**Nos. 20-35412, 20-35414, 20-35415, and 20-35432**
**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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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*.

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

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# BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND USTELECOM – THE BROADBAND ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

*Amicus curiae* Edison Electric Institute (EEI) is a national association that has no parent corporation, and no publicly-held corporation holds a 10% or greater ownership interest in EEI.

*Amicus curiae* the International Brotherhood of Electrical Workers (IBEW) is a nonprofit corporation that has no parent corporation, and no publicly-held corporation holds a 10% or greater ownership interest in IBEW. IBEW is affiliated with the American Federation of Labor and Congress of Industrial Organizations, which is also a nonprofit.

*Amicus curiae* the Chamber of Commerce of the United States of America "Chamber") is a non-profit corporation organized under the laws of the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

*Amicus curiae* USTelecom – The Broadband Association (US Telecom) is a trade association that has no parent corporation, and no publicly-held corporation holds a 10% or greater ownership interest in US Telecom.

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* Edison Electric Institute (EEI), International Brotherhood of Electrical Workers ("IBEW"), Chamber of Commerce of the United States of America ("Chamber") and USTelecom – the Broadband Association ("USTelecom") (collectively, "Utility, Labor, Telecom, and Business *Amici*") file this brief supporting Defendants-Appellants United States Army Corps of Engineers ("Corps"), et al., and Intervenor-Defendants-Appellants TC Energy Corporation et al.[1]

EEI represents all U.S. investor-owned electric companies. Its members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. The IBEW represents approximately 775,000 active members and retirees who work in the electric power sector, in a variety of fields including utilities, construction, telecommunications, and manufacturing. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every economic sector and from every region of the country. U.S. Telecom represents service providers

[1] This brief was submitted with a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a). No counsel for a party authored this brief in whole or in part, and no party or their counsel or any person other than *amici*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

and suppliers for the communications industry. USTelecom's members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its diverse membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses in every corner of the country.

Utility, Labor, Telecom, and Business *Amici's* members provide safe and reliable electricity and telecommunications services nationwide, often over long distances, so their operations sometimes require permits under Clean Water Act ("CWA") section 404, 33 U.S.C. § 1344, for discharges of dredged or fill material. To that end, *amici's* members have for decades received authorization for such discharges under the Corps' Nationwide Permit 12 ("NWP 12"). NWP 12 is thus integral to the construction and repair of power and telecommunications lines and other infrastructure projects that involve discharges with minimal impacts to jurisdictional waters, and *amici's* members regularly engage in construction, maintenance, and repair activities which ensure that any regulated discharges comply with NWP 12's many requirements. Furthermore, NWP 12 plays a particularly important role in emergency situations where electric or telecommunications lines are damaged by extreme weather or some other cause, and *amici's* members must repair or replace them expeditiously. The public health, safety, and welfare depend on safe and reliable delivery of electricity as well as

telecommunications connectivity, and the providers of electricity and telecommunications services depend, in turn, on NWP 12.

*Amici* also have a strong interest in this appeal given the business community's reliance on the continued provision of electricity and telecommunications services, made possible by work conducted by utilities under NWP 12, and the corresponding harm to businesses—and the U.S. economy more broadly—should that construction and repair work be impeded by the district court's decision finding NWP 12 unlawful.

For these reasons, Utility, Labor, Telecom, and Business *Amici* have an obvious and substantial interest in the current and future availability of NWP 12, as they seek to continue to provide secure and reliable electricity and broadband to homes, schools, hospitals, fire stations, industrial and commercial facilities, and other customers. The *amici* believe that their long experience operating under NWP 12 will assist this Court in resolving the issues on appeal.

## BACKGROUND

NWP 12 is a general permit issued on a nationwide basis under CWA section 404(e), 33 U.S.C. § 1344(e). The permit authorizes discharges of dredged or fill material into navigable waters associated with various activities undertaken by the electric utility and telecommunications industries, among others, including certain categories of pipelines. For instance, NWP 12 authorizes discharges in

connection with "the construction, maintenance, or repair of utility lines." 82 Fed. Reg. 1,860, 1,985 (Jan. 6, 2017).

The Corps reviews and reissues NWP 12 through notice and comment rulemaking every five years to ensure ongoing compliance with applicable statutory requirements. *See generally id*. The Corps did so most recently in 2017, and the lawfulness of that reissuance is the subject of this case. The 2017 reissuance of NWP 12 (and other nationwide permits) was but the latest step in the long history of the Corps' administration of the nationwide permit program that spans decades. *Amici* wish to highlight some of that history so that this Court understands how NWP 12 came to be and the extensive expertise that the Corps has developed in administering that permit over the decades.

### A. The Corps' Long History and Expertise with NWP 12.

When Congress enacted CWA section 404 in 1972, it authorized the Corps to issue permits for the discharge of dredged or fill material into "navigable waters." 33 U.S.C. §§ 1344, 1362. In 1977, Congress added Section 404(e) specifically to eliminate regulatory hurdles for discharges related to projects with minimal impacts on jurisdictional waters. *See* H.R. Rep. No. 95-830, at 38, 98, 100 (1977), *reprinted in* 3 A Legislative History of the Clean Water Act of 1977 ("Leg. Hist.") at 348 (1978) (Conf. Rep.). Section 404(e) authorizes the issuance of permits on a nationwide basis covering entire categories of activities involving discharges that

have no more than "minimal" individual or cumulative environmental effects. 33 U.S.C. § 1344(e).

At the time of the CWA's enactment, the nation relied on extensive networks of wires to transmit electricity and provide telecommunications services, but the 1972 Act did not provide for nationwide permits authorizing certain discharges related to the construction and repair of those critical networks. After a 1975 court decision ordered the Corps to regulate "navigable waters" under the CWA "to the maximum extent permissible under the Commerce Clause," *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), it quickly became apparent that a streamlined permit process was desperately needed for minor discharges of dredged or fill material associated with routine activities, such as construction of and work on electric and telecommunications infrastructure.

Without waiting for Congress to act,[2] the Corps established five nationwide permits in July 1977, including a permit for discharges associated with utility lines. The 1977 Utility Line NWP—the direct ancestor of today's NWP 12—defined "utility line" the same way NWP 12 does today: "any pipe or pipeline for the

[2] *See* H.R. Rep. No. 95-139 (1977), *reprinted in* 4 Leg. Hist. at 1217 ("While considerable opposition to any increase in regulatory activity under section 404 was expressed, the Subcommittee . . . strongly urged the Corps of Engineers and the EPA to . . . develop workable regulations which would be capable of effective administration and would not create undue hardship and inconvenience to potential applicants for permits.").

transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication." 42 Fed. Reg. 37,122, 37,146 (July 19, 1977). But unlike today, the 1977 permit imposed no limit on the total acreage of authorized discharges and required no preconstruction notification ("PCN") to the Corps.[3]

After the Corps established the initial NWPs in 1977, the Senate began considering a bill to amend the CWA to "provide[] for the use of general permits as a mechanism for eliminating [] delays and administrative burdens[.]" S. Rep. No. 95-370, at 74, 80 (1977), *reprinted in* 4 Leg. Hist. at 707, 713. Notably, members in both chambers of Congress recognized with approval the Corps' new NWPs. *See* Senate Debate on the Clean Water Act of 1977 (Aug. 4, 1977), *reprinted in* 4 Leg. Hist. at 922 (statement of Sen. Baker that NWPs "received a favorable reaction by all interest groups"); *see also* H.R. Rep. No. 95-830 (1977).

In fact, in the 1977 CWA amendments establishing section 404(e), Congress adopted concepts and language from the Corps' 1977 NWP rule, including

[3] The 1977 Utility Line NWP authorized the discharge of "[d]redged or fill material placed as backfill or bedding for utility line crossings provided there is no change in preconstruction bottom contours." 42 Fed. Reg. at 37,146. The Corps explained that the NWP set no acreage limit and required no PCN because its terms, such as preservation of contours, "limit any sedimentation or disruption of water flow in streams as a result of these activities." *Id*. at 37,131.

"nationwide" permits for "categories" of activities with "minimal" adverse individual or "cumulative" impacts. *Compare* 33 U.S.C. § 1344(e) *with* 42 Fed. Reg. at 37,130-31, 37,146-47. When the Corps reissued the NWPs in 1982 after public comment,[4] it noted that many of the NWPs "were in effect at the time Congress adopted Section 404(e)" and that the "legislative history clearly shows Congress' intent to endorse the program . . . and to encourage its expansion." 47 Fed. Reg. 31,794, 31,798 (July 22, 1982).

The Corps has refined its NWP for utility lines through multiple renewal proceedings, thereby ensuring its continuing compliance with the statutory minimal effects standard. When the Corps reissued its five original NWPs in 1982, it also established new NWPs. *See id*. The 1982 NWP rulemaking created separately numbered NWPs for specific categories of activities; re-designated the 1977 Utility Line NWP as NWP 12; established regulations governing the NWP program in 33 C.F.R. Part 330; authorized Division Engineers to modify NWPs by adding regional conditions; and gave District Engineers the discretion to require individual permit applications. *See* 47 Fed. Reg. at 31,795, 31,798, 31,832-34. And the Corps "prepared environmental assessments for all proposed nationwide permits" to comply with NEPA. *Id*. at 31,798.

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[4] Corps headquarters issues notice and takes comment on proposed NWPs, 33 C.F.R. § 330.5(b)(2), (3), and Division Engineers provide notice and comment on proposed regional conditions. *Id*. § 330.5(c).

When the Corps reissued the NWPs in 1991, it significantly amended the NWP regulations at 33 C.F.R. Part 330. *See* 56 Fed. Reg. 59,110, 59,134-47 (Nov. 22, 1991). Among other things, those amendments detailed a process for recognizing conditions that require more attention at regional and local levels and responsibilities within the Corps for addressing those conditions. At the national level, the Chief of Engineers issues and conditions NWPs. The Division Engineers, in various regional offices around the country then establish more restrictive regional conditions within Corps Districts and states. District Engineers in states and territories review specific projects and, if appropriate, impose project-specific conditions or require individual permits. 33 C.F.R. §§ 330.1(b), (d), 330.4(b)(1), (2).

Most recently, when the Corps reissued NWP 12 in 2017, it provided an even more detailed qualitative and quantitative analysis of potential environmental effects, ultimately concluding that the impacts of NWP 12 activities would be insignificant. *See* 82 Fed. Reg. at 1,890-91. The Corps explained that numerous general conditions, as well as regional and project-specific conditions, provide additional safeguards and mitigation that further support a finding of no significant impact. *See id*.

The current terms of NWP 12 do not authorize any activity that will result in a loss of more than 1/2 acre of jurisdictional waters, and require PCN for any

activity that will result in a loss of more than 1/10 acre of jurisdictional waters, 82 Fed. Reg. at 1,986—or that might affect endangered species. Because of these requirements, only activities with minor impacts—*e.g.*, construction and maintenance of electric or telecommunications lines that cross waters or wetlands at discrete points—may be conducted under NWP 12. The majority of those activities undergo PCN review, *see id*. at 1,864-65, further ensuring that they will have minimal impacts.

The comprehensive terms and conditions that govern NWP 12 today assure that its use for utility line construction and maintenance will have minimal adverse environmental effects, and they also serve to protect species and habitat. For example, NWP 12 limits the allowable loss of waters for a single and complete project to half of an acre, 82 Fed. Reg. at 1,885, 1,985; requires that there be no change to preconstruction contours of waters of the United States ("WOTUS"), *id.* at 1,985; requires that temporary fills be removed in their entirety and the affected areas returned to their original preconstruction elevations and revegetated, *id.* at 1,986; and requires that normal downstream flows be maintained, *id*. Furthermore, all NWPs are subject to 31 general conditions, which (*inter alia*) require the avoidance and minimization of adverse impacts through design and construction measures, 82 Fed. Reg. at 2,001; prohibit substantial disruption of aquatic life cycle movements, *id.* at 1,998; and require the use of mats for heavy

equipment used in wetlands, as well as soil erosion and sediment controls, *id.* at 1,999. Moreover, NWP 12 requires that crossings of single waterbodies must be sufficiently separate that they do not comprise individual channels in a braided stream, or individual arms of a large, irregularly shaped wetland or lake, further preventing cumulative impacts to the environment, listed species, or critical habitat. 33 C.F.R. § 330.2(i).

Thus, NWP 12—which has evolved considerably from its 1977 origins—includes many safeguards to ensure that impacts from authorized discharges are individually and cumulatively minimal. And the Corps has now been implementing those requirements for over four decades, and has developed considerable expertise in doing so, as discussed further in Argument Section I below.

### B. Plaintiffs-Appellees' Challenge to NWP 12.

Plaintiff-Appellee environmental groups brought suit challenging the use of NWP 12 to authorize certain activities related to construction of portions of the Keystone XL pipeline. They also brought facial challenges to NWP 12 under the Endangered Species Act ("ESA"), National Environmental Policy Act ("NEPA"), and the CWA.

On April 15, 2020, the U.S. District Court for the District of Montana ruled in the Plaintiffs-Appellees' favor on their ESA claim, holding that the Corps violated the Act by reissuing NWP 12 in 2017 without formally consulting under

section 7 of the ESA. *See N. Plains Res. Council v. U.S. Army Corps of Eng'rs,* No. CV-19-44-GF-BMM, 2020 WL 1875455, *7 (D. Mont. Apr. 15, 2020) ("April 15 Order"). The lower court did not rule on the NEPA or CWA claims, *see id*. at *8-9, so those claims are not at issue on appeal.

Initially, the district court remanded the Permit to the Corps; vacated the Permit; and enjoined the Corps "from [authorizing] *any* dredge or fill activities under NWP 12." *See* April 15 Order, 2020 WL 1875455 at *9 (emphasis added)). One month later, however, the court narrowed the relief granted to vacate and enjoin the use of NWP 12 as to the construction of new oil and gas pipelines only. *N. Plains Res. Council v. U.S. Army Corps of Eng'rs,* No. CV-19-44-GF-BMM, 2020 WL 3638125, *6 (D. Mont. May 11, 2020) ("May 11 Order") (finding it appropriate to "narrow the vacatur of NWP 12 to a partial vacatur that applies to the construction of new oil and gas pipelines"). And while the district court and this Court both declined to stay the decision below pending appeal, on July 6, 2020, the U.S. Supreme Court stayed those portions of the district court's May 11 Order that enjoin uses of NWP 12 other than the Keystone XL pipeline.

Utility, Labor, Telecom, and Business *Amici* urge this Court to find that the district court erred in holding that the Corps violated the ESA in reissuing NWP 12 without formal consultation, even though the Corps is the "action agency" that

deployed its considerable expertise in determining that the reissuance of NWP 12 would have no effect on listed species or critical habitat.

## ARGUMENT

### I. THE DISTRICT COURT SHOULD HAVE DEFERRED TO THE CORPS' EXPERT ASSESSMENT THAT REISSUANCE OF NWP 12 WILL HAVE NO EFFECT ON LISTED SPECIES OR HABITAT.

An agency's determination under the ESA must be upheld unless it is arbitrary, capricious, an abuse of discretion, or contrary to law under the Administrative Procedure Act. *See Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007); 5 U.S.C. § 706(2)(A). And perhaps more specifically, an action agency's "no effect" determination must be reviewed deferentially, particularly where, as in this case, the agency draws upon its lengthy experience administrating a regulatory program. *E.g.*, *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1449 (9th Cir. 1996).

Here, the Corps' threshold determination in 2017 that the reissuance of NWP 12 would have "no effect" on listed species or critical habitat fulfilled the statutory requirement to "insure" that its action is not likely to jeopardize a listed species or adversely modify critical habitat. *See* 16 U.S.C. § 1536(a)(2). The district court erred by not affirming that determination under the deferential standard of review applicable to ESA cases. By rejecting the Corps' "no effect" determination, the district court improperly substituted its own judgment in place

of the Corps' expert judgment, which was informed by its decades of experience in administering NWP 12.

### A. The District Court Failed to Accord Proper Deference to the Corps' Expert "No Effect" Determination Under the ESA.

Under ESA section 7, federal agencies must ensure that "any action authorized, funded or carried out by such 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 [critical] habitat of such species." 16 U.S.C. § 1536. But if an agency, such as the Corps, makes the threshold determination that listed species or critical habitat will not be affected by the Federal action, often referred to as a "no effect" determination, then it need not consult with consult with the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (together, "Services").

The Services have long interpreted the relevant text of the ESA to allow action agencies to make threshold effect determinations for themselves. In promulgating consultation regulations in 1986, the Services explained that while they may, "when appropriate, request consultation on particular Federal actions, [they] lack[] the authority to require the initiation of consultation" and that "[t]he determination of possible effects is the Federal agency's responsibility." *Interagency Cooperation-Endangered Species Act of 1973*, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). In clarifying that an action agency "makes the final decision

on whether consultation is required," the Services cautioned that the action agency "likewise bears the risk of an erroneous decision." *Id.* Decades later, when revising their regulations, the Services reaffirmed their confidence in action agencies' ability to make informed "no effect" determinations, noting that "while the Services may recommend consultation, it is the Federal agency that must request initiation of consultation." 84 Fed. Reg. 44,976, 44,980 (Aug. 27, 2019).

Against this backdrop, this Court has repeatedly agreed that the ESA authorizes action agencies such as the Corps to make threshold determinations about whether their proposed actions will have "no effect" (no consultation needed), or instead "may affect" listed species or critical habitat (consultation needed). *E.g.*, *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 922 (9th Cir. 2020). "[I]f the action agency finds that its action will have no effect on listed species or critical habitat even within the action area, it need not consult" with the Services. *Id.; see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) ("[I]f the [action] agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered."). Courts in other circuits have likewise recognized that "Congress intended to allow Action Agencies to initially evaluate the potential environmental consequences of federal actions and to move forward on many of them without first consulting" other agencies. *Defenders of Wildlife v. Kempthorne*, Civ. A. No.

04-1230 (GK), 2006 WL 2844232, at *19 (D.D.C. Sept. 29, 2006); *see also id.* at 2 (noting that the ESA's "consultation requirements apply primarily to 'Action Agencies' such as . . . the Army Corps of Engineers").

Notably, this Court has upheld action agencies' no effect determinations even where there was disagreement between the action agency and the Services about whether consultation was necessary. For example, in *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1068-70 (9th Cir. 2005), this Court upheld the Corps' "no effect" determination even though the FWS objected twice and made it clear that it "did not concur" in the Corps' determination. While FWS had requested formal consultation, the Court explained that "[n]othing in the regulations mandates the action agency to enter into consultation after it receives such a request." *Id*. at 1069-70. Similarly, in *Southwest Center for Biological Diversity v. U.S. Forest Service*, this Court upheld the Forest Service's determination that its action would have "no effect" on the Mexican Spotted Owl even though it was "in tension with an internal [FWS] policy." 100 F.3d 1443, 1446 (9th Cir. 1996). The Court noted that the Forest Service "had no obligation to consider the views of [FWS]," and "was entitled to rely on the opinions and recommendations of its own experts." *Id*. at 1449.

These decisions are not surprising given that courts are at their "most deferential" when reviewing agencies' expert "scientific determination[s]." *San*

*Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601-02 (9th Cir. 2014); *see also Friends of Santa Clara River v .U.S. Army Corps of Eng'rs*, 887 F.3d 906, 924-26 (9th Cir. 2018) (holding that the Corps reasonably concluded that a project's discharges of dissolved copper would have "no effect" on Southern California steelhead and declining to "substitute our scientific judgment for that of the agency"); *Sw. Ctr. for Biological Diversity v. Glickman*, 932 F. Supp. 1189, 1193-94 (D. Ariz. 1996), *aff'd* 100 F.3d 1443 (9th Cir. 1996) (deferring to Forest Service's "no effect" determination and recognizing that "[a] deferential approach is especially appropriate where, as here, the challenged decision implicates substantial agency expertise").

Here, the Corps' conclusion that reissuance of NWP 12 would have "no effect" on listed species or critical habitat was based on its extensive experience administering the CWA section 404 program. The Corps has updated, refined, and implemented the NWPs, including NWP 12's protective terms and conditions, over the course of several decades. And the Corps explained that most NWP 12 uses require pre-construction notification (PCN), and thus a project-level review that gives the Corps the opportunity to confirm that the proposed activities will not impact listed species or critical habitat. *See* 82 Fed. Reg. at 1,861, 1,864. The Corps' own data shows that consultation with other agencies regularly occurs

pursuant to the PCN requirement of NWPs. *See id*. at 1,873-74 (finding that thousands of consultations occurred annually under the NWP program in 2012-16).

The district court's conclusion that programmatic ESA consultation was required prior to reissuance of NWP 12 demonstrates the little regard—and lack of deference—that it afforded the Corps' thoughtful analysis of NWP 12's impacts. For example, the district court dismissed the Corps' data regarding the frequency of project-level review based largely on contrary opinions provided by appellants' experts, which it adopted uncritically—and without any attempt to explain why those outside "experts" view of the impacts of NWP 12 should be accepted over the views of the agency that has administered the program for decades. *See* April 15 Order, 2020 WL 1875455, at *5-6 (summarizing opinions of plaintiffs' experts and concluding that there was "resounding evidence from experts" that "discharges authorized by NWP 12 may affect listed species and critical habitat") (internal quotation marks omitted).

The district court also improperly substituted its own flawed logic for the Corps' expert analysis, asserting that the Corps' "acknowledg[ment]" that NWP 12 will result in "a minor incremental contribution to the cumulative effects to wetlands, streams, and other aquatic resources" is "evidence[]" that NWP 12 "may affect listed species and critical habitat." *Id*. at *5-6. That is a non-sequitur. That an action may have effects on jurisdictional water bodies does not mean it will have

effects on *listed* species or their habitat. *Cf. Friends of Santa Clara River*, 887 F.3d at 915, 926-26 (affirming that Corps' conclusion, that an endangered fish species would be exposed to copper as a result of the discharge of dredged or fill material, did not trigger consultation because the Corps appropriately found that the amount of copper to which fish populations would be exposed was within normal background concentrations). More importantly, it is an improper substitution of the court's judgment for that of the action agency entrusted by Congress to administer the NWP program generally, which also has the most experience and expertise regarding the impacts of NWP 12 specifically. *See id.* at 924-26 (affirming Corps' "no effect" determination and declining to "substitute our scientific judgment for that of the agency").

The Corps' conclusion—which was based on the structure of the NWPs, its decades of experience administering the nationwide permit program, and its technical expertise—that reissuance of NWP 12 itself has "no effect" on listed species or critical habitat was not a "clear error of judgment." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The district court would have so concluded—had it viewed the Corps' analysis and conclusion with the deference due to the decision of an action agency based on years of experience

administering the program at issue. This Court should correct that error and reaffirm the importance of deference in this unique context.

### B. The District Court Failed to Recognize the Significance of General Condition 18, Which Ensures Full Compliance with the ESA.

In addition to relying on its decades of experience administering NWP 12, the Corps' 2017 "no effect" determination was also based on its longstanding General Condition 18 (GC 18) NWP requirement. *See* 82 Fed. Reg. at 1,874. The district court erred by failing to defer to the Corps' reasonable and well-supported conclusion that GC 18 appropriately safeguards threatened or endangered species and critical habitat by requiring project-level review for any project that *might* possibly impact species or habitat.

General Condition 18 flatly prohibits the use of NWP 12 for any activity "which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation . . . or which will directly or indirectly destroy or adversely modify the critical habitat of such species." *2017 Nationwide Permit General Conditions* ("NWP General Conditions"), Nationwide Permit Information - Army Corps of Engineers, § 18(a).[5]

[5] https://www.nap.usace.army.mil/Portals/39/docs/regulatory/publicnotices/2017%20Nationwide%20Permit%20General%20Conditions.pdf (accessed Sept. 1, 2020).

GC 18 also requires ESA Section 7 consultation before any activity which "may affect" a listed species or critical habitat. *Id*.

To ensure compliance with the "may effect" standard, GC 18 mandates that a non-federal would-be permittee submit a PCN "if any listed species or designated critical habitat *might* be affected or is in the vicinity of the activity." NWP General Conditions at § 18(c). As the Corps explained when reissuing NWP 12 in 2017, "the 'might affect' threshold in . . . paragraph (c) of general condition 18 . . . is more stringent than the 'may affect' threshold for section 7 consultation" because "'might' is defined as having 'less probability or possibility' than the word 'may.'" 82 Fed. Reg. at 1,872 (quoting Merriam-Webster's Collegiate Dictionary, 10th ed.). The Corps further explained that the very intent of General Condition 18 is "to establish a low reporting threshold to ensure that PCNs are submitted for any proposed NWP that has the potential to affect listed species or designated critical habitat." *Id*. at 1,954.

Once a would-be permittee submits a PCN, the Corps must either determine that the proposed activity will have "no effect" on listed species or critical habitat, or undertake ESA consultation—and the applicant may not begin work on the project until the Corps does so. *See* NWP General Conditions at § 18(c) ("[T]he applicant shall not begin work until the Corps has provided notification that the proposed activity will have 'no effect' on listed species or critical habitat, or until

ESA section 7 consultation has been completed."); *see also* 82 Fed. Reg. at 1,873 ("If the project proponent is required to submit a PCN because the proposed activity might affect listed species or critical habitat, the activity is not authorized by NWP until either the Corps district makes a "no effect" determination or . . . completes formal or informal ESA section 7 consultation").

Although the Corps is supposed to review the PCN and revert to the applicant within 45 days, GC 18 instructs that, even "[i]f the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps." General Conditions, § 18(c). Thus, under GC 18, no non-federal activity that *might* possibly affect listed species or critical habitat may be undertaken under NWP 12 until the Corps confirms that the proposed use will have no such effect or completes formal ESA consultation. And GC 18 empowers district engineers to "add species-specific permit conditions to the NWPs" in order to avoid any such effects. General Conditions, § 18(d); *see also* 82 Fed. Reg.at 1,873 ("Division engineers can add regional conditions to the NWPs to protect listed species and critical habitat, and to facilitate compliance with general condition 18.").

The district court nonetheless incorrectly concluded that GC 18 project-level review fails to ensure that any action authorized by the Corps is not likely to jeopardize the continued existence of any listed species or result in the destruction

of adverse modification of such species' habitat in accordance with ESA section 7. *See* April 15 Order, 2020 WL 1875455, at *7. The court opined that, through GC 18, the Corps had impermissibly "delegate[d]" the duty to determine whether consultation is required to the permittee. *See id*. But it is unavoidably the case that, whenever a private party must obtain a federal permit or authorization, it is up to that party to make the initial determination as to whether its action might require it to provide information or notification—that is how the federal permitting system operates. And if a project proponent moves forward without the necessary permits and authorizations (*e.g.*, it does not submit a PCN when it should have under General Condition 18), then any discharges into navigable waters violate the CWA, and any taking of a listed species violates the ESA, thereby subjecting the project proponent to Corps enforcement action, 33 C.F.R. § 330.1(c), and potentially civil or criminal penalties under the CWA and the ESA. *See* 33 U.S.C. § 1319; 16 U.S.C. §§ 1540(a)(1), (b)(1); *see also* 82 Fed. Reg. at 1,954 ("If the project proponent conducts an activity that affects listed species or designated critical habitat, but did not submit the PCN required by paragraph (c), the activity is not authorized by NWP. That activity is an unauthorized activity and the Corps will take appropriate action to respond to the unauthorized activity.").

The district court's suggestion that would-be users of NWP 12 might simply bypass General Condition 18 and decline to submit a PCN even if an activity might

affect listed species or critical habitat is inconsistent with *amici's* experience with NWP 12—and the Corps' record findings. Based on its decades of experience with the program, the Corps estimated that over 80% of all projects conducted under NWP 12 go through the PCN process. *See* 2 E.R. 259 (finding that approximately 82% of projects conducted under NWP 12, accounting for over 97% of aquatic acreage impacted, will undergo PCN review). Furthermore, once a PCN is submitted—which, as noted above, the Corp estimates occurs in the vast majority of projects conducted under NWP 12—it is the Corps that makes the ESA section 7 determination, not the permittee. *See* 82 Fed. Reg. at 1,955 ("The prospective permittee does not decide whether ESA section 7 consultation is required for NWP activities; that is the Corps' responsibility.").

The district court therefore was wrong to conclude that GC 18 represented an improper delegation of the Corps' permitting authority, as opposed to an effective safeguard that supports the Corps' conclusion that NWP 12 itself will have no effect on listed species or critical habitat. This Court should so hold, and accordingly reverse the decision below.

## CONCLUSION

Because the Corps' "no effect" determination fulfilled its statutory obligations under ESA section 7, this Court should reverse the district court's order.

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Respectfully submitted,

s/ David Y. Chung

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the length limitations in Federal Rules of Appellate Procedure 29(5) because the brief contains 5,397 words as calculated by Microsoft Word, excluding parts exempted by the Federal Rule of Appellate Procedure 32(f).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman font.

Dated: September 23, 2020 /s/ David Y. Chung
David Y. Chung

## CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I caused to be filed electronically the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, that all participants in this case are registered appellate CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/ David Y. Chung
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