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

NORTHERN PLAINS RESOURCE COUNCIL,
ET AL.,

PLAINTIFFS,

V.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

DEFENDANTS,

TC ENERGY CORPORATION, ET AL.,

DEFENDANT-INTERVENORS,

STATE OF MONTANA,

DEFENDANT-INTERVENOR,

AMERICAN GAS ASSOCIATION, ET AL.,

DEFENDANT-INTERVENORS.

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

**BRIEF IN SUPPORT
OF FEDERAL
DEFENDANTS' MOTION
TO VACATE**

Plaintiffs challenge a permit that is no longer in effect, claiming harm from a project that has been terminated and asking this Court to grant relief that it cannot give. Vacatur of this Court’s April 15, 2020 and May 11, 2020 orders is, therefore, appropriate.

Plaintiffs’ challenge is moot because the 2017 NWP 12 is no longer in effect and has been replaced by the 2021 NWP 12—the subject of ongoing litigation between many of these same parties in this very court. *See Akiachak Native Cmty. v. U.S. Dep’t of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (“[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot.”); *Ala. Hosp. Ass’n v. Beasley*, 702 F.2d 955, 961 (11th Cir. 1983) (“Newly promulgated administrative regulations can have the effect of moot[ing] a previously viable case.”). The Ninth Circuit expressly held that the 2021 NWP 12 permit superseded the 2017 NWP 12 at issue in this case. *N. Plans Res. Council v. U.S. Army Corps of Eng’rs*, No. 20-35412 (9th Cir.), Dkt. 164, at 3. Accordingly, this Court can no longer grant effective relief and this case is moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (federal courts lack jurisdiction “to give opinions upon moot questions or abstract propositions, or to declare

principles or rules of law which cannot affect the matter in issue in the case before it”); *see also Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (“If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed.”).

Because Plaintiffs’ challenge to the 2017 NWP 12 is moot, this court should vacate its April 15, 2020 and May 11, 2020 decisions. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see also Forest Serv. Emps. v. U.S. Forest Serv.*, 408 F. Supp. 2d 916, 920–21 (N.D. Cal. 2006) (“Ordinarily, when a case becomes moot, the appropriate action is to vacate the judgment and dismiss.”). This circuit treats “automatic vacatur as the established practice,” *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995) (quotations omitted), except when the appellant’s voluntary actions moot the appeal. *See Munsingwear*, 340 U.S. at 39; *Ringsby Truck Lines, Inc. v. W. Conf. of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982). Montana has not taken any voluntary actions to moot this litigation—this litigation is moot for circumstances beyond the State’s control. *See Akiachak Native*

Cnty., 827 F.3d at 115. Vacating this Court’s decisions will therefore preserve “the rights of all parties.” *Munsingwear*, 340 U.S. at 40.

This Court should accordingly vacate its orders of April 15, 2020 and May 11, 2020, to preserve and protect the rights of the State of Montana.

DATED this 9th day of May, 2022.

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CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: May 9, 2022

/s/ Kathleen L. Smithgall
Kathleen L. Smithgall