

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

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Defendants/Appellants,

and

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

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

**MOTION OF DEFENDERS OF WILDLIFE, VIRGINIA WILDERNESS
COMMITTEE, WEST VIRGINIA HIGHLANDS CONSERVANCY, AND
WEST VIRGINIA RIVERS COALITION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE OPPOSING STAY PENDING APPEAL**

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ARGUMENT

Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and the West Virginia Rivers Coalition (collectively *amici*) respectfully move under Rule 29(a) of the Federal Rules of Appellate Procedure for leave to file a brief as *amici curiae* opposing a stay pending appeal in these consolidated cases.

Amici sought consent of the parties in accordance with Circuit Rule 29-3. Plaintiffs, Federal Defendants, Intervenor Defendants TC Energy Corporation and Keystone Pipeline LP, and Intervenor Defendant State of Montana all consent to *amici* filing their brief. Intervenor Defendant Nationwide Permit 12 Coalition does not oppose.¹

Amici have a strong interest in preserving the district court's tailored vacatur of Nationwide Permit 12 (NWP 12) while this case is heard in the ordinary course. *See* Fed. R. App. P. 29(a)(3)(A). *Amici* are non-profit organizations dedicated in part to preserving the natural heritage of Virginia and West Virginia by protecting species in the crosshairs of new gas pipelines permitted under NWP 12.

Amici offer the Court a unique perspective on why a stay pending appeal is not justified and not desirable. *See* Fed. R. App. P. 29(a)(3)(B). The streams and

¹ The Nationwide Permit 12 Coalition is comprised of the American Gas Association, the American Petroleum Institute, the Association of Oil Pipelines, the Interstate Natural Gas Association of America, and the National Rural Electric Cooperative Association.

rivers of the Appalachian mountains and Southeast coastal plain are a treasure trove of aquatic biodiversity and a home to endangered species found nowhere else on earth. Those same streams and rivers also offer a case study in why the district court got this case right on the merits and tailored its vacatur of NWP 12 appropriately. *Amici* explain in their concurrently filed brief that proposed gas pipelines like the Atlantic Coast Pipeline and Mountain Valley Pipeline have a compounding effect on endangered species—which goes unanalyzed when the Army Corps silos its review and blinds itself to anything other than project-level impacts. Protected species, and *amici*'s members' interests in observing and studying those species and their habitats, are harmed by infliction of these unassessed impacts.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant their motion for leave and accept their concurrently filed brief opposing a stay.

Date: May 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Ninth Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 375 words, excluding the parts of the motion listed in Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Date: May 22, 2020

/s/ J. Patrick Hunter

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: May 22, 2020

/s/ J. Patrick Hunter

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**BRIEF OF DEFENDERS OF WILDLIFE, VIRGINIA WILDERNESS
COMMITTEE, WEST VIRGINIA HIGHLANDS CONSERVANCY, AND
WEST VIRGINIA RIVERS COALITION AS *AMICI CURIAE* OPPOSING
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state the following:

Defenders of Wildlife is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in Defenders of Wildlife.

Virginia Wilderness Committee is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in Virginia Wilderness Committee.

West Virginia Highlands Conservancy is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in West Virginia Highlands Conservancy.

West Virginia Rivers Coalition is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in West Virginia River Coalition.

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STATEMENT OF INTEREST¹

Defenders of Wildlife, Virginia Wilderness Committee, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition (collectively *amici*) are non-profit organizations dedicated in part to preserving the natural heritage of Virginia and West Virginia. *Amici* have a particular interest in ensuring that federal permitting does not unlawfully place endangered species in the region in the crosshairs of major gas pipelines. *Amici* oppose a stay pending appeal.

INTRODUCTION

The streams and rivers of the Appalachian mountains and the Southeast coastal plain are a treasure trove of aquatic biodiversity and a home to endangered species found nowhere else on Earth. Gas pipelines that carve through the headwaters and river valleys of this region threaten those rare species. Many of these pipelines are built using a streamlined Clean Water Act permit, issued by the U.S. Army Corps of Engineers (Corps), called Nationwide Permit 12 (NWP 12). The district court correctly concluded that NWP 12 sanctions impacts to species that go unaccounted for in analysis required under the Endangered Species Act

¹ No party or its counsel, or any other person, other than *amici* and their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

(ESA). The pipelines of Virginia and West Virginia are a testament to that harm and its consequences.

Consider the clubshell, an endangered and rapidly declining sediment-sensitive freshwater mussel. In recent years, five gas pipelines have targeted clubshell habitat in West Virginia. All five pipelines—Atlantic Coast Pipeline, Mountain Valley Pipeline, Rover Pipeline, Mountaineer Xpress, and WB Xpress—used or plan to use NWP 12. Yet the Corps and the U.S. Fish and Wildlife Service (FWS) have never considered in a jeopardy analysis the combined impact of these NWP 12 projects on clubshell or other species.

The Corps' approach to NWP 12 violates the ESA. Even where project-specific analysis suggests that project-specific impacts are acceptable, that analysis misses the overall effect of NWP 12. *Amici* ask the Court to deny a stay pending appeal to ensure that NWP 12 does not further license piecemeal destruction of clubshell and other protected species.

ARGUMENT

I. Appalachian Pipelines Demonstrate How Project-Specific Consultation Does Not Account for the Overall Effects of NWP 12.

The Atlantic Coast Pipeline (ACP) and Mountain Valley Pipeline (MVP) are a case study in why NWP 12 is flawed, because the combined effect of these neighboring pipelines on endangered species like clubshell, Roanoke logperch, and candy darter has gone unanalyzed. Project-specific consultations do not account

for the overall effects of the NWP 12 program—and therefore cannot ensure that the NWP 12 program will not jeopardize protected species—because the ESA concept of “action area” limits the scope of project-specific analysis and because cumulative effects under the ESA exclude federal actions.

Under the ESA, the “action area” is the area “affected directly or indirectly by the Federal action.” 50 C.F.R. § 402.02.² Jeopardy determinations turn on three considerations related to the “action area” that are relevant here: “effects of the action,” “cumulative effects,” and “environmental baseline.” *Id.* § 402.14(g)(2)–(4). *Effects of the action* are “all consequences to listed species” caused by the action. *Id.* § 402.02. *Cumulative effects* are those of “future State or private activities, not involving Federal activities,” that occur “within the action area.” *Id.* *Environmental baseline* means the condition of listed species also within “the action area,” considering impacts from past or present Federal, State, or private actions and anticipated impacts from Federal projects that have completed Section 7 consultation. *Id.*

As illustrated in *amici*’s table, *infra*, the way an agency defines “the action” determines the “action area” and the effects the agency considers in jeopardy analysis. The Corps agrees, noting below that for an individual project

² The Section 7 regulations were recently revised. *See* 84 Fed. Reg. 44,976 (Aug. 27, 2019). *Amici*’s analysis applies pre- and post-revision.

“consultation would be limited *to that project*.” Dist. Ct. Dkt. No. 88, at 42 (emphasis added). Conversely, for a program like NWP 12, consultation must encompass *the program* and the area affected by the program as a whole.

	<i>Action</i>	
	<i>Nationwide Permit 12</i>	<i>Project-Specific</i>
<i>Action Area</i>	Area affected by NWP 12 program	Area affected by specific NWP 12 project
<i>Effects</i>	Overall effects of NWP 12 program	Overall effects of specific NWP 12 project
<i>Environmental Baseline</i>	Condition of species in NWP 12 Action Area	Condition of species in project-specific Action Area
<i>Cumulative Effects</i>	Effects of future non-federal actions in NWP 12 Action Area	Effects of future non-federal actions in the project-specific Action Area

Using project-specific consultations in lieu of programmatic consultation lets adverse impacts go unaccounted for, with real-world consequences. For example, ACP and MVP are being constructed through Virginia and West Virginia; together they will cross waterbodies over 1,000 times in Virginia alone.³ Both pipelines rely on NWP 12. Both pipelines also have caused significant stream sedimentation. West Virginia has cited MVP at least 46 times, including

³ See Downstream Strategies, *Threats to Water Quality from Mountain Valley Pipeline and Atlantic Coast Pipeline Water Crossings in Virginia* (Feb. 16, 2018), <https://bit.ly/2TqZQ7u>.

for water quality violations.⁴ Virginia sued MVP for water quality violations.⁵ And ACP has caused similar problems.⁶

Both pipelines will adversely affect the endangered Roanoke logperch, a freshwater fish.⁷ The “most widespread current threat to Roanoke logperch is non-point source pollution in the form of fine sediment.”⁸ There are “approximately eight total populations of ... logperch.”⁹ MVP will affect three populations; ACP will affect another one.¹⁰

Despite the overall adverse effect of these NWP 12 projects on logperch, project analysis for each pipeline ignores the adverse effect of the other when assessing jeopardy. Each project would cross dozens of streams in logperch watersheds—collectively introducing significant sediment into logperch habitat—but both project analyses myopically define the logperch “action area” as only

⁴ See Consent Order Issued Under the West Virginia Water Pollution Control Act (Apr. 19, 2019), <https://bit.ly/2LNgvxF>.

⁵ Complaint, *Paylor v. Mountain Valley Pipeline, LLC*, No. CL18006874-00 (Va. Cir. Ct. Dec. 7, 2018).

⁶ See, e.g., Letter from Richard Gangel, Dominion Energy Servs., Inc., to Timothy J. Casto, W.Va. Dep’t of Env’tl. Prot. (Aug. 22, 2018) (reporting violations).

⁷ See FWS, Biological Opinion for ACP 38–39 (Sept. 11, 2018), <https://bit.ly/3g7DuBA> (ACP BiOp); FWS, Biological Opinion for MVP 23–24 (Nov. 21, 2017), <https://bit.ly/2WRUBjm> (MVP BiOp).

⁸ FWS, Roanoke Logperch Five-Year Review 16 (2007), <https://bit.ly/2Tpg0hK>.

⁹ *Id.* at 10.

¹⁰ Compare *id.* (listing populations) with ACP BiOp 18-19; MVP BiOp 14-16.

“200 [meters] above and 800 [meters] below” individual crossings where logperch are present, plus the width of the construction right-of-way.¹¹ The logperch “action area” for ACP is a mere “3,104 [meters]” of its habitat.¹² Projects outside of this cramped “action area” are excluded from environmental baseline and cumulative effects considerations in ACP’s jeopardy analysis. These NWP 12 projects will *together* adversely affect logperch, but that compounding effect is never addressed in project-specific consultation because MVP does not cross ACP’s 3,104-meter “action area.”

Even if MVP crossed ACP’s “action area,” MVP’s impacts likely would be excluded from ACP-specific jeopardy analysis. Cumulative effects under the ESA exclude effects from other federal projects like MVP. “Environmental baseline” further excludes projects with incomplete Section 7 consultation. Since ACP and MVP went through consultation at roughly the same time, MVP would be left out of ACP’s baseline (and vice versa). Programmatic analysis fixes this problem because both ACP and MVP are “effects of the [NWP 12] action”—regardless of cumulative effects or environmental baseline. *See* 50 C.F.R. § 402.02.

By focusing only on project-specific impacts, significant effects of the overall NWP 12 program—such as the combined effect of ACP and MVP on

¹¹ ACP BiOp 19; MVP BiOp 14.

¹² ACP BiOp 19.

logperch—are unaccounted for in any jeopardy analysis. This is the “piecemeal destruction of species and habitat” the district court warned of. *See* Corps App. 9. It is also a problem this Court has previously identified: “project-specific consultations do not include ... analysis comparable in scope and scale to consultation at the programmatic level.” *Cottonwood Env'tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082 (9th Cir. 2015). Siloed project-specific consultations may wrongly suggest that impacts to logperch are acceptable precisely because they fail to account for the combined effect of the NWP 12 program on the species.

This problem is not limited to logperch. MVP and ACP also will both affect the candy darter, another endangered freshwater fish found only in Virginia and West Virginia. FWS specifically recognizes the threat of pipeline construction to candy darter.¹³

Both projects also risk impacts to clubshell. Although “once abundant,” “[o]nly eight clubshell populations show evidence of recent reproductive success.”¹⁴ FWS confirms that a “variety of instream activities continue to

¹³ *See* FWS, Special Status Assessment Report for the Candy Darter 37–38 (Sept. 2017), <https://bit.ly/36mlGhq>. Candy darter consultation for both pipelines remains incomplete.

¹⁴ FWS, Clubshell Five-Year Review 25 (2019), <https://bit.ly/2WSfFGw>.

threaten clubshell populations, including ... pipeline construction.”¹⁵ Specific impacts in West Virginia include “numerous stream crossings for gas pipelines.”¹⁶ ACP, MVP, Rover Pipeline, Mountaineer Xpress, and WB Xpress—all of which are NWP 12 projects—affect clubshell habitat in West Virginia. ACP alone has nearly destroyed one of the only remaining populations.¹⁷ Yet the overall effect of these NWP 12 pipelines on clubshell is unaccounted for. Without programmatic consultation for NWP 12, we may learn too late that the accumulating harm of pipeline construction pushed the clubshell across a one-way threshold to extinction.

II. The Corps Applies Different Approaches to Individual and Nationwide Permits.

The Corps asserted below that whether a project utilizes an individual permit or nationwide permit, the consultation “result is the same either way.” Dist. Ct. Dkt. No. 88, at 42–43. That claim ignores a critical difference between the Corps’ individual and nationwide permitting schemes.

Corps regulations known as the § 404 Guidelines prohibit the discharge of dredged or fill material “if there is a practicable alternative to the proposed

¹⁵ *Id.* at 21.

¹⁶ *Id.*

¹⁷ *See* Letter from Patrick Hunter, SELC, to Pam Toschik, FWS, 5–6 (Feb. 11, 2020), <https://bit.ly/2AKPbxL>.

discharge which would have less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a). Impacts to protected species are considered as part of the “aquatic ecosystem.” *See id.* §§ 230.10(c), 230.30. But the Corps takes the position that “[a]ctivities authorized by [nationwide permits] do not require a 404(b)(1) Guidelines alternatives analysis, including the identification of the least environmentally damaging practicable alternative.” Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1899 (Jan. 6, 2017). Accordingly, the consultation outcome may be materially different depending on whether an individual or a nationwide permit is used, because identification of the “least environmentally damaging practicable alternative” required for individual permits may compel an alternative that is less harmful to protected species.

III. The Partial Vacatur of NWP 12 Should Not Be Stayed.

NWP 12 is unlawful under the ESA. The district court crafted an equitable remedy that Plaintiffs ably defend. Here, *amici* emphasize that, regardless of what this Court may decide about the injunction below, a stay of the partial vacatur of NWP 12 is not justified. The district court was right on the merits and tailored its vacatur appropriately. That ordinary result does not merit an “intrusion into the ordinary processes of administration and judicial review.” *Nken v. Holder*, 556 U.S. 418, 427 (2009).

First, Defendants are not likely to prevail on their argument that partial vacatur was an abuse of discretion because partial vacatur is a suitable remedy here. As an initial matter, the Court should reject the Corps’ suggestion that vacatur must somehow be limited to Keystone XL. Corps Mot. at 27. The Administrative Procedure Act (APA) directs courts to “set aside” unlawful agency actions, and the text and history of the APA confirm that the statute authorizes universal vacatur even if that remedy affects nonparties. 5 U.S.C. § 706(2); *see also* Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 Harv. L. Rev. 920, 991 n.466 (2020). Likewise, *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011), illustrates that an order declaring a regulation invalid is an appropriate remedy even if an injunction would be overbroad. Federal agencies have tried the Corps’ argument in other cases and have been rightly met with judicial bewilderment.¹⁸

In any event, the district court’s partial vacatur is the proper remedy in this case. Defendants argue that the district court should have remanded without vacatur under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146 (D.C. Cir. 1993). But Defendants do not claim that the district court applied

¹⁸ *See, e.g., O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019) (“To the extent Defendants argue that the vacatur remedy should be limited to the plaintiffs in this case, that contention is both at odds with settled precedent and difficult to comprehend.”).

the wrong standard, only that it reached (in their view) the wrong result. The opposite is true. The district court's remedy strikes an equitable balance that minimizes regulatory uncertainty while still affording species their due protection under the ESA. Pipelines like Keystone XL, ACP, and MVP pose significantly greater threats to endangered species than other NWP 12 activities. FWS recognizes that stream crossings for pipeline rights-of-way "can result in significant biological and engineering problems," and that the "scope and magnitude of many pipeline projects" necessitates "safeguards to protect these important resources."¹⁹ The district court was right to tailor its vacatur accordingly. And partial vacatur is hardly novel. In fact, it is a favored remedy compared to its cousin the injunction. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010).

Second, the equities and the public interest weigh heavily against a stay. A stay would revive a permitting program that unlawfully gave endangered species short shrift. That should end the inquiry. When there is an ESA procedural violation, "the equities and public interest factors always tip in favor of the protected species." *Cottonwood*, 789 F.3d at 1091. "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in

¹⁹ FWS, *Energy Development: Oil and Gas Pipelines* (May 2, 2018), <https://bit.ly/2XoPiqK>.

favor of affording endangered species the highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

Defendants’ countervailing reasons for a stay are not persuasive. Pipeline developers remain free to seek individual § 404 permits, and concerns about increased costs and processing time would not justify the intrusion of a stay even if they could constitute irreparable harm. *See Nken*, 556 U.S. at 427 (A stay “is not a matter of right, even if irreparable injury might otherwise result.”). The supposed public benefit of new pipeline construction also comes up short. For example, other *amici* posit that ACP will be a positive economic force and save consumers hundreds of millions in energy costs each year. Dkt. No. 31-2 at 6. In reality, the benefits of ACP accrue primarily to investors while its ballooning costs are passed to captive ratepayers—all of which recently led Virginia to tell the Supreme Court that the project threatens Virginia’s natural resources without clear corresponding benefits.²⁰ In any event, whatever value this Court assigns to streamlined pipeline construction, Congress assigned a higher value to protecting endangered species. *See Hill*, 437 U.S. at 194.

Finally, the Corps inaccurately downplays the threat that a stay would pose to endangered species in the paths of ACP and MVP. The Corps insinuates that

²⁰ Brief of *Amicus Curiae* Virginia 4–9, *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, No. 18-1584 (Jan. 22, 2020).

the Fourth Circuit's decision in *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635 (4th Cir. 2018), left the two pipelines ineligible for NWP 12. *See* Corps Mot. at 44. Not so fast. The Fourth Circuit held that the Corps could not excuse MVP from complying with a West Virginia-specific condition on NWP 12 that the pipeline concededly could not satisfy. *Sierra Club*, 909 F.3d at 639. The same issue temporarily blocked ACP from using NWP 12. But West Virginia has since purported to modify that condition, and MVP has already reapplied for NWP 12 verification.²¹ ACP's sponsors recently told their investors they plan to as well.²²

The district court crafted appropriate relief. Whatever this Court decides about the injunction below, the Court should leave the partial vacatur in place.

CONCLUSION

For the foregoing reasons, *amici* ask the Court to deny a stay.

Date: May 22, 2020

Respectfully submitted,

/s/ J. Patrick Hunter

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²¹ Status Report at 4, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1713 (4th Cir. Feb. 25, 2020), Dkt. No. 69.

²² *See* Dominion Energy, Q1 2020 Earnings Call 23 (May 5, 2020), <https://bit.ly/3bV5tB4>; Duke Energy, Earnings Review and Business Update: First Quarter 2020, at 18 (May 12, 2020), <https://bit.ly/2Tt1m8Z>.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Ninth Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 2793 words, excluding the parts of the brief listed in Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Date: May 22, 2020

/s/ J. Patrick Hunter

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: May 22, 2020

/s/ J. Patrick Hunter

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SOUTHERN ENVIRONMENTAL LAW CENTER