Nos. 20-35412, 20-35414, 20-35415, 20-35432

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,

TC ENERGY CORPORATION, et al.,

Intervenor-Defendants/Appellants.

On Appeal from the United States District Court
for the District of Montana
(No. 4:19-cv-44)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in important cases on administrative law, as well as in important cases on the proper scope of Article III. See, e.g., *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Util. Air Reg. Group v. EPA*, 573 U.S. 302 (2014); *In re Cigar Assoc. of Am.*, 812 Fed. Appx. 128 (4th Cir. 2020). This appeal involves both those topics.

This case is—or, at least, it *should* be—about the dredge and fill that companies sometimes place in navigable waters as they construct utility lines. The core issue is whether a federal agency committed a procedural violation of an environmental law when it renewed a streamlined protocol for permitting such dredge and fill activity. The plaintiffs and the trial court seem, however, to have gotten distracted by what *comes out* at *the end* of certain utility lines. This might explain why the trial court issued an arbitrary order blocking dredging and

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

filling for new *oil line* and *gas line* projects, but not other utility-line projects, nationwide. It might also explain why the trial court issued a remedy that is drastically overbroad.

The plaintiffs lacked standing to obtain nationwide relief. Rather than vacate the permitting system and issue a nationwide injunction, the trial court should have simply remanded to the agency to fix the supposed procedural defect. WLF urges this Court to vacate the trial court's remedy order.

SUMMARY OF ARGUMENT

A company must obtain a permit from the U.S. Army Corps of Engineers before discharging dredged or fill material into navigable waters. 33 U.S.C. § 1344(f)(2). Since 1977 the Corps has allowed companies seeking such approval for certain utility-line projects to obtain it through a general permit called nationwide permit 12 (NWP 12). NWP 12 is no blank check; a company proceeding under it must meet many conditions, including one that ensures a project poses no threat to the existence or habitat of an endangered species. 16 U.S.C. § 1536(a)(2); Dep't of the Army, Corps of Engineers, *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 1860-01, 1999 (Jan. 6,

2017). Still, a general permit typically "allow[s] parties to proceed with much less red tape than is involved in obtaining individual permits." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 663 F.3d 470, 472 (D.C. Cir. 2011). A general permit like NWP 12 lasts only five years, at the end of which, to be renewed, it must go through a new round of public notice and comment. 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1(b). The Corps last reissued NWP 12 in 2017. 82 Fed. Reg. at 1985.

In this lawsuit, environmental groups challenged the Corps' use of NWP 12 to approve construction of the Keystone XL pipeline, which received extensive environmental analysis—including a biological assessment and opinion. (Dkt. 36 ¶1.) The plaintiffs claimed to "stand in the shoes of members, staff, and other supporters who live, work, and recreate in places threatened by Keystone XL." (*Id.* ¶23.) The district court agreed with the plaintiffs that, despite the broad protections NWP 12 affords endangered species, the Corps committed a procedural violation of the Endangered Species Act by reissuing NWP 12 without first engaging in greater consultation with federal wildlife agencies. (Dkt. 130.) Although wrong—indeed, quite wrong (see TC Energy AOB

at 30-51; American Gas AOB at 20-38)—this ruling is the stuff of which modern environmental-law litigation is made. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 Law & Contemp. Probs. 311, 321, 334, 354 (1991).

By any standard, however, what happened next was extraordinary. Although the plaintiffs had sought to establish standing to challenge only the Keystone XL project, the district court vacated NWP 12 in full and enjoined its use for *any* project, nationwide. (*Id*. at 26.) In subsequent briefing, *even the plaintiffs* encouraged the court to narrow its remedy. The court did so, constricting the scope of its order to "the construction of new oil and gas pipelines" (Dkt. 151 at 38)—but the vacatur and injunction remain woefully defective.

A. The plaintiffs lacked standing to obtain the sweeping relief the trial court granted them. To be sure, they failed even to justify enjoining the Keystone XL project itself. Yet to establish standing to block NWP 12 nationwide, the plaintiffs would have had to show that they use an area affected by every project approved under NWP 12. The plaintiffs did not try, did not even *want*, to do that. They

acknowledged—as did the trial court itself—that their challenge specifically targeted the Keystone XL project. Yet the trial court issued nationwide relief anyway. Scrambling to catch up, the plaintiffs submitted declarations that tried to establish standing at least for "new oil and gas pipelines" that might be constructed under NWP 12. But these declarations came too late, were too vague, and addressed only a small subset of the projects potentially covered by the trial court's second remedy order.

B. The trial court should not have issued a nationwide injunction. Basic Article III principles hold that a court should only resolve live controversies between the parties before it. In accord with these principles, this Court requires that an injunction be no broader than is necessary to ensure that *the plaintiff* obtains relief. Although the Court has recently permitted some broad injunctions, in those cases the geographic scope of the potential harm to the plaintiffs was hard to pin down—something that cannot be said of the potential harm emanating from oil and gas pipeline construction. In any event, those injunctions have regularly been stayed by the Supreme Court. That makes sense, because even if they can be squared with Article III, nationwide

injunctions are highly disruptive. The validity of NWP 12 can readily be litigated case by case; there was no need for a lone trial court to block implementation of government policy nationwide.

C. The district court should not have vacated NWP 12. The court could, and should, have simply remanded to the agency. The court had to retract its first remedy order, and the scope of its second order is unclear. The court's struggles to craft a workable vacatur of NWP 12 confirms that the court should have left it to the agency and its experts to cure any defect in the rule.

ARGUMENT

THE REMEDIES AWARDED BELOW SHOULD BE VACATED.

A. The Plaintiffs Lacked Standing To Obtain Nationwide Relief.

Injury in fact is the "first and foremost" of standing's three elements. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To qualify as an injury in fact, a harm must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

What counts, in an analysis of injury-in-fact in an environmental-law case, is an injury *to the plaintiff*, not an injury to the environment

at large. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 181 (2000). "To establish standing plaintiffs must show that they use the area affected by the challenged activity and not an area roughly in the vicinity of a project site." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Further, "a court may not assume that the areas used and enjoyed by a prospective plaintiff will suffer all or any environmental consequences that [a regulatory] rule . . . may cause." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996).

This is not a close case; it does not turn on line-by-line scrutiny of declarations or testimony. In support of their motion for summary judgment, the plaintiffs submitted *no* evidence (aside from broad and conclusory hearsay (see, e.g., Dkt. 73-2 ¶8)) directed at *any* project other than the Keystone XL pipeline.

This is not to say the plaintiffs did something wrong. They were *not even asking* for a nationwide bar on the use of NWP 12. (Dkt. 36 ¶1.)

At one point in the litigation, the trial court even acknowledged as much. In an order concluding that the State of Montana and the NWP 12 Coalition could not intervene in the action as of right, the court wrote:

> The action's disposition as currently pled by Plaintiffs proves unlikely to impair or impede Montana or the Coalition's abilities to rely on NWP 12. Plaintiffs do not ask the Court to vacate NWP 12. (*See* Dkt. 36 at 87-88.) Plaintiffs seek instead declaratory relief as to NWP's legality. (*Id.*) Montana and the Coalition could still prospectively rely on the permit until it expires on its own terms in March 2022, even if Plaintiffs prevail on the merits.

(Dkt. 59 at 4-5.) Come the resolution of the plaintiffs' summary-judgment motion, however, that stance went out the window. "Plaintiffs do not ask the Court to vacate NWP 12," the court wrote in November 2019. (*Id.*) "NWP 12 is vacated," it wrote in its April 2020 summary-judgment order. (Dkt. 130 at 26.) "Plaintiffs seek . . . declaratory relief," the court wrote in November 2019. (Dkt. 59 at 4-5.) "The Corps is enjoined from authoring any dredge or fill activities under NWP 12," it wrote in April 2020. (Dkt. 130 at 26.)

And the court did this, to repeat, without *any* evidence that the plaintiffs were at risk of suffering an injury-in-fact outside the Keystone XL project. The plaintiffs made no showing that they "use the areas affected" by the court's order, *Summers*, 555 U.S. at 499—i.e., land near every project approved through NWP 12 nationwide—or that they are at real risk, in each of those areas, of suffering tangible harm, *Fla. Audubon Soc.*, 94 F.3d at 667.

Even the plaintiffs understood that the trial court went too far. In response to the defendants' motion to stay the court's summary-judgment order pending appeal, they suggested that the court narrow "the vacatur of NWP 12 to . . . the construction of new oil and gas pipelines" and narrow the injunction to "the construction of Keystone XL." (Dkt. 144 at CM/ECF p. 49.) The court adopted most (but not all) of this suggestion, narrowing both the vacatur and the injunction to cover "the construction of new oil and gas pipelines." (Dkt. 151 at 38.)

As the defendants pointed out, however, the court had no more authority to issue this second remedy than it had had to issue the original one. True, the plaintiffs submitted new declarations in support of their newly suggested remedy. But this amounted, in the Corps' words, to "fil[ing] a brand new lawsuit—with new purported evidence, new targeted projects, new alleged injuries, and new requested relief." (Dkt. 149 at 2.) And the new declarations continued to fall far short of establishing injury-in-fact as to *each* project blocked by the court's new order. The declarants identified only a few projects, about which they raised only vague and speculative potential harms. (See Dkt. 150 at CM/ECF p. 7 n.3.) A declarant who is "very concerned" about a project's

"potential impacts on Virginia's environment and on wildlife" (Dkt. 144-15 ¶9), for example, is describing a harm that is "conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

The plaintiffs' (belated) declarations do not compare favorably with the ones submitted in *Center for Biological Diversity v. EPA*, 937 F.3d 533 (5th Cir. 2019)—and even *those* were too vague to establish standing. The plaintiffs there challenged an EPA permit allowing certain discharges into the Gulf of Mexico. The plaintiffs' declarants made clear that they intended to spend time in many areas along the Gulf Coast. What they did not do, however, was point "to the specific locations of the relevant [project] facilities in the Gulf" or explain "how widely water currents might transport any pollutants." 937 F.3d at 539. Because the declarants did "not provide nearly enough information to infer, with any degree of certainty, that any discharges w[ould] geographically overlap with their interests," the plaintiffs lacked standing to sue. *Id.* The plaintiffs here have the same problem: they've failed to establish a "geographical overlap" between places where their declarants have interests and places where projects could realistically be expected to harm an endangered species. Indeed, they go a step

further (or backward, as it were) by failing to discuss most projects at all.

Because the plaintiffs lacked standing to challenge any project other than Keystone XL, the trial court erred in issuing remedies that apply beyond that single project.

B. No Grounds Justified A Nationwide Injunction.

Even if the plaintiffs had had standing to seek one, a nationwide injunction was not an appropriate remedy in this case.

To issue a nationwide injunction is "not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which [the courts] plainly do not possess." *Frothingham v. Mellon*, 262 U.S. 447, 489 (1923). Generally, therefore, "the court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff." Douglas Laycock, *Modern American Remedies* 276 (4th ed. 2010).

This Court recently confirmed these principles. In *City & County of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020), San Francisco

and California challenged conditions the federal government attached to the disbursement of money from federal criminal-justice assistance programs. Although it agreed with the trial court that the challenged conditions were invalid, the Court vacated the trial court's nationwide injunction. "The district court abused its discretion," the Court explained, "by issuing a nationwide injunction without determining whether Plaintiffs needed relief of this scope to fully recover." *Id.* at 764. The district court needed, but failed, to consider "whether Plaintiffs themselves will continue to suffer their alleged injuries if [the federal government] were enjoined from enforcing the Challenged Conditions only in California." *Id.* at 765. Because the plaintiffs had not established a "nexus between their claimed injuries and the nationwide operation of the challenged conditions," a nationwide injunction should not have been issued. *Id.* at 764.

It is true that this Court has recently permitted several nationwide injunctions. But the Supreme Court has repeatedly stayed enforcement of such injunctions. *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020); *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019); *Trump v. Int'l*

Refugee Assistance Project, 138 S. Ct. 542 (2017); *Trump v. Hawaii*, 138 S. Ct. 542 (2017). Indeed, it stayed enforcement in this very case. *Army Corps of Engineers v. N. Plains Res. Council*, No. 19A1053 (U.S., July 6, 2020). This Court should be "heeding these signals" that nationwide injunctions are suspect. *Doe #1 v. Trump*, 957 F.3d 1050, 1071 (9th Cir. 2020) (Bress, J., dissenting).

In any case, *City & County of San Francisco* shows why these other injunctions are irrelevant here. Unlike the plaintiffs in this Court's nationwide-injunction cases, the state and municipality in *City & County of San Francisco* "operate in a fashion that permits neat geographic boundaries." 965 F.3d at 766. Because they "do not operate or suffer harm outside of their own borders, the geographical scope of an injunction can be neatly drawn to provide no more or less relief than what is necessary to redress [their] injuries." *Id.* The situation here is similar. Oil and gas pipelines don't hide. Their locations are announced, and publicly known, long before their construction. They "operate in a fashion that permits neat geographic boundaries." *Id.* A plaintiff seeking to enjoin a pipeline project must establish, therefore, in accord with *City & County of San Francisco* and fundamental Article III

principles, that an injunction is no broader than necessary to provide *her*, and her alone, a full recovery.

Finally, even if this Court *could* affirm the trial court's nationwide injunction, that does not mean it *should*. Although the Court's precedent precludes the Court "from saying that universal injunctions are *never* appropriate," that precedent does not require the Court "to say that they are *always* appropriate." *E. Bay Sanctuary Covenant v. Barr*, 764 F.3d 832, 863 (9th Cir. 2020) (Miller, J., concurring in part and dissenting in part). On the contrary, even apart from the Article III problems they create, nationwide injunctions are, as a practical matter, generally a very bad idea. As Justice Gorsuch recently explained, they are a recipe for sclerosis. "If a single successful challenge is enough to stay [a] challenged rule across the country," the government must win *every* court case—"a straight sweep"—to implement any policy. *New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring in the grant of stay). "A single loss and the policy goes on ice—possibly for good." *Id*. It makes no sense to put the government under this "asymmetric" pressure. *Id*. Better to let "multiple judges and multiple circuits . . . weigh in . . . after

careful deliberation"—a "process that permits the airing of competing views." *Id.*

For "our democratic system" to work, the elected government must be able "to translate [the people's] views into action." *Barr v. Am. Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2359 (2020) (Breyer, J., dissenting in part). Courts should therefore shrink from sweeping measures that "obstruct the ordinary workings of democratic governance." *Id.* at 2360. Yet nationwide injunctions do precisely that.

C. The Trial Court Should Simply Have Remanded To The Agency.

In its first remedy order, in which it "fully" vacated NWP 12, the district court observed that §706 of the Administrative Procedure Act "instructs a reviewing court to 'hold unlawful and set aside' agency action deemed 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A)." (Dkt. 130 at 6-7.) The court then opined in its second remedy order, with its "partial" vacatur covering only "the construction of new oil and gas pipelines," that under §706 vacatur is "the presumptive remedy when an agency violates the law." (Dkt. 151 at 8, 38.)

It's not clear how the trial court's revised, partial vacatur works. What does it "mean to vacate a regulation, but only as applied to the parties before the Court"? *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019). "What would it mean to 'vacate' a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?" *Id.*

At any rate, the notion that vacatur is a presumptive remedy under §706 "is a questionable interpretation of [that section], which is more naturally read not as a remedial provision but simply as an instruction to courts to disregard unlawful agency actions when deciding cases." *E. Bay Sanctuary Covenant*, 764 F.3d at 863 (Miller, J., concurring in part and dissenting in part). "Indeed," this Court has "not construed section 706 to require vacatur in every case in which an agency action is determined to be unlawful." *Id.* Simply put, "a flawed rule need not be vacated." *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

A key factor, when a court considers whether to vacate an agency rule, is the potentially "disruptive consequences of an interim change that may itself be changed." *Id.* Both sides here effectively

acknowledged that the district court's order vacating NWP 12 would cause undue disruption. Hence the plaintiffs' suggestion, in response to the motion to stay, that the vacatur be narrowed to cover only new oil and gas pipelines. And although the district court adopted that suggestion, its second remedy order creates more questions than it answers. After all, the new order never says what "the construction of new oil and gas pipelines" means. (Dkt. 151 at 38.) The district court left it to others (or a further order) to determine whether the second remedy order governs pipeline projects *under* construction.

That the district court had to rescind its first vacatur, and that the scope of its second vacatur is unclear, shows the complexity of the issue at hand and previews the disruption that will arise if the agency is not allowed to fix NWP 12 (if a fix is needed) in the first instance. Faced with such complexity and uncertainty, the trial court should not have "substitute[d] its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It should instead have simply "remand[ed] to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

CONCLUSION

The trial court's May 2020 remedy order should be vacated.

September 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3,497 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) That 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 using Microsoft Office Word 2010 and is set in 14-point Century Schoolbook font.

September 23, 2020

/s/ Cory L. Andrews

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2020, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Cory L. Andrews