

No. 19A1053

In the Supreme Court of the United States

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Applicants

v.

NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,
Respondents

On Application for a Stay Pending Appeal to the
United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Elena Kagan, Associate Justice of the Supreme Court
of the United States and Circuit Justice for the Ninth Circuit

**MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, BRIEF OF *AMICI CURIAE*
STATES OF WEST VIRGINIA, TEXAS,
AND 16 OTHER STATES IN SUPPORT OF APPLICANTS**

PATRICK MORRISEY
*Attorney General
of West Virginia*

KEN PAXTON
*Attorney General
of Texas*

LINDSAY S. SEE
*Solicitor General
Counsel of Record*
THOMAS T. LAMPMAN
JESSICA A. LEE
Assistant Solicitors General

KYLE D. HAWKINS
Solicitor General
JEFF C. MATEER
*First Assistant
Attorney General*
RYAN L. BANGERT
*Deputy First Assistant
Attorney General*
KATHLEEN T. HUNKER
Special Counsel

OFFICE OF THE WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25301
Tel.: (304) 558-2021
Lindsay.S.See@wvago.gov

OFFICE OF THE TEXAS
ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
Kyle.Hawkins@oag.texas.gov

[additional counsel listed at end]

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Proposed *amici curiae* the States of West Virginia, Texas, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and Utah (“*amici* States”) have a substantial interest in the issuance of a stay pending appeal. The application seeks to stay the district court’s amended order vacating the U.S. Army Corps of Engineers’ (“the Corps”) Nationwide Permit 12 (“NWP-12”) as applied to “construction of new oil and gas pipelines” anywhere in the country. App’x 42a.

NWP-12 makes federal approval of certain energy infrastructure construction projects quicker and more cost-effective than other permitting systems. These construction projects—and the energy resources they provide—are critical to the economies of *amici* States. Halting these projects while this appeal is pending will immediately disrupt *amici* States’ economies in an already precarious time. These immediate impacts can only be addressed by a stay. Moreover, *amici* States had no way to know that this case could or would impact projects on a nationwide scale until

the district court entered its initial order on April 15. Indeed, the district court had 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’x 73a (emphasis added). Thus, *amici* States are directly impacted by the resolution of this Application.

The filing of this brief by *amici* States “may be of considerable help to the Court.” Sup. Ct. R. 37.1. Where, as here, the government is a party, it is critical for courts to determine whether a stay will protect the public from irreparable harm. *Nken v. Holder*, 556 U.S. 418, 433-35 (2009); *see also Sierra Club v. Trump*, 929 F.3d 670, 704-05 (9th Cir. 2019). The proposed *amicus* brief provides the perspective of States on three facets of the public’s interest in this case: how and why a stay pending appeal is necessary to protect the public’s interests in reliable energy infrastructure; how these interests will be irreparably harmed if a stay is not granted; and how a stay will not cause irreparable harm to the public’s interest in protecting endangered species. This Court often permits co-sovereign States to offer such perspectives in *amicus* briefs without first seeking leave to do so. See Sup. Ct. R. 37.4.

For all these reasons, the *amici* States respectfully submit that filing the brief will be in aid of the Court

Respectfully submitted.

PATRICK MORRISEY
*Attorney General
of West Virginia*

LINDSAY S. SEE
*Solicitor General
Counsel of Record*
THOMAS T. LAMPMAN
JESSICA A. LEE
Assistant Solicitors General

Office of the West Virginia
Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25301
(304) 558-2021
Lindsay.S.See@wvago.gov

*Counsel for amicus curiae
State of West Virginia*

KEN PAXTON
*Attorney General
of Texas*

KYLE D. HAWKINS
Solicitor General
JEFF C. MATEER
*First Assistant
Attorney General*
RYAN L. BANGERT
*Deputy First Assistant
Attorney General*
KATHLEEN T. HUNKER
Special Counsel

Office of the Texas
Attorney General
P.O Box 12548
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
Kyle.Hawkins@oag.texas.gov

*Counsel for amicus curiae
State of Texas*

[additional counsel listed at end]

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae the States of West Virginia, Texas, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and Utah¹ have compelling interests in the appeal of the district court’s May 11, 2020 Amended Order (the “Order”). The Order vacated Nationwide Permit 12 (“NWP-12”) as applied to “construction of new oil and gas pipelines” anywhere in the country. App’x 42a. NWP-12 is a streamlined

¹ Although not ordinarily subject to Supreme Court Rule 37.6, *amici* States certify that no party’s counsel authored this brief in whole or part and no party or counsel contributed money that was intended to fund preparing or submitting this brief. Because of the timing of this Application, *amici* States were not able to provide notice to the parties more than ten days before filing this brief as required by Supreme Court Rule 37.2(a). Counsel for Applicants did not respond to *amici* States’ request for consent to file. Counsel for Respondents, Plaintiffs below, took no position. Counsel for defendants-intervenors below, TC Energy and the NWP-12 Coalition, consent. Counsel for defendant-intervenor the State of Montana took no position.

alternative to individual permitting review under the Clean Water Act (“CWA”) for utility line and pipeline projects with a “minimal cumulative adverse effect 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 now than ever.

None of the parties to this action asked the district court to transform a case challenging application of NPW-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 Applicants are likely to prevail on their appeal before the Ninth Circuit. 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 while the appeal is pending call for an immediate stay.

Further, *amici* States had no notice that the district court would go beyond Respondents’ (Plaintiffs-Appellees’ below) 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’x 73a (emphasis added). The district court’s about-face makes the interests of *amici* States and the nation at large even more stark. *Amici* therefore support this Application.

REASONS FOR GRANTING THE STAY

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. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

The Application thoroughly explains the Corps’ significant likelihood of success on the merits and irreparable harm without a stay. See App. 20-33. 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 Respondents alleged will arise under NWP-12’s streamlined process. App. 7-8, 32. 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. See App. 27-28.

Amici States affirm these and the other strong bases for a stay in the stay application. 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”). And many courts recognize the critical public interest in a stable electrical grid. See, e.g., *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (declining to vacate approval of an electric power plant in part due to public interest in a steady power supply); *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (per curiam) (same); *Caballo Coal Co. v. Ind. Mich. Power Co.*, 305 F.3d 796, 801-02 (8th Cir. 2002) (noting that “the supply of energy” was “not in jeopardy” in evaluating whether injunction was within public interest); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (finding FERC’s argument that an installed capability deficiency charge was necessary to “assure adequate energy supplies” carried weight); *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (per curiam) (affirming granting of preliminary injunction in part due to public interest in power supply).

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 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.⁵

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 725,000 Americans worked in the oil and gas industry in December 2018, earning average salaries over \$105,000.⁶ States across the country share in these opportunities. In Appalachia, new technology has tapped untold reserves of natural gas from shale deposits,⁷ and advanced recovery practices dramatically increased oil

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

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

⁴ U.S. Energy Information Administration, *U.S. Energy Facts Explained*, <https://bit.ly/2ZbgThp> (accessed June 15, 2020).

⁵ *Id.*

⁶ Data source: U.S. Bureau of Labor Statistics, *Quarterly Census of Employment and Wages*, https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=11&year=2018&qtr=4&own=5&area=US000&supp=0 (accessed June 15, 2020) (NAICS codes: 211120, 211130, 213111, 213112, 237120, 33313).

⁷ U.S. Geological Survey, *Appalachian Basin Oil and Gas Assessments*, <https://on.doi.gov/3cvDGsh> (accessed June 15, 2020).

production in the Permian Basin region of Texas.⁸ 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 in revenue in 2019.⁹ Indeed, just one natural gas pipeline can generate over \$10 million in income and property tax revenue every year.¹⁰

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.¹¹ 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

⁸ Railroad Commission of Texas, *Permian Basin Information*, <https://bit.ly/2T7yu6e> (accessed June 15, 2020).

⁹ Railroad Commission of Texas, *Utility Audit Gas Utility Tax Collected Calendar Year*, <https://bit.ly/2zK3TF2> (accessed June 15, 2020).

¹⁰ 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").

¹¹ U.S. Energy Information Administration, *New Pipeline Infrastructure Should Accommodate Expected Rise in Permian Oil Production*, <https://bit.ly/2Z1SGu0> (May 9, 2017).

of the country.¹² Indeed, the public’s need for the only pipeline that Respondents 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”).

II. Absent A Stay, The Order Will Cause Significant Harm To The Nation’s Energy Infrastructure.

The Order has hugely disruptive consequences for the nationwide energy-distribution network. It is irrelevant that—modified after even Respondents could not credibly defend the first injunction’s scope, App’x 10a-11a—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.

¹² U.S. National Energy Technology Laboratory, *Additional Pipeline Capacity and Baseload Power Generation Needed to Secure Electric Grid* (Feb. 20, 2020), <https://netl.doe.gov/node/9516>.

The district court 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’x 33a (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’x 83a.

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 132 days to complete these assessments.¹³ And these averages reflect a regime where NWP-12 remained available for qualified projects—every stage of individual-permitting

¹³ Ass’n Water Quality Admin., *401 Certification Survey Summary* 1, (May 2019) available at <https://bit.ly/3fCmlzG>.

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 time and money into the individual permitting process, or they could wait to start construction until the Corps' 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'x 38a. 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. See *id.* The Order does not grapple with these consequences. The Ninth Circuit 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 (quotation omitted), in favor of a stay. Respondents brought this case seeking

Endangered Species Act review, a process FERC already conducts for every proposed natural gas pipeline. See *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 Respondents described in their belated declarations are not even currently authorized by NWP-12. See D. Ct. Doc. 144, at 27. 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. at 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 Respondents 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.

PATRICK MORRISEY
*Attorney General
of West Virginia*

LINDSAY S. SEE
*Solicitor General
Counsel of Record*
THOMAS T. LAMPMAN
JESSICA A. LEE
Assistant Solicitors General

Office of the West Virginia
Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25301
(304) 558-2021
Lindsay.S.See@wvago.gov

*Counsel for amicus curiae
State of West Virginia*

KEN PAXTON
*Attorney General
of Texas*

KYLE D. HAWKINS
Solicitor General
JEFF C. MATEER
*First Assistant
Attorney General*
RYAN L. BANGERT
*Deputy First Assistant
Attorney General*
KATHLEEN T. HUNKER
Special Counsel

Office of the Texas
Attorney General
P.O Box 12548
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
Kyle.Hawkins@oag.texas.gov

*Counsel for amicus curiae
State of Texas*

Dated: June 17, 2020

Additional Counsel

STEVE MARSHALL
Attorney General
State of Alabama

KEVIN CLARKSON
Attorney General
State of Alaska

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CHRIS CARR
Attorney General
State of Georgia

AARON NEGANGARD
Chief Deputy Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
State of Kentucky

JIM LANDRY
Attorney General
State of Louisiana

ERIC SCHMITT
Attorney General
State of Missouri

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

WAYNE STENEHJEM
Attorney General
State of North Dakota

DAVE YOST
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

JASON RAVNSBORG
Attorney General
State of South Dakota

SEAN REYES
Attorney General
State of Utah