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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,
Defendants/Appellants,

and

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

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

REPLY IN SUPPORT OF FEDERAL APPELLANTS' MOTION TO VACATE DECISIONS BELOW

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INTRODUCTION

Plaintiffs brought this suit to prevent the Corps from authorizing portions of the Keystone XL pipeline under the 2017 version of NWP 12. That permit has been superseded by a new and different permit. *See* ECF No. 150-1 (Motion) at 7-8. As to Keystone, President Biden revoked a cross-border permit which had authorized TC Energy to operate the pipeline at the U.S.-Canada border. And since the Corps filed its motion, TC Energy has *terminated* the project. *See* ECF No. 161. The case is moot. And since it became moot for reasons unrelated to this lawsuit or not attributable to the Corps, vacatur of the court's decisions is warranted. *United States v. Munsingwear*, 340 U.S. 36 (1950). Plaintiffs agree the appeals are moot as to the court's injunction and vacatur, but seek a remand as to the grant of declaratory relief and their claims under the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA), as well as for the court to determine whether to vacate its own orders. Plaintiffs' Response at 4-11. But the declaratory relief does not prevent mootness because that relief cannot provide any relief to Plaintiffs or to anyone else, and cannot on its own create jurisdiction that does not otherwise exist. The CWA and NEPA claims are moot for the same reasons the ESA claim is, and Plaintiffs make no argument to the contrary. And vacatur is required under binding caselaw.

This Court thus should not indulge Plaintiffs' request to burden the Corps and Intervenors with a pointless remand. Contrary to Plaintiffs' assertion, there are no

relevant "factual questions" to resolve. In particular, Plaintiffs' suggestion that the Corps "def[ied]" the district court's remand or otherwise acted improperly is both irrelevant and baseless. Plaintiffs have already brought a lawsuit challenging the 2021 permit, which is pending before the same district judge, and which is the proper forum for their grievances about the new permit; they no longer have any remaining cognizable quarrel with the old permit and there is no basis for prolonging this case further. This Court should vacate the decisions below, remand with instructions to dismiss, and "clear[] the path for future relitigation of the issues" as appropriate in Plaintiffs' new lawsuit. *Munsingwear*, 340 U.S. at 40.

ARGUMENT

I. These cases are moot.

Plaintiffs stop short of claiming that any aspect of the case is *not* moot. But they insist that the case *might* not be moot as to the district court's declaratory relief, as well as their claims under the CWA and NEPA. We address each in turn.

Declaratory relief: A claim for declaratory relief only prevents mootness when the plaintiff has a continuing concrete injury from the agency action at issue, and where declaratory relief can provide meaningful relief to the plaintiff as to that injury. *See, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2115-2116 (2021) (no standing where plaintiffs sought only declaratory relief as to challenged provision, which would not redress an injury of plaintiffs); *Center For Biological Diversity v.*

Lohn, 511 F.3d 960, 964 (9th Cir. 2007). Otherwise, a request for a declaratory judgment, standing alone, "does not provide a court with jurisdiction" if jurisdiction is otherwise absent. *California* v. *Texas*, 141 S. Ct. at 2115. Plaintiffs do not dispute that this lawsuit presents no continuing controversy regarding Keystone—and they filed their response *before* TC Energy terminated the project. They instead argue that the declaratory relief and remand may keep this case alive because other activities previously permitted remain authorized until March 18, 2022. Plaintiffs' Response at 7.[1] There are two problems with this contention. For one, Plaintiffs never established an injury from any such other projects. *See, e.g.*, *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 868 (9th Cir. 2017) (plaintiff must show the challenged policy continues to affect a present interest *of the plaintiff*). Indeed, the complaint does not even *identify* any other ongoing project besides Keystone XL. *See* ECF No. 70 at 16. The Supreme Court implicitly recognized as much when it stayed the injunction and vacatur except as applied to Keystone. *Id.* at 21.

In any event, the district court's declaratory relief and remand—and any decision from this Court affirming that relief—would have *no effect* on any projects

[1] Plaintiffs appear to suggest that the Corps' motion, which described the 2017 version as "no longer operative," was misleading but that suggestion falls flat. The Corps simply meant that the permit had been superseded and was not being applied to Keystone. The Corps was not required to anticipate Plaintiffs' novel argument that the case somehow remains alive because of grandfathered authorizations they do not challenge and that are unaffected by the district court's declaratory relief.

that remain authorized under the 2017 NWP 12. The district court itself recognized this early in the case, reassuring Montana and the NWP 12 Coalition—and by extension, any other project proponents that are not even parties to this case—that they "could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits." 3-ER-457.[2] A declaratory judgment addressing unidentified projects that Plaintiffs lack standing to challenge—and that will not affect those projects anyway—is of course an advisory opinion. And any such advisory opinion from this Court could only even "advise" for a very brief period—any grandfathered authorizations under the 2017 NWP 12 will expire automatically less than nine months from now.

CWA and NEPA claims: After granting Plaintiffs summary judgment on their ESA claim, the district court denied all parties' motions for summary judgment on their CWA and NEPA claims. 1-ER-60. Plaintiffs insist that a remand to determine mootness is necessary for these claims. But these claims likewise challenge the 2017 NWP 12, which has been superseded. 3-ER-558-562. The CWA and NEPA claims are thus simply alternative legal grounds the district court declined to reach—they do not keep alive a lawsuit challenging a superseded permit, particularly since the only project as to which Plaintiffs demonstrated standing has now been terminated.

[2] The district court of course disregarded this promise in its two summary judgment orders, but the district court's broader vacatur and injunction have been stayed and Plaintiffs have abandoned—or more accurately, re-abandoned—those remedies.

Indeed, Plaintiffs make no argument why, if the ESA claim is moot (which it is), the CWA and NEPA claims are not moot as well. And where the district court lacks jurisdiction as a matter of law, this Court has authority to order the entire case dismissed even when the appeal does not involve a final judgment. *See, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790 (2018); *Jordahl v. Brnovich*, 789 F. App'x 589, 590 (9th Cir. 2020); *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001). This Court can and should efficiently conclude this case without further proceedings by holding that both this appeal and the entire case are moot.

II. This Court should vacate the district court's decisions.

When a case becomes moot on appeal, the "established practice" is to reverse or vacate the decision below. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). The Supreme Court recognized a limited exception to this established practice in *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership* "where mootness results from settlement," recognizing that in that context "the losing party has voluntarily forfeited his legal remedy." 513 U.S. 18, 25 (1994). But cases involving intervening executive action are not exempt from the ordinary *Munsingwear* vacatur rule—*Munsingwear* itself involved Executive action. *See* 340 U.S. at 37. And at the very least, vacatur is required where action by an appellant mooting appeal "was wholly unrelated to th[e] lawsuit and would have occurred in the absence of th[e] litigation." *Dilley v. Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995).

Indeed, the Supreme Court recently has vacated multiple lower-court judgments against the government that were either moot or that no longer merited further review in light of substantially changed circumstances resulting from policy changes implemented by the Executive Branch for reasons unrelated to the litigation. *See Mayorkas* v. *Innovation Law Lab*, No. 19-1212 (June 21, 2021) (vacating following termination of challenged migrant protection protocols); *Biden* v. *Sierra Club*, No. 20-138 (July 2, 2021) (vacating because of changed circumstances following termination of border-wall construction). The same result is warranted here.

Initially, Plaintiffs do not dispute that President Biden's revocation of TC Energy's cross-border permit was a policy determination made for reasons independent of this litigation, and TC Energy's decision to terminate the Keystone project is also not attributable to the Corps (let alone to Montana or the NWP 12 Coalition). The termination of the Keystone XL project itself moots this case—independent of the new permit—because Plaintiffs did not establish standing to challenge any other ongoing project (or even mention any such project in their Complaint). *See supra* p. 3. For these reasons alone, vacatur is required.

Nor do Plaintiffs have any persuasive response to the obvious point that, under the circumstances—a nationwide order affecting all new oil and gas pipeline construction—vacatur is warranted to protect the interests of those pipelines which are regulated by the CWA and directly affected by the district court orders barring

their reliance on a nationwide permit. Courts of appeals, including this Court, have repeatedly held that vacatur should be granted under similar circumstances. *See* NWP 12 Coalition Response (collecting cases). Contra Plaintiffs' suggestion, it makes no difference whether another party was responsible for mootness. Plaintiffs' Response at 15. Indeed, as other courts have held, this circumstance makes it unnecessary to *even decide* whether federal defendants were responsible for mootness or themselves entitled to vacatur. *See, e.g.*, *Wyoming v. Zinke*, 871 F.3d 1133, 1145 (10th Cir. 2017); *Akiachak Native Community v. U.S. Department of Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016); *Humane Society of U.S. v. Kempthorne*, 527 F.3d 181, 187 (D.C. Cir. 2008). And for good reason. Intervenors directly affected by the district court's orders in this manner should not be forced to acquiesce here in a decision they were precluded from appealing through no fault of their own. *See Munsingwear*, 340 U.S. at 40.

It is thus unnecessary to address Plaintiffs' insinuation that the Corps issued the new nationwide permits to moot out these appeals; and given the above, this Court need not do so. But this argument also fails. The Corps issued the proposed rule modifying and re-issuing the nationwide permits on September 15, 2020. *See* 85 Fed. Reg. 57,298 (Sept. 15, 2020). The proposed rule comprises 98 pages in the Federal Register, proposed changes to twelve nationwide permits, as well as multiple new ones. The Corps obviously did not craft this overhaul of the nationwide permit

system on the fly in four months because of a single federal district court decision addressing only one nationwide permit, which the government was in the process of appealing—particularly since, by September 2020, the district court's decision affected only one project (Keystone XL), as to which the project sponsor had already submitted an individual permit application the Corps was then considering. *See* Motion at 7. Rather, the Corps' plan to modify and re-issue the 2017 nationwide permits was announced long before the court's decision, was included on at least four unified agendas in 2018 and 2019, and was announced as under consideration in October 2017. Motion at 17. On October 25, 2017 the Corps issued a report recommending changes to nine nationwide permits, including the 2017 NWP 12; that report was released to meet the requirements of a 2017 Executive Order and recommended changes "to reduce burdens on domestic energy producers."[3] It makes no difference that the agendas "did not provide any specific timeframe for doing so" or included taking no action until 2022 as a "potential alternative" (this could be said of almost any possible regulatory action before a final rule). Plaintiffs' Response at 14. The modification of NWP 12 was years in the making; it was not

[3] *See* https://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/1353578/us-army-corps-of-engineers-issues-report-on-nationwide-permits/. That Executive Order—Executive Order 13783—was revoked by President Biden on January 20, 2021.

an improvised effort to moot out a district court decision that the Corps' has challenged from the day it was issued. The Corps is entitled to vacatur.

III. No remand is warranted.

The Court should end this case now. There are no "important factual questions" for the district court to resolve and none of Plaintiffs' arguments persuade otherwise. Plaintiffs' Response at 2. In particular, it makes no difference whether and how many ongoing projects remain authorized under the 2017 NWP 12 until March 2022; as discussed, Plaintiffs have established no injury from any such time-limited authorizations, which are unaffected by the district court's declaratory relief anyway. *See supra* pp. 3-4. There is also no conceivable difference for mootness purposes between the ESA claim on the one hand and the NEPA and CWA claims on the other—and Plaintiffs have not even tried to articulate one. *See supra* pp. 4-5. And vacatur here follows from well-established legal principles, not fact-specific equitable considerations the district court needs to weigh in the first instance.

Finally, Plaintiffs' inflammatory claims that the Corps "def[ied] the district court's remand for over a year" and engaged in "disregard of federal courts' authority" lack merit. Plaintiffs' Response at 15. The court's order did not impose any timetables on the Corps. Although the court may have contemplated that consultation would occur, it imposed no specific conditions beyond compliance with the ESA. 1-ER-63-64. Indeed, the court purported to find "resounding evidence"

in the record that the 2017 permit "may affect" listed species—leaving it open to the Corps to conclude that a new permit, accompanied by a different record, did not share this asserted defect.

The Corps has done that. The 2021 permit differs from the 2017 permit, and is based on a different record. Motion at 12-13. And the Corps' supported its "no-effect" determination in 2021 with a biological assessment,[4] a step it did not take for the 2017 permit. If Plaintiffs believe the new permit is unlawful and injures them, their remedy is to file a new lawsuit—which Plaintiffs have done and which is assigned to the same district judge. *See* No. 4:21-cv-00047-BMM, ECF No. 1 (D. Mont. May 3, 2021). They are not entitled to burden the Corps and needlessly multiply proceedings by simultaneously pursuing this moot lawsuit, over a superseded permit that is not inflicting any continuing injury upon them.

CONCLUSION

This Court should vacate the district court's April 15, 2020 and May 11, 2020 decisions and orders, and remand with instructions to dismiss.

Dated: July 2, 2021.

[4] *Available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/.

Respectfully submitted,

s/ *Andrew M. Bernie*

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the length limitation of Circuit Rule 27-1(1)(d) because it does not exceed 10 pages.

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