, the district court's conclusion was still correct.

Defendants do not dispute that the district court properly "consider[ed] the extent to which either vacating or leaving the decision in place would risk environmental harm." *Nat'l Family Farm Coal.*, 960 F.3d at 1144-45. Nor, contrary to Defendants' contentions, did the district court ignore economic consequences—it specifically considered the disruptive effects of forcing projects like Keystone XL to proceed through the individual permitting process, but declined to treat them as dispositive. 1-ER-16–18. That analysis was consistent with cases recognizing that even "protracted delay" and "significant financial costs and logistical difficulties" do not outweigh the consequences of proceeding without sufficient environmental analysis. *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 218 F. Supp. 3d 53, 60 (D.D.C. 2016), *rev'd on other grounds*, 877 F.3d 1051 (D.C. Cir. 2017); *see also Idaho Conservation League v. U.S. Forest Serv.*, No. 18-cv-504-BLW, 2020 WL

2115436, at *2 (D. Idaho May 4, 2020) (finding unpersuasive assertion that vacatur would "stop the entire Project and result in economic loss and layoffs," given that such "delays [were] the normal result of a full NEPA study"); *California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125-27 (N.D. Cal. 2017) (rejecting disruption argument despite more than $100 million in compliance costs). Indeed, this Court recently vacated a pesticide registration, notwithstanding the costs it would impose on growers who had "been placed in this situation through no fault of their own." *Nat'l Family Farm Coal.*, 960 F.3d at 1145.

None of Defendants' cases show that the district court was *required* to strike a different balance here. Defendants primarily rely on *California Communities Against Toxics v. EPA*, TC Br. 63-64; Fed. Br. 55, but that case is readily distinguishable. There, the agency conceded flaws in the reasoning for its rule, and this Court declined to consider the agency's post-hoc reasoning. *Cal. Cmtys.*, 688 F.3d 989, 993 (9th Cir. 2012) (per curiam). That inadequate explanation is a far cry from the Corps' serious violation here. Moreover, *California Communities* explained that vacatur could *increase* air pollution, "the very danger the [statute] aim[ed] to prevent." 688 F.3d at 994. Here, TC Energy does not suggest that vacatur as to Keystone XL for the duration of the remand will somehow increase risks to listed species.

TC Energy also briefly cites a handful of cases for the general proposition that courts may consider economic disruption. TC Br. 64-65 n.13. As explained above, the district court did consider those claims. Regardless, those cases likewise involved flawed explanations that the court viewed as curable. *See City of Oberlin v. FERC*, 937 F.3d 599, 607-08, 611 (D.C. Cir. 2019); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 652 (D.C. Cir. 2016) (per curiam); *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1135-36 (D.C. Cir. 1995). And none identified a "risk [of] environmental harm" that would ensue from remanding without vacatur. *Nat'l Family Farm Coal.*, 960 F.3d at 1145.[20]

In short, TC Energy's economic concerns are irrelevant to the *Allied-Signal* analysis for the Corps' Section 7 violation, and in any event, overblown. Regardless, the caselaw makes clear that such costs do not justify allowing Keystone XL to proceed without the requisite environmental analysis.

[20] Federal Defendants make a similarly passing reference, Fed Br. 55 n.7, to *Public Employees for Environmental Responsibility v. Hopper*, but that case confirms the propriety of vacatur here—the court vacated the flawed NEPA analysis and required the agency to fix the error "before [the project] may begin construction." 827 F.3d 1077, 1084 (D.C. Cir. 2016).

CONCLUSION

For the foregoing reasons, the Court should affirm the portions of the district court's order (1) declaring NWP 12 unlawful and remanding to the Corps to initiate programmatic ESA Section 7 consultation on NWP 12 and (2) vacating NWP 12 insofar as it applies to the Keystone XL pipeline.

Respectfully submitted,

Dated: December 15, 2020

/s/ Doug Hayes
Doug Hayes
/s/ Eric Huber
Eric Huber
Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
Boulder, CO 80301
(303) 449-5595
doug.hayes@sierraclub.org
eric.huber@sierraclub.org

Attorneys for Sierra Club and Northern Plains Resource Council

/s/ Jaclyn Prange
Jaclyn Prange
/s/ Cecilia Segal
Cecilia Segal
/s/ Alexander Tom
Alexander Tom
Natural Resources Defense Council
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100
jprange@nrdc.org
csegal@nrdc.org
atom@nrdc.org

Attorneys for Bold Alliance and Natural Resources Defense Council

/s/ Jared Margolis
Jared Margolis
Center for Biological Diversity
2852 Willamette St. # 171
Eugene, OR 97405
(971) 717-6401
jmargolis@biologicaldiversity.org

/s/ Eric Glitzenstein
Eric Glitzenstein
Center for Biological Diversity
1411 K Street, NW, Suite 1300
Washington, DC 20005
(202) 849-8401
eglitzenstein@biologicaldiversity.org

Attorneys for Center for Biological Diversity and Friends of the Earth

/s/ Timothy M. Bechtold
Timothy M. Bechtold
Bechtold Law Firm, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorney for all Plaintiffs

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 14,743 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).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[X] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;

[X] a party or parties are filing a single brief in response to multiple briefs; or

[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Alexander Tom **Date** December 15, 2020

ADDENDUM

50 C.F.R. § 402.02 Definitions.

. . . .

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include,
but are not limited to:

(a) actions intended to conserve listed species or their habitat;
(b) the promulgation of regulations;
(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
(d) actions directly or indirectly causing modifications to the land, water, or air.

. . . .

Cumulative 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.

. . . .

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

. . . .

50 C.F.R. § 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.

. . . .

(c) Initiation of formal consultation. A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;
(2) A description of the specific area that may be affected by the action;
(3) A description of any listed species or critical habitat that may be affected by the action;
(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a

comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(i) Incidental take.

. . . .

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.