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.

U.S. 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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, TEXAS, AND 16 OTHER STATES IN SUPPORT OF DEFENDANTS-APPELLANTS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

None of the parties to this action asked the district court to transform a case challenging application of the Army Corps of Engineers Nationwide Permit 12 ("NWP-12") to *one* pipeline project into an opportunity to issue a *nationwide* injunction affecting new oil and gas pipelines in *every* State—no matter their length, purpose, or minimal environmental effects. The district court's overbroad, unasked for relief is flawed as a matter of fairness and court procedure, not to mention on the merits, and Appellants are likely to prevail on this appeal. Nevertheless, the surprise nationwide consequences of the district court's order mean entities like the undersigned *amici* cannot wait until then for relief: The disruption, delay, and costs the underlying decision will impose call for an immediate stay.

Amici curiae the States[1] of West Virginia, Texas, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and Utah have compelling interests in the appeal of the district court's May 11, 2020 amended order ("the Order"). The Order vacated NWP-12 as applied to "construction of new oil and gas pipelines" anywhere in the country. App. 38. NWP-12 is a streamlined alternative to individual permitting review under the Clean Water Act ("CWA") for utility line and pipeline

[1] Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(D), States may file an *amicus* brief without consent of the parties or leave of the Court.

projects with a "minimal cumulative adverse impact on the environment." 82 Fed. Reg. 1860, 1860 (Jan. 6, 2017). Under the Order, needed infrastructure projects will become significantly more costly and time-consuming—potentially rendering some unfeasible at all. Yet electrical power is the lifeblood of the modern world, meaning all States need this infrastructure to power everything from homes to hospitals. And given the recent downturn caused by COVID-19, the economic vitality pipeline projects generate is more essential than ever.

Further, *amici* States had no notice that the district court would go beyond Plaintiffs-Appellees' requested relief to issue an Order affecting States far afield of the Keystone XL route. Indeed, the district court expressly assured parties—including the State of Montana—that they would be able to "prospectively rely on [NWP-12] until it expires on its own terms . . . *even if Plaintiffs prevail on the merits*." App. 304 (emphasis added). The lower court's about-face makes the interests of *amici* States and the nation at large even more stark. *Amici* therefore support this appeal and Federal Appellants' motion for a stay.

ARGUMENT

This Court applies a four-factor test when granting a stay pending appeal: (1) likelihood of success on the merits; (2) whether appellants will be irreparably harmed absent a stay; (3) potential injury to other parties; and (4) the public interest. *E.g.*, *Doe #1 v. Trump*, 2020 WL 2110978 (9th Cir. May 4, 2020) (citing *Nken v.*

Holder, 556 U.S. 418, 433-34 (2009)). Courts consider the public interest together with irreparable harm where, as here, the government is a movant—sovereigns are entitled to a stay of judgments that threaten to harm their citizens. *Id.* at 435; *see also Sierra Club v. Trump*, 929 F.3d 670, 704-05 (9th Cir. 2019).

Federal Appellants' motion thoroughly explains their significant likelihood of success on the merits and irreparable harm without a stay. *See* Fed. Appellants' Mot. For Stay Pending Appeal, ECF No. 11, at 19-43 ("Fed. Mot."). Congress expressly authorized general permits like NWP-12, which are appropriate for activities causing "only minimal adverse environmental effects" and that "have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). The Tenth Circuit upheld the prior, substantially similar version of the permit, *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043 (10th Cir. 2015), and numerous safeguards in the current program mitigate concerns Plaintiffs-Appellees allege will arise under NWP-12's streamlined process. Fed. Mot. 31-39. The Order is also procedurally flawed and vastly overbroad—granting relief beyond the complaint, crediting declarations entered after the summary-judgment stage, and enjoining projects the parties and general public had no notice were at risk. Fed. Mot. 19-31.

Amici States affirm these and the other strong bases for a stay in the Federal Appellants' motion. In addition, they write to elaborate on the public's strong interest in staying—and ultimately invalidating—the Order.

I. Expanding And Strengthening Energy Infrastructure Is A Critical National Interest.

No less than water itself, electricity is an "essential" and foundational element of modern life. *See*, *e.g.*, *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1950 (2016) (describing water and electricity as "essential public services"). This Court recognizes the critical public interest in a stable electrical grid. *See*, *e.g.*, *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (per curiam) (declining to vacate approval of an electric power plant in part due to public interest in a steady power supply). Many others do as well. *See*, *e.g.*, *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016); *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (per curiam); *Caballo Coal Co. v. Ind. Mich. Power Co.*, 305 F.3d 796, 801-02 (8th Cir. 2002); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001).

As the nation's demand for electricity expands, so too must the fuel supply.[2] This need has been met more and more by oil and natural gas in recent years.[3] In the past decade, production of oil and gas has grown at a breakneck speed: Natural

[2] Electric Reliability Council of Texas ("ERCOT"), *ERCOT Reserve Margin up for Summer 2020, Energy Alerts Still Possible*, https://bit.ly/2X14cmx (accessed May 15, 2020) (forecasting increased demand).

[3] *See*, *e.g.*, ERCOT, *Capacity Changes by Fuel Type*, https://bit.ly/2zBVwLv (accessed May 15, 2020) (showing that gas-powered generation increased by over 1,100% from 1999-2020).

gas production grew over 60% from 2009 to 2019, and oil production more than doubled.[4] Oil and gas now account for over half of domestic energy production, and for the first time since 1957, America produces more energy than it consumes. *Id*.

This growth has brought considerable economic opportunities, as oil and gas production both fuel the economy and are significant economic engines in their own right. Over 704,000 Americans worked in the oil and gas industry in 2018, earning average salaries over $100,000.[5] States across the country share in these opportunities. In Appalachia, new technology has tapped untold reserves of natural gas from shale deposits,[6] and advanced recovery practices dramatically increased oil production in the Permian Basin region of Texas.[7] This growth generates substantial revenue for States and local governments through income, sales, property, and utility taxes. Texas, for example, places a 0.5% tax on gas utilities' gross income, Tex. Util. Code § 122.051, which has grown with the industry to more than $31.2 million

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[4] U.S. Energy Information Admin., *U.S. Primary Energy Production by Major Sources: 1950-2019*, https://bit.ly/2ZbgThp (accessed May 15, 2020).

[5] U.S. Bureau of Labor Statistics, *Quarterly Census of Employment and Wages*, https://bit.ly/2zGv2IK (accessed May 15, 2020) (selecting NAICS codes: 211, 213111, 213112, 237120, 33313; Area: US Total; Owner: Private; Type: All employees, Total wages (in thousands)).

[6] U.S. Geological Survey, *Appalachian Basin Oil and Gas Assessments*, https://on.doi.gov/3cvDGsh (accessed May 15, 2020).

[7] Railroad Comm'n of Texas, *Permian Basin Information*, https://bit.ly/2T7yu6e (accessed May 15, 2020).

in revenue in 2019.[8] Indeed, just one natural gas pipeline can generate over $10 million in income and property tax revenue every year.[9]

None of this is possible without a dynamic pipeline network. And as one could expect, growing the oil and gas supply requires expanding capacity of the nation's pipeline system. For example, the new trove of oil extracted from the Permian Basin is significantly above what existing refineries and pipelines can support.[10] The National Energy Technology Laboratory's review of natural gas consumption similarly concluded that "between $470 million and $1.1 billion" of additional investment in pipeline infrastructure is needed just to meet seasonal demand in part of the country.[11] Indeed, the public's need for the only pipeline that Plaintiffs-Appellees challenged in their complaint has already been reviewed and established. *See In re Application No. OP-0003*, 932 N.W.2d 653 (Neb. 2019) (affirming state agency's finding that Keystone XL was "in the public interest").

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[8] Texas Railroad Comm'n, *Utility Audit Gas Utility Tax Collected Calendar Year*, https://bit.ly/2zK3TF2 (accessed May 15, 2020).

[9] *See* U.S. Fed. Energy Reg. Comm'n, *Atlantic Coast Pipeline and Supply Header Project: Final Environmental Impact Statement* 4-509 (July 2017), *available at* https://bit.ly/2Z0oIq3 ("ACP FEIS").

[10] U.S. Energy Info. Admin., *New Pipeline Infrastructure Should Accommodate Expected Rise in Permian Oil Production*, https://bit.ly/2Z1SGu0 (May 9, 2017).

[11] U.S. Nat'l Energy Tech. Laboratory, *Additional Pipeline Capacity and Baseload Power Generation Needed to Secure Electric Grid* (Feb. 20, 2020), *available at* https://netl.doe.gov/node/9516.

II. Absent A Stay, The Order Will Cause Significant Harm To Our National Energy Infrastructure.

The Order has hugely disruptive consequences for the nationwide energy-distribution network. It is irrelevant that—modified after even Plaintiffs-Appellees could not credibly defend the first injunction's scope, App. 4—the Order applies "only" to new oil and gas pipelines. Without a stay, *no* entity in *any* part of the country can rely on NWP-12 for construction of new oil and gas pipelines, even ones that do not implicate the concerns animating the challenge here. This means that projects indisputably meeting the well-understood and long-standing requirements of NWP-12 will be forced to undergo the additional delays and costs associated with individualized review. *See Sierra Club v. U.S Army Corps of Engineers, et al.*, No. 1:20-CV-460 (W.D. Tex. Apr. 30, 2020) (arguing that existing verifications for Permian Highway Pipeline are invalid under the Order). Delaying any of these projects will directly harm both the communities that operate these pipelines and those the pipelines will serve.

The court below trivialized the Order's consequences, noting that developers no longer able to rely on NWP-12 can nonetheless "pursue individual permits for their new oil and gas pipeline construction." App. 29 (citation omitted). But this is cold comfort in light of the magnitude of difference—in time and dollars—between obtaining authorization through NWP-12 and undergoing the full individual

permitting process under Section 404 of the CWA. Individual permitting review is a lengthy, costly undertaking: "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006). These processes have sped up somewhat since *Rapanos* was decided, but the Corps estimates that it still takes nearly six times as long—over 250 days—as the process of applying through NWP-12. App. 225.

Moreover, individual permitting imposes delays even before the clock starts for the permit itself: Under Section 401, for example, applicants cannot obtain individual permits without a water quality survey from the State where the discharge will take place. 33 U.S.C. § 1341. State water regulators currently average 130 days to complete these assessments.[12] And these averages reflect a regime where NWP-12 remained available for qualified projects—every stage of individual-permitting review will slow down even more if the Order is allowed to channel *all* new oil and gas pipeline projects through individual permitting.

Thus, absent a stay, decision makers for new oil and gas projects will face a lose-lose proposition. They could take the district court up on its alternative, sinking

[12] Ass'n Water Quality Admin., *401 Certification Survey Summary* 1, May 2019, *available at* https://bit.ly/3fCmlzG.

time and money into the individual permitting process, or they could wait to start construction until Federal Appellants' position is ultimately vindicated. Either option will potentially add years to the timelines of projects that require substantial capital investment. Such "nonrecoverable compliance costs" are an "irreparable harm." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring). Some projects likely will not survive these setbacks.

The district court was therefore too cavalier when dismissing these concerns as mere "temporary economic harms." App. 112. They are serious enough to constitute irreparable injury for pipeline operators, *see Thunder Basin*, 510 U.S. 220-21, and without a stay, the public will be deprived of crucial energy infrastructure for at least as long as this appeal is pending. And some of that deprivation—of jobs, tax revenue, and energy resources—will become permanent if these "temporary" harms force projects to shut down altogether. The Order does not grapple with these consequences. The district court was wrong not to stay the Order in light of these concerns, making this Court's intervention critical.

III. A Stay Will Not Harm The Public's Interest In Environmental Protection.

Beyond these affirmative harms to the public, lack of a meaningful threat to the public from *other* quarters further tips the "balance of hardships," *Nken*, 556 U.S. at 436, in favor of a stay. Plaintiffs-Appellees brought this case seeking Endangered

Species Act review, a process FERC already conducts for every proposed natural gas pipeline. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 269 (4th Cir. 2018). Staying the Order would thus not cause these projects to proceed without environmental safeguards. Similarly, some of the projects Plaintiffs-Appellees describe in their belated declarations are not even currently authorized by NWP-12. *See id*. at 44-45. Whatever harms they believe would be caused by these projects are thus unrelated to NWP-12.

As to any remaining cases, it is a misnomer to suggest that NWP-12 does not involve environmental review. The process is streamlined because projects qualify for the program only if they have "minimal cumulative adverse effect on the environment," 33 U.S.C. § 1344(e)(1), but the Corps still considers potential environmental consequences before authorizing construction for all projects subject to preconstruction notification. 82 Fed. Reg. 1986. And project proponents required to submit preconstruction notices must list any endangered "species or designated critical habitat" affected by the project, which the Corps reviews before the projects are allowed to proceed. *Id*. at 1861, 1873. Staying the Order will thus cause no meaningful harm to the interests Plaintiffs-Appellees advance, and any marginal purported gains do not tip the balance of hardships against a stay.

CONCLUSION

The court should stay the Order of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations for an *amicus* brief because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains fewer than half of the pages available to a movant under Circuit Rule 27-1(d). This brief complies with the typeface and type style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Lindsay S. See
Lindsay S. See

May 15, 2020
Date

STATEMENT OF RELATED CASES

Amici States are not aware of any related cases that have not been disclosed by other parties.

/s/ Lindsay S. See
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CERTIFICATE OF SERVICE

I certify that on May 15, 2020, the foregoing document was served on counsel of record for all parties through the CM/ECF system.

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