

Case Nos. 20-35412, 20-35414, 20-35415 & 20-35432

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNSEL, ET AL.,
Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,
Defendants-Appellants,

TC ENERGY CORPORATION, ET AL.,
Intervenor-Defendants-Appellants,

STATE OF MONTANA,
Intervenor-Defendant-Appellant,

and

AMERICAN GAS ASSOCIATION, ET AL.,
Intervenor-Defendants-Appellants.

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

**REPLY BRIEF OF APPELLANTS TC ENERGY CORPORATION
AND TRANSCANADA KEYSTONE PIPELINE LP**

Joseph R. Guerra
Peter Whitfield
Kathleen M. Mueller
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jguerra@sidley.com

*Attorneys for Appellants
TC Energy Corporation and
TransCanada Keystone Pipeline LP*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
I. THE DISTRICT COURT ERRED IN OVERTURNING THE CORPS’ “NO EFFECT” DECISION.	5
A. NWP 12 Was Not Subject To Programmatic Consultation....	5
1. Programmatic consultation was not required as a matter of law.	5
2. Plaintiffs’ policy arguments for mandatory programmatic consultation are misplaced.	12
B. The Corps’ “No Effect” Determination Was Not Arbitrary Or Capricious.	14
C. Plaintiffs Failed To Make The Strong Showing Necessary To Establish That The Corps Knowingly Evaded Its Lawful Duties.....	17
D. The Corps Did Not Delegate Its Duty To Permittees.....	20
II. The District Court’s Injunction and Vacatur Ruling Should Be Reversed.....	23
A. There Is No Basis For Vacating NWP 12 For Keystone XL Alone.	24
B. The Lower Court Erred By Vacating NWP 12 For All New Oil And Gas Pipelines.	30
1. The Corps’ failure to consult was not a “serious” error.	31
2. The disruption and financial harm factors weighed heavily against vacatur.	33
CONCLUSION	36
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Amoco Prod. Co. v. Vill. of Gambell</i> , 480 U.S. 531 (1987)	35
<i>California ex. rel. Becerra v. Azar</i> , 950 F.3d 1067 (9th Cir. 2020), <i>cert. granted sub nom.</i> , 2021 WL 666372 (U.S. Feb. 22, 2021) (No. 20-429)	22
<i>Citizens for Better Forestry v. USDA</i> , 481 F. Supp. 2d 1059 (N.D. Cal. 2007)	10
<i>Conner v. Burford</i> , 848 F.2d 1441 (1988)	9, 10, 17, 20
<i>Cottonwood Env't Law Ctr. v. U.S. Forest Serv.</i> , 789 F.3d 1075 (9th Cir. 2015)	9, 31
<i>Defs. of Wildlife v. EPA</i> , 420 F.3d 946 (9th Cir. 2005), <i>rev'd and remanded by Nat'l</i> <i>Ass'n of Home Builders v. Defs. of Wildlife</i> , 551 U.S. 644 (2007)	28, 31
<i>Defs. of Wildlife v. Flowers</i> , 414 F.3d 1066 (9th Cir. 2005)	20
<i>Dep't of Commerce v. New York</i> , 139 S. Ct. 2551 (2019)	17
<i>Gov't of Province of Manitoba v. Zinke</i> , 849 F.3d 1111 (D.C. Cir. 2017)	27
<i>Kisor v. Wilkie</i> , 139 U.S. 2400 (2019)	19, 21
<i>Lane Cnty. Audubon Soc'y v. Jamison</i> , 958 F.2d 290 (9th Cir. 1992)	9, 10

<i>California ex rel. Lockyer v. USDA</i> , 575 F.3d 999 (9th Cir. 2009).....	9
<i>Lowry v. Barnhardt</i> , 329 F.3d 1019 (9th Cir. 2003).....	34
<i>Nat’l Ass’n of Home Builders v. Defs. of Wildlife</i> , 551 U.S. 664 (2007).....	19, 31
<i>Nat’l Parks Conservation Ass’n v. Jewell</i> , 62 F. Supp. 3d 7 (D.D.C. 2014).....	28, 29, 31
<i>Nat’l Wildlife Fed’n v. Brownlee</i> , 402 F. Supp. 2d 1 (D.D.C. 2005).....	13
<i>Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.</i> , 886 F.3d 803 (9th Cir. 2018).....	27, 33
<i>Nat’l Family Farm Coal. v. EPA</i> , 966 F.3d 893 (9th Cir. 2020).....	1, 2, 5, 11, 19
<i>Pac. Rivers Council v. Thomas</i> , 30 F.3d 1050 (9th Cir. 1994).....	6, 13
<i>Pollinator Stewardship Council v. EPA</i> , 806 F.3d 520. (9th Cir. 2015).....	33
<i>San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson</i> , 548 U.S. 1301 (2006).....	29
<i>W. Watersheds Project v. Kraayenbrink</i> , 632 F.3d 472 (9th Cir. 2011).....	2, 9, 14, 16, 17
<i>Whaley v. Schweiker</i> , 663 F.2d 871 (9th Cir. 1981).....	7
<i>WildEarth Guardians v. EPA</i> , 759 F.3d 1196 (10th Cir. 2014).....	11
Statutes	
5 U.S.C. § 702	27

16 U.S.C. § 1540(a)(1), (b)(1)	22
16 U.S.C. § 1540(g)	22
33 U.S.C. § 1319.....	22

Other Authorities

33 C.F.R. § 330.1(c).....	22
50 C.F.R. § 402.14(a)	6, 19
51 Fed. Reg. 19,926 (June 3, 1986)	7
80 Fed. Reg. 26,832 (May 11, 2015).....	7, 8
82 Fed. Reg. 1860 (Jan. 6, 2017)	21

INTRODUCTION AND SUMMARY OF ARGUMENT

Agency actions may be structured so that they do not affect species or habitat protected by the Endangered Species Act (ESA). *See Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 925 (9th Cir. 2020). That is what the U.S. Army Corps of Engineers (Corps) did here. Nationwide permit (NWP) 12 automatically authorizes only activities that will not affect protected species or habitat. Activities that are in the vicinity of, or that “might affect,” protected species are *prohibited* unless a permittee obtains a separate authorization—*i.e.*, a “no effect” finding from the Corps or authorization to proceed after the Corps consults with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (the Services). The Corps found that reissuance of a permit so structured will not affect protected species or habitat.

The district court should have deferred to that reasonable conclusion. Instead, the court substituted its own “may affect” determination based on its own mistaken policy judgments. Plaintiffs’ efforts to defend that ruling are unavailing.

Indeed, plaintiffs repeatedly attempt to evade or deny the deferential standard of review that applies here. They argue that the

Services’ regulations mandated programmatic review for NWP 12, and that the Corps’ contrary view is not entitled to deference. But the Services have confirmed that their regulations require programmatic review only *if* a program “may affect” protected species, and that the action agency, not the Services, makes that determination. The Corps’ “no effect” decision, therefore, could be overturned only if it was irrational. *Nat’l Family Farm Coal.*, 966 F.3d at 924.

None of the supposedly “resounding evidence” the district court cited below supports such a conclusion. Indeed, plaintiffs’ comparison to *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011), only underscores how deficient their evidentiary showing was. And plaintiffs’ insistence that only programmatic review can forestall the piecemeal destruction of protected species conflicts with the views of the Services, which require such review only where an action agency makes a “may affect” finding.

Plaintiffs also argue that the Corps is not entitled to deference because it deliberately evaded its statutory duty. But TC Energy demonstrated that the centerpiece of that claim—an email by a career Corps’ employee—shows no misconduct. Plaintiffs do not contest that

showing and instead now claim that the email reflects an “erroneous legal position.” Br.41. That would not establish agency bad faith even if it were correct. And it is not.

Finally, plaintiffs cannot defend the court’s “improper delegation” theory. They claim that the Corps has drawn a meritless distinction between NWP 12’s “might affect” standard and the regulatory “may affect” standard. But the Corps’ interpretation of its own permit is plainly reasonable and thus binding. Under that interpretation, NWP 12 does not delegate to others the Corps’ duty to make “may affect” decisions.

Plaintiffs are equally unable to defend the district court’s remedy. In fact, they abandon most of it, declining to defend the injunction at all, and arguing for vacatur only as to Keystone XL. But this new, gerrymandered relief is incoherent and inequitable. Vacating NWP 12 for Keystone XL alone cannot forestall the alleged aggregate harms attributable to 14,000 annual uses of the permit *by others*, and the Corps has already engaged in extensive consultations with FWS and concluded that Keystone XL will not jeopardize protected species. The district court identified no defects in that conclusion, and in fact held

that “it would be *improper* to single out Keystone XL” and treat it differently from other oil and gas pipelines that may use NWP 12. ER22 (emphasis added). The Supreme Court’s unexplained ruling on the government’s emergency stay application cannot be read to question that finding or suggest that this Court should order vacatur limited to Keystone XL as the final remedy.

In all events, the district court’s remedy should be reversed in its entirety. The Corps’ failure to engage in programmatic consultation was not error at all, much less a serious error that could justify vacatur of NWP 12 for all new oil and gas pipelines. Plaintiffs have cited no record evidence that refutes the government and TC Energy’s showing that the Corps could reissue NWP 12 following informal consultation on remand, and that vacatur will cause significant disruption for the Corps, the oil and gas pipelines that seek to use NWP 12, and the customers and communities that those pipelines serve.

Accordingly, and as explained in greater detail below, the district court’s judgment should be reversed.

I. THE DISTRICT COURT ERRED IN OVERTURNING THE CORPS’ “NO EFFECT” DECISION.

The issue in this case is not, as plaintiffs claim, whether the district court “correctly concluded that” reissuance of NWP 12 “‘may affect’ protected species and critical habitat.” Br. 3. Under ESA and its implementing regulations, the agency that adopts an action—not a federal court—determines whether that action “‘may affect’ protected species. An agency’s “no effect” finding cannot be set aside unless it is arbitrary, capricious, or irrational. *Nat’l Family Farm Coal.*, 966 F.3d at 924. Plaintiffs offer various arguments to try to justify the district court’s decision to set aside the Corps’ finding here. None has merit.

A. NWP 12 Was Not Subject To Programmatic Consultation.

1. Programmatic consultation was not required as a matter of law.

To evade the deferential standard of review, plaintiffs argue that the Corps misapplied the Services’ ESA regulations. Plaintiffs repeatedly claim that the ESA regulations “make clear that consultation is *necessary* for programmatic actions.” Br. 16 (emphasis added). *See also id.* at 21 (because NWP 12 is a “program,” it “*requires* consultation at the programmatic level”) (emphasis added); *id.* at 22

(ESA regulations “make clear that programmatic consultation *must* occur”) (emphasis added); *id.* at 24 (ESA regulations mandate “a two-step process for programs,” with “analysis of the overall effects of the program first, and then project-specific evaluations ... second”).

Plaintiffs then claim that the Corps’ “no effect” finding rests on the invalid theory that “later project-specific review negates the need for” this (supposedly) mandatory programmatic consultation. *Id.* at 22.

These arguments are demonstrably wrong.

The Services’ regulation states that agencies must determine “whether *any* action *may affect* listed species or critical habitat. *If such a determination is made*, formal consultation is required” 50 C.F.R. § 402.14(a) (emphases added). Thus, the regulation requires consultation only *if* an agency determines that one of its actions—including a program—“may affect” protected species or critical habitat. *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (“if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered”).

Plaintiffs assert that “formal consultation is required for any agency action ... that ‘may affect’ listed species *unless* the FWS and/or NMFS concurs” in the action agency’s “not likely to adversely affect” finding, and there “has been no such concurrence here.” Br. 23 n.5. But this is question-begging obfuscation. As just noted, the requirements plaintiffs describe apply only *if* the action agency makes a “may affect” finding. Here, the Corps made a “no effect” finding, and there is no requirement that the Services concur in a “no effect” finding. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (the “determination of possible effects is the Federal agency’s responsibility”).¹

Plaintiffs repeatedly cite the preamble to the Services’ 2015 regulation, Br. 6-7, 18, 23-27, 42, but it, too, refutes their claims. That regulation dispensed with the need for incidental take statements at the programmatic level *when* formal consultation is required. *See* 80 Fed. Reg. 26,832, 26,833 (May 11, 2015). The Services repeated, however, that formal consultation is only required “[i]f” a “may affect” “determination is made.” *Id.* at 26,832 (emphasis added); *see also id.* at

¹ Plaintiffs’ reliance, Br. 17, 23, on *Whaley v. Schweiker*, 663 F.2d 871 (9th Cir. 1981), is thus misplaced.

26,833 (“[f]ramework programmatic actions will trigger formal consultation *if* the action may affect listed species or their designated critical habitat”) (emphasis added). It then stressed that the change to the incidental take regulation “does not imply that section 7 consultation is required for a framework programmatic action that has no effect.” *Id.* at 26,835. These statements cannot be reconciled with plaintiffs’ assertion that programs *always* require programmatic consultation. In fact, plaintiffs ultimately concede this, acknowledging that “framework programmatic actions that truly have no effect on listed species ... would not require [formal] consultation.” Br. 43.

Nor does the preamble identify the Corps’ NWP’s “as an example of a federal program *subject to [formal] consultation.*” Br. 18 (emphasis added). After explaining that programmatic actions include “an action that adopts a framework for the development of future actions,” the preamble simply states: “Examples of Federal programs *that provide such a framework* include land management plans ... and the U.S. Army Corps of Engineers’ Nationwide Permit Program.” 80 Fed. Reg. at 26,835 (emphasis added). If the Corps’ NWP’s always triggered formal consultation, the Services would have said so, but did not.

Finally, plaintiffs cite *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992), *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), and *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), to show that project-level review does not negate the duty to engage in programmatic-level consultation. Br. 29-32. As TC Energy previously explained, however, these cases did not address the validity of an action agency’s “no effect” decision. TC Br. 39-41.² That is the critical antecedent issue here, because it determines whether programmatic review is required in the first place.

While these cases are therefore not “squarely on point,” Br. 30, several illustrate a fundamentally mistaken assumption underlying plaintiffs’ argument. In cases like *Lane County*, agency regulations were *focused on* areas where protected species were clearly present.³ The

² Plaintiffs admit this, yet claim that TC Energy “mischaracteriz[ed]” *Lane County*. Br. 29-30. But as TC Energy accurately stated, in *Lane County*, the Bureau of Land Management (BLM) argued that its logging “strategy” was a “policy statement,” not an “action,” and thus did not make a “no effect” finding. See 958 F.3d at 293.

³ See also *California ex rel. Lockyer v. USDA*, 575 F.3d 999, 1019 (9th Cir. 2009) (rule repealed protections for roadless areas that agency conceded were “biological strongholds for populations of threatened and endangered species”); *Kraayenbrink*, 632 F.3d at 496 (liberalized grazing regulations turned criteria to protect federal rangelands into non-enforceable standards and gave private ranchers ownership rights

logging strategy at issue in *Lane County*, for example, established criteria for harvesting the habitat of an endangered species. 958 F.2d at 294. That strategy thus necessarily triggered the “may affect” standard.

Plaintiffs repeatedly imply that NWP 12 also triggers this standard, because it is used 14,000 times annually. *See* Br. 1, 8, 10, 28, 39. But, unlike the actions at issue in cases like *Lane County*, NWP 12 is not focused on areas where endangered species or their habitat are known to exist; it can be used in jurisdictional waters anywhere in the nation. Indeed, over the course of three years, General Condition 18’s “in-the-vicinity” “might affect” standard triggered only 3,400 preconstruction notifications. ER260-61. Thus, the vast majority of NWP 12 uses were *not* in the vicinity of protected species. Moreover, the small minority that were in the vicinity were not authorized automatically by NWP 12 itself; they were authorized only after the

in water on 160 million acres where “over 300” “endangered, threatened, or candidate species” lived); *Conner*, 848 F.2d at 1452 (sales of oil and gas leases in forests inhabited by protected species); *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059, 1067, 1096 (N.D. Cal. 2007) (rule eliminated or weakened protections for habitat and species on lands where “there *are* indeed listed species”).

Corps conducted the same individualized ESA review that applies to individual permits.

Plaintiffs ignore that under the ESA, “the duty to consult is bounded by the agency action.” *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1208 (10th Cir. 2014). Here, the Corps did not rely on project-level review to “negate” its supposed duty to conduct programmatic consultation. The vast majority of dredge and fill activities for utility lines do *not* trigger the “may affect” standard, and the Corps designed NWP 12 to limit automatic authorizations to those activities, and to prohibit activities that might affect protected species—unless and until the Corps conducts the same project-level review that would be required if there were no NWP 12. Moreover, in areas where protected species are known to exist, the Corps has imposed regional conditions to preclude uses of NWP 12 that could cause harm. *See, e.g.*, NWPRC0000184 (barring dredge and fill activities during spawning season in specified river). Structuring the permit this way was entirely consistent with the Corps’ obligations under the ESA. *See Nat’l Family Farm Coal.*, 966 F.3d at 925 (agency properly used binding mitigation measures to “*rule out* any effect on” protected species or habitat).

2. Plaintiffs' policy arguments for mandatory programmatic consultation are misplaced.

To bolster their erroneous reading of the Services' regulations, plaintiffs repeat the district court's claim that only programmatic consultation can ensure that NWP 12 does not cause the piecemeal destruction of protected species. Br. 25-35. The short, dispositive answer is that the Services disagree. Charged with implementing the ESA, they have concluded that programmatic consultation is not required when, as here, an agency concludes that its programmatic action will not affect listed species. *See supra* 6-8. Plaintiffs' policy argument is thus irrelevant.

It is also misguided. The Corps' recognition that programmatic consultation can yield "tools that districts can use to better address potential impacts to" protected species in their regions, Br. 26 (quoting 72 Fed. Reg. 11,092, 11,096 (Mar. 12, 2007)), is not a concession that programmatic consultation is "the only way to avoid piecemeal destruction of" protected species. ER56. Nor did the Corps make such a concession when issuing the newly proposed NWPs. Br. 26. Those proposed permits were issued *without* formal consultation. And it is not nonsensical, *id.*, for the Corps to perform a nationwide cumulative

impact analysis for NWP 12 under the National Environmental Policy Act, but not to engage in programmatic consultation. Utility line dredge and fill activities may affect the *environment* wherever they occur. But protected species are not found everywhere, and NWP 12 prohibits activities where such species are present.

The precedents plaintiffs cite are also irrelevant. In *Conner, Lane County*, and *Cottonwood*, consultation was required because a “may affect” finding was undisputed or indisputable, or the agency was required to reinitiate consultation. *See* TC Br. 39-41. *See also Pac. Rivers Council*, 30 F.3d at 1055 (“may affect” standard met where agency plans “set forth criteria for harvesting resources within the [protected] salmon’s habitat”). This Court held that programmatic review was required in these circumstances—not in all circumstances.

In *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005), the court incorrectly thought the Corps had conceded that NWP 12 itself met the “may affect” standard. *See* TC Br. 41-42 (explaining how court misread the Corps’ brief). The fact that no party in *Brownlee* appealed, Br. 29, does not refute TC Energy’s showing. In all events, the Services’ more recent confirmation that programmatic

review is required only if the action agency makes a “may affect” finding overrides any contrary conclusion by an out-of-circuit district court.

Finally, plaintiffs again claim that project-level review will not protect against harms to migratory birds. Br. 33-34. But they do not address TC Energy’s showing that this claim is mistaken. *See* TC Br. 45-46 (citing ESA Handbook).

B. The Corps’ “No Effect” Determination Was Not Arbitrary Or Capricious.

In addition to their erroneous reading of the Services’ regulations, plaintiffs argue that the district court correctly “found” that “issuance of NWP 12 ‘may affect’ listed species and their habitat.” Br. 35-36. The relevant inquiry, however, is whether the Corps’ “no effect” decision had a “rational connection” to the relevant facts. *Kraayenbrink*, 632 F.3d at 481. The Corps’ decision satisfied that standard, and the district court had no basis for ruling otherwise.

Plaintiffs claim that “the Permit as a whole meets” the “may affect” standard because many utilities’ dredge and fill activities require project-specific review. Br. 35. But the question is whether the Corps’ action, *i.e.*, *issuance* of NWP 12, triggers the “may affect” standard. The answer is “no.” Reissuance of NWP 12 only authorizes activities that

have no effect on protected species. Activities that “may affect” such species require additional agency authorization.

The Corps’ recognition of past and future cumulative impacts of dredge and fill activities on wetlands and aquatic resources, Br. 35-36; ER50-51, does not demonstrate that its “no effect” decision was irrational. Because protected species are not ubiquitous, an impact on wetlands somewhere does not establish impact on protected species and their habitat. This is particularly true inasmuch as NWP 12 automatically authorizes dredge and fill activities only where protected species are not in the vicinity and will not be affected.

Nor do plaintiffs’ standing declarations show that the Corps’ “no effect” decision was irrational. These materials were not in the administrative record and plaintiffs did not even include them in their motion to supplement that record. TC Br. 34-35. Moreover, plaintiffs nowhere dispute TC Energy’s showings, *id.* at 33, 35, that the two “experts” the district court relied on mistakenly thought Keystone XL could be built in the vicinity of protected species without any further ESA analysis.

Indeed, plaintiffs tacitly concede the inadequacy of the foregoing evidence by now relying extensively on statements NMFS made in 2012 and 2014. Br. 37-38. But the court did not include these statements in its recitation of the supposedly “resounding evidence” underlying its “may affect” ruling; it cited prior NMFS statements, *see* ER58, only to support its erroneous conclusion that the Corps was “well aware” that issuance of NWP 12 required consultation *See infra* 17-18. More fundamentally, NMFS’ statements in 2012 and 2014 concerned the prior version of NWP 12, which the Corp modified to address NMFS’s concerns. These statements, therefore, provide no basis for finding that the 2017 version of NWP 12 triggered the “may affect” standard. *See also infra* at 32-33 (discussing NMFS’ position on the 2017 version).

Finally, *Kraayenbrink* does not “bolster[],” but instead undermines, the decision below. Br. 39. This Court did not rely solely on the number of affected acres and the number of protected species residing on them to find that the “may affect” standard was met. It also cited a wealth evidence, much of it from current and former BLM scientists, showing that the standard was clearly satisfied. *Kraayenbrink*, 632 F.3d at 497-98. *See also* TC Br. 36-37; Corps Reply

21-22. Plaintiffs identified no remotely similar evidence here. Moreover, the evidence they cite shows that the Corps expected NWP 12 to affect only 8,000 acres over five years, Br. 39 (citing SER11), not “160 million,” *Kraayenbrink*, 632 F.3d at 496 (emphasis added), and the Corps expressly designed NWP 12 so that it does not itself authorize any activity in the vicinity of protected species. Thus, plaintiffs’ analogy fails even on these isolated metrics.

C. Plaintiffs Failed To Make The Strong Showing Necessary To Establish That The Corps Knowingly Evaded Its Lawful Duties.

In claiming that the Corps unlawfully evaded its duty, plaintiffs once again ignore their burden of proof. Not only is the Corps’ decision entitled to deference, the agency must be presumed to have discharged its duties properly, *Conner*, 848 F.2d at 1448. Accordingly, plaintiffs had to make a “strong showing of bad faith or improper behavior.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019). They did not remotely discharge that burden.

Plaintiffs rely on selective quotations from an email written by the Corps’ Regulatory Program Manager, David Olson, in 2014. Br. 40-41. But plaintiffs simply ignore language in the email that refutes their

sinister reading. Far from acknowledging a categorical duty to engage in programmatic consultations before the NWP's were issued in 2017, Olson stated that such a duty would arise *if* the Corps modified the 2012 NWP's before they expired—something that did not occur. TC Br. 48-49 n.9; *see also* Corps Reply 25 (same). Plaintiffs offer no response to this showing. Nor do they dispute that Olson was not the final decisionmaker; his email was written years before the 2017 NWP's were issued; and the Corps' legal counsel had informed the Services in 2012 of the rationale underlying its view that the structure of the NWP's justified a "no effect" finding. *See* TC Br. 47-48.

Instead, plaintiffs shift gears and now claim that the Olson email shows that the Corps' "no effect" decision rests on an "erroneous legal position" and is therefore not entitled to deference. Br. 41. But a mistaken legal position is not evidence of bad faith or a deliberate attempt to evade a recognized regulatory duty. And the Corps' position is not "erroneous." It rests on the legitimate recognition that NWP 12 is

structured to “rule out any effect on” protected species or habitat. *Nat’l Family Farm Coal.*, 966 F.3d at 925.⁴

None of the other “evidence” plaintiffs and the district court cited establishes bad faith. The Corps’ consultations on earlier NWP, ER58, are not admissions that consultation was legally required. Agencies are entitled to change their positions, *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 658-59 (2007), and the Corps stated in 2012 that it was consulting voluntarily, not because it had to. SER1005-12.⁵

Plaintiffs claim that the Services’ 2015 regulation shows that “consultation is required for NWP 12.” Br. 41-42. But, as discussed above, that is wrong. *See supra* 7-8. And while NMFS initially raised concerns about the 2017 version, it never requested consultation, despite its right to do so. 50 C.F.R. § 402.14(a) (Service may request consultation if it “identifies any action ... that may affect listed species

⁴ Contrary to plaintiffs’ assertion, Br. 41, the Corps’ “no effect” finding is not divorced from the agency’s scientific expertise, and scientific expertise is not, in any event, the sole basis for agency deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (plurality opinion).

⁵ *Kraayenbrink* does not hold that prior programmatic consultation renders a “no effect” decision arbitrary. Br. 28. There, a wealth of evidence showed that the agency’s change in position on consultation was irrational. *See supra* 16-17.

or critical habitat”). Plaintiffs assert that NMFS did not press its initial objection, and FWS never made one, because it “would have been futile.” Br. 44. But Plaintiffs cite no evidence to support that speculation, which is contradicted by the Services’ conduct in other cases. *See Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1068 (9th Cir. 2005) (even *after* permit issued, FWS requested consultation and gave formal notice that it disagreed with Corps’ “no effect” determination). Moreover, given the presumption of regularity, *Conner*, 848 F.2d at 1447-48, there is no basis for assuming that the Services simply acquiesced in a clear ESA violation.

D. The Corps Did Not Delegate Its Duty To Permittees.

Finally, there is no merit to the lower court’s “improper delegation” ruling. Here again, plaintiffs ignore the deference due to the Corps’ reasonable judgments.

On the critical question at issue—whether issuance of NWP 12 “may affect” protected species—the Corps did not delegate that determination to anyone. It made the decision itself.

Nor does NWP 12 make any improper delegations. In claiming otherwise, plaintiffs disparage the distinction the Corps has drawn

between the “may affect” assessment that it must make, and the broader, and more easily triggered, “in the vicinity of”/“might affect” standard that General Condition 18 imposes on permittees. Br. 46. But the online dictionary definition of “may” that plaintiffs cite suggests, at most, that the distinction is ambiguous. The Corps’ interpretation of its own (allegedly) ambiguous permit is plainly reasonable—indeed, its rests on other dictionary definitions that justify the distinction the Corps has drawn. *See* 82 Fed. Reg. 1860, 1873 (Jan. 6, 2017). It is therefore controlling. *See Kisor*, 139 S. Ct. at 2418.

As a consequence, the district court’s improper delegation theory fails. Because there is a meaningful difference between the “might affect” and “may affect” standards, NWP 12 does not delegate the Corps’ duty to make “may affect” decisions to permittees. Instead, because the broader “might affect” standard requires pre-construction notifications (PCNs) for all situations where a “may affect” finding is potentially warranted, NWP 12 ensures that the Corps ultimately makes all required “may affect” decisions.

Plaintiffs argue that, in practice, the “might affect” standard will not work. Br. 45-47. Even if true, this would not show that General

Condition 18 impermissibly delegates the Corps' duty to make "may affect" decisions. In all events, the district court correctly assumed that permittees *will* comply with the "might affect" requirement. ER57.

Permittees who violate the requirement risk enforcement action by the Corps, 33 C.F.R. § 330.1(c); civil or criminal action by the government under the ESA or the Clean Water Act, 16 U.S.C. § 1540(a)(1), (b)(1); 33 U.S.C. § 1319; and citizen actions under the ESA (if species are harmed). 16 U.S.C. § 1540(g). The Corps thus had ample grounds for concluding that private parties will submit PCNs for projects that may affect protected species. *See California ex. rel. Becerra v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020) (en banc) (deference owed to agency's reasonable "predictive judgment' on relevant questions" including "predictions of how regulated parties will respond to its regulation"), *cert. granted sub nom.* 2021 WL 666372 (U.S. Feb. 22, 2021) (No. 20-429).

* * *

In finding an ESA violation, the district court repeatedly failed to defer to the reasonable judgments and conclusions of the Corps, and

instead substituted its own mistaken views. That decision should be reversed.

II. The District Court's Injunction and Vacatur Ruling Should Be Reversed

Because the lower court erred in finding an ESA violation, the Court need not address any questions of remedy. But here, too, the lower court erred. Indeed, plaintiffs no longer defend the district court's injunction at all; as to vacatur, they ask this Court "to maintain only the Keystone XL-specific portion," claiming that the district court did not "abuse[] its discretion in vacating [NWP] 12 as to Keystone XL." Br. 49, 51 (bold font altered). But the district court did not vacate the permit just "as to Keystone XL." In fact, in fashioning injunctive relief, it expressly found that "it would be *improper* to single out Keystone XL" and treat it differently from other oil and gas pipelines that may use NWP 12. ER22 (emphasis added). Plaintiffs ignore that finding and provide no valid justification for vacating NWP 12 for Keystone XL alone.

Indeed, there is a fatal disconnect between the violation the lower court found and the gerrymandered relief plaintiffs now seek. They argue that the Corps' ESA violation is "serious" because NWP 12 is

used 14,000 every year, and (in plaintiffs' view) only programmatic review can prevent the alleged piecemeal destruction of protected species. But a Keystone XL-only vacatur does nothing to redress that alleged harm. And the Supreme Court's stay decision did not signal that such an incoherent remedy is "appropriate." Br. 50.

A. There Is No Basis For Vacating NWP 12 For Keystone XL Alone.

Plaintiffs have expediently shifted their position on the question of relief. Plaintiffs originally did not seek vacatur of NWP 12 at all, only a remand for programmatic consultation, and an injunction barring Keystone XL's use of the permit in the interim. ER-275, ER-342. That request required a showing that use by Keystone XL alone would cause plaintiffs irreparable harm. After the district court vacated NWP 12 *in toto* and enjoined its use by anyone, plaintiffs argued that vacatur should be narrowed to new oil and gas pipelines and injunctive relief should be limited to Keystone XL. ER-93-95. Now, plaintiffs abandon any defense of the district court's injunction, and seek vacatur of NWP 12 only as to Keystone XL. They thus seek the equivalent of the injunctive relief they initially requested, without making the showing necessary for such relief.

This latest gambit fails for multiple reasons. Plaintiffs cite no authority establishing that it is appropriate, let alone “typical,” to vacate a rule or permit of general application only as to a single potential beneficiary, while allowing thousands of others to continue to use it. And doing so here is flatly at odds with equitable principles. Indeed, unable to show that Keystone XL’s use of NWP 12 will cause any irreparable harm, plaintiffs now rely on alleged harms that are not attributable to Keystone XL at all to justify a Keystone XL-only vacatur.⁶

Plaintiffs argue that the Corps’ failure to engage in programmatic consultation is a “serious deficiency” because “NWP 12 authorizes tens of thousands of water crossings each year,” and programmatic consultation is a “fundamental procedural safeguard” needed to protect species from the aggregate impacts of those uses of NWP 12. Br. 54, 56; *see also id.* at 28 (“aggregate impacts” can be “meaningfully addressed

⁶ Plaintiffs suggest that the relief they now seek is proper given TC Energy’s “representations” that the Corps cannot act on PCNs for Keystone XL in light of the lower court’s ruling. Br. 50 & n.13 (citing TC Br. 22-23 n.4). But the district court vacated NWP 12 for all new oil and gas pipelines, not just for Keystone XL. TC Energy never conceded that vacatur as to Keystone XL alone was proper; it opposed any vacatur and argued Keystone XL should be allowed to use NWP 12.

only through programmatic consultation”). As TC Energy has shown, programmatic review is not essential to preventing harm to protected species. *See* TC Br. 44-45; Corps Reply 15-17. But even if it were, the alleged irreparable harm from thousands of *other* uses of NWP 12 cannot justify vacating the permit as to *Keystone XL alone*. *See* TC Br. 57.

Such a remedy is particularly improper here, where plaintiffs have not shown that Keystone XL’s use of NWP 12 will cause *any* irreparable harm. The Corps has already consulted with FWS, which concluded that Keystone XL is not likely to adversely to affect any protected species except the American Burying Beetle, and that the continued existence of that species is not likely to be jeopardized. *See* TC Br. 21-22, 57-58. Plaintiffs note that they are challenging the Biological Assessment (BA) and Biological Opinion (BiOp) for Keystone XL in *other* litigation. Br. 52 & n.14. But they did not do so below.⁷

⁷ Pulling quotes out of context, plaintiffs accuse TC Energy of “false[ly]” claiming that plaintiffs had never challenged the BA and BiOp. Br. 52 n.14. But TC Energy made clear that “[p]laintiffs did not challenge the BA or BiOp *below*, and *that failure* precludes a finding that Keystone XL’s use of NWP 12 will cause irreparable harm.” TC Br. 29 (emphases added).

Because the district court thus made no finding that the BA and BiOp are deficient in any respect, limiting vacatur to Keystone XL alone cannot be predicated on the assumption that the BA and BiOp are invalid. *See Gov't of Province of Man. v. Zinke*, 849 F.3d 1111, 1118 (D.C. Cir. 2017) (injunction cannot be sustained by plaintiffs' allegation, unsupported by district court findings, that environmental analysis was deficient). Moreover, it is undisputed that, even without NWP 12, TC Energy can obtain an individual permit to conduct the same dredge and fill activities in the same waters, based on the *same* type of project-level consultation. *See* Br. 34 n.8; TC Br. 44-45; Corps Reply 17.

Together, the scope of the alleged irreparable harm and plaintiffs' inability to tie that aggregate harm to Keystone XL's use of NWP 12, renders a Keystone XL-only vacatur plainly improper. Both vacatur and injunctions are equitable remedies. *See* 5 U.S.C. § 702 (court has the "power" and "duty" to deny vacatur on any "appropriate ... equitable ground"). Equitable principles would foreclose an injunction on use of NWP 12 by Keystone XL alone. There is no causal connection, much less a "sufficient causal connection," *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018), between the alleged

irreparable harm that flows from 14,000 uses of NWP 12 each year and Keystone XL's proposed use of NWP 12 for 573 water-crossings,⁸ which FWS found will not jeopardize any protected species. And an injunction limited to Keystone XL alone obviously cannot “forestall” an irreparable harm allegedly caused by 14,000 *other* uses per year. *Id.* Indeed, the district court recognized that limiting injunctive relief to Keystone XL would be improper. ER22. The same equitable principles render Keystone XL-only vacatur improper.

Plaintiffs cite *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), and *National Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7 (D.D.C. 2014), *see* Br. 54. But neither case held, or affirmed, that an invalid agency rule that governs activities by many entities can properly be vacated only as to one such entity. In *Defenders of Wildlife*, EPA's decision to transfer Clean Water Act permitting authority to Arizona was invalidated *in toto*. 420 F.3d at 978-79. Similarly, in *Jewell*, a rule that governed coal mining activities near streams in

⁸ Transcript of Motion Hearing at 53, *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 19-cv-44 (D. Mont. Mar. 6, 2020), ECF No. 124.

numerous states was vacated in its entirety, not as to a single mining company. 62 F. Supp. 3d at 21.

At bottom, plaintiffs apparently assume that the Supreme Court's stay justifies the gerrymandered relief they now seek. Br. 50. But that assumption is mistaken. To obtain a stay of a district court ruling, a party must show, among other things, that if the ruling is upheld on appeal, the Supreme Court is likely to grant *certiorari* and reverse. *See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). In this case, the government argued that the growing frequency of nationwide injunctions was a "recurring and important" issue, and that, if the Court granted review, it should ensure that injunctive relief is limited to remedying the injury that provides a plaintiff's basis for Article III standing, which in this case meant limiting the injunction to Keystone XL's use of NWP 12. *See Application for Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit & Pending Further Proceedings in This Court at 21, U.S. Army Corps of Eng'rs v. N. Plains Res. Council*, No. 19A1053 (U.S. June 15, 2020). To stay the injunction and vacatur as to Keystone XL, the Court would have had to

conclude that it would also grant *certiorari* to review the district court's merits ruling and whether any relief beyond remand is appropriate for an ESA procedural violation. *See* Brief of Respondents TC Energy Corporation & TransCanada Keystone Pipeline LP in Support of Application for a Stay, *U.S. Army Corps of Eng'rs v. N. Plains Res. Council*, No. 19A1053 (U.S. June 17, 2020).

Given both the high standards for obtaining a stay and the limited period in which the Court had to rule (without the benefit of argument), there is no basis for viewing its unexplained partial stay as a determination that party-specific vacatur is appropriate, even where (as here) such relief cannot forestall the harms that the plaintiffs cited to justify vacatur. That is particularly true because the Court did not stay the lower court's injunction as to Keystone XL, which rendered party-specific vacatur redundant—something that is no longer true in light of plaintiffs' latest change of position.

B. The Lower Court Erred By Vacating NWP 12 For All New Oil And Gas Pipelines.

Because plaintiffs have abandoned the vacatur that the district court actually ordered, there is no reason to consider its validity. To the

extent the Court disagrees, however, TC Energy submits that vacatur of NWP 12 for all new oil and gas pipelines was also erroneous.

1. The Corps' failure to consult was not a "serious" error.

Plaintiffs argue that "wholesale violations of Section 7 are serious errors," and that, given consultation's "critical role in effecting the ESA's substantive protections," the Corps' failure to consult justified vacatur. Br. 53-54. But the cases they cite cannot sustain this proposition. The discussion of remedies in *Defenders of Wildlife* lacks precedential force; its ruling on the merits was reversed. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 673. And to the extent its vacatur ruling was based on a presumption, rather than proof, that lack of consultation was likely to cause irreparable harm to protected species (*see* 420 F.3d at 978-79), it has been overruled by *Cottonwood*, 789 F.3d at 1089-91. In *Jewell*, the government confessed error and asked court to vacate mining rule. 62 F. Supp. 3d at 21.

Instead, the relevant inquiry under the "serious error" prong is whether "there is 'at least a serious possibility' that the Corps could reissue the same version of NWP 12 following a remand." TC Br. 62 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988

F.2d 146, 151 (D.C. Cir. 1993)). Plaintiffs do not dispute that the now-vacated 2017 version of NWP 12 includes most of the protective measures from the 2012 permit that NMFS found would “prevent adverse effects to endangered or threatened species under NMFS’s jurisdiction or critical habitat.” TC Br. 62 (quoting 2014 NMFS BiOp at SER997-98). Plaintiffs nevertheless claim that programmatic consultation “may” result in changes because a few protective measures were not continued from the earlier permit, usage of the permit has increased since then, and the Corps did not complete consultation with FWS in 2012, so its views are not known. Br. 53. Plaintiffs are mistaken.

Their argument ignores that the protective measures that were not retained were “three measures that NMFS itself had determined were infeasible.” Corps Br. 14; *see also* ER600 (NOAA, an agency within NMFS, stated “that THEY have decided the approach [in the three protective measures] is inappropriate and that it would not work”). In addition, FWS did not object to the Corps’ determination that issuance of NWP 12 in 2017 would have “no effect” on protected species, *see* Corps Br. 13; TC Br. 20; Br. 13; and neither Service asked the Corps to

initiate formal consultation, *see* Corps Br. 14, 38; TC Br. 60. In light of those facts, it is clear that the Corps “could adopt the same [permit] on remand,” and this is not a case where there are “such fundamental flaws in the agency’s decision” that it is “unlikely” to be adopted on remand. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532. (9th Cir. 2015).

2. The disruption and financial harm factors weighed heavily against vacatur.

The district court also erred by failing properly to weigh the substantial disruption and financial harm that vacatur inflicted on TC Energy, its workers and vendors, and local communities. *See* SER882-84; SER622-23; TC Br. 65. Plaintiffs respond that the ESA precludes consideration of these harms and requires the court “to presume ‘that the balance of interests weighs in favor of protecting endangered species.’” Br. 57 (quoting *Nat’l Wildlife Fed’n*, 886 F.3d at 817). But *National Wildlife Federation* held only that the “ESA removes the latter three factors in the four-factor injunctive relief test from [the court’s] equitable discretion,” so those factors cannot justify denial of an injunction that is necessary to prevent irreparable harm to protected species. 886 F.3d at 817. It has no application when, as here, plaintiffs

cannot “demonstrate that irreparable injury ‘is *likely* in the absence of an injunction.’” *Id.* at 818.

Nor can the demonstrated harm of vacatur be discounted on the ground that they related to the 2020 construction season that has already been lost, and future harm might be mitigated if the Corps finishes programmatic consultation on NWP 12 or grants Keystone XL an individual permit. Br. 59-60. This Court determines whether the district court abused its discretion based on the record below. *See, e.g., Lowry v. Barnhart*, 329 F.3d 1019, 1025 (9th Cir. 2003) (“[t]he appellate process is for addressing the legal issues a case presents, not for generating new evidence to parry an opponent’s arguments”). The court’s order thus cannot be affirmed based on subsequent events or speculation and conjecture about what may occur in the future.

Finally, plaintiffs are wrong to say that the harms caused by vacatur of NWP 12 should be discounted because TC Energy has no right to a “quicker, cheaper” permitting process, and the company “assumed the risk” of litigation delay. Br. 61-62. As the American Gas Association Appellants explained (at 5-6), the nationwide permit system

was authorized by Congress precisely to provide a streamlined alternative to the individual permitting process.

The fact that Keystone XL has been targeted by environmental groups that have filed multiple lawsuits challenging nearly every federal agency action related to the project is not proof that it is not in the public interest or that the costs of delay are irrelevant. Equity requires a consideration of the interests of all parties and the public. *See, e.g., Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). And the balance of equities favored allowing a project to proceed when environmental harm is “not at all probable” and when delaying the project will cause substantial financial harm. *Id.* at 545. That is the situation here, where the injunction and vacatur harmed not only TC Energy, but also its workers, its customers, and local communities along the Keystone XL route. The district court erred in vacating NWP 12 and enjoining its use for all new oil and gas pipelines.

CONCLUSION

For the reasons stated above, the Orders entered by the district court on April 15 and May 11, 2020 should be reversed and vacated.

Dated: February 25, 2021

Respectfully submitted,

/s/ Joseph R. Guerra

Joseph R. Guerra

Peter C. Whitfield

Kathleen M. Mueller

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000 (telephone)

(202) 736-8711 (fax)

Email: jguerra@sidley.com

Counsel for TransCanada Keystone

Pipeline LP and TC Energy

Corporation

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)

I am the attorney or self-represented party.

This brief contains words, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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

- ☒ complies with the word limit of Cir. R. 32-1.
- ☐ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ☐ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ☐ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ☐ 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

Date

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov