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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

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Northern Plains Resource Council, et al.,  
Plaintiffs,  
v.  
U.S. Army Corps of Engineers, et al.,  
Defendants,  
and  
TransCanada Keystone Pipeline, LP,  
et al.,  
Defendant-Intervenors.

Case No. 4:19-cv-00044-BMM

**Memorandum in Support of  
Motion to Vacate April 15, 2020  
and May 11, 2020 Decisions and  
Order**

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## I. INTRODUCTION

Plaintiffs brought this action to prevent the U.S. Army Corps of Engineers (Corps) from authorizing certain discharges of dredge and fill material associated with construction of portions of the Keystone XL pipeline under a nationwide utility-line general permit known, at that time, as Nationwide Permit 12 (NWP 12), which the Corps had re-issued on January 6, 2017. Plaintiffs expressly and repeatedly sought injunctive relief and vacatur directed only at Keystone XL—seeking vacatur of NWP 12 as applied to verifications that proposed Keystone XL crossings comported with NWP 12. This Court nevertheless vacated NWP 12 and enjoined its use for *all* new oil and gas pipelines across the country. The Court granted summary judgment to Plaintiffs on their claim challenging NWP 12 under the Endangered Species Act, but did not rule on their challenges to NWP 12 under the Clean Water Act (CWA) or the National Environmental Policy Act (NEPA).<sup>1</sup>

The Corps appealed and sought a stay pending appeal. Ultimately, the Supreme Court stayed, pending appeal, the district court’s injunction and vacatur except as to Keystone XL. On appeal, Plaintiffs sought to maintain only the Keystone XL-specific portion of the vacatur. During the appeal, the Corps issued a January 2021 rule that re-issued 12 existing nationwide permits, including a

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<sup>1</sup> Nor did the parties ever address Plaintiffs’ claims under the CWA and Endangered Species Act (ESA) challenging the verifications because there never were any ripe verifications.

modified NWP 12, and issued four new ones. President Biden also issued Executive Order 13990, which revoked a 2019 Presidential permit authorizing TC Energy to construct and operate the Keystone XL pipeline at the international border with Canada. Accordingly, the United States moved to dismiss the appeal and vacate the decisions below. The Ninth Circuit dismissed the appeal for lack of jurisdiction and instructed this Court to dismiss the underlying ESA claim and determine, in the first instance, whether the case is moot in its entirety and whether the Corps is entitled to vacatur.

The Ninth Circuit concluded (and the parties agree) that the ESA claim on which Plaintiffs prevailed is moot. *See* ECF 171 (Status Report ¶ 3).<sup>2</sup> And rightfully so: the potential applicability of the 2017 NWP 12 to Keystone XL alone no longer creates an Article III case or controversy, even if it once might have. Indeed, shortly after this Court enjoined the 2017 NWP 12, TC Energy applied for an individual permit—the project was no longer planning to proceed under the 2017 NWP 12. Furthermore, the agency action Plaintiffs challenged in this case—the 2017 re-issuance of NWP 12—has been superseded by a new nationwide permit, which took effect in March 2021 and which is currently being

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<sup>2</sup> For the same reasons the Ninth Circuit found the ESA claim to be moot, Plaintiffs' remaining four claims in this case also are moot. The parties agree that those four claims should be dismissed without prejudice. ECF 171 (Status Report ¶ 3).

separately challenged by some of these same Plaintiffs. President Biden also has since revoked the separate 2019 permit authorizing the Keystone XL project proponent (TC Energy) to build and operate the segment of the pipeline that crosses the U.S.-Canada border. Thereafter, TC Energy announced that it was terminating the Keystone XL project. On these facts, this case is no longer justiciable. The Court should vacate its April 15, 2020 and May 11, 2020 orders as moot and dismiss the case. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

## **II. BACKGROUND**

### **A. Nationwide Permits**

The Corps authorizes discharges of dredged or fill material into waters of the United States through individual and general permits under the Clean Water Act. 33 U.S.C. § 1344(a), (e). An individual permit generally may be issued only after the applicant submits site-specific documentation and the Corps then provides an opportunity for public comment. But the CWA also authorizes general permits for categories of activities similar in nature that the Corps determines will have minimal separate and cumulative adverse environmental effects. 33 U.S.C. § 1344(e)(1). Nationwide permits—the type of general permit at issue here—are “designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts.” 33 C.F.R. § 330.1(b). Depending on the terms and

conditions applicable to a given permit, nationwide permits may authorize some activities without any notification to the Corps, while other activities require a preconstruction notice (PCN) to the Corps and verification from the Corps that activities qualify for a nationwide permit.

## **B. ESA Consultation Requirements**

In issuing nationwide permits, the Corps must comply with applicable statutes, including the Endangered Species Act. Section 7(a)(2) of the ESA requires each federal agency, “in consultation with” the Services, to “insure that any action authorized, funded, or carried out” by the agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2). If the “action agency” determines that its action “may affect” endangered or threatened species (listed species), it must pursue either informal or formal consultation with the National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service (collectively, the Services). 50 C.F.R. §§ 402.13, 402.14(b)(1). If the action agency determines that the proposed action is “likely to adversely affect” listed species or designated critical habitat, the agency must engage in formal consultation. *Id.* §§ 402.13(a), 402.14(a)-(b). But if the action agency determines that its action will have “no effect” on a listed species or designated critical habitat, “the consultation requirements are not triggered.”

*Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 913 (9th Cir. 2018) (citation omitted).

### **C. The 2017 Nationwide Permit 12**

The 2017 NWP 12 challenged in this case is no longer in effect. 86 Fed. Reg. 2744, 2747 (Jan. 13, 2021). It applied to “the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States.” 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). The 2017 NWP 12 allowed certain activities to go forward without notification to the Corps but also required prospective permittees to submit a PCN under certain circumstances seeking verification that a proposed activity complied with the permit. Among other such circumstances, a PCN was required if the “discharges [would] result in the loss of greater than 1/10-acre of waters of the United States.” *Id.* at 1986. The 2017 NWP 12 was also subject to a General Condition (applicable to other nationwide permits as well) requiring a PCN “if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat.” *Id.* at 1999. The Corps explained that this “might affect” standard is a broader standard (encompassing more activities) than the “may affect” threshold triggering Section 7(a)(2) consultation. *Id.* at 1873. If an applicant does not comply with the General Condition requirement to submit a

PCN, the activity is not authorized under the nationwide permit and the Corps district will determine the appropriate enforcement response.

#### **D. Prior Proceedings**

This suit challenging the 2017 NWP 12 concerns the now-abandoned Keystone XL pipeline. Plaintiffs filed their operative amended complaint on September 10, 2019. *See* ECF No. 36. That Complaint challenged the Corps' issuance of the 2017 NWP 12 as violating NEPA, the CWA, and the ESA. The Complaint also challenged the Corps' verifications under NWP 12 for crossings associated with the Keystone XL pipeline, even though those verifications had been withdrawn at that point. *See id.*; *see also* ECF No. 53. As the Corps has explained elsewhere, Plaintiffs' Complaint and summary judgment filings consistently sought vacatur and injunctive relief limited to Keystone XL, and did not attempt to establish injury from any other project. *See, e.g.*, ECF No. 131. This Court ultimately granted summary judgment to Plaintiffs on their ESA claim, ruling that the 2017 NWP 12 "may affect" listed species or critical habitat and, therefore, programmatic consultation with the Services was required. *See* ECF No. 130 (April 15, 2020 Decision). Rather than merely enjoin and vacate the 2017 NWP 12 as applied to Keystone XL (as Plaintiffs requested), this Court instead vacated and enjoined the nationwide permit in its entirety. *See id.*

In response to Defendants’ motions for a stay of the district court’s order pending appeal, this Court amended its order in part (May 11, 2020 Decision), vacating NWP 12 “as it relates to the construction of new oil and gas pipelines” and enjoining its use to authorize “any dredge or fill activities for the construction of new oil and gas pipelines.” *See* ECF No. 151 at 38. The Corps, TC Energy, and the other two intervenor-defendants (the State of Montana and the NWP 12 Coalition) appealed and (with the exception of Montana) filed motions for a stay pending appeal. Two Judges in the Ninth Circuit Court of Appeals denied a stay in a brief order. *See* ECF No. 162. The Corps then sought a stay pending appeal from the Supreme Court. In July 2020—without any noted dissent—that Court granted a stay in substantial part, staying the district court’s order granting partial vacatur and an injunction of the 2017 NWP 12 except as it applies to Keystone XL. *See U.S. Army Corps of Eng’rs v. N. Plains Res. Council*, Case No. 19A1053 (July 6, 2020).

#### **E. Further Developments**

On June 1, 2020—shortly after the Ninth Circuit denied Defendants’ motion to stay the district court’s order—TC Energy submitted an application for an individual permit covering the crossings it had previously sought to be verified under the 2017 NWP 12. *See* Exhibit 1. That application acknowledged the Corps’ inability, in light of the injunction, to approve TC Energy’s proposed crossings as

verifications under the 2017 NWP 12. *See id.* at 13 (page 15 of PDF). The Corps received a completed application in July 2020. *See*

<https://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/Oil-and-Gas-Development/KXL/> (last visited April 27, 2022). Thus, had the Corps approved that application for an individual permit, the regulated activities would not have proceeded under the 2017 NWP 12. Thereafter, TC Energy announced that “advancement of the project will be suspended[,]” *see* Exhibit 2 at 2, before ultimately announcing that it was terminating the project while this case was on appeal. *See* Exhibit 3. As outlined in this Court’s decision in a related case, TC Energy has removed buried pipe in the border segment of the project, performed reclamation measures to restore the land disturbed by removal of the pipe, and relinquished the right-of-way it had acquired from the Bureau of Land Management. *See Indigenous Env’t Network v. Trump*, Case No. 4:19-cv-00028-BMM (D. Mont.), ECF No. 186 (Mar. 11, 2022). Based on these developments, another district court has described the Keystone XL project as “dead.” *See id.* at 11 (quoting *Texas v. Biden*, Case No. 3:21-cv-00065 (S.D. Tex.), ECF No. 150 (Jan. 6, 2022)). This Court has agreed that it can no longer issue any meaningful relief concerning the Keystone XL project. *Id.* at 12-13.

Furthermore, since the Court issued its orders, the Corps finalized a rule re-issuing 12 existing nationwide permits (including NWP 12) as well as issuing four

new ones; that rule was published in the Federal Register on January 13, 2021. *See* 86 Fed. Reg. 2744. The modification of NWP 12 was years in the making: the Corps' plan to modify and re-issue the 2017 nationwide permits had been included on at least four unified agendas in 2018 and 2019, and was announced as under reconsideration in October 2017. *E.g.*, Modification of Nationwide Permits, RIN: 0810-AA84 (Spring 2018), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=0710-AA84> (last visited Apr. 28, 2022); Modification of Nationwide Permits, RIN: 0710-AA84 (Fall 2018), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0710-AA84> (last visited Apr. 28, 2022); Modification of Nationwide Permits, RIN: 0710-AA84 (Spring 2019), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=0710-AA84> (last visited Apr. 28, 2022); Reissuance and Modification of Nationwide Permits, RIN: 0710-AA84 (Fall 2019), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=0710-AA84> (last visited Apr. 28, 2022). The rule replaces the 2017 NWP 12 with the 2021 NWP 12, which is limited to activities required for the construction, maintenance, repair, and removal of oil and natural gas pipeline and associated facilities in waters of the United States, and two new nationwide permits that

separately authorize activities required for construction, maintenance, repair, and removal of electric utility line and telecommunications activities as well as water and other substances. 86 Fed. Reg. at 2769. The 2021 NWP 12 also adds a new PCN threshold for new oil or natural gas pipelines that are greater than 250 miles in length, to address stakeholder concerns about cumulative adverse environmental effects. *Id.* at 2775-2776. The 2021 NWP 12 continues to require a PCN for, *inter alia*, discharges that will result in the loss of greater than 1/10-acre of waters of the United States. And, similar to the 2017 NWP 12, the 2021 NWP 12 requires a PCN “if any listed species . . . or designated critical habitat . . . might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat.” *Id.* at 2869. The rule became effective in March 2021. *See* Exhibit 4. Accordingly, the agency action at issue here (the 2017 NWP 12) is no longer operative. *See* 87 Fed. Reg. 17,281 (Mar. 28, 2022) (seeking public input on 2021 final rule that re-issued and modified 12 nationwide permits, including NWP 12).

In the meantime, President Biden was sworn into office on January 20, 2021. On his first day in office, President Biden issued Executive Order 13990. *See* 86 Fed. Reg. 7037 (Jan. 20, 2021). In Section 6 of that Executive Order, President Biden revoked a previous 2019 permit (separate from the CWA authorizations at issue here) issued by President Trump, which had authorized TC Energy to “construct, connect, operate, and maintain pipeline facilities at the international

border of the United States and Canada.” 84 Fed. Reg. 13,101, 13,101 (Mar. 29, 2019); see also 86 Fed. Reg. at 7041 (“The Permit is hereby revoked in accordance with Article 1(1) of the Permit.”).

In May 2021, Defendants filed a motion in the Ninth Circuit Court of Appeals, requesting that the court find that the appeal was moot and vacate this Court’s April 15, 2020 and May 11, 2020 Decisions. *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, No. 20-35412 (9th Cir.), Dkt. No. 150. In ruling on that motion, the Ninth Circuit held that the Corps’ issuance of a new nationwide permit superseded the agency action that was the subject of the appeals. *Id.*, Dkt. No. 164. The appeals were dismissed for lack of jurisdiction and the Ninth Circuit remanded with instructions to dismiss the underlying claim. *Id.* However, the Ninth Circuit took no position on whether the underlying cases are moot in their entirety, stating that it would “leave that determination to the district court in the first instance.” *Id.* at 4. The Ninth Circuit further declined to vacate any of the district court’s decisions, stating that, on remand, the district court shall consider whether the Corps was entitled to vacatur. *Id.*

Finally, as this Court is aware, Plaintiffs have challenged the 2021 NWP 12 in a new lawsuit filed in this Court in 2021. *See Ctr. for Biological Diversity v. Spellmon*, No. 4:21-cv-00047-BMM (D. Mont.). Summary judgment briefs have been filed in that case, and a hearing is scheduled for June 6, 2022.

### III. ARGUMENT

On appeal, Plaintiffs opposed Defendants' argument that their claims were moot, and indicated that they may seek additional relief relating to their ESA claim. *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir.), Dkt. No. 158 at 2-3. The Ninth Circuit rejected their arguments, however, and found that Plaintiffs' ESA claim is moot and directed this Court to dismiss the claim. Plaintiffs now concede that the claim is moot. ECF No. 171 at 2. Similarly, although Plaintiffs argued to the Ninth Circuit that their additional claims may not be moot, they seem to no longer intend to pursue any further relief on those claims by agreeing that "the remaining claims" should be dismissed "without prejudice." *Id.* However, in an abundance of caution, Defendants first reiterate why the entire case is moot before turning to their argument that, given the Ninth Circuit's finding, this Court should follow the "established practice" under *Munsingwear* and vacate its April 15, 2020 and May 11, 2020 Decisions.

#### A. This Case Is Moot.

A federal court has jurisdiction only to address actual "Cases" or "Controversies." U.S. Const. Art. III, § 2, cl. 1. If a case becomes moot while on appeal, this Court may not render a judgment on the merits. *In re Burell*, 415 F.3d 994, 998 (9th Cir. 2005). Under the circumstances presented here, this case is moot.

Initially, Plaintiffs have mooted their claims by expressly disclaiming almost all of the relief the district court granted. *See Frank v. Minn. Newspaper Ass’n*, 490 U.S. 225, 227 (1989) (per curiam) (case moot in light of concession that plaintiff was willing to forego relief sought in complaint). As noted above, this Court’s order as modified prohibited use of the 2017 NWP 12 for new oil and gas pipeline construction. ECF No. 151; *see supra* p. 7. The Supreme Court stayed this Court’s vacatur and injunction except with respect to Keystone XL, and Plaintiffs then stated in their answering brief on appeal that they “seek to maintain only the Keystone XL-specific portion of the vacatur.” *See* Exhibit 5 at 49. Plaintiffs’ express disclaimer during the course of this litigation moots any controversy extending beyond Keystone XL. *Shinault v. Hawks*, 782 F.3d 1053, 1060 n.7 (9th Cir. 2015) (dismissing claim because plaintiff “disclaimed an injunctive remedy during oral argument”); *Seven Words LLC v. Network Sols.*, 260 F.3d 1089, 1097 (9th Cir. 2001) (case moot notwithstanding theoretical possibility of damages claim where, among other things, plaintiff did not assert damages claim in initial appellate briefing).

Moreover, any desire Plaintiffs might assert to maintain this Court’s orders with respect to Keystone XL alone does not create a continuing controversy. For one, the agency action Plaintiffs challenged in this case—the 2017 NWP 12—is no longer operative. *See supra* p. 10. The Supreme Court has made clear that a

challenge to a regulation or other agency action at least ordinarily becomes moot when that agency action is repealed or replaced; cases from the Ninth Circuit and elsewhere are in accord. *See, e.g., Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (challenge to a university regulation was moot because, *inter alia*, the regulation had been substantially amended); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) (issuance of superseding biological opinion mooted challenge to previous biological opinion); *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (same); *Idaho Dep’t of Fish & Game v. Nat’l Marine Fisheries Serv.*, 56 F.3d 1071, 1074 (9th Cir. 1995) (same); *Akiachak Native Cmty. v. U.S. Dep’t of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (describing as “a perfectly uncontroversial and well-settled principle of law” that “when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot”). Consistent with these cases, the expiration of the 2017 NWP 12 alone moots Plaintiffs’ challenge under the circumstances here. Even if Plaintiffs’ arguments had merit this Court could not grant effective relief on Plaintiffs’ challenge to the 2017 NWP 12 because that Permit has been superseded. *Am. Rivers*, 126 F.3d at 1123 (“If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed.”) (citations omitted).

A superseding regulation may not moot out a case if that regulation “differs only in some insignificant respect” from the prior regulation. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993). But Plaintiffs already have conceded that the 2021 NWP 12 is not a “mirror image” of the 2017 NWP 12. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111 (10th Cir. 2010); *see also* Exhibit 5 at 49 (noting “significant modifications” to NWP 12 in then-proposed rule). And Plaintiffs are challenging those “significant modifications” in their pending challenge to the 2021 NWP 12. *See supra* p. 11.

Plaintiffs may suggest that the core issue of whether the issuance of the 2017 or the issuance of the 2021 NWP 12 “may affect” listed species remains the same.<sup>3</sup> However, this Court’s analysis of the record accompanying the 2017 NWP 12 does not extend to the 2021 NWP 12, as they are wholly different and distinct agency actions. To the extent Plaintiffs assert the same legal arguments in any future challenge to the 2021 NWP 12, they must be presented in a new lawsuit, challenging an application of the 2021 NWP 12 if and when such an application of that permit inflicts an actual or certainly impending Article III injury on them.

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<sup>3</sup> The Corps acknowledges that, based on Plaintiffs’ arguments, this Court previously determined that the 2017 NWP 12 “may affect” listed species and their habitat. ECF No. 130 at 11. However, the Corps rebutted Plaintiffs’ arguments and continued to object to this Court’s findings on appeal. *See* Exhibit 6 at 17-20, 25-26.

*Akiachak*, 827 F.3d at 113 (“[I]f the agency promulgates a new regulation contrary to one party’s legal position, that party may ‘cure its mootness problem by simply starting over again’ by challenging the regulation currently in force.”) (citation omitted). Indeed, Plaintiffs have *filed* such a lawsuit. *See supra*, p. 11.

This Court, however, need not determine whether the expiration of the 2017 NWP 12 and re-issuance of the 2021 NWP 12 *by itself* moots this case. That is because, under the circumstances here, TC Energy does not intend to proceed under either a nationwide permit or individual permit, nor can it. President Biden has revoked the cross-border permit for Keystone XL, and TC Energy has announced that the project has been terminated. *See supra* pp. 3. In the unlikely event that the project is revived in the future, regulated activities would require new authorization under a general permit or an individual permit. In either circumstance, Plaintiffs’ remedy would be to challenge that application in a separate lawsuit.<sup>4</sup>

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<sup>4</sup> Alternatively, at the very least, this case is prudentially moot. Plaintiffs’ challenges concern application of a superseded permit, limited to a project that has been terminated, and hypothetical PCNs that are exceedingly unlikely to be submitted and which, even if verified, would be verified under a different permit. Even if there were conceivably *any* case or controversy remaining to that limited extent, any such controversy would be “so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.” *Chamber of Com. v. U.S. Dep’t of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980) (per curiam); *see also Deutsche Bank Nat’l Tr. Co. v. FDIC*, 744 F.3d 1124, 1135 (9th Cir. 2014) (“The doctrine of prudential mootness permits a court to ‘dismiss an appeal not

**B. No Exception to Mootness Applies.**

Although courts recognize certain limited exceptions to the mootness doctrine, none apply here. It is “well settled,” for example, “that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 289 (1982). But the Ninth Circuit “treat[s] the voluntary cessation of challenged conduct by government officials ‘with more solicitude ... than similar action by private parties.’” *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc) (citation omitted). This presumption applies equally to the Executive Branch. *See Or. Nat. Res. Council v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992) (no “reasonable expectation” that timber sale would recur once the agency had halted it, and the mere possibility of a future sale was not enough to avoid mootness); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1094-96 (9th Cir. 2003) (challenge to a Forest Service policy was moot once the agency had issued an official clarification). “At least in the absence of overwhelming evidence (and perhaps not then), it would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against

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technically moot if circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief.”) (citation omitted).

that branch a doctrine that appears to rest on the likelihood of a manipulative purpose.” *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (en banc).

No evidence rebuts the presumption here. Neither the Corps’ issuance of new nationwide permits nor the revocation of TC Energy’s cross-border permit was driven by any manipulative purpose and, indeed, neither decision was driven by this litigation. The Corps’ plan to modify and re-issue the 2017 nationwide permits was announced long before the district court’s April 15, 2020 Decision; it was included on the Fall 2019 unified agenda,<sup>5</sup> as well as the Spring and Fall 2018 and Spring 2019 agendas. And the Corps announced that changes to certain 2017 nationwide permits (including NWP 12) were being considered in October 2017.<sup>6</sup> Similarly, President Biden’s decision to revoke the cross-border permit has nothing to do with this litigation. And, of course, Plaintiffs’ own decision to abandon most of the relief this Court awarded them is not attributable to the Corps at all.

Nor is this the type of case that is “capable of repetition while evading review.” *Pub. Utils. Comm’n v. FERC*, 100 F.3d 1451, 1459-60 (9th Cir. 1996).

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<sup>5</sup> See Reissuance and Modification of Nationwide Permits, RIN: 0710-AA84 (Fall 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=0710-AA84> (last visited Apr. 28, 2022).

<sup>6</sup> See <https://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/1353578/us-army-corps-of-engineers-issues-report-on-nationwidepermits/> (last visited Apr. 27, 2022).

This exception applies in “exceptional circumstances,” *id.* at 1459, and only where there is both (1) “a ‘reasonable expectation’ that the same complaining party will be subject to the same injury again,” and (2) an injury that is so “inherently limited in duration” that “it is likely always to become moot before federal court litigation is completed,” *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007) (citation omitted). Neither requirement is met here. For reasons previously discussed, there is no “reasonable expectation” that the Corps will approve Keystone XL crossings under the 2021 NWP 12 (let alone under the superseded NWP 12 Plaintiffs challenged), particularly where TC Energy has terminated the project.<sup>7</sup> Nor is the 2021 NWP 12 (which does not expire until 2026) the type of action so “inherently limited in duration” that it would evade review. *See, e.g., Idaho Dep’t of Fish & Game*, 56 F.3d at 1075 (four years is “more than enough time for litigants to obtain judicial review”).

**C. The Court Should Vacate Its April 15, 2020 and May 11, 2020 Decisions.**

When a case becomes moot on appeal, the “established practice” is to reverse or vacate the decision below. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997). Vacatur under these circumstances “clears the path for future

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<sup>7</sup> Moreover, even if there was such an expectation, verified activities would be based on a different administrative record with different analysis and factual findings.

relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40.

Indeed, some of the Plaintiffs already are relitigating their concerns as they relate to the 2021 NWP 12. *See supra* p. 11. Vacatur is generally “automatic” when a case becomes moot on appeal for reasons other than voluntary action of the appellant. *Pub. Utils. Comm’n*, 100 F.3d at 1461.

Vacatur of this Court’s April 15, 2020 and May 11, 2020 Decisions is warranted under these principles. In the first place, this case was indisputably mooted by both the Ninth Circuit’s express holding that the underlying claim is moot and by Plaintiffs’ express abandonment of any request for relief as to all oil and gas pipelines other than Keystone XL. Furthermore, as explained at length above, a new nationwide permit took effect in March 2021, thus superseding the agency action Plaintiffs challenged in this case. President Biden has revoked the cross-border permit,<sup>8</sup> and TC Energy has terminated the project. The circumstances giving rise to mootness here are either unrelated to this lawsuit or not attributable to the Corps. *See supra* pp. 17-19. The Ninth Circuit has treated as “happenstance”—and thus falling within *Munsingwear*—action by the appellant

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<sup>8</sup> Executive action can be exempt from the *Munsingwear* rule under certain circumstances, although *Munsingwear* itself involved Executive action. *See Humane Soc’y of U.S. v. Kempthorne*, 527 F.3d 181, 187 (D.C. Cir. 2008) (declining to decide this question).

mooting the appeal where that action “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. 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 (or any other party, as discussed further below). For these reasons alone, *Munsingwear* applies and the Court should vacate its April 15, 2020 and May 11, 2020 Decisions and Orders.

Vacatur under *Munsingwear* is appropriate for all of the reasons listed above. But, even if the Court were to find that the Corps took action in this case which fell within an exception to *Munsingwear* (which it did not), that does not

end the debate. Other parties (namely TC Energy, Montana, and the NWP-12 Coalition) maintained their own appeal of this Court's decision, and that appeal was mooted by circumstances out of their control. *See, e.g., Akiachak*, 827 F.3d at 115 (granting vacatur because of Intervenor's request when the Department of Interior rescinded a rule). Thus, in addition to the Corps, each of these parties is entitled to vacatur under *Munsingwear*. As the Supreme Court has explained, following this procedure will allow "the rights of all parties [to be] preserved," while prejudicing none of them. *Munsingwear*, 340 U.S. at 40.

#### IV. CONCLUSION

This Court should vacate its April 15, 2020 and May 11, 2020 Decisions and Orders and dismiss this case.

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Civil Rule 7.1(d)(2)(B) and (E), I hereby certify that the above memorandum is 5,347 words, exclusive of the caption, tables of contents and authorities, exhibit index, and certificates of service and compliance.

/s/ Alison C. Finnegan

### **CERTIFICATE OF SERVICE**

I certify that on April 29, 2022, I electronically filed the foregoing with the Clerk of the U.S. District Court of Montana using the CM/ECF system, which will send a Notice of Electronic filing to all counsel of record.

/s/ Alison C. Finnegan