Consolidated Case 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.
U.S. ARMY CORPS OF ENGINEERS, ET AL.,
Defendants/Appellants,

TC ENERGY CORPORATION, ET AL.,

STATE OF MONTANA, and

AMERICAN GAS ASSOCIATION, ET AL.,
Intervenors-Defendants/Appellants.

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

REPLY BRIEF OF APPELLANTS AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this appeal is whether the U.S. Army Corps of Engineers (Corps) properly determined that the challenged action—the tightly circumscribed set of activities authorized by the Headquarters' reissuance of Nationwide Permit (NWP) 12—has "no effect" on listed species or designated critical habitat for purposes of complying with the Endangered Species Act (ESA). Where an agency finds that its action has "no effect" on listed species or designated critical habitat, as the Corps did here, its ESA obligations are complete.

In defending the District Court's merits ruling below, Northern Plains[1] exhibits a fundamental misapprehension of both the ESA's statutory scheme and the scope of the action at issue—Headquarters' reissuance of NWP 12 in 2017.[2] Northern Plains contends that programmatic consultation was required because NWP 12 is "a 'program.'" Pls.' Answering Br. at 21, Dkt. 112. But Northern Plains completely ignores the ESA's focus on the action actually authorized by the agency, and fails to grapple with the specific scope of action Corps Headquarters authorized when it reissued NWP 12.

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[1] Appellees are Northern Plains Resource Council, Bold Alliance, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, and Friends of the Earth (collectively, "Northern Plains").

[2] The Corps published a final rule reissuing twelve NWPs, including NWP 12, and issuing four new NWPs, on January 13, 2021. 86 Fed. Reg. 2744 (Jan. 13, 2021). The 2021 NWPs will become effective on March 15, 2021.

As the NWP 12 Coalition explained, the ESA charges the action agency—here, the Corps—with determining first the scope of the action authorized and then the "effects," if any, on listed species or designated critical habitat. ESA § 7, 16 U.S.C. § 1536(a)(2). Where the action agency determines that the authorized actions have "no effect" on listed species or designated critical habitat, the agency's obligations under section 7 of the ESA are complete. Whether the "action" takes the form of a permit or program does not change how the statute works. Consultation is required if and only if the action "may affect" species or habitat.

Here, Corps Headquarters determined that the tightly circumscribed set of actions authorized by its reissuance of NWP 12 was limited to those that have "no effect" on listed species or designated critical habitat, and thus consultation was not triggered. 82 Fed. Reg. 1860, 1873 (Jan. 6, 2017). The Corps' determination was based on the numerous limitations incorporated in the NWPs, including General Condition (GC) 18, which closely confine the scope of actions authorized by Headquarters' reissuance of NWP 12. NWP 12 Coalition's Opening Br. at 7-10, Dkt. 82 (describing the many terms and restrictions that limit the scope of activities that may proceed under NWP 12 without further review and approval). GC 18 requires an applicant submit a pre-construction notification (PCN) for any future proposed use of NWP 12 that "might affect" or "is in the vicinity of" listed

species or designated critical habitat. 82 Fed. Reg. at 1999. Each PCN is a new proposed action that the Corps must evaluate and, where required, undertake appropriate ESA section 7 consultation before approving. *Id.* at 1874, 1999. These future actions that require submission of PCN and further review by the Corps were not part of the "action" authorized by the Headquarters' reissuance of NWP 12. And they were, thus, properly not considered by the Corps when the agency determined that reissuance of NWP 12 has "no effect" on listed species or habitat.

Northern Plains does not meaningfully contest this explanation of the ESA, or the scope of the action that was authorized by the Headquarters' reissuance of NWP 12. Instead, it asserts that the Corps was required to engage in programmatic consultation simply because NWP 12 is a "program." Not so. There is no unique requirement to consult for every agency action that can be described as a program. As with any other "action," the analysis turns on the scope of authorized activities. At issue here is the Headquarters' reissuance of NWP 12, and it specifically authorizes only those NWP 12 activities that have "no effect" on listed species or designated critical habitat. As such, no consultation was required.

With respect to the District Court's remedy, Northern Plains abandons much of what it was granted, all but conceding that the District Court vastly exceeded its authority. Throughout this litigation, Northern Plains has not hesitated to shift

positions whenever it seemed favorable to do so. It has done so again. Clearly chastised by the Supreme Court's stay, and implicitly acknowledging the strength of the NWP 12 Coalition's arguments, Northern Plains now gives up nearly all the remedy arguments previously presented to this Court and the Supreme Court in stay briefing. As to the limited arguments that remain, the NWP 12 Coalition joins with the Corps, Fed. Appellants' Reply Br. at 27-29, Dkt. 129, and does not address those issues further in this brief.

The District Court's order is wrong on the merits and remedy, and this Court should reverse.

ARGUMENT

I. Programmatic Consultation Is Not Required When the Agency Action Has "No Effect" on Listed Species or Designated Critical Habitat.

Northern Plains' main argument boils down to its contention that programmatic consultation is required simply because "NWP 12 constitutes *both* a 'permit' … *and* a 'program.'" Dkt. 112 at 21. But that argument is fatally incomplete, as it fails to consider the scope of the action authorized by the Headquarters' reissuance of NWP 12. The ESA mandates consultation only if the agency action "may affect" species or habitat. That requires a precise understanding of the action at issue and the scope of that action. Here, the Corps correctly concluded that it need not consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the Services)

because the action at issue—the Headquarters' reissuance of NWP 12—was limited to a tightly circumscribed set of authorized activities that have "no effect."

A. The Corps Met its Obligations Under the ESA by Assessing the Effect of Actions Authorized by the Headquarters' Reissuance of NWP 12 on Listed Species and Critical Habitat.

An agency's obligations under the ESA turn on what the action agency has chosen to approve. ESA section 7(a)(2) requires every federal agency to ensure that "any action authorized, funded, or carried out" *by that agency* "is not likely to jeopardize the continued existence" of listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). The Services' regulations likewise require the action agency to ensure the action "*it* authorizes," including authorization by permit, "is not likely to jeopardize" listed species or "result in the destruction or adverse modification" of designated critical habitat. 50 C.F.R. §§ 402.01(a), 402.02 (emphasis added).

It follows that, in determining whether consultation is required, an agency properly focuses on the action it has chosen to approve and assesses the effect of that action only. "[T]he duty to consult is bounded by the agency action." *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1208 (10th Cir. 2014). And where the action agency determines that its authorized action will have "no effect" on listed species or designated critical habitat, "consultation requirements are not triggered." *See Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*,

887 F.3d 906, 913 (9th Cir. 2018) (internal quotation marks and citation omitted). Upon reaching a "no effect" determination, the agency's ESA obligations are complete.

Here, in reaching its "no effect" determination for the Headquarters' 2017 reissuance of NWP 12, the Corps properly assessed only the tightly circumscribed set of activities actually authorized by that reissuance. 82 Fed. Reg. at 1873. The Corps' determination was based on the numerous limitations incorporated in the NWPs, including GC 18, which requires PCN for any activity that "might affect" or "is in the vicinity of" species or habitat. *Id.* at 1999. Submission of a PCN is a new proposed action that might be authorized *after* further agency review, including consultation consistent with the Services' regulations. *Id.* at 1874, 1999; 50 C.F.R. §§ 402.13, 402.14. But any activity that would trigger PCN is beyond the bounds of the Headquarters' reissuance of NWP 12—the action at issue here. And "[w]hen an agency action has clearly defined boundaries, [courts] must respect those boundaries and not describe inaction outside those boundaries as merely a component of the agency action." *WildEarth Guardians*, 759 F.3d at 1209. For the Headquarters reissuance, therefore, the Corps properly limited its assessment to only those NWP 12 activities that have "no effect" on listed species or habitat.

B. The Focus on What Is Actually Authorized by the Agency Action Applies to Programmatic Action, Too.

Northern Plains does not respond to the Coalition's explanation of the tightly defined scope of the action that is authorized by the Headquarters' reissuance of NWP 12. Rather, it contends that programmatic consultation was required simply because the NWPs are a "'framework programmatic action.'" Dkt. 112 at 22-24. According to Northern Plains, because NWP 12 constitutes both a permit "*and* a 'program,'" it "requires consultation at the *programmatic* level when issued by the Corps." *Id.* at 21 (emphases in original).

But there is no categorical rule under the ESA that requires consultation for every action that is a program. As the Services' regulations confirm, consultation is *not* required for programmatic action that has "no effect" on listed species or critical habitat. 80 Fed. Reg. 26,832, 26,835 (May 11, 2015). That is because the analysis is the same for every action, whether a "framework programmatic action" or otherwise: consultation is required if and only if the action "may affect" species or habitat.

The operative word in the statute is "action." 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.02 (defining agency "action" under the ESA as including "programs" and "permits"). "Consultation is called for to ensure that the *action* does not jeopardize endangered or threatened species." *WildEarth Guardians*, 759 F.3d at 1208. Thus, the ultimate question remains the same: what effect does the

authorized agency action, whether a program or otherwise, have on species and habitat? "[T]he ESA consultation requirement … cannot be invoked by trying to piggyback nonaction on an agency action by claiming that the nonaction is really part of some broader action." *Id.* at 1209.

The Services' regulations are consistent in their explanation of consultation for framework programmatic action. As the regulations explain, framework programmatic action can include activities immediately authorized without further agency approval, but also could contemplate future actions that might later be authorized. Thus, a framework programmatic action could be "a collection of activities of a similar nature, … *or* an action adopting a framework for the development of *future actions*." 80 Fed. Reg. at 26,835 (emphases added). And consistent with the statute, the regulations recognize that *future* actions are "subject to section 7 consultation requirements *at a later time as appropriate*." *Id.* (emphasis added).

That tracks precisely with what the Corps did here. In determining whether to consult with the Services when Headquarters reissued NWP 12, the Corps considered only the carefully confined scope of activities authorized by the Headquarters' reissuance of NWP 12. It did not consider future activities not authorized by reissuance of NWP 12. Those activities, if later proposed, would

require submission of PCN pursuant to GC 18 and be subject to further agency review and ESA consultation, at that time as appropriate.

Absent this focus on the actually authorized action, the consultation requirement would have no stopping point. If agencies had to consider not only the self-executing reach of the agency action, but also all potential *future* actions that might be later proposed, reviewed, and approved under a framework, there would be no logical end. "The agency would have to set forth everything it might do." *WildEarth Guardians*, 759 F.3d at 1209. "And requiring consultation on everything the agency might do would hamstring government regulation in general and would likely impede rather than advance environmental protection." *Id.* As the Corps explains, this position is untenable, not only for the NWPs, but for "countless other federal permitting and authorization regimes." Dkt. 129 at 15.

Northern Plains is thus wrong in contending that the Headquarters' reissuance of NWP 12 required consultation simply because it is a "program." Actions with "no effect"—whether a framework programmatic action or otherwise—do not require consultation. 80 Fed. Reg. at 26,835 (confirming that "this … [rule] does not imply that section 7 consultation is required for a framework programmatic action that has no effect on listed species or critical habitat") (emphasis added). Indeed, even Northern Plains eventually concedes that

"framework programmatic actions that truly have no effect on listed species … would not require … consultation." Dkt. 112 at 43.

As the Coalition previously explained, not a single case cited by the District Court—the same cases on which Northern Plains now relies—is to the contrary. Dkt. 82 at 35-38. Northern Plains admits, as it must, that most of the cases "did not involve 'no effect' determinations." Dkt. 112 at 29. They thus say nothing about the question here: whether the Corps was correct to look only at its authorized action in determining that the action at issue has "no effect."

The case that Northern Plains singles out as "squarely on point"—*Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992)—is actually the farthest afield. The agency's error there was choosing not to make any effects assessment, claiming it had not taken any "action" at all. There is no dispute that the Corps took action here; the question is the *scope* of the agency action relevant to the effects assessment. In short, Northern Plains' cases speak to entirely different questions at different stages in the ESA consultation process and are not "still relevant" simply because Northern Plains proclaims them to be. Dkt. 112 at 29.

Nor is there merit to Northern Plains' assertion that the Corps' approach would render programmatic consultation "'superfluous.'" Dkt. 112 at 25. To the contrary, the argument reveals a critical misunderstanding. Northern Plains attacks

the Corps and the Coalition for contending that "programmatic consultation is not required [whenever] project-specific consultations will [later] occur." *Id.* But no one is taking that position.

Whether programmatic consultation is needed for a particular action is *independent* of whether project-specific consultation will later occur. As explained above, consultation turns on the scope of the agency's authorized action. If an action is a program, and that action "may affect" species or habitat, then programmatic consultation would be required. And if the action is narrowly cabined such that it has "no effect," then programmatic consultation is not required. Whether project-specific consultation might or might not later occur is irrelevant in either circumstance. Northern Plains' concern is thus entirely misplaced.[3]

[3] Project-specific consultation has been discussed in this case only to ensure the Court has a complete understanding of the NWP regime. Here, the Corps did not consult with the Services about the Headquarters' reissuance of NWP 12 because that reissuance (the "action") does not authorize any activities that affect species or habitat. That is the end of the Corps' ESA obligations for purposes of the action challenged in this case. But, as noted, that tightly circumscribed "action" means that the Corps must, and will, undertake project-specific consultation for future actions—such as those PCNs submitted for review and approval as required under GC 18—as appropriate.

II. Northern Plains' Remaining Arguments Fail Because They Ignore the Scope of the Action Authorized by the Corps' Reissuance of NWP 12.

Northern Plains' other arguments all suffer from this same fatal flaw: failure to recognize and appreciate the Corps' role of determining the authorized "action" and then evaluating whether that *specific* action has effects.

A. GC 18 Does Not Unlawfully Delegate the Initial ESA Section 7 Effects Determination to Applicants.

Like the District Court, Northern Plains argues that GC 18 improperly delegates the initial ESA "effects" review to potential permittees. Dkt. 112 at 44-48. But Northern Plains has no response to the Coalition's explanation that this argument confuses applicants' compliance with a permitting regime, on the one hand, with the Corps' responsibility to assess the scope of the authorized action under that regime, on the other.

As the Coalition explained (Dkt. 82 at 29-32), like in many permitting programs, it is incumbent on a prospective NWP 12 permittee to make an initial determination whether the proposed activity meets the requirements of the permit. Those requirements include GC 18, which excludes any activity that "might affect" or "is in the vicinity of" species or habitat from authorization. 82 Fed. Reg. at 1999. The potential permittee bears the burden of complying with GC 18 and all other limitations.

That burden of compliance on the potential permittee, however, does not mean that the Corps has "delegated" any of its responsibilities. It has still exercised its responsibilities under the ESA to determine the scope of the authorized action, and then assessed the effect of that action on listed species and habitat. Simply stated, the Corps' before-the-fact job of defining the agency action and assessing the effects of that action is distinct and independent from an applicant's after-the-fact job of complying with the permitting regime.

B. The Corps' "No Effect" Determination Is Consistent with the Record.

Northern Plains also contends there is "'resounding evidence'" in the record that the Corps' Headquarters reissuance of NWP 12 "may affect" listed species, and, therefore, the Corps should have initiated section 7 consultation. Dkt. 112 at 35. But again, Northern Plains' argument is built on its fundamentally flawed view of the reach of Headquarters' reissuance of NWP 12. Properly looking only at the carefully circumscribed set of actions authorized by the Headquarters' reissuance, the administrative record amply supports the Corps' "no effect" determination.

As the Coalition explained (Dkt. 82 at 23-25), the District Court based its holding that the Corps' "no effect" determination was arbitrary and capricious on selective and irrelevant snippets from the record. Relying on *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011), the court parsed limited statements from the Corps' NEPA analysis (which did not address species)

and "expert" declarations submitted by Northern Plains to establish standing as to its Keystone XL allegations (which also did not address potential impacts to species resulting from the "action"—Headquarters' reissuance of NWP 12). These statements have no bearing on whether the NWP 12 activities *authorized* by the Headquarters' reissuance of NWP 12 have effects on species. They are thus materially different from the agency expert statements made by Bureau of Land Management wildlife staff and FWS in *Western Watersheds* regarding impacts that *would* occur as a result of *actually authorized* activities. Indeed, unlike in *Western Watersheds*, the Services expressed *no concern* here about the Corps' "no effect" determination.

In an attempt to rehabilitate the District Court's decision, Northern Plains now points to statements in a 2014 Biological Opinion issued by the NMFS on an expired iteration of the NWPs, which it claims "establish that NWP 12 'may affect' myriad listed species." Dkt. 112 at 37. But Northern Plains fails to explain how statements made by NMFS on the 2012 NWPs have any bearing on the actions authorized by the Corps' 2017 reissuance of the NWPs. Nor could it. Not only was the 2014 Biological Opinion issued for the prior version of the NWPs, which were replaced by the 2017 NWPs, but the Corps included all of the protective measures identified in the 2014 Biological Opinion in the 2017 NWPs,

and NMFS acquiesced in the Corps' "no effect" determination for the 2017 NWPs during the OMB process. Dkt. 129 at 20 n.2.

C. Cumulative Effects Are Properly Reviewed.

Finally, Northern Plains argues that, by looking only at the effects of the actions authorized by Headquarters' reissuance of NWP 12, the Corps failed to consider cumulative impacts of future projects. Dkt. 112 at 32-34. But this does not identify any error in the Corps' definition of the scope of authorized action; it merely identifies a consequence of that definition with which Northern Plains disagrees as a policy matter. If the Corps properly defined and considered only the scope of actions authorized by the reissuance of NWP 12, as explained above, it was not required under the ESA to consider any effects of future, yet-to-be-proposed-or-approved projects. Moreover, it is undisputed that the Corps *will* properly analyze cumulative effects to species each time it reviews a project-specific PCN, pursuant to GC 18 and the applicable ESA regulations. 50 C.F.R. § 402.02.

CONCLUSION

This Court should reverse the District Court's order.

Date: February 25, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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