

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,

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

STATE OF MONTANA
Intervenor-Defendants/Appellants.

Appeal from the United States District Court for the
District of Montana

No. 4:19-cv-00044 (Hon. Brian Morris)

STATE OF MONTANA'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
1. Programmatic consultation is unnecessary when the alleged harm results from one project already subject to extensive review	4
2. NPRC’s arguments, if accepted, threaten the reliability and development of critical energy infrastructure	9
CONCLUSION	13
CERTIFICATE OF COMPLIANCE.....	14

TABLE OF AUTHORITIES

Cases

<i>Nat’l Wildlife Fed’n v. Brownlee</i> , 402 F. Supp. 2d 1 (D.D.C. 2005).....	6
<i>Optimus Steel, LLC v. United States Army Corps of Eng’rs</i> , 2020 U.S. Dist. LEXIS 183571 (E.D. Tex. Oct. 4, 2020)	7-8
<i>Sierra Club v. Fed. Energy Reg. Comm’n</i> , Case No. 20-1512, Order Denying Stay (D.C. Cir. Feb. 19, 2021) ...	10
<i>Sierra Club v. U.S. Army Corps of Eng’rs</i> , 2020 U.S. Dist. LEXIS 156337 (W.D. Tex. Aug. 28, 2020)	7
<i>Sierra Club v. United States Army Corps of Eng’rs</i> , 981 F.3d 251 (4th Cir. 2020)	10

Federal Materials

Federal Register	
82 Fed. Reg. 1860 (Jan. 6, 2017)	8, 9
85 Fed. Reg. 50,043 (Aug. 17, 2020)	5

Other Authorities

James W. Coleman, <i>Pipelines & Power-lines: Building the Energy Transport Future</i> , 80 Ohio St. L.J. 263, 296 (2019)	10, 12
Jason Hayes, <i>Texas blackouts warning to Biden and all of us: Renewables do play a role in grid problems</i> , USA Today (Feb. 22, 2021)	1
Ryan W. Miller, ‘ <i>Massive failure</i> ’: <i>Why are millions of people in Texas still without power?</i> , USA Today (Feb. 18, 2021)	1
Fed. Energy Reg. Comm’n, <i>Energy Primer: A Handbook of Energy Market Basics</i> (2020)	2
Fed. Energy Reg. Comm’n, <i>Report on Outages and Curtailments During the Southwest Cold Weather Event of Feb. 1–5, 2011</i> (2011)	12

INTRODUCTION AND SUMMARY OF ARGUMENT

The Nation's energy infrastructure in recent weeks has been pushed to the brink by extremely cold weather. In Texas and the Midwest, some energy systems failed altogether, causing millions to lose electricity and heat when they needed it most.¹ Initial reports indicate underperforming renewable energy sources, power plant freeze-ups, and natural gas shortages due to high demand and frozen infrastructure, in part, contributed to these rolling blackouts.²

From this icy fiasco we've relearned a hard lesson: right now and in the foreseeable future we need a wide variety of energy sources—including fossil fuels—to maintain reliable service during periods of high

¹ See Press Release, North American Electric Reliability Corporation, FERC, NERC to Open Joint Inquiry into 2021 Cold Weather Grid Operations (Feb. 16, 2021), <https://www.nerc.com/news/Pages/FERC,-NERC-to-Open-Joint-Inquiry-into-2021-Cold-Weather-Grid-Operations.aspx>.

² Ryan W. Miller, *'Massive failure': Why are millions of people in Texas still without power?*, USA Today (Feb. 18, 2021), <https://www.usatoday.com/in-depth/news/nation/2021/02/16/texas-weather-power-outage-rolling-blackouts-leave-millions-dark/6764764002/>; Jason Hayes, *Texas blackouts warning to Biden and all of us: Renewables do play a role in grid problems*, USA Today (Feb. 22, 2021), <https://www.usatoday.com/story/opinion/2021/02/22/renewable-energy-part-cause-texas-blackouts-column/6772677002/>.

demand and supply constraints.³ In particular, we still need pipelines like Keystone XL (“Keystone”) to reliably transport reliable energy sources for use throughout the country.⁴

Of course, that reality runs headlong into Plaintiffs’ (collectively, “NPRC”) preferred world, in which fossil fuels are left in the ground and renewable energy sources meet all our energy needs. That is not the real world, at least not yet. And as the State of Montana has pointed out, NPRC’s attacks on programs such as Nationwide Permit 12 (“NWP-12”) make it more difficult for renewables to be reliably integrated into the grid. *See* Doc. 77 at 15–19.

NPRC principally seeks to halt the construction and operation of Keystone. But it does so by attacking the validity of the umbrella NWP-12, a broad provision designed to streamline approval of utility lines under the Clean Water Act, on the grounds that NWP-12 should be

³ *See* Fed. Energy Reg. Comm’n, *Energy Primer: A Handbook of Energy Market Basics*, 19 (2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_Final.pdf (“Supply diversity tends to improve *reliability* and moderate prices, while constraints increase prices.”) (emphasis added).

⁴ This is why the Montana Attorney General called on President Biden to reconsider his revocation of Keystone’s cross-border permit, and is preparing legal action to reverse it, if necessary. *See* Press Release, Mont. Dep’t of Justice, Attorney General Knudsen Leads Coalition Calling on Biden to Reinstate Keystone XL Permit (Feb. 9, 2021), <https://dojmt.gov/attorney-general-knudsen-leads-coalition-calling-on-biden-to-reinstate-keystone-xl-permit/>.

subjected to duplicative and unnecessary environmental review. They overlook that NWP-12 contains a mechanism by which the Army Corps of Engineers (“Corps”) and the putative permittee may conduct project-specific environmental consultations—and that the Corps and TC Energy have undertaken those consultations. The sweep of NPRC’s arguments, and the logical results of the district court’s decision, will subject other critical energy infrastructure projects relying on NWP-12 to additional, duplicative review, leading to further indefinite delay. Perhaps that’s the point, as certain amici curiae point out. *See* Doc. 118-2 at 23 (Defenders of Wildlife, *et al.*, arguing that two other pipelines should be blocked because NWP-12 did not undergo programmatic consultation).

Montana’s critical energy infrastructure is more winterized than other regions of the U.S., but it still faces energy supply threats from natural disasters such as severe storms or wildfires. Mont. Suppl. ER 13. The district court’s decision makes building and repairing infrastructure to address these threats more difficult. This Court should reverse it so that NWP-12 may continue to function as designed and Appellants may continue to responsibly develop the Keystone XL Pipeline as a positive, reliable contribution to our national energy supply.

ARGUMENT

1. Programmatic consultation is unnecessary when the alleged harm results from one project already subject to extensive review.

In the federal appellants' reply brief, they point out the absurdity of requiring programmatic consultation for alleged environmental harms stemming from just one project—particularly *this* project, which has complied with its environmental consultation requirements. *See* Doc. 129 at 14 (“the only project as to which Plaintiffs seek relief — Keystone XL — complied with General Condition 18.”). In short, even if NPRC was entitled to its requested relief (it is not), there’s no good argument why programmatic consultation is the proper remedy. Both the district court and NPRC fail to identify any other impacts that cry out for programmatic review rather than the project-specific review already available under General Condition 18.

Clearly, the district court was concerned with the speculative environmental harms related to just one project: Keystone. The district court examined two expert statements describing the potential impacts

on the American burring beetle and pallid sturgeon. ER 1-53.⁵ For the pallid sturgeon, the expert identified two concerns: (1) potential release of sediment from the construction of Keystone using the horizontal directional drilling method, ER 3-370–71 (¶¶ 10–11), and (2) Keystone potentially creating oil spills, *id.* 3-371–72 (¶ 13). These concerns were based on the expert’s understanding that Keystone would go through “crossings of the Missouri and Milk Rivers” in Montana. *Id.* 3-371 (¶ 11).

For the American burring beetle, the expert only identified potential oil spills from Keystone as a concern. *Id.* 3-350 (¶ 12). While this expert’s declaration does not explain where Keystone would interface with the American burring beetle, *id.* 3-347–52, administrative action specific to Keystone reveals that these impacts would occur in “Tripp County, South Dakota, and Antelope, Boyd, Holt, and Keya Paha Counties, Nebraska.” 85 Fed. Reg. 50,043. These experts’ declarations, which the district court relied on in requiring programmatic consultation, mention *only* Keystone and no other project.

⁵ Federal appellants identify good reasons for why these declarations should not have been considered for the district court’s ESA analysis in the first instance. *See* Doc. 129 at 21–24.

By comparison, the plaintiffs in *Nat'l Wildlife Fed'n v. Brownlee*, challenged four separate nationwide permits: NWP-12 at issue here; NWP-14 for linear transportation crossings; NWP-39 for residential, commercial, and institutional development in non-tidal areas; and NWP-40 for agricultural activities in non-tidal areas. 402 F. Supp. 2d 1, 3 (D.D.C. 2005). Further, they did not challenge any particular project, but instead argued, which the district court agreed with, that “overall consultation for the NWPs is necessary to avoid piece-meal destruction of panther habitat through failure to make a cumulative analysis of the program as a whole.” *Id.* at 10.⁶ In other words, section 7 programmatic consultation is intended to prevent harm to species through “death by a thousand cuts.” Doc. 112 at 39.

Here, the only articulated potential impacts are from *one* project operating under the auspices of NWP-12: Keystone. Accordingly, ESA

⁶ The *Brownley* court ordered programmatic consultation with some amount of trepidation. 402 F. Supp. 2d at 10, n.16 (“The relationship between that site-specific consideration and the overall consultation that is the subject of this suit *remains to be worked out*”) (emphasis added). As the federal appellants point out, the voluntary remand in *Brownlee* was limited to just the Corps district “to adopt various regional conditions to the NWPs for their use in Florida.” Doc. 129 at 27. In contrast, the district court placed no such limitations on its order for remand and instead provided the wide-ranging and generic instruction for the Corp to conduct ESA Section 7(a)(2) consultation. ER 1-59.

section 7 consultation, where required, *should* be limited to just Keystone. The district court identified no other projects or nationwide permits that would impose harm on the American burring beetle or pallid sturgeon. *Compare* ER 1-52–53 (the district court basing its ESA findings on two species only impacted by Keystone) *with* Doc. 118-2 (amici Defenders of Wildlife, *et al.*, arguing that the cumulative effects of the Mountain Valley Pipeline and the now canceled Atlantic Coast Pipeline should have been evaluated together). General Condition 18 serves as a targeted and simple solution to addressing the environmental risks that NPRC raises in this litigation. NPRC has acknowledged that their requested relief is limited to Keystone, *see* Doc. 112 at 48–49, so it makes no sense in this case to require programmatic consultation.

From this, two distinct conclusions emerge. First, Keystone has already complied with ESA section 7 requirements and more than any other project, it should be approved. *See* Doc. 70 at 24–25 (describing the pre-construction notice and individual permits that TC Energy has submitted to the Corps). Indeed, such targeted review has satisfied the U.S. Army Corps of Engineers’ section 7 obligations in another case concerning NWP-12. *See Sierra Club v. U.S. Army Corps of Eng’rs*, 2020

U.S. Dist. LEXIS 156337 (finding review for 129 individual water crossings of the Permian Highway Pipeline under General Condition 18 was adequate to satisfy the Corps' ESA obligations); *see also Optimus Steel, LLC v. United States Army Corps of Eng'rs*, No. 1:20-CV-00374, 2020 U.S. Dist. LEXIS 183571, *9–10, *25–27 (E.D. Tex. Oct. 4, 2020) (in another challenge to a pipeline relying on NWP-12, plaintiff lacked standing under the ESA because the applicant's pre-construction notification, as verified by the Corps, revealed that no "ESA-protected species or critical habitat is present on [plaintiff's] property"). Had the district court engaged in a similar targeted review, Keystone would have satisfied its section 7 obligations, which is why NPRC had to invent an additional requirement for programmatic consultation.

Second, the satisfaction of Keystone's section 7 obligations through General Condition 18 review is precisely what the Corps said would occur when it made its "no effect" determination in reissuing NWP-12. *See* 82 Fed. Reg. 1860, 1873 (Jan. 6, 2017). Accordingly, as the other appellants have advocated, this Court should provide the Corps deference in this determination.

2. NPRC's arguments, if accepted, threaten the reliability and development of critical energy infrastructure.

From the very beginning of this litigation, Montana has sounded the alarm about the wide ranging and disruptive impacts of NPRC's arguments and request for relief. *See* Doc. 77 at 2–6, 12–14. NPRC argues these “concerns are now irrelevant” because of “Plaintiffs’ more limited request to maintain vacatur as to Keystone XL.” Doc. 112 at 68; *See also* 82 Fed. Reg. at 1873 (“The Corps’ inability to use NWP 12 to authorize a single project cannot plausibly strain the agency’s resources or cause widespread permitting delays to other pipelines.”). But that is merely deferring mischief for a later day. NPRC’s demand for programmatic consultation implicates the entire program, NWP-12. Future litigants could easily repackage NPRC’s arguments to obstruct electricity transmission lines, or any other utility lines, that might rely on NWP-12.

They’ve already told us so. Amici curiae Defenders of Wildlife, *et al.*, argue that NWP-12 was also improperly issued for the Mountain Valley Pipeline and the now canceled Atlantic Coast Pipeline. *See* Doc. 118–2, 23–28. To support this position, they raise concerns about the logperch, Indiana bat, and clubshell species in the Appalachian region.

82 Fed. Reg. at 1873. No doubt, if NPRC's arguments are accepted by this Court, these amici and others will use this Court's opinion to block the construction of other energy projects.

Subjecting NWP-12 projects to both programmatic consultation *and* General Condition 18 review increases the opportunities for opponents to block the construction of utility lines. *See* James W. Coleman, *Pipelines & Power-lines: Building the Energy Transport Future*, *supra*, at 296, https://scholar.smu.edu/cgi/viewcontent.cgi?article=1037&context=law_faculty ("Multiple veto gates just mean more opportunities to kill proposed investments—and that is true whether those investments are in oil, gas, or renewable power transport."). Indeed, the Mountain Valley Pipeline, which amici seek to thwart, has already been approved under the Natural Gas Act. *See* Doc. 118-2 at 17, n.5; *Sierra Club v. Fed. Energy Reg. Comm'n*, Case No. 20-1512, Order Denying Stay (D.C. Cir. Feb. 19, 2021) (denying amici's last-ditch effort to stay FERC's approval of the Mountain Valley Pipeline under the Natural Gas Act). No matter, amici will now simply use NPRC's blueprint of facially attacking NWP-12 in order to prevent or delay the construction of this project and others they do not like. *See Sierra Club v. United States Army Corps of Eng'rs*,

981 F.3d 251, 257–58 (4th Cir. 2020) (denying the same ESA section 7 programmatic consultation arguments for lack of jurisdiction).

Like Montana, *see* Mont. Suppl. ER 11–13, other groups have pointed out that NWP-12 is essential for both building and repairing critical infrastructure, *see* Doc. 95-2 (amici Edison Electric Institute, *et al.*, stating “NWP 12 plays a particularly important role in emergency situations where electric or telecommunications lines are damaged by extreme weather or some other cause”); Doc. 94-2 at 20 (amici Essential Infrastructure Coalition stating its “members use NWP 12 to facilitate construction, maintenance, and repair of electric transmission and distribution lines and substations; gas transmission, gathering, storage, and distribution pipelines; and pipelines for transporting water and wastewater.”); Doc. 96 at 17 (amici West Virginia, *et al.*, citing Electric Reliability Council of Texas (“ERCOT”), for the proposition that, “As the nation’s demand for electricity expands, so too must the fuel supply” and “in recent years, this need has been met more and more by oil and natural gas.”).

At the very least, recent severe weather makes clear that the U.S. will have to rapidly improve and winterize segments of its energy

infrastructure, and those projects will likely rely upon NWP-12. *See, e.g.,* Fed. Energy Reg. Comm’n, *Report on Outages and Curtailments During the Southwest Cold Weather Event of Feb. 1–5, 2011*, 209 (2011), <https://www.ferc.gov/sites/default/files/2020-04/08-16-11-report.pdf> (identifying several capital improvements that electricity transmission operators could make to further winterize utility lines); *see also id.* at 216–17 (the same for natural gas distribution). But the district court’s declaration that the Corps’ 2017 reissuance of NWP-12 required programmatic consultation cast that ability into doubt. Even if these projects survive the review, increased regulatory risk creates additional costs and delays in repairing and constructing these projects. *Coleman, supra*, at 293–95 (explaining how increased regulatory risks demands higher rates of return for linear infrastructure).

Further, because this same alleged procedural defect applies to all utility line projects, NPRC’s arguments may be reused to attack long-range electricity transmission line projects, which are necessary to integrate *renewable* energy into the U.S. grid. *See* Doc. 77 at 15–19 (Montana’s summary of this issue in its opening brief). The district

court's decision will therefore undermine the very green energy projects NPRC ostensibly wants to promote.

CONCLUSION

NPRC isn't entitled to any relief here. Keystone and the Corps have been and continue to be engaged in consultations under General Condition 18. That meets Section 7's obligations. The breadth of the NPRC's arguments and the district court's decision call every NWP-12 project into question—not just Keystone. In this case, the cure far outstrips an illness that doesn't even exist. For the reasons stated above and those articulated by the other Appellants, this Court should reverse the district court's order.

Respectfully submitted this 25th day of February, 2020.

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FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

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

I am the attorney or self-represented party.

This brief contains 2,474 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).

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Signature /s/ Jeremiah Langston

Date February 25, 2021