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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Defendants/Appellants,

and

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

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

UNOPPOSED MOTION OF DEFENDERS OF WILDLIFE, VIRGINIA WILDERNESS COMMITTEE, WEST VIRGINIA HIGHLANDS CONSERVANCY, AND WEST VIRGINIA RIVERS COALITION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

J. Patrick Hunter
SOUTHERN ENVIRONMENTAL LAW CENTER
48 Patton Avenue, Suite 304
Asheville, NC 28801
Telephone: (828) 258-2023
Email: phunter@selcnc.org

Spencer Gall
Gregory Buppert
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
Telephone: (434) 977-4090
Email: sgall@selcva.org;
gbuppert@selcva.org

Counsel for Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition.

ARGUMENT

Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and the West Virginia Rivers Coalition (collectively *amici*) respectfully move under Rule 29(a) of the Federal Rules of Appellate Procedure for leave to file a brief as *amici curiae* supporting Appellees and affirmance in these consolidated cases.

Amici are non-profit organizations dedicated in part to preserving the natural heritage of Virginia and West Virginia by protecting species in the crosshairs of new gas pipelines permitted under Nationwide Permit 12 ("NWP 12"). *Amici* have a strong interest in affirmance, *see* Fed. R. App. P. 29(a)(3)(A), because *amici* have seen firsthand how the U.S. Army Corps of Engineers' ("Corps") unlawful decision to sidestep consultation under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, has resulted in a spotty regulatory scheme that lets accumulating harm to imperiled species escape notice.

Amici provide a unique perspective on the legal and practical problems with the Corps' approach to NWP 12. *See* Fed. R. App. P. 29(a)(3)(B). The streams and rivers of the Appalachian mountains and Southeast coastal plain are a treasure trove of aquatic biodiversity and a home to endangered and threatened species found nowhere else on earth. Those same streams and rivers also offer a case study in why the district court got this case right and should be affirmed.

Amici explain in their concurrently filed brief that proposed gas pipelines like the Mountain Valley Pipeline and the now-cancelled Atlantic Coast Pipeline can have a compounding effect on protected species—which the Corps has unlawfully overlooked. The Corps tried to devise work-arounds so that it could avoid its straightforward obligation under the Endangered Species Act to consult with expert wildlife agencies before issuing NWP 12. And in court the Corps has touted those work-arounds as providing sufficient protection. *Amici* offer the Court concrete examples of why the Corps is wrong.

The Court permitted *amici* to file a brief opposing a stay pending appeal, *see* Dkt. No. 58, and *amici* are equally well positioned to provide the Court with a useful perspective now.

Amici sought consent of the parties in accordance with Circuit Rule 29-3. Plaintiffs, Federal Defendants, and Intervenor Defendant State of Montana consent to *amici* filing their brief. Intervenor Defendants TC Energy Corporation and Keystone Pipeline LP, and Intervenor Defendant Nationwide Permit 12 Coalition do not oppose.[1]

[1] The Nationwide Permit 12 Coalition is comprised of the American Gas Association, the American Petroleum Institute, the Association of Oil Pipelines, the Interstate Natural Gas Association of America, and the National Rural Electric Cooperative Association.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant their motion for leave and accept their concurrently filed brief supporting Appellees and affirmance.

Date: December 22, 2020

Respectfully submitted,

/s/ J. Patrick Hunter
J. Patrick Hunter (N.C. Bar No. 44485)
SOUTHERN ENVIRONMENTAL LAW CENTER
48 Patton Avenue, Suite 304
Asheville, NC 28801
Telephone: 828-258-2023
Facsimile: 828-258-2024
Email: phunter@selcnc.org;

Spencer Gall (V.A. Bar No. 95376)
Gregory Buppert (V.A. Bar No. 86676)
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
Telephone: 434-977-4090
Facsimile: 434-977-1483
Email: sgall@selcva.org;
gbuppert@selcva.org;

Counsel for Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition.

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Ninth Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 448 words, excluding the parts of the motion listed in Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Date: December 22, 2020

/s/ J. Patrick Hunter

J. Patrick Hunter
SOUTHERN ENVIRONMENTAL LAW CENTER

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 22, 2020

/s/ J. Patrick Hunter

J. Patrick Hunter
SOUTHERN ENVIRONMENTAL LAW CENTER

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Defendants/Appellants,

and

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

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

BRIEF OF DEFENDERS OF WILDLIFE, VIRGINIA WILDERNESS COMMITTEE, WEST VIRGINIA HIGHLANDS CONSERVANCY, AND WEST VIRGINIA RIVERS COALITION AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

J. Patrick Hunter
SOUTHERN ENVIRONMENTAL LAW CENTER
48 Patton Avenue, Suite 304
Asheville, NC 28801
Telephone: (828) 258-2023
Email: phunter@selcnc.org

Spencer Gall
Gregory Buppert
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
Telephone: (434) 977-4090
Email: sgall@selcva.org;
gbuppert@selcva.org

Counsel for Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state the following:

Defenders of Wildlife is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in Defenders of Wildlife.

Virginia Wilderness Committee is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in Virginia Wilderness Committee.

West Virginia Highlands Conservancy is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in West Virginia Highlands Conservancy.

West Virginia Rivers Coalition is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in West Virginia Rivers Coalition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

STATEMENT OF INTEREST[1]

Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition (collectively *amici*) are non-profit organizations dedicated in part to preserving the natural heritage of Virginia and West Virginia. *Amici* have a particular interest in ensuring that federal permitting does not unlawfully place endangered and threatened species in the region in the crosshairs of major gas and oil pipelines. *Amici* support Appellees and affirmance.

[1] No party or its counsel, or any other person, other than *amici* and their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION

This case is simpler than it seems. Although it involves overlapping regulatory schemes, many of the key points are not in dispute. Importantly, the parties agree that reissuance of Nationwide Permit 12 is an "action" for purposes of the Endangered Species Act. Otherwise there would have been no need to make a "may affect" or "no effect" determination in the first place.

The parties also agree that to comply with the Endangered Species Act, Section 7 consultation over Nationwide Permit 12 must, to quote the U.S. Army Corps of Engineers, "take into account the combined effects of other NWP 12-authorized activities."[2] The Endangered Species Act is in accord, requiring federal agencies to consider "all consequences" of their actions "as a whole."

This case is about whether the Corps has lived up to that standard. There are two reasons why it has not. ***First***, the Corps decided to forego consultation under the Endangered Species Act when it issued Nationwide Permit 12 in 2017, attempting instead to defer all of its consultation obligations for the full Nationwide Permit 12 program to individual projects. But relying solely on consultations for individual projects without consulting at the programmatic level—that is, when the Corps reissued Nationwide Permit 12 in 2017—

[2] Corps Br. 34.

necessarily fails to account for the combined effect on protected species of activities authorized under the Nationwide Permit 12 program. Experience with pipelines in the Appalachian Mountains relying on Nationwide Permit 12 illustrates why programmatic consultation is necessary. Nationwide Permit 12 projects have repeatedly affected the same threatened and endangered species but the Corps has never accounted for the aggregate effect of those projects. Piece by piece, pipelines have destroyed species and their habitats without the Corps putting the pieces together to see the full picture of the damage done.

Consider the endangered Roanoke logperch, Indiana bat, and clubshell mussel. Two Nationwide Permit 12 pipelines authorized in 2017 in Virginia and West Virginia would have collectively impacted four of the eight remaining populations of logperch, a freshwater fish. At least three Appalachian Nationwide Permit 12 pipelines would adversely affect the Indiana bat. And multiple Nationwide Permit 12 pipelines would adversely affect the clubshell. Yet the Corps has never considered the additive impacts of these projects on the species under the Endangered Species Act.

This failure violates the Endangered Species Act, which requires federal agencies to consider "*all* consequences to listed species or critical habitat" caused by federal actions "as a whole" to prevent jeopardizing species or adversely modifying critical habitat. If the Corps' Nationwide Permit 12 program is

jeopardizing species, the Corps will not know until it is too late. The Section 7 consultation procedures are meant to avoid precisely that outcome.

Second, the Corps pawns responsibility for a key part of its compliance scheme off onto interested third parties. Specifically, the Corps delegates to non-Federal permittees *the Corps'* statutory obligation to assess in the first instance whether *Corps-approved* projects affect listed species thereby triggering Section 7 consultation. This is an unlawful delegation. The Corps takes pains to explain why permittees will adequately fulfill the Corps' duties under the Endangered Species Act, but the agency misses the point—the Corps cannot turn this job over to private parties in the first place.

For these and other reasons explained by Appellees, the district court's order must be affirmed.

BACKGROUND

The Endangered Species Act ("ESA") prohibits federal agencies from taking any action that is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). This requires "considering the effects of the action or actions as a whole." 50 C.F.R. § 402.14(c)(4). "Action means all activities or programs of any

kind authorized, funded, or carried out, in whole or in part, by Federal agencies." *Id*. § 402.02.

The prohibition against jeopardy is achieved through the Section 7 consultation process. *See* 16 U.S.C. § 1536(a)(2). Section 7 consultation is required for all federal agency actions that "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a). If the action is "likely to adversely affect listed species or critical habitat," the agency must enter formal Section 7 consultation with either the U.S. Fish and Wildlife Service or National Marine Fisheries Service (interchangeably "Service"), depending on the species. *See id*. § 402.13(a)–(b).

Formal consultation requires an in-depth consideration of the "effects of the action" on protected species. "Effects of the action are *all* consequences to listed species or critical habitat that are caused by the proposed action." *Id*. § 402.02 (emphasis added). Formal consultation also requires consideration of the "environmental baseline" and "cumulative effects" within the "action area" which is "all areas to be affected directly or indirectly by the Federal action." *See id.* (defining "cumulative effects," "environmental baseline," and "action area").

Regardless of the scope of the relevant action, "all consultations are required to fully satisfy section 7(a)(2) of the Act"—the section of the ESA prohibiting jeopardy and adverse modification of critical habitat. *See* 84 Fed. Reg. 44,976, 44,996 (Aug. 27, 2019) (defining "programmatic consultation"). Fulfilling that

obligation for a "program" of work, "may require [Section 7 consultation] at both the program level as well as at the tiered or step- down, site-specific level to insure compliance with section 7(a)(2) of the Act." *Id*. But first, "programmatic action requires a programmatic consultation." *Id*. at 44,997 (discussing "mixed programmatic actions").

If the Section 7 consultation process reveals that an agency action would jeopardize listed species or adversely modify critical habitat, the action cannot be approved absent modification to avoid jeopardy. 16 U.S.C. § 1536(a)(2); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F.3d 917, 925 (9th Cir. 2008) (stating the same).

Nationwide Permit 12 ("NWP 12") is a Clean Water Act § 404 general permit issued by the U.S. Army Corps of Engineers ("Corps") to authorize discharges of pollutants into navigable waters associated with the construction of "utility lines," which the Corps interprets to include pipelines. Corps Br. 1, 9. It was most recently reissued in 2017. While NWP 12 is a permit, it is also a programmatic approval that authorizes covered activities en masse. Indeed, the Corps estimates that "the permit would be relied on 14,000 times per year" nationwide. *Id*. at 12.

The Corps did not conduct Section 7 consultation when it reissued NWP 12 in 2017. Instead, to meet its Section 7 obligations, the Corps relied on permit

General Condition 18, which precludes use of the permit for activities that "'may affect' a listed species or critical habitat, unless ESA Section 7 consultation addressing the effects of the proposed activity has been completed." *See* Corps Br. 10 (quoting General Condition 18). The Corps does not dispute that it must engage in Section 7 consultation for NWP 12–authorized activities but argues that "because the regulatory scheme and the permits are designed to ensure that any necessary consultation occurs on an activity-specific basis" it does not have to engage in programmatic consultation at the permit-issuing level. *See* Corps Br. 12.

ARGUMENT

I. Siloed Project-Specific Consultations Are No Substitute for Consultation over the Whole NWP 12 Program

To cut to the chase, much of the Corps' argument that it has complied with the ESA's Section 7 consultation procedures rides on this sentence: "To the extent that the district court intended to suggest that activity-specific review fails to take into account the combined effects of other NWP12-authorized activities . . . the court simply misunderstood the regulatory scheme." Corps Br. 34. To the contrary, it is *the Corps* that has misunderstood and misapplied the regulatory scheme, to the detriment of protected species and in violation of the ESA.

A. The Corps' Approach to Consultation Precludes Consideration of "All Consequences" of NWP 12 "As a Whole"

There is no dispute here that NWP 12–authorized activities adversely affect threatened and endangered species. While the Corps frames its decision to forego consultation at the permit-issuing level as a "no effect" determination, in truth the Corps' argument is that it can rely on individual project-specific Section 7 consultations triggered by General Condition 18 to satisfy its consultation requirements for the full NWP 12 program. *See* Corps Br. 12 (justifying "no effect" determination "because the regulatory scheme and the permits are designed to ensure that any necessary consultation occurs on an activity-specific basis"). But project-specific consultations do not account for "*all* consequences to listed species or critical habitat" that are caused by NWP 12 "*as a whole*." *See* 50 C.F.R. §§ 402.02; 402.14(c)(4) (emphasis added). This is a significant problem because it omits any jeopardy consideration of the overall effect of the Nationwide Permit 12 program. The Services mandate the fix: a "programmatic action requires a programmatic consultation" even when paired with "step- down, site-specific [consultations] to insure compliance with section 7(a)(2) of the Act." 84 Fed. Reg. at 44,996–97.

The Corps effectively concedes the requirement to consider the effect of the NWP 12 program as a whole but argues that its project-by-project approach "take[s] into account the combined effects of other NWP 12-authorized activities."

Corps Br. 34. To make that argument, the Corps relies on the requirement to consider in Section 7 consultations the "environmental baseline" and "cumulative effects." Corps Br. 34. But this overlooks that consideration of both the "environmental baseline" and "cumulative effects" are limited to the "action area." 50 C.F.R. § 402.02 (defining both terms to limit application to the "action area"). "Action area means all areas to be affected directly or indirectly by the Federal action." *Id*. Individual project consultations do not account for the combined effect of NWP 12–authorized activities because most other NWP 12 projects are outside the "action area"—i.e., "the area affected directly or indirectly"—for an individual project.

The result is that the aggregate effect on protected species of the thousands of NWP 12–authorized activities is never considered. This violates the ESA because the Corps never accounts for "*all* consequences to listed species or critical habitat that are caused by" NWP 12 "*as a whole*." 50 C.F.R. §§ 402.02, 402.14(c)(4) (emphasis added). The Corps only accounts for effects project-by-project, piece-by-piece. Without engaging in Section 7 consultation at the programmatic level, the overall effect of NWP 12 on protected species is unknown, and the Corps' obligation to ensure its actions do not jeopardize listed species or adversely modify critical habitat is unfulfilled.

Relying on siloed project-by-project consultations to account for the effects of NWP 12 produces a similar problem to segmenting analyses under the National Environmental Policy Act ("NEPA").[3] NEPA requires preparation of an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This Court has long recognized that agencies may not segment a larger, significant federal action into smaller, insignificant individual actions to evade this requirement. *See Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (forbidding an agency from "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact"), *abrogated on other grounds as recognized by Cottonwood Envtl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1092 (9th Cir. 2015); *see also Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) ("The justification for the

[3] The Corps must also comply with NEPA when reissuing NWP 12, which it recently proposed to do. *See* Corps Br. 9 n.1. The Corps takes diametrically opposed positions to its obligations to consider effects under NEPA and the ESA at the NWP 12–issuing level. For ESA purposes the Corps attempts to defer all effects consideration to individual projects. For NEPA purposes, on the other hand, the Corps takes the position that "[c]ompliance with NEPA is accomplished when the [nationwide permit] is issued by Corps Headquarters, with its decision document" making further consideration of effects at the individual project level unnecessary for NEPA purposes. *See* U.S. Army Corps of Engineers, Review of 12 Nationwide Permits Pursuant to Executive Order 13783, at 46 (Sept. 25, 2017), https://bit.ly/38tZt2q.

rule against segmentation is obvious: it 'prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" (citation omitted)). By the same token, the Corps fails to meet its obligation to consult on the effects of its action "as a whole" when it segments the larger federal action—NWP 12—into smaller site-specific actions whose effects standing alone may appear less significant.

The failure to complete consultation at the programmatic level is most harmful for species that are impacted by multiple NWP 12 projects, because the combined effect of those projects is unaccounted for.

B. Appalachian Pipelines Demonstrate the Problem with Relying Solely on Project-Specific Consultations

Real-world experience in Virginia and West Virginia confirms that different NWP 12 activities are impacting the same protected species but that individual Section 7 consultations do not account for the overall effect of those activities on species, underscoring the need for Section 7 consultation at the programmatic level.

The Atlantic Coast Pipeline ("ACP")[4] and Mountain Valley Pipeline ("MVP")[5] were both NWP 12 projects[6] planned for construction through Virginia and West Virginia. Both pipelines would have adversely affected the endangered Roanoke logperch.[7] There are "approximately eight total populations

---

[4] The Atlantic Coast Pipeline was cancelled in July 2020. *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline,* Atlantic Coast Pipeline (July 5, 2020), https://bit.ly/38NZNJd. Because the project had previously received final approvals from the Fish and Wildlife Service ("FWS") and the Corps and began construction along portions of the proposed route, it remains an example of the problems with relying solely on project-specific consultations.

[5] Both ACP and MVP were approved pursuant to the Natural Gas Act. The Corps argues that Natural Gas Act projects are irrelevant to the concerns before this Court because "the District of Montana would not even have jurisdiction to review challenges to . . . pipelines . . . subject to the Natural Gas Act," for which "original and exclusive jurisdiction" resides in the courts of appeal. Corps Br. 50. Of course, the challenged agency approval here is NWP 12, not an approval under the Natural Gas Act. Moreover, this appears to be an argument of convenience. When groups filed suit directly in the United States Court of Appeals for the Fourth Circuit alleging similar violations of the ESA associated with use of NWP 12 for MVP, the Corps argued that its "reissuance of NWP 12" did not "authorize[] any activity relating to the Mountain Valley Pipeline . . . [and] therefore, [was] reviewable (if at all) exclusively in the district courts." Resp't Opp. to Pet'rs' Stay Mot. at 8–9, *Sierra Club v. U.S. Army Corps of Engineers,* No 20-2042 (4th Cir. Oct. 9, 2020), ECF No. 23.

[6] MVP recently announced that it was reevaluating use of NWP 12. *See* Int. Mot. to Extend Briefing Schedule at 2, *Sierra Club v. U.S. Army Corps of Engineers*, No 18-1713(L) (4th Cir. Dec. 14, 2020), ECF No. 86.

[7] *See* FWS, Biological Opinion for ACP 38–39 (Sept. 11, 2018), https://bit.ly/3g7DuBA ("ACP BiOp"); FWS, 2017 Biological Opinion for MVP 23–24 (Nov. 21, 2017), https://bit.ly/2WRUBjm ("2017 MVP BiOp"). FWS issued a new biological opinion for MVP in September 2020, after the cancellation of ACP.

of … logperch."[8] MVP will affect three populations; ACP would have affected a fourth.[9]

Despite the overall adverse effect of these NWP 12 projects on logperch, project analysis for each pipeline ignored the adverse effects of the other when assessing jeopardy. That is because each project myopically defined the logperch "action area" as only "200 [meters] above and 800 [meters] below" individual stream crossings where logperch are present, plus the width of the construction right-of-way.[10] The logperch "action area" for ACP was a mere "3,104 [meters]" of its habitat.[11] Projects outside of that cramped "action area" were excluded from environmental baseline and cumulative effects considerations in ACP's jeopardy analysis. These NWP 12 projects *together* would have adversely affected logperch, potentially risking jeopardy, but that compounding effect was never addressed in project-specific consultation because MVP did not cross ACP's 3,104-meter "action area."

---

[8] FWS, Roanoke Logperch Five-Year Review 10 (2007), https://bit.ly/2Tpg0hK.

[9] *Compare id*. (listing populations), *with* ACP BiOp 18–19, *and* 2017 MVP BiOp 14–16.

[10] ACP BiOp 19; 2017 MVP BiOp 14. FWS increased the "action area" in some instances in MVP's September 2020 biological opinion. For example, the action area for terrestrial species has been expanded from "0.6 to 2.0 miles from the project [right of way]." FWS, Biological Opinion for MVP 75 (Sept. 4, 2020) ("2020 MVP BiOp"), https://bit.ly/3pktPeV.

[11] ACP BiOp 19.

Even had MVP crossed ACP's "action area," MVP's impacts likely would have been excluded from ACP's jeopardy analysis. Cumulative effects under the ESA exclude effects from other federal projects like MVP. *See* 50 C.F.R. § 402.02. "Environmental baseline" further excludes projects with incomplete Section 7 consultation. *See id*. Since ACP and MVP initially went through consultation at roughly the same time, MVP would have been left out of ACP's baseline (and vice versa).

Combined NWP 12 project effects on the endangered Indiana bat provide another example. In 2015, FWS issued a biological opinion for the NiSource Multi-Species Habitat Conservation Plan ("MSHCP").[12] The biological opinion authorizes impacts on protected species from, among other things, "certain expansion activities related to NiSource's natural gas systems."[13] This includes new pipeline construction such as the approximately 160 miles of pipeline in West

---

[12]*See* FWS, Biological Opinion for the NiSource Multi-Species Habitat Conservation Plan (May 1, 2015), https://bit.ly/37CybrG. The MSHCP biological opinion was prepared to respond to NiSource Inc.'s request for an incidental take permit to cover a variety of activities associated with its natural gas pipeline system. *Id*. at 8. The biological opinion authorizes impacts to species from qualifying projects over multiple years using a tiering approach to confirm coverage for specific projects. *See id*. at 3-4 (describing consultation approach). Some of those projects happen to be NWP 12 projects. Similar to NiSource's use of a tiering approach to attempt to track the overall effects of *its* activities, the Corps must tier between programmatic and site-specific consultations to account for the overall effect of NWP 12.

[13]*Id.* at 10.

Virginia, Ohio, and Pennsylvania approved as the Leach XPress pipeline.[14] The MSHCP biological opinion authorizes impacts to Indiana bats, including impacts attributable to the Leach XPress pipeline.[15] ACP and MVP also would have both adversely affected Indiana bat.[16] Yet the aggregate impact of these NWP 12–authorized activities on Indiana bat is not accounted for in the project-specific jeopardy analyses.

A third Appalachian example comes from collective pipeline impacts on the clubshell mussel, which has been listed as endangered since 1993.[17] The WB XPress project, a 29.3-mile NWP 12 gas pipeline in West Virginia approved in 2017, risked impacts to clubshell (as well as Indiana bat) that were also tiered to the biological opinion for the MSHCP.[18] The MSHCP biological opinion authorizes extensive impacts to clubshell, including effects to five distinct

---

[14] Federal Energy Regulatory Commission, Leach XPress Final Environmental Impact Statement 1–4 (2016) (noting use of NWP 12), https://bit.ly/38rIPk1.

[15] *See id*. at 4-99 (noting that "take of the Indiana bat in covered lands has been addressed as part of the MSHCP").

[16] ACP BiOp at 59–60; 2020 MVP BiOp at 115–130.

[17] Biological Opinion for the NiSource Multi-Species Habitat Conservation Plan at 66.

[18] Federal Energy Regulatory Commission, WB XPress Project Environmental Assessment 4 (noting use of NWP 12 for the project), 152 (noting coverage under the MSHCP biological opinion for effects on clubshell) (2017), https://bit.ly/3h9rEHY.

populations and take[19] of up to 34,000 individual mussels.[20] For perspective, FWS's 2019 Five-Year Review for clubshell determined that only 11 populations of the species remain,[21] and most of those populations are struggling to hang on. For example, the St. Joseph River population is documented primarily by: "5 live clubshells observed in 2014, including one juvenile; 2 live juveniles observed in 2017; 6 live individuals found during extensive survey of 26 miles of Fish Creek in 2004 and 2005; single live adult found in 2012 from Fish Creek, Dekalb County, Indiana; numerous dead shells found in 2009, 2010, 2011, and 2012."[22]

The ACP would have adversely affected clubshell,[23] As would the approximately 170-mile Mountaineer XPress project.[24] Like the ACP, Mountaineer XPress was a NWP 12 project[25] with a very narrowly defined "action

---

[19] Take "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[20] Biological Opinion for the NiSource Multi-Species Habitat Conservation Plan at 344.

[21] *See* FWS, Clubshell Five-Year Review 13–18, Table 1 (2019), https://bit.ly/3reObIh.

[22] *Id*. at 13.

[23] ACP BiOp at 39–41.

[24] *See* FWS, Biological Opinion for the Mountaineer XPress Project 14–19 (Sept. 18, 2018), https://bit.ly/2KhwF5v.

[25] Army Corps of Engineers, Nationwide Permit 12 Verification for the Mountaineer XPress Project (May 25, 2018), https://bit.ly/2LYv5G5.

area."[26] The biological opinion for that project was prepared after the MSHCP biological opinion and approval of WB XPress, and after the original ACP biological opinion (but before ACP was cancelled). But aside from disclosing the general existence of impacts associated with pipeline development, the biological opinion for Mountaineer XPress does not account for the effects on clubshell from the earlier ACP, WB XPress, and other MSHCP projects in its jeopardy analysis. The additive effect of these NWP 12 projects on clubshell is never accounted for in the jeopardy analyses.[27]

This is the "piecemeal destruction of species and habitat" the district court warned of. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 454 F. Supp. 3d 985, 993 (D. Mont. 2020), *amended*, 460 F. Supp. 3d 1030 (D. Mont. 2020). And it stems from a problem this Court has previously identified: "project-specific consultations do not include . . . analysis comparable in scope and scale to consultation at the programmatic level." *Cottonwood*, 789 F.3d at 1082.

---

[26] Biological Opinion for the Mountaineer XPress Project at 6–7 (mapping action area as the area affected "directly or indirectly by the project").

[27] As these examples show, TC Energy's suggestion that project-specific consultations accurately capture effects from the entire NWP 12 program because "the environmental baseline is updated each time an activity is approved" does not reflect actual practice. *See* TC Energy Br. 27. Regardless, "environmental baseline" is still confined to the "action area," so activities outside the project-specific action area that affect the same species will not be accounted for.

C. The Services Have Repeatedly Confirmed the Effects of Pipeline Construction on Protected Species

Other documents prepared by the Services confirm that pipeline construction is having a detrimental impact on protected species. For instance, the ESA requires the Services to review at least every five years all listed species to determine if they should be removed from the list of protected species or if their status should be changed from threatened to endangered and vice versa. *See* 16 U.S.C. § 1533(c)(2). Many of these "Five-Year Reviews" completed in just the last two years document threats to protected species from pipeline construction:

- The Piping Plover is an endangered bird that has been listed under the ESA since 1986.[28] Its 2020 Five-Year Review noted oil "pipeline rupture and transportation" as a "continued potential threat" to the species as well as "stressors arising from oil and gas production," presumably including pipelines.[29]
- The Northern Riffleshell is an endangered freshwater mussel listed under the ESA since 1993.[30] Its 2019 Five-Year Review confirms that a "variety of instream activities continue to threaten northern riffleshell populations,

[28] FWS, Piping Plover Five-Year Review 2 (2020), https://bit.ly/2WBh2It.

[29] *Id*. at 56–57, 93–94.

[30] FWS, Northern Riffleshell Five-Year Review 2 (2019), https://bit.ly/2KN0kTK.

including . . . pipeline construction."[31] "These activities can directly affect the species through crushing, burying in silt/sediment, etc."[32]

- The Diamond Tryonia is an endangered freshwater snail listed under the ESA since 2013.[33] Its 2019 Five-Year Review notes the threat "[s]everal natural gas pipelines" pose to water quality important to the species' survival.[34]
- The Austin Blind Salamander has been listed as endangered since 2013.[35] Its 2019 Five-Year Review notes the threat posed from "pipelines [that] transport crude oil, natural gas, and natural gas liquid."[36]
- The Yellow Lance, a freshwater mussel, has been listed as threatened since 2018.[37] When proposing to designate critical habitat for the Yellow Lance in 2020, FWS specifically noted the threat to the species posed by "oil and gas

[31] *Id*. at 18.

[32] *Id*.

[33] FWS, Diamond Tryonia Five-Year Review 2 (2019), https://bit.ly/2KrvcJN.

[34] *Id*. at 29–33.

[35] FWS, Austin Blind Salamander Five-Year Review 3 (2019), https://bit.ly/2J9lfzZ.

[36] *Id*. at 28.

[37] Proposed Critical Habitat Designation, 85 Fed. Reg. 6,856, 6,857 (Feb. 6, 2020).

pipeline projects that propose to cross streams at locations where the species occurs" in Virginia.[38]

These findings are not restricted to NWP 12 projects,[39] but given that the Corps implements the vast majority of its permitting regime through general permits,[40] it is almost certain that some of the documented harms are attributable to NWP 12 projects.

D. Consultation Over the NWP 12 Program Stands to Benefit Protected Species

In a last-ditch effort to defend its failure to consult over NWP 12, the Corps argues that completing consultation over the NWP 12 program would impose "economic harm and inconvenience . . . without any meaningful countervailing benefit to the environment." Corps Br. 35. The Corps should know better.

Past Section 7 consultation over the NWP 12 program has generated better protections for listed species. For example, consultation with the National Marine Fisheries Service over the 2012 version of NWP 12 resulted in the Corps adopting

---

[38] *Id.* at 6,863.

[39] Even if these Five-Year Reviews mentioned specific pipeline projects it would be difficult to confirm use of NWP 12 because the Corps does not track use of the permit in any publicly accessible database.

[40] *See* Congressional Research Service, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENT (June 3, 2016), https://bit.ly/3pgXw0q (reporting that "[m]ore than 97% of the Corps' regulatory workload is processed in the form of general permits").

a series of mitigation, data collection, monitoring, and reporting measures at the national level in order to avoid jeopardy. *See* Appellees Br. 9–10. Those measures were required because they benefit species and guard against jeopardy. Programmatic consultation here may well generate similar benefits.

Embedded in the Corps' argument is the suggestion that because projects authorized through individual § 404 permits do not necessitate an "added layer of nationwide programmatic review," NWP 12 activities should not either. Corps Br. 35. But *individual* § 404 permits do not necessitate "nationwide programmatic review" because they do not authorize *nationwide* programs like NWP 12, only one-off, individual projects.

More to the point, the Corps' argument overlooks the fact that individual permits are inherently more protective of listed species. Individual permits may be issued only if there is no "practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). Impacts to protected species are considered as part of the "aquatic ecosystem." *See id*. §§ 230.10(c), 230.30. This is commonly referred to as the requirement to identify the least environmentally damaging practicable alternative and, for pipelines, could require route changes to avoid or minimize harm to protected species. But "[a]ctivities authorized by [nationwide permits] do not require . . . identification of the least environmentally damaging practicable alternative."

Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,860, 1,899 (Jan. 6, 2017). The fact that the thousands of projects approved with nationwide permits do not have to be designed according to the least environmentally damaging practicable alternative makes programmatic consultation *more* important, not less.

Similarly, the Corps' defense of its determination that "re-issuance of NWP 12 did not require programmatic consultation [a]s particularly appropriate in light of the structure of [Clean Water Act] general permits" confuses its obligations under the Clean Water Act and ESA. Corps Br. 28. Nothing in the "structure" of the Clean Water Act authorizes an end run around the ESA. To the contrary, the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

II. The Corps May Not Delegate Its Initial Effect Determination to Non-Federal Permittees

Because the Corps skipped programmatic consultation, NWP 12 is fatally infected by the Corps' failure regardless of the operation of General Condition 18. The Court's analysis can stop there. Nevertheless, the Corps' rationale for reaching a "no effect" determination is also arbitrary and capricious because the Corps uses General Condition 18 to unlawfully delegate to non-Federal permittees the *Corps*' obligation to make an initial ESA effect determination.

When a statute delegates authority to an agency, subdelegating that authority to a "subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). Agency subdelegations to *outside parties*, however, "are assumed to be improper absent an affirmative showing of congressional authorization."[41] *Id.* No such affirmative authorization allows the Corps to subdelegate its initial effect determination to non-Federal permittees here.

Congress placed the responsibility of complying with the ESA's Section 7 consultation procedures squarely on federal agencies. "*Each Federal agency shall* . . . insure that any action authorized, funded, or carried out by such agency" is not likely to jeopardize listed species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). Consistent with this command, ESA implementing regulations require *the agency* to determine, "at the earliest possible time," whether "*its* actions . . . may affect listed species or critical habitat." 50 C.F.R. § 402.14(a) (emphasis added). Thus, subdelegation of an agency's initial

[41] This is especially true when the outside party is a "private actor" whose "interests are likely to conflict with the national environmental interests that [the agency] is statutorily mandated to represent." *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18–19 (D.D.C. 1999); *see also Sierra Club v. Sigler*, 695 F.2d 957, 962 n.2 (5th Cir. 1983) ("[A]n agency may not delegate its public duties to private entities . . . particularly private entities whose objectivity may be questioned on grounds of conflict of interest.").

effect determination to outside parties is improper. *Cf. U.S. Telecom*, 359 F.3d at 566 ("It is clear here that Congress has not delegated to the [agency] the authority to subdelegate to outside parties.").

Perhaps due to the weight of this authority, the Corps does not contest that a subdelegation of its Section 7(a)(2) duties would be unlawful. *See* Corps Br. 29–31. Instead, it argues that no subdelegation has occurred because the Corps still makes the initial effect determination—even though it quite literally does not make the "initial" effect determination. *See* Corps Br. 29 (arguing "the Corps itself makes the Section 7(a)(2) determination" while conceding that "General Condition 18 does rely on prospective permittees to identify those activities for which such a determination might be necessary").

In fact, the Corps' own figures reveal that it plays no role in many NWP 12 initial effect determinations. The Corps projected that NWP 12 would be used 14,000 times per year from 2017 to 2022. Corps Br. 12. The Corps has also disclosed that around 3,400 activities authorized by the 2017 permit have required project-specific ESA review over the last three years. *Id.* Thus, since the 2017 permit has been in operation, over 90% of NWP 12–authorized activities either: (i) received "no effect" determinations from the non-Federal permittee, in which case

the Corps never weighed in on the activity's compliance with the ESA;[42] or (ii) received "might affect" determinations from the permittee and subsequent "no effect" determinations from the district engineer. This means non-Federal permittees—not the Corps—have almost certainly made *thousands* of final "no effect" determinations on activities that the Corps never even reviewed. In these circumstances, private parties have unlawfully made final, dispositive ESA decisions for the Corps. *Cf. U.S. Telecom Ass'n*, 359 F.3d at 568 (holding that an agency using an outside entity to help fulfill its statutory duty must "make[] the final decisions itself" to avoid an unlawful subdelegation).

The Corps and TC Energy counter that this arrangement is not unlawful because permittees are presumed to comply with General Condition 18. Corps Br. 30; TC Energy Br. 43. Thus, whenever a permittee makes a "no effect" determination, it is presumed that no listed species are actually impacted—no harm, no foul. *See* TC Energy Br. 43 (arguing "the district court's 'improper delegation' theory would be plausible only if one assumes that permittees will not

[42] The Corps points out that when a pre-construction notice ("PCN"), *see* Corps Br. 7 (explaining PCNs), is required for a project, the permittee must identify all jurisdictional waters crossed by the overall project even if those crossings would not require a PCN on their own, *id*. at 11. But as Appellees correctly note, the Corps does not undertake consultation on these non-PCN crossings because it finds they are "already authorized without the need for any Corps verification or other project-level approval." Appellees Br. 46 (citing 2-TC_ER-967).

comply with General Condition 18"). But the mere fact that permittees *may* be picking up the agency's slack does not cure the unlawful subdelegation.[43] Put differently, it is irrelevant that permittees are presumed to do a good job in fulfilling the Corps' ESA duties—the Corps cannot give permittees that job in the first place.

Appellants also weakly suggest that requiring the "prospective permittee to make an initial determination whether it meets the required conditions or exceptions" of the permit is typical of "all permitting regimes." NWP 12 Coal. Br. 29; *see also* Corps Br. 29–30 (noting that in "any situation in which a private party must obtain a federal permit or authorization," permittees must "evaluate whether a given activity triggers the relevant condition"). The thrust of this argument seems to be that asking non-Federal permittees to fulfill the Corps' Section 7(a)(2) duties is no different than asking those permittees to notify the Corps if one of NWP 12's seven PCN requirements is triggered. *See* Corps Br. 29–30. This is incorrect. Alerting the Corps that one's planned NWP 12 activity involves "mechanized land

[43] As the National Marine Fisheries Service pointed out, there may be cause to question even the good-faith efforts of permittees. Appellees Br. 47. Permittees may lack both "sufficient knowledge" of the ESA's requirements and "technical knowledge necessary to determine if their activity might have direct or indirect effects." *Id.* (citing SER-64–66).

clearing in a forested wetland,"[44] for example, is a world apart from assuming the Corps' statutorily prescribed role under the ESA.

In one final gambit, the NWP 12 Coalition argues that it is irrelevant "that the government places th[e] *initial burden of compliance* on private citizens." NWP 12 Coal. Br. 30 (emphasis added); *see also id.* at 16 ("[General Condition] 18 . . . puts the burden of compliance on the potential permittee."). In effect, the Coalition concedes that the Corps subdelegated its initial effect determination to private parties—presumably including those that are members of the Coalition—but argues that whether those parties abuse that delegated power "says nothing about what activity is actually authorized" by the Corps. *Id.* at 29–31. To the contrary, it is *highly* relevant that the Corps places its ESA burden on private citizens—because agencies are not allowed to do so. The Coalition admits as much in its brief. *Id.* at 20 ("ESA § 7 charges the action agency—and only the action agency—with the exclusive responsibility to . . . assess the authorized action."). In the end, the Coalition freely concedes the very proposition it is arguing against.

[44] NWP 12 requires pre-construction notification when "the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way." Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,860, 1,986 (Jan. 6, 2017).

CONCLUSION

For these and other reasons articulated by Appellees, the Court should affirm the district court's order declaring NWP 12 unlawful and requiring the Corps to initiate programmatic consultation on NWP 12 under Section 7 of the ESA.

Date: December 22, 2020

/s/ J. Patrick Hunter
J. Patrick Hunter (N.C. Bar No. 44485)
SOUTHERN ENVIRONMENTAL LAW CENTER
48 Patton Avenue, Suite 304
Asheville, NC 28801
Telephone: 828-258-2023
Facsimile: 828-258-2024
Email: phunter@selcnc.org

Spencer Gall (V.A. Bar No. 95376)
Gregory Buppert (V.A. Bar No. 86676)
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
Telephone: 434-977-4090
Facsimile: 434-977-1483
Email: sgall@selcva.org; gbuppert@selcva.org

Counsel for Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 22, 2020

/s/ J. Patrick Hunter

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

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 6,167 **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.

[X] 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.

[ ] 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;
- [ ] 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/ *J. Patrick Hunter* **Date** 12/22/2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*