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,

and

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

Appeal from the United States District Court for the District of Montana
No. 4:19-cv-00044 (Hon. Brian Morris)

FEDERAL APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION AND SUMMARY OF ARGUMENT

Nationwide Permit 12 (NWP 12) authorizes no activity that "may affect" species listed under the Endangered Species Act (ESA) or their critical habit — unless and until consultation addressing the effects of the activity has been completed.[1] Before relying on a nationwide permit, permittees must notify the U.S. Army Corps of Engineers (Corps) and receive approval not only for activities that "might affect" listed species or critical habitat — a more expansive standard than the "may affect" standard triggering ESA consultation — but also for activities *in the vicinity* of listed species or located in critical habitat. If the Corps determines following receipt of a pre-construction notice (PCN) that consultation is necessary, what follows is the same consultation that would occur *even if NWP 12 did not exist*. The Corps consequently concluded that the mere re-issuance of NWP 12 would itself have no effect on listed species or habitat. Contrary to Plaintiffs' arguments, that determination is entitled to deference. And the Corps' conclusion was entirely reasonable, if not tautological.

Plaintiffs no longer defend the district court's broad vacatur and injunction, and their defense of the district court's flawed merits analysis fares no better.

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[1] The Corps has finalized a rule re-issuing twelve existing nationwide permits (including NWP 12) as well as issuing four new ones, and that rule was published in the Federal Register on January 13, 2021. *See* 86 Fed. Reg. 2744. These permits will become effective 60 days after publication. The Corps will promptly inform the Court of any developments concerning such permits that may affect these appeals.

Plaintiffs initially argue that the Corps' determination is contrary to the Services' regulations governing consultation on a "framework programmatic action." But those regulations govern the scope of consultation that must take place *if* an action may affect listed species, not *whether* a particular action in fact affects species, and those regulations expressly contemplate that not all such framework actions will affect listed species. Plaintiffs also repeat the district court's erroneous conclusion that General Condition 18 "delegates" the Corps' ESA-related duties to permittees, but they do not dispute that *the Corps itself* makes the "may affect" determination. The fact that General Condition 18 identifies a *broader* set of circumstances in which permittees must seek approval from the Corps does not constitute a "delegation" and, indeed, is a necessary feature of virtually any permit authorization process. Plaintiffs also contend that programmatic review is needed to assess the supposed "aggregate impacts" of NWP 12, but Plaintiffs persuasively identify no shortcomings in the *cumulative* effects analysis that occurs when projects are subject to consultation. Again, this is the exact same analysis that would occur even if NWP 12 were never reissued.

Stripped of these flawed legal contentions, Plaintiffs' arguments provide no convincing refutation of the Corps' no-effect determination. Plaintiffs echo the district court's conclusion that there was "resounding evidence" of NWP 12's supposed effect on listed species. But the materials on which Plaintiffs rely consist

almost entirely of general environmental findings in the Corps' analysis under the National Environmental Policy Act (NEPA) that have nothing to do with impacts on species, along with two extra-record declarations that are so conclusory that even Plaintiffs did not intend to use them for merits purposes. The district court's holding that consultation was nonetheless required has no basis in this Court's precedent. Indeed, only one of the appellate decisions cited by Plaintiffs involved a no-effect determination, and that decision only underscores just how comparatively lacking the evidence was here.

Plaintiffs' contention that the Corps *believed* that consultation was required and proceeded without consulting anyway is without merit. Plaintiffs cite a single email from a Corps employee, but that email is both legally irrelevant and utterly innocuous. Plaintiffs do not meaningfully grapple with any of the points discussed in the Corps' opening brief on this topic: no appellate court has ever required such consultation for the nationwide permit program; the Corps *also* took the position that consultation was not legally required in 2012; the Corps has repeatedly gone forward with nationwide permits even when consultations have not been completed; and *Sierra Club itself* included no ESA claim in its challenge to the previous version of NWP 12, even though the consultation for that re-issuance was never completed.

Finally, no vacatur is warranted even if this Court were to conclude that the Corps was required to programmatically consult. Plaintiffs have abandoned any

claim to vacatur extending beyond the Keystone XL Pipeline. But the narrowed remedy now sought by Plaintiffs only underscores the illogic of the district court's decision. Plaintiffs cannot dispute that Keystone XL has already been subjected to extensive and site-specific environmental analysis. It is nonsensical to place that project — *and only that project* — on hold for programmatic consultation that, unlike the extensive environmental review that has already taken place, would not even address Keystone in particular.

The district court's order should be reversed in its entirety.

ARGUMENT

I. The Corps reasonably determined that re-issuance of NWP 12 would have no effect on listed species or critical habitat.

A. The Corps' no-effect determination is entitled to deference.

The Corps' no-effect determination is reviewed under APA standards, which are "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund v. USDA*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotation marks omitted). That standard applies to claims, like Plaintiffs', challenging an agency's no-effect determination under the ESA. *National Family Farm Coalition v. U.S. EPA*, 966 F.3d 893, 923 (9th Cir. 2020). Plaintiffs nonetheless advance a hodgepodge of arguments why the Corps' no-effect determination is not entitled to deference. All lack merit.

Initially, Plaintiffs repeat the district court's contention that the Corps was "well aware" that it had a duty to consult and proceeded with a no-effect determination anyway. Plaintiffs' Brief at 40. As we discuss below, there is no basis for Plaintiffs' contention that the Corps *believed* consultation was required. *See infra* pp. 24-26. Plaintiffs' remaining argument that the Corps unlawfully evaded its "known" duties is just a rehash of their *merits* contention that the Corps' no-effect determination was incorrect. Plaintiffs' Brief at 41-44.

Plaintiffs also claim that "it is the Services — not the Corps — that Congress entrusted to administer the ESA." Plaintiffs' Brief at 41. But the Services have repeatedly made clear that the action agency is entrusted with the initial effects determination. *See* 50 C.F.R. § 402.14(a); ESA Section 7 Consultation Handbook at xvi, https://www.fws.gov/endangered/esa-library/index.html#consultations; 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). Not surprisingly therefore, this Court has made clear that deference applies to an agency's decision that consultation is not required because an action has no effect on listed species or critical habitat. *See National Family Farm Coalition*, 966 F.3d at 924.

Plaintiffs also insist that the Corps' no-effect determination is not entitled to deference because the Services stated that the nationwide permit program requires programmatic consultation when they revised the consultation regulations in 2015. Plaintiffs' Brief at 42. Even assuming such an assertion would preclude deference

to the Corps' 2017 determination, the Services made no such assertion. *See infra* p. 10. As already discussed, the Corps engaged with the Services prior to re-issuing the nationwide permits, and neither Service requested consultation. Opening Brief at 13-14, 38. The Corps' no-effect determination is entitled to deference.

B. The Corps' no-effect determination was reasonable.

The Corps' determination that re-issuance of NWP 12 would not itself have an effect on listed species or critical habitat was not arbitrary or capricious. In addition to the many other features of NWP 12 that confine its reach, *see* Opening Brief at 27-28, General Condition 18 requires a PCN "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." 82 Fed. Reg. 1860, 1999 (Jan. 6, 2017). That is, even if an activity otherwise falls within the scope of NWP 12, the activity is not authorized unless (1) it does not meet the "might affect" standard *and* is not even in the vicinity of any listed species or located in critical habitat; (2) it requires a PCN but the Corps makes a "no effect determination"; or (3) the Corps makes a "may affect" determination and the activity is separately authorized following ESA consultation. *Id.* at 1873. Under the first two scenarios, the activity by definition does not affect listed species or habitat. Under the third, the resulting ESA consultation that occurs is the same that would occur under an individual permit, i.e., if NWP 12 did not exist. *See* 50 C.F.R. § 402.02; 33 C.F.R. § 325.2(b)(5).

For ESA purposes, then, NWP 12 leaves project proponents who wish to undertake species-affecting behavior *in the same position* in which they would be absent the permit. Plaintiffs' response fundamentally fails to grapple with this basic feature of the permit. The Corps' argument is not that programmatic consultation is unnecessary simply because project-specific consultation is completed later. *See, e.g.*, Plaintiffs' Brief at 23. The point is that NWP 12 is expressly *not available* for any activity that may affect species or habitat — unless those activities are subjected to the same ESA steps that would occur if the nationwide permit had not been re-issued. 82 Fed. Reg. at 1,873.

The Corps reasonably concluded that re-issuance of a permit so designed would not itself affect listed species or critical habitat. Contrary to Plaintiffs' characterization, the Corps does not contend that it is categorically relieved "of the requirements for considering the effects of the action as a whole." 50 C.F.R. § 402.14(c). But in undertaking this consideration, it is the scope of the proposed action that determines whether consultation is required. *See WildEarth Guardians v. U.S. EPA*, 759 F.3d 1196, 1209 (10th Cir. 2014) (for ESA purposes, when "an agency action has clearly defined boundaries, we must respect those boundaries").

This Court's recent decision in *National Family Farm Coalition* is likewise instructive on this point. That decision recognized that an agency may use mitigation measures to reach a "no effect" determination, provided the measures are the result

of "specific and binding plans" and "reasonably certain to occur." 966 F.3d at 923. Indeed, the Court made clear the action agency was entitled to "reach its own 'no effect' conclusion" even though the agency acknowledged that listed species were at potential risk of exposure, provided that risk did not rise to the level of a potential effect. *Id.* at 924; *see also Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466, 482 (D.C. Cir. 2009) ("satisfaction of the ESA mandate that no endangered life be jeopardized must be measured in view of the full contingent of . . . checks and balances and all mitigating measures adopted in pursuance thereof" (internal quotation marks omitted)).

The same analysis applies here. Like mitigation measures, General Condition 18 is simply another way of bounding the scope of an agency action. The Corps reasonably determined that, so bounded, the mere re-issuance of NWP 12 would not itself affect listed species.

II. Plaintiffs' contrary arguments are unpersuasive.

A. The Corps' no-effect determination does not conflict with the Services' regulations.

Plaintiffs initially argue that the Corps' determination that consultation was not required "violates the plain language of the Services' " consultation regulations, which (according to Plaintiffs) "set forth procedures for consultation on a 'framework programmatic action.' " Plaintiffs' Brief at 22-24. This argument has no basis in the text of the consultation regulations. Plaintiffs emphasize 50 C.F.R. § 402.14(c),

which provides that requests for formal consultation "may encompass . . . a number of similar individual actions," while stating that the "provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole." But this language says nothing about when framework programmatic actions may be subject to consultation. Indeed, this portion of the regulation (and paragraph (c)(4) in particular) addresses the *scope* of consultation that may occur if consultation is initiated. *See also* TC Energy Brief at 38. But the provision says nothing about *which* agency actions may affect listed species and accordingly require consultation in the first place.

Urging otherwise, Plaintiffs argue that "formal consultation is required for any agency action — including programmatic actions — that 'may affect' listed species unless the [appropriate Service] concurs in writing that the action is 'not likely to adversely affect' the species." Plaintiffs' Brief at 23 n.5. Precisely so, but this has nothing to do with the question *whether* an agency action "may affect" listed species, and the regulations reserve that question to the action agency. *See* 50 C.F.R. § 402.14(a). Indeed, Section 402.14 mentions framework programmatic actions only once, and only to make clear that an incidental take statement is *not* required when programmatic consultation is undertaken. *See id.* § 402.14(i)(6). The regulations in no way call into question the Corps' judgment that a framework action that *prohibits* activities that may affect listed species — unless and until they are

separately authorized following ESA Section 7 consultations identical to that which would take if the framework action did not exist — has no effect on such species.

Plaintiffs also contend that the Corps' position conflicts with views the Services expressed in issuing the regulations in 2015. Plaintiffs' Brief at 42. Even if true, this would not control interpretation of the regulation. *See, e.g.*, *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("preamble does not 'control' the meaning of the regulation"). In any event, it is not true. Plaintiffs contend that "the Services specifically used the Corps' NWP program as an example of a federal program subject to such consultation." Plaintiffs' Brief at 17-18. No: the Services mentioned the Nationwide Program only once, and only as an example *of a framework programmatic action*. *See* 80 Fed. Reg. 26,832, 26,835 (May 11, 2015). The Services then made clear — on the same page of the Federal Register — that "this regulatory change does not imply that section 7 consultation is required for a framework programmatic action that has no effect on listed species or critical habitat." *Id.* Pointing this out does not "miss[] the point." Plaintiffs' Brief at 43. It underscores that there is no merit to Plaintiffs' claim that the Services "acknowledg[ed] that programmatic consultation is required for NWPs." *Id.* at 42.

Finally, Plaintiffs are incorrect in contending that the Corps' reasoning means that "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." Opening Brief at 25. Some framework programmatic actions may have self-executing features in the sense that they specify a category of on-the-ground activities permitted to go forward that, although they do not result in any incidental take, may affect listed species. Other framework actions, even if they lack such self-executing features, may make regulatory changes that inherently affect listed species or critical habitat. *See Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 476-77 (9th Cir. 2011) (consultation was required where grazing regulation amendments "decreased public involvement in public lands management, put new limitations on the BLM's enforcement powers, and increased ranchers' ownership rights to improvements and water on public lands"). But NWP 12 presents no such situation. It is simply a permit that expressly authorizes no activities that may affect listed species unless those activities undergo the same ESA review to which they would be subject if NWP 12 did not exist.

B. General Condition 18 does not "delegate" the Corps' ESA duties to permittees.

Plaintiffs next assert that General Condition 18 improperly delegates to permittees the Corps duty to determine whether its actions may affect listed species or habitat. Plaintiffs' Brief at 44-48. But Plaintiffs do not dispute that the Corps itself determines upon receipt of a PCN whether the proposed activity may affect listed species and accordingly whether consultation is required. *See* 82 Fed. Reg. at 1954, 1955; *see also* 33 C.F.R. § 330.4(f)(2). The Corps does not "delegate" its ESA

responsibilities by making the precise determinations that the ESA and its implementing regulations require the Corps to make, and neither of the two cases cited by Plaintiffs stands for any such proposition. *See* Plaintiffs' Brief at 46-47 (citing *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003), and *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002)).

To be sure, General Condition 18 does rely on permittees to comply with the requirement that it submit a PCN for an even broader set of proposed activities: activities that either "might affect" or are "in the vicinity of" listed species or habitat. *See also* 33 C.F.R. § 330.4(f)(2). But this "might affect" or "in the vicinity of" requirement is not an *ESA* standard. It is a *nationwide permit standard*. Plaintiffs dispute that the "might affect" prong of this standard is broader than the "may affect" standard that triggers ESA consultation, *see* Plaintiffs' Brief at 46 n.13, but the Corps contemporaneously and reasonably explained that the might-affect threshold was intended to be "more stringent," and that the "word 'might' is defined as having 'less probability or possibility' than the word 'may.'" 82 Fed. Reg. at 1873 (quoting *Merriam-Webster's Collegiate Dictionary* (10th ed.)). And Plaintiffs ignore that the Condition also requires a PCN if the activity is even "in the vicinity of" a listed species or located in critical habitat — language that is unquestionably broader than the may affect standard for ESA consultation. In other words, General Condition 18 imposes a prophylactic requirement that is far broader than the standard for ESA

consultation. This requirement ensures that any activities which even conceivably could affect species or habitat are brought to the Corps' attention, at which time the Corps itself makes the ESA determination. That is not a delegation under any plausible theory. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) ("agency delegates its authority when it shifts to another party almost the entire determination of whether *a specific statutory requirement* . . . has been satisfied" (internal quotation marks omitted and emphasis added)).

Plaintiffs also raise the specter of "self-interested" permittees proceeding without notifying the Corps even where a PCN is required. Plaintiffs' Brief at 45. There are a number of problems with this argument. Most fundamentally, it has nothing to do with whether General Condition 18 effects an unlawful delegation. As the NWP 12 Coalition points out, such concerns conflate compliance with a permitting regime with the activities actually authorized by that regime. NWP 12 Coalition Brief at 29. But even putting aside that basic defect, the Corps takes non-compliance with permit conditions seriously: if a permittee fails to comply with the requirements of General Condition 18, the activity is "unauthorized activity and the Corps will take appropriate action." 82 Fed. Reg. at 1954. A permittee who proceeds without submitting a required PCN is potentially subject not only to Corps enforcement action, 33 C.F.R. § 330.1(c), but also to civil or criminal action under either the ESA, 16 U.S.C. § 1540(a)(1), (b)(1), or for unauthorized discharge of

dredged or fill material under the Clean Water Act, 33 U.S.C. § 1319, as well as civil actions under the ESA's citizen-suit provision.

Plaintiffs provide no evidence that permittees are failing to comply with General Condition 18, and the district court "presume[d] that the Corps, the Services, and permittees will comply with all applicable statutes and regulations." 1-ER-57. Plaintiffs acknowledge that the Corps has received approximately 3,400 PCNs triggered in whole or in part by General Condition 18 since 2017, *see* Plaintiffs' Brief at 28, and the Corps has estimated that approximately *82 percent* of NWP 12's projected uses would be submitted to the Corps as part of a written request for NWP 12 authorization, 2-ER-259. Nor do Plaintiffs contend that the language of General Condition 18 is confusing or provides insufficient guidance to permittees. *See also* NWP 12 Coalition Brief at 31 (observing that the Fish and Wildlife Service provides a planning tool that informs project proponents about what species and critical habitat (if any) are in the area and might be impacted). Moreover, the Corps may impose — and has imposed — regional conditions, including conditions that provide additional layers of protection for listed species or habitat in a particular region. *See* Opening Brief at 11. And indeed, the only project as to which Plaintiffs seek relief — Keystone XL — complied with General Condition 18.

Plaintiffs' "delegation" theory also has no logical stopping point. If Plaintiffs are correct, it is not clear why programmatic consultation would even cure any such

"delegation": even following programmatic consultation, the Corps would still rely on non-federal permittees to submit PCNs for activities that might affect or are in the vicinity of listed species. More broadly, the position would imperil the entire nationwide permit program, as well as countless other federal permitting and authorization regimes. In any situation in which a private party must obtain a federal permit or authorization, the private party must determine *whether* the activity triggers the permit or authorization requirement. General Condition 18 is no different in this respect from the other General Conditions accompanying the nationwide permits, including the numerous other conditions that also address potential environmental effects. *See* Opening Brief at 27 (providing examples); 82 Fed. Reg. at 1998-99. The same is true, for example, of the requirement that permittees submit a PCN if discharges from a proposed project will "result in the loss of greater than 1/10-acre of waters of the United States." 82 Fed. Reg. at 1986.

General Condition 18 does effect any delegation of the Corps' ESA duties.

C. Plaintiffs' "aggregate impacts" argument is not a basis for requiring consultation.

Unable to dispute that NWP 12 does not itself authorize any species-affecting activities, Plaintiffs repeatedly speculate about what they describe as "the aggregate *impacts* to listed species from *all* NWP 12-authorized activities." Plaintiffs' Brief at 28; *see also id.* at 16, 26, 31, 33, 34, 38. First of all, this "aggregate" standard is not grounded in any statute or regulation. The regulation at 50 C.F.R. § 402.14,

which defines the scope and content of formal consultation and the resulting biological opinion, requires assessment of the cumulative effects of an action on listed species or critical habitat, but says nothing about a separate standard of "aggregate" impacts.

Putting this aside, Plaintiffs' effort to portray project-level review as some sort of "narrow[]" or siloed process, Plaintiffs' Brief at 32-33, is meritless. When consultation is initiated, one or both Services establishes the status and environmental baseline of any applicable species or critical habitat, and determines the effect of the action, *including cumulative effects*. 50 C.F.R. § 402.14(g)(3), (4). Determining the environmental baseline requires taking into account "the past and present impacts of *all* Federal, State, or private actions and other human activities in the action area," and the determination of cumulative effects includes all future state or private activities reasonably certain to occur within the action area. *Id.* § 402.02 (emphasis added).

Indeed, although Plaintiffs repeatedly contend that the cumulative-effects analysis is somehow insufficient, they appear to identify only one purported shortcoming: that it is limited to the proposed activity's "action area." Plaintiffs' Brief at 5-6, 32-33. But the "action area" for purposes of cumulative-effects analysis is "*all areas* to be affected *directly or indirectly* by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02 (emphasis added).

Moreover, a Clean Water Act general permit itself may encompass only activities that have minimal adverse environmental effects, *both separately and cumulatively*. *See* 33 U.S.C. § 1344(e)(1). And if consultation is necessary for activities subject to General Condition 18, that review is the same review that occurs under individual permit review. *See* Opening Brief at 35. Plaintiffs' attempt to shrug off that obvious problem with their position, *see* Plaintiffs' Brief at 34 n.8, is unpersuasive. Under Plaintiffs' own theory, ordinary individual permit review "cause[s] the piecemeal destruction of habitat or jeopardize[s] listed species through death by a thousand cuts." *Id.* at 2. That cannot be right, and Plaintiffs' argument is not right either.

D. The Corps' no-effect determination is consistent with the record.

Plaintiffs echo the district court's contention that there was "'resounding evidence' in this case that the Corps' reissuance of NWP 12 may affect listed species and their habitat." 1-ER-49 (some internal quotation marks omitted) (quoting *Kraayenbrink*, 632 F.3d at 498); Plaintiffs' Brief at 35. For this proposition, the court relied principally on the Corps' own statements as well as two extra-record declarations submitted solely for purposes of establishing Plaintiffs' standing.

As for the Corps' own statements, as we previously noted, those statements — from the Corps' *NEPA* analysis — do not address impacts to species at all. Opening Brief at 18, 31. Plaintiffs claim that this characterization "is incorrect" because "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." Plaintiffs' Brief at 36. But Plaintiffs' purported correction is incorrect: for this proposition, the district court relied on Plaintiffs' extra-record declarations (which we discuss separately below), not the Corps' own statements, which have nothing to do with impact to species.

And even putting aside that the statements on which the district court relied do not concern species, the statements are wholly unremarkable. Plaintiffs note the Corps' acknowledgments that NWP 12 "authorizes actual discharges . . . into jurisdictional waters," 1-ER-53 (citing 82 Fed. Reg. at 1985), and that "past versions of NWP 12 'have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources, ' " 1-ER-50. But every Clean Water Act permit — whether a nationwide permit or an individual permit — authorizes discharges of dredged or fill material into waters of the United States, 33 U.S.C. §§ 1311(a), 1344(a), (e), which of course will have direct and indirect impacts to aquatic resources. Plaintiffs' argument implies that any activity with direct or indirect impacts on the human environment also requires consultation, which assuredly is not the ESA standard.

That leaves Plaintiffs' two extra-record declarations. Both declarants are members of Plaintiff Center for Biological Diversity, and Plaintiffs do not dispute that they did not even *intend* for those declarations to be used for merits (as opposed to standing) purposes: Plaintiffs did not move to supplement the record to include

these two declarations, and they cited the declarations only in their discussion of standing when they moved for summary judgment. Opening Brief at 32. It was plainly improper for the district court to consider those declarations for merits purposes. Plaintiffs contend that ESA citizen suit claims can be resolved based on any admissible evidence. Plaintiffs' Brief at 37. Federal Defendants do not concede this is correct; but even if it is, this misses the point: because Plaintiffs did not move to supplement the record with these declarations, they were not admissible for merits purposes. Because Plaintiffs never even invoked the declarations in contesting the Corps' no-effect determination, the Corps could not reasonably have been expected to address them. As with the district court's broad remedy, the court's consideration of these materials flouted principles of party presentation and fair notice. *See* Opening Brief at 40-48.

In any event, presumably because not even Plaintiffs intended for the declarations to attack the Corps' ESA merits determination, they lend no support to the district court's decision. In total, the body of the declarations span approximately eleven pages of double-spaced text, much of which is devoted to the declarants' academic credentials and allegations of future injury intended to establish the authors' standing. *See* 3-ER-347–52, 368–74. To the extent that the declarants address the merits of the Corps' no-effect determination at all, the analysis is utterly conclusory: neither declarant even mentions General Condition 18 or the many other

nationwide permit provisions triggering site-specific review. Opening Brief at 32-33. The declarants only reference two species by name — the American burying beetle, 3-ER-348–51, and pallid sturgeon, 3-ER-370–73 — and neither mentions the regional conditions imposed by the Corps to provide extra protection to those two species in particular. Opening Brief at 33. It is preposterous to contend that such materials render the Corps' no-effect determination arbitrary or capricious.[2]

E. The Corps' no-effect determination is consistent with judicial precedent.

Contrary to Plaintiffs' argument, the Corps' determination that NWP 12's reissuance would not itself affect species or critical habitat accords with precedent from this Court and other courts. The only appellate decision addressing a no-effect decision that Plaintiffs invoke is this Court's decision in *Kraayenbrink*, from which the district court derived the "resounding evidence" standard. But that case bears no resemblance to this one and in fact simply underscores the comparative absence of evidence here.

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[2] Plaintiffs also discuss NMFS's BiOps in 2012 and 2014, Plaintiffs' Brief at 37-38, but those opinions likewise lend no support to the district court's decision. The 2012 opinion was superseded when NMFS issued its no-jeopardy opinion in 2014. Opening Brief at 38. As to the 2014 opinion, it found no jeopardy to listed species and in any event addressed a different and now expired permit. And in the 2017 opinion, the Corps *included* all the protective measures identified in the prior 2014 BiOp, except those NMFS itself recognized were infeasible. *Id.* Whatever NMFS might have believed about the prior permit, the agency was satisfied in 2017 following the resolution through the OMB process, and it acquiesced in the Corps' no-effect determination.

Kraayenbrink considered eighteen amendments to BLM grazing regulations that, among other effects, "alter[ed] ownership rights to water on public lands; increase[d] the barriers to public involvement in grazing management; and substantially delay[ed] enforcement on failing allotments, in ways that will have a substantive effect on special status species." 632 F.3d at 498. In other words, *Kraayenbrink* involved far-reaching regulatory changes that inherently affected listed species or critical habitat quite apart from the effects of individual projects. NWP 12 is different in kind: it is simply a permit that authorizes no activities that may affect listed species unless those activities undergo the same ESA consultation that would take place if the permit did not exist.

The differences between *Kraayenbrink* and this case do not end there. The "resounding evidence" that the proposed grazing amendments may affect listed species and critical habitat included (but was not limited to) the following:

- the amendments affected 160 million acres of public lands, home to hundreds of special status species, *id.* at 496;
- a BLM wildlife biologist concluded that "we are definitely in a 'may affect' situation and should therefore consult," *id.* at 497;
- a "lead representative from the BLM's Fish and Wildlife Program concluded that consultation was a 'no brainer,' " *id.*;
- "a BLM fisheries biologist concluded that 'several of the regulation changes within the proposed action are likely to adversely affect listed species which triggers the need to consult with FWS,' " *id.* (cleaned up);

- FWS squarely "concluded that the 2006 Regulations would affect status species and their habitat," *id.*;

- a BLM wildlife biologist who helped write the draft environmental impact statement submitted a declaration detailing numerous long term effects from the regulatory changes, *id.* at 497-98; and

- another longtime agency biologist and aquatic scientist submitted a declaration "detailing the effects the 2006 Regulations would have on ESA listed salmonids" as well as other adverse effects, *id.* at 498.

The extreme facts in *Kraayenbrink* obviously bear no resemblance to those here.

Plaintiffs' invocation of *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005) — on which the district court also heavily relied — is similarly unavailing. *Brownlee* did not concern Corps headquarters' reissuance of nationwide permits and, indeed, did not really even involve "programmatic consultation" of the sort at issue here. Rather, *Brownlee* addressed whether sufficient consultation had occurred with respect to regional conditions insofar as those conditions affected *one species* (the Florida Panther). 402 F. Supp. 2d at 11. Indeed, the plaintiff in *Brownlee* did not seek to enjoin the nationwide permits nationwide or require programmatic consultation; rather, it sought only to require the Corps to consult with the Services concerning the impacts of the permits on the Florida Panther. *See* Complaint ¶¶ 23-27, 48, and Prayer for Relief, 2003 WL 23781745 (D.D.C. June 26, 2003). On remand, the Corps district (not Corps headquarters) consulted with FWS to adopt various regional conditions to the NWPs for their use in Florida. *See* Motion for Voluntary Remand or in the Alternative to Stay ¶¶ 4-6,

2005 WL 6173605 (D.D.C. May 13, 2005). And of course, *Brownlee* involved several nationwide permits issued in 2002, three iterations before the permit here. To whatever limited extent this out-of-Circuit district court decision might be read as suggesting more broadly that programmatic consultation is required for the nationwide permit program, it is not persuasive and should not be followed here.

Plaintiffs' remaining cited authority, none of which involved a "no affect" determination, is even further afield. Contrary to Plaintiffs, *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), is not "instructive." Plaintiffs' Brief at 31. *Conner* involved the issuance of federal oil and gas leases on 1.3 million acres of forest land. 848 F.2d at 1443-44. The Forest Service determined that the sale of these oil and gas leases "might affect" listed species and initiated consultation with FWS. *Id.* at 1452. This Court concluded that FWS's resulting biological opinion was inadequate because it did not consider the effects of post-leasing activities. *Id.* at 1443-44, 1453-54. *Conner* thus considered the scope and content of a biological opinion following a might-affect determination by the action agency, not the reasonableness of an action agency's no-effect determination. Moreover, several of the leases at issue *did not permit* the government to preclude drilling, construction, or other surface-disturbing activities, and so it was certain that post-leasing activity would occur. *Id.* at 1443-54. Here, by contrast, no species-affecting behavior will take place unless and until such activities undergo the same ESA review that would take place absent NWP 12.

Contrary to Plaintiffs' argument, *see* Plaintiffs' Brief at 30, *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992), is also inapposite. The "Jamison Strategy" at issue in that case set "forth the criteria for selection of land for logging in the millions of acres administered by the BLM in Washington, Oregon and California" and "was designed to be implemented immediately." *Id.* at 291. BLM, the action agency in that case, never even made an effects determination and instead claimed that the strategy was not an "agency action" at all. *Id.* at 293. This Court rejected that contention. *Id.* at 294. Because the Jamison Strategy was issued directly in response to the listing of the northern spotted owl as a threatened species, *id.* at 291 — and "since it forth criteria for harvesting owl habitat," *id.* at 294 — this Court had no difficulty concluding that BLM was required to submit the Jamison Strategy for consultation. *Id.* The Corps' no-effect decision is fully consistent with *Lane County* and all of the other decisions on which Plaintiffs rely.

F. The Corps did not disregard its ESA duties at all, let alone its "known" ESA duties.

Finally, Plaintiffs repeat the district court's contention that the Corps was "well aware that its reauthorization of NWP 12 required Section 7(a)(2) consultation." Plaintiffs' Brief at 40 (quoting 1-ER-58); *see also id.* (claiming that the Corps unlawfully evaded "its known ESA duties"). But the effects question is an *objective* one, and Plaintiffs never intelligibly explain the legal relevance of this unfounded ad hominem attack on the Corps' motives. Although a Court "may inquire into the

mental processes of administrative decisionmakers upon a strong showing of bad faith or improper behavior," *Department of Commerce v. New York*, 139 S. Ct. 2551, 2556 (2019), Plaintiffs do not even allege any such showing here or otherwise assert that the agency's no-effect decision was pretextual.

Even putting that aside, Plaintiffs' contention that the Corps somehow knew it was required to engage in consultation is baseless. The sole piece of "evidence" that Plaintiffs muster for this purported conclusion is an email from a Corps employee in January 2014. Plaintiffs' Brief at 41 (discussing 3-ER-605). But a single predecisional email from an employee who was not the Corps' ultimate decisionmaker — a full *three years before the nationwide permits' reissuance* — is not meaningful evidence of anything. In any event, the email is utterly innocuous. For one, the email noted that if "we complete consultation on the 2012 NWPs, the biological opinion will be valid *until those NWPs expire*" but that "[*i*]*n the meantime*, if we modify any of those NWPs at the national level, that would be a trigger for re-initiating consultations. *So* for the 2017 NWPs we would have to do a new consultation." 3-ER-605 (emphasis added). In other words, the email was opining about what would be required if the Corps modified the 2012 NWPs before "those NWPs expire." And even more fundamentally, the email cannot reasonably be read as expressing an opinion that a no-effect determination on the next set of nationwide permits would be unlawful. Indeed, the email *recommends* precisely that course and

discusses ways of making that determination in a manner that would strengthen the Corps' legal position. *Id.* Plaintiffs observe that the email went on to say that if "we lose in federal court, then we would start doing the national programmatic consultations again," *id.*, *cited in* Plaintiffs' Brief at 41, but this is simply an accurate statement about the consequences of a hypothetical adverse judicial ruling.

While Plaintiffs labor to construct a sinister interpretation of this stray 2014 email, they have virtually nothing to say about any of the points discussed in the Corps' opening brief on this topic. For one, the Corps' no-effect determination was not an innovation in 2016-2017, but was consistent with the Corps' longstanding position. The Corps voluntarily initiated consultation in 2012, but it also took the position that consultation was not required. Opening Brief at 13. Moreover, the Corps has consistently issued nationwide permits even when initiated consultations have not been completed, including in 2012 (when FWS never completed the consultation). *Id.* at 37. Plaintiffs do not address this longstanding history. Indeed, under Plaintiffs' own theory, it would seem that all of the 2012 nationwide permits were also issued in violation of the ESA because FWS never issued a biological opinion. *See* 50 C.F.R. 402.14(h); *see also* Plaintiffs' Brief at 53 (noting that "the Corps has never completed consultation with FWS"). Yet in challenging the 2012 version of NWP 12, Sierra Club did not even *assert* an ESA claim. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1046-47 (10th Cir. 2015).

III. Vacatur of NWP 12 with respect to Keystone XL is unwarranted.

The district court initially vacated and enjoined use of NWP 12 in its entirety, contrary to the Plaintiffs' and the court's own representations; the court then largely doubled down in response to the Corps' motion for a stay pending appeal, awarding vacatur and injunctive relief that was still far broader than what Plaintiffs requested. Opening Brief at 17-21. The Supreme Court subsequently stayed the district court's vacatur and injunction, except as applied to the Keystone Pipeline. 2-ER-65. After defending a broad and disruptive remedy they never requested all the way up to the Supreme Court, Plaintiffs now "seek to maintain only the Keystone XL-specific portion of the vacatur." Plaintiffs Brief at 49.

Even if the Court concludes that programmatic consultation was required, any vacatur is inappropriate. As to vacatur generally, see Opening Brief at 52-55. Because Plaintiffs do not defend the district court's broad order of vacatur, the Corps does not discuss that issue further here.

In any event, the limited vacatur urged by Plaintiffs is both illogical and inappropriate. Plaintiffs cannot dispute that the Keystone project has received *extensive* environmental review. Keystone's environmental effects were analyzed in a 2013 ESA consultation with FWS (which resulted in a "no jeopardy" biological opinion); in a Final Supplemental Environmental Impact Statement issued by the Department of State in 2014; and in a supplemental ESA (and NEPA) analysis in

2019 (which once again found that Keystone XL would not jeopardize any protected species). Opening Brief at 15. Plaintiffs remain free to challenge that analysis. *See* Plaintiffs' Brief at 12 n.3, 13 (noting such challenges in this action and another in the District of Montana). The Corps accordingly agrees with TC Energy that, because FWS has already concluded that the Keystone project will not jeopardize listed species or critical habitat, there is no showing of harm that would justify any Keystone-specific vacatur or injunction. TC Energy Brief at 56-58.

More fundamentally, there is no *relationship* between the harms that Plaintiffs seem to think programmatic consultation is intended to prevent and a Keystone-specific vacatur. Plaintiffs' brief contends over and over again that the reason programmatic consultation is supposedly needed is to capture what they describe as NWP 12's "aggregate" effects. These arguments lack merit. *See supra* pp. 15-17. But in any event, a Keystone-*specific* vacatur would not address this asserted shortcoming in the slightest.

Finally, the Supreme Court's denial of a stay as to Keystone XL does not suggest that a Keystone-specific vacatur is appropriate. Unlike the other projects affected by the district court's order, Plaintiffs actually challenged the Keystone project in district court; the Keystone project therefore did not implicate the party presentation, fair notice, and nationwide injunction issues that the Corps presented as the primary bases for the stay application. Most plausibly then, the Court's denial

of relief as to Keystone simply indicates that the Court, at least at that preliminary stage, was not convinced that the merits consultation question here would *warrant certiorari*, as required to obtain a Supreme Court stay.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Dated: January 15, 2021.

Respectfully submitted,

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