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

NORTHERN PLAINS RESOURCE  
COUNCIL, BOLD ALLIANCE,  
NATURAL RESOURCES DEFENSE  
COUNCIL, SIERRA CLUB, CENTER  
FOR BIOLOGICAL DIVERSITY, and  
FRIENDS OF THE EARTH,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,  
and LIEUTENANT GENERAL TODD  
T. SEMONITE (in his official capacity  
as U.S. Army Chief of Engineers and  
Commanding General of the U.S. Army  
Corps of Engineers),

Defendants,

and

THE STATE OF MONTANA,  
TRANSCANADA KEYSTONE  
PIPELINE, LP, TC ENERGY

Case No. CV-19-44-GF-BMM

**NWP 12 COALITION'S  
RESPONSE IN SUPPORT OF  
FEDERAL DEFENDANTS'  
MOTION TO VACATE APRIL 15,  
2020 AND MAY 11, 2020  
DECISIONS AND ORDER**

CORPORATION, AMERICAN GAS  
ASSOCIATION, AMERICAN  
PETROLEUM INSTITUTE,  
ASSOCIATION OF OIL PIPE LINES,  
INTERSTATE NATURAL GAS  
ASSOCIATION OF AMERICA, and  
NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION,

Defendant-  
Intervenors.

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Pursuant to “established practice,” this Court should vacate its prior decisions and orders and dismiss this case in its entirety because it is moot. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (“*Munsingwear*”); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997). The NWP 12 Coalition submits this response in support of the Federal Defendants’ Motion to Vacate the April 15, 2020 and May 11, 2020 Decisions and Order (Doc. 174), which should be granted.

Vacatur is warranted to “clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40. And it will ensure “the rights of all parties,” including the NWP 12 Coalition, “are preserved.” *Id.* In the Ninth Circuit, vacatur is generally “automatic” when a case becomes moot on appeal, as is the case here. *Pub. Utils. Comm’n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996).

No “exception” to the ordinary rule applies. *Id.* at 1459-61. The appeals, including the NWP 12 Coalition’s appeal (No. 20-35414), were mooted through no action of the Coalition. As the Federal Defendants have explained (Doc. 175 at 8-10), the U.S. Army Corps of Engineers (“Corps”) reissued Nationwide Permit (“NWP”) 12 on January 13, 2021. 86 Fed. Reg. 2744 (Jan. 13, 2021). The 2021

NWP 12 became effective on March 15, 2021, and replaced the 2017 version of NWP 12, which was under review in this case.<sup>1</sup> *Id.*

Following the reissuance of NWP 12 in 2021, the Federal Defendants filed a motion in the U.S. Court of Appeals for the Ninth Circuit requesting the court find that the appeals were 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. May 4, 2021), (Dkt. No. 150). The NWP 12 Coalition filed a response in support of that motion for vacatur. (Dkt. No. 157).

The Ninth Circuit subsequently held that the Corps’ 2021 reissuance of NWP 12 superseded the agency action—the 2017 NWP 12—that was the subject of the appeals, causing the appeals and the Endangered Species Act (“ESA”) claim to be moot. (Dkt. No. 164 at 4). Accordingly, the court dismissed the appeals for lack of jurisdiction. *Id.* The Ninth Circuit remanded the appeals to this Court with instructions to: dismiss the ESA claim; consider whether the underlying case is moot in its entirety; and determine whether Defendants are entitled to vacatur.<sup>2</sup> *Id.*

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<sup>1</sup> The 2021 NWP 12 is currently being challenged by some of the same Plaintiffs before this Court. *See Ctr. for Biological Diversity v. Spellmon*, No. 4:21-cv-00047-BMM (D. Mont.). Summary judgment briefing is underway, and a hearing is scheduled for June 6, 2022.

<sup>2</sup> For the same reason the ESA claim is moot—that the Corps’ 2021 reissuance of NWP 12 superseded the 2017 NWP 12—Plaintiffs’ remaining four claims are moot. (Dkt. No. 164 at 4). And the parties have agreed that those four claims should be dismissed without prejudice. (Doc. 171 at 2).

Vacatur of this Court’s April 15, 2020 and May 11, 2020 Decisions is warranted and appropriate under the circumstances. Neither the reissuance of NWP 12 in 2021, nor any of the other reasons articulated by the Federal Defendants as to why the case is moot (Doc. 175 at 12-16, 20) are the result of actions by the NWP 12 Coalition. A party like the NWP 12 Coalition (and other Defendant-Intervenors) that “seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994). Vacatur in such a situation “eliminat[es] a judgment the loser was stopped from opposing on direct review.” *Arizonans for Official English*, 520 U.S. at 71. “The equitable remedy of vacatur ensures that ‘those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.’” *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39).

Indeed, courts repeatedly have held that when a case is mooted by the actions of the government, vacatur must be granted to protect the rights of intervenors—like the NWP 12 Coalition—that did not cause that mootness. *See, e.g., Indigenous Env’tl. Network v. U.S. Dep’t of State*, No. 18-36068, 2019 WL 2542756, at \*1 (9th Cir. June 6, 2019) (granting intervenors’ motion to vacate the district court’s judgments when appeals were mooted by issuance of new permit);

*Wyoming v. Zinke*, 871 F.3d 1133, 1145 (10th Cir. 2017) (vacating judgment to preserve rights of intervenors where agency rescission of a permanently enjoined regulation mooted a lawsuit challenging that regulation); *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016) (granting intervenor's request for vacatur where the agency rescinded the challenged rule, mooting the appeal); *Humane Soc'y v. Kempthorne*, 527 F.3d 181, 187 (D.C. Cir. 2008) (vacating judgment and injunction to preserve rights of intervenor where challenge became moot due to subsequent agency action); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1213, 1213 n.6 (10th Cir. 2005) (vacating judgment to preserve rights of intervenors where challenge to agency regulation became moot when agency promulgated a new regulation).

The parties agree that the case is moot. (Doc. 171 at 2). That mootness is not due to the actions of the NWP 12 Coalition. Accordingly, to preserve the rights of the NWP 12 Coalition, while prejudicing none of the parties, *Munsingwear*, 340 U.S. at 40, the Court should dismiss the case and grant the Federal Defendants' motion to vacate the District Court's orders of April 15, 2020 and May 11, 2020.

Date: May 9, 2022

Respectfully submitted,

/s/ Karma B. Brown

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**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing NWP 12 Coalition's Response in Support of the Federal Defendants' Motion to Vacate April 15, 2020 and May 11, 2020 Decisions and Order complies with the requirements of Local Rule 7.1(d)(2) and contains 980 words, excluding the parts exempted by Local Rule 7.1(d)(2)(E), according to the word count calculated by Microsoft Word for Microsoft 365.

/s/ Karma B. Brown



**CERTIFICATE OF SERVICE**

I hereby certify that on May 9, 2022, I filed the above pleading with the Court's electronic case management system, which caused notice to be sent to counsel for all parties.

/s/ Karma B. Brown