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

On Appeal from the United States District Court
for the District of Montana
No. 4:19-cv-00044
Hon. Brian Morris, Judge

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, MARYLAND, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, WASHINGTON AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PLAINTIFFS-APPELLEES AND SUPPORTING AFFIRMANCE

Xavier Becerra
Attorney General of California
Ed Ochoa
Senior Assistant Attorney General
David A. Zonana
Supervising Deputy Attorney General
Jamie Jefferson
Laura Zuckerman
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Telephone: (510) 879-0280
Fax: (510) 622-2270
E-mail: Jamie.Jefferson@doj.ca.gov
Attorneys for the State of California

[additional counsel listed at end]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES (CONTINUED)

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae the States of California, Connecticut, Delaware, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and the Commonwealth of Massachusetts (collectively, *Amici* States) file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) in support of Plaintiffs-Appellees. This case concerns the legality of the Army Corps of Engineers' (Corps) reauthorization of nationwide permit 12 (NWP 12), which allows construction of electrical lines, pipelines, and utility projects resulting in encroachments on wetlands and other waters of the United States, without consulting with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) (collectively, Services) under the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq*. (ESA).

The Corps's reauthorization of NWP 12 streamlines the approval of "the construction, maintenance, repair, and removal of utility lines [including oil and gas pipelines] and associated facilities" in waters of the United States, without requiring an applicant to obtain an individual permit under the CWA. 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). Although NWP 12 generally applies only to "each single and complete project" that does not result in the loss of more than one-half acre of waters of the United States, *id*., the Corps applies that limitation in a way that effectively exempts linear projects like pipelines from meaningful review.

Specifically, the Corps considers each place where a pipeline crosses a single waterbody – no matter how distant or how frequently – to be a separate "project" for purposes of NWP authorization. 82 Fed. Reg. at 2007. In most cases, projects utilizing NWP 12 may be constructed without further action by, or notification to, the Corps. *See* 33 C.F.R. §§ 330.1(e)(1), 330.1(c).[1]

The individual impacts from pipelines authorized by NWP 12 have the potential for extensive cumulative impacts to federally listed endangered and threatened species (listed species). Pipelines can contaminate and extensively damage waters of the United States, which provide valuable habitat for many listed species, with tragic consequences. *See, e.g.*, Appellees' Supplemental Excerpts of Record (SER) 8-9, 12-20, 21-23, 31-33; (NWP authorizes activities that can harm listed species through habitat loss and fragmentation, bird power line collisions, sedimentation, contamination of water from spills, and indirect impacts associated with climate change); SER 24-30 (discussing several pipeline spills); SER 11 (Corps estimates NWP 12 could be used approximately 14,000 times a year over a five-year period, and impact over 8,000 acres of water).

All *Amici* States have listed species with habitat located in their geographic boundaries that the activities authorized under NWP 12 may affect. As just a few

[1] All citations to the Code of Federal Regulations are to the version in effect in 2017 when the Corps engaged in the reauthorization of NWP 12.

examples, California has approximately 300 listed species that reside wholly or partially within the State and its waters for some or all of the year – more than any other mainland state. These include two different runs of Chinook salmon (*Oncorhynchus tshawytscha*) and their spawning, rearing, and migration habitat in the Bay-Delta and Central Valley rivers and streams; the southern sea otter (*Enhydra lutris nereis*) found along California's central coastline; the desert tortoise (*Gopherus agassizii*) and its critical habitat in the Mojave Desert; the marbled murrelet (*Brachyramphus marmoratus*) and its habitat in North Coast redwood forests. At least 17 federally listed species are found in Massachusetts, including, for example, the threatened piping plover (*Charadrius melodus*) and northern long-eared bat (*Myotis septentrionalis*), and the endangered shortnose sturgeon (*Acipenser brevirostrum*) and leatherback sea turtle (*Dermochelys coriacea*). New Jersey has at least 14 federally listed species, including the threatened piping plover (*Charadrius melodus*), red knot (*Calidris canutus rufa*), and the recently designated New Jersey state reptile, the bog turtle (*Clemmys muhlenbergii*). Due to its geographic location, New Jersey has also become the site for numerous proposed energy transmission infrastructure projects which require federal approvals.

Amici States have a compelling interest in ensuring that the Corps complies with its obligation under the ESA to consult with the Services when proposing

actions, like the reauthorization of NWP 12, that may affect listed species, in order to minimize impacts to listed species and critical habitat within their geographic boundaries. *Amici* States rely on the expertise of the Services to comprehensively evaluate the cumulative impacts that nationwide permits may have on listed species and critical habitat through programmatic consultation with the Corps. Programmatic consultations are critical because it is only by examining the aggregate impact of each individual application of NWP 12 can the Services craft conservation measures that will prevent jeopardy and ensure the continued existence of listed species, in conjunction with the physical activities authorized by the nationwide permit program.

Amici States have a strong interest in holding the Corps accountable for unlawfully abdicating its legal responsibility under the ESA to consult with the Services on its reauthorization of NWP 12: such consultation is critical to preventing harms to listed species found within *Amici* States. Given that NWP 12 is used 14,000 times a year for pipelines that span hundreds of waterways, *see* 2 Federal Appellants' Excerpts of Record (ER) 67, programmatic consultation on NWP 12 – which could result in nationally-applicable conservation measures to safeguard species – is, in *Amici* States' view, vital to prevent jeopardy to these listed species.

LEGAL BACKGROUND

I. THE CLEAN WATER ACT

The CWA prohibits the discharge of any "pollutant," including dredged or fill material, into "navigable waters" of the United States without a permit. 33 U.S.C. §§ 1311(a), 1342, 1344(a), (e), 1362(7) (defining "navigable waters" broadly as "waters of the United States," which includes waters that are not navigable-in-fact, such as wetlands, streams, and tributaries). *See Rapanos v. United States,* 547 U.S. 715, 731 (2006). The Corps issues both individual and general permits for discharges of dredged or fill material into waters of the United States. 33 U.S.C. §§ 1344(a), (e). Nationwide permits like NWP 12 are "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). NWP 12 is touted by industry as a "cost-and time-effective alternative to individual permitting" because it directly enables physical activities that alter, modify, and fill waters of the United States without the need to apply for and obtain a project-specific CWA permit. Brief of *Amici Curiae* States of West Virginia, *et al*. (AC Br.) at 1.

II. THE ENDANGERED SPECIES ACT OF 1973

Congress enacted the ESA in 1973 "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Section 7 of the ESA reflects the "explicit congressional decision to require agencies to afford first priority to the declared national policy of saving

endangered species." *Id*. at 185. The Act requires all federal agencies to "insure" that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence" of any endangered or threatened species, or to "result in the destruction or adverse modification of" designated critical habitat.[2] 16 U.S.C. § 1536(a)(2).

Federal agencies must consult with the Services before taking actions that "may affect" listed species, *see* 50 C.F.R. § 402.14(a); 16 U.S.C. § 1536(a)(2), including "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02. The term "actions" encompasses the promulgation of regulations, the granting of permits, and all "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. Formal consultation culminates in a biological opinion containing the Services' determination whether the action is likely to jeopardize listed species or adversely modify critical habitat, and prescribing measures for avoiding or mitigating such effects. 50 C.F.R. § 402.14(h)(2); *see also* 50 C.F.R. § 402.14(g).

[2] "Jeopardizing" the continued existence of listed species means to engage in an action that reasonably would be expected "to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R § 402.02.

Programmatic consultation, as opposed to site-specific consultation, "allows for a broad-scale examination of a program's potential impacts on a listed species and its designated critical habitat[,]" 80 Fed. Reg. at 26,836. The purpose of programmatic consultation is to permit the Services to assess the impact of the whole of a proposed action, *see, e.g., Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir.1988) (noting the obligation under the ESA "to analyze the effect of the entire agency action"), and avoid piecemeal destruction of habitat that would jeopardize listed species, *see, e.g., Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 523 (9th Cir. 2010) (quoting *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255 (D.D.C. 2003) ["'If FWS were allowed to apply such a limited scope of consultation to all agency activities' – in that case, one year – 'any course of agency action could ultimately be divided into multiple small actions, none of which, in and of themselves, would cause jeopardy'"]).[3]

[3] The district court in *American Rivers* went on to note, "Moreover, such impermissible segmentation would allow agencies to engage in a series of limited consultations without ever undertaking a comprehensive assessment of the impacts of their overall activity on protected species. The ESA requires more; it requires that the consulting agency scrutinize the *total scope* of agency action." 271 F. Supp. 2d at 255 (emphasis in original) (citation and internal quotation marks omitted).

Indeed, in 2015, the FWS singled out the NWP program at the heart of this case as an example of a federal program subject to programmatic consultation, leaving no doubt that programmatic consultation for NWP 12 is mandatory. *See* 80 Fed. Reg. at 26,835 ("Examples of Federal programs that provide such a framework include . . . the U.S. Army Corps of Engineers' Nationwide Permit Program").

III. PERTINENT FACTUAL BACKGROUND

In 2005, a district court faced the identical issue presented in this appeal, whether the Corps was required to consult with the Services when it reauthorized four nationwide permits (including NWP 12), and concluded that programmatic consultation was legally required. *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 10-11 (D.D.C. 2005) ("'[A]ction' in question under the ESA and its regulations is the issuance of the NWP itself," not "the authorization to proceed with a [] project at a specific site"). Since this 2005 decision, the Corps has consulted with the Services on the nationwide impact of NWP 12 whenever it has reauthorized it, citing *Brownlee* as holding that the agency "is obligated to consult . . . ." 76 Fed. Reg. 9173, 9176-77 (Feb. 16, 2011); *see also* 71 Fed. Reg. 56,258, 56261 (Sept. 26, 2006). For example, in 2012, the Corps consulted with NMFS when reauthorizing NWP 12, resulting in a biological opinion from NMFS that the program as a whole "was jeopardizing" listed species. SER 67. In order to

obtain a "no jeopardy" finding from NMFS at that time, the Corps adopted national mitigation, monitoring, and reporting measures for the benefit of the listed species. SER 35, 36-38. Yet despite this 10-year history of consultation with NMFS, and in the face of precedent to the contrary, when the Corps resumed the process to reissue the NWP program in 2016 it abruptly reversed course, refusing to engage in any Section 7 consultation.

ARGUMENT

The ESA requires consultation for any "action authorized, funded, or carried out" by an agency that may affect listed species, 16 U.S.C. § 1536(a)(2), and the Services' implementing regulations apply the core consultation requirement to any "program" carried out by an agency, which would necessarily include the nationwide permit program under the CWA. 50 C.F.R. §§ 402.02, 402.14(g). Despite this legal mandate and its past practice, in 2016, the Corps determined that its reauthorization of NWP 12, which applies to most, if not all, pipeline crossings, did not require programmatic consultation. *See* 82 Fed. Reg. at 1873-74; *see also* 80 Fed. Reg. at 26,835-36.

Instead, the Corps summarily concluded that NWP 12 would have "no effect" on listed species or critical habitat "because the regulatory scheme and the permits are designed to ensure that any necessary consultation occurs on an activity-specific basis." Federal Appellants' Opening Brief (AOB) at 12; 25-29; *see also*

82 Fed. Reg. at 1873-74. According to the Corps, programmatic consultation is, in its own estimation, unnecessary, because the Corps (or the project applicant) will undertake project-specific review of individual activities which it determines may affect listed species.

As the district court correctly found, there is "resounding" evidence that the Corps's reauthorization of NWP 12 "may affect" listed species at a programmatic level, and that the Corps's failure to consult with the Services, and its decision to rely on project-level consultations, violated the ESA and the Administrative Procedure Act. 1 ER 49-59. As explained below, the district court's decision is correct, and should be affirmed.

I. THE CORPS VIOLATED THE ESA

A. The Corps's Reauthorization of NWP 12 Is an Action That Triggered Programmatic Consultation

The NWP program is precisely the type of federal program which, when amended or reauthorized, requires consultation with the Services to protect imperiled species. NWP 12 functions as both a "permit" *and* a "program" requiring review at the *programmatic* level when issued by the Corps. *See* 50 C.F.R § 402.02; *California ex rel. Lockyer v. U.S. Dep't of Agric.,* 575 F.3d 999, 1018-19 (9th Cir. 2009) (repealing a rule protecting roadless area is a decision that triggers programmatic consultation); *W. Watersheds Project v. Kraayenbrink*, 632

F.3d 472, 495-97 (9th Cir. 2011) (amending BLM's grazing regulations triggers programmatic consultation with the Services).

The threshold for triggering consultation under the ESA is purposefully low, so as to ensure the utmost protection for imperiled species. "[C]onsultation is required whenever a federal action 'may affect listed species or critical habitat.'" *California ex rel. Lockyer,* 575 F.3d at 1018. Whether a particular action "may affect" listed species includes analysis of "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character." 50 C.F.R. § 402.14(a); *see Brownlee*, 402 F. Supp. 2d at 7-8 (finding the Corps's reissuance of NWPs triggers consultation requirement). The reauthorization of NWP 12, which enables the discharge of dredged or fill material into waters of the United States nationwide, clearly exceeds that intentionally low threshold and requires consultation. 1 E.R. 49-51.

In *California ex rel. Lockyer*, this Court held that the Forest Service's decision to repeal the so-called national "Roadless Rule," a rule prohibiting roadbuilding and logging in "inventoried roadless areas," triggered programmatic consultation. 575 F.3d at 1019. Although repealing the Roadless Rule would not directly affect listed species, this Court found that the repeal would reduce "substantive protections afforded to inventoried roadless areas," which "may affect federally listed species and their critical habitats." *Id.* This Court observed that

the potential for a change in the level of protection given roadless areas was an "effect" triggering consultation under 50 C.F.R. § 402.14(a). *California ex rel. Lockyer*, 575 F.3d at 1018-19.

Similarly, in *Kraayenbrink*, this Court rejected the U.S. Bureau of Land Management's (BLM) contention that programmatic consultation was not required for amendments to its grazing regulations. 632 F.3d at 498. BLM maintained that it fulfilled its section 7 obligations by concluding that none of the 18 "administrative changes" to its grazing regulations would have any effect on listed or proposed species. *Id.* at 495. This Court again disagreed, noting that the "minimum threshold" to trigger consultation is low, and held that the regulatory amendments at issue in that case – which affected 160 million acres of public land, home to hundreds of special status species – "handily me[t] that threshold." *Id.* at 496*; see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994) (amending land and resource management plan triggered programmatic consultation on impact to newly listed chinook salmon).

According to this Court, the repeal of the Roadless Rule and the adoption of grazing regulations triggered programmatic consultation because each potentially reduced substantive protection for species and their habitat. Here, as in *California ex rel. Lockyer* and *Kraayenbrink*, the Corps's reauthorization of NWP 12 "handily" exceeds the threshold required to trigger the Corps's duty to consult.

Because protected species, such as migratory birds, rely on these waterbodies as habitat for their survival, the trigger for consultation is easily met. Not only does the NWP program itself generally reduce protections afforded waters of the United States by eliminating the Corps's individualized review, but reauthorizing NWP 12 specifically facilitates physical activities from pipeline construction that will significantly modify, alter, and fragment waterbodies – and species' habitats – with only a minimum level of review. 82 Fed. Reg. 1985-86; AC Br. at 15 ("Corps estimates that it takes nearly six times as long – over 250 days – for an individual permit compared to NWP 12").

The permit is used an estimated 14,000 times annually (SER 10-11), and according to the Corps, NWP 12 has triggered project-specific ESA review more than 3,400 times. 2 ER 260. Rather than militating against the need for comprehensive programmatic consultation, the fact that project-level review was required 3,400 times underscores its necessity. Viewed in isolation, each permitted project or pipeline may not "adversely" affect protected species, but taken together in the aggregate, the impacts from all permits authorized under the program nationwide clearly may. *See* 1 ER 3; *California ex rel. Lockyer v. U.S. Dep't of Agric*., 459 F. Supp. 2d 874, 912 (N.D. Cal. 2006) (programmatic consultation on Roadless Rule, if it had taken place, could have revealed overall impacts to species with broad range), *aff'd*, 575 F.3d 999 (9th Cir. 2009).

B. The Corps Cannot Rely on Future Project-Specific Review to Excuse its Failure to Consult on the Reissuance of NWP 12.

The Corps argues more broadly that because it will be consulting with the Services on individual projects where warranted, it need not consult with the Services regarding the reissuance of NWP 12 as a whole. AOB at 33-35. The argument fails. As this Court held in *Conner v. Burford*, the ESA does not permit an "incremental-step" consultation approach as a substitute for consultation on the overall agency action. 848 F.2d at 1457 (BLM's sale of oil and gas leases in national forests, where FWS biological opinion examined only the impact of the leasing stage, not the impact of post-leasing oil and gas activities, on threatened or endangered species violated the ESA); *cf., e.g.*, *Conservation Law Foundation v. Ross*, 422 F. Supp. 3d 12, 29 (D.D.C. 2019) (segmented, fishery-by-fishery consultation approach not permitted by ESA regulations or caselaw, even when consultation occurs). Instead, the "ESA regulations are clear that '[a]ny request for formal consultation may encompass . . . a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.'" *Brownlee*, 402 F. Supp. 2d at 10 (quoting 50 C.F.R. § 402.14(c)); *see also, e.g.*, *id.* ("Overall consultation for the NWPs is necessary to avoid piece-meal destruction of panther habitat through failure to make a cumulative analysis of the program as a whole"); *Lane County Audubon v.*

Jamison, 958 F.2d 290, 294 (9th Cir. 1992) (consulting on individual timber sales, but failing to consult on timber sales guidelines as a whole, violated the ESA). As the court explained in *Conservation Law Foundation*,

> ESA regulations permit grouping individual actions for purposes of consultation, but expressly caution that any such groupings "do[] not relieve the Federal agency of the requirements for considering the effects of the action as a whole." 50 C.F.R. § 402.14(c). The reason for this is intuitive: "such impermissible segmentation would allow agencies to engage in a series of limited consultations without ever undertaking a comprehensive assessment of the impacts of their overall activity on protected species.

422 F. Supp. 3d at 30. Indeed, in the preamble to their 2019 regulations, the Services state explicitly that the ESA "still requires a programmatic consultation to meet the requirements of section 7(a)(2)," even if "specific projects [] developed in the future [] are subject to *site-specific* stepped-down, or tiered consultations." 84 Fed. Reg. at 44,997 (emphasis added).

The Corps's assertion that programmatic consultation is unnecessary because it will conduct project-level review triggered by the pre-construction notifications is not only illegal but illogical. The district court found project-specific reviews do not address aggregate impacts to species that travel through multiple project areas and regions. *See* 1 ER 3. This finding was based in part on a 2019 biological assessment for the Keystone pipeline XL which examined the cumulative impacts to migratory birds located in the projects action area only. 1-TC ER 715. Further evidence of the utility of programmatic consultations in protecting imperiled

species can be found in the example of the Corps's own 2012 purportedly "voluntary" programmatic consultation on the reauthorization of NWP 12 that resulted in the imposition of nationwide protective measures in NMFS's 2014 Biological Opinion. SER 35, 36-38, 59-61; 3 E.R. 599-601.

Were reliance on project-specific review enough to eliminate the need for programmatic review, there would never be a need for consultation at the program level, despite the clear mandate in the regulations. 50 C.F.R. § 402.02. Project-specific review is always required for actions undertaken pursuant to a program for which programmatic consultation has already occurred. *See* 80 Fed. Reg. at 26,835. Exempting an agency from engaging in programmatic consultation because it will later engage in project-specific review, therefore, essentially reads the requirement of programmatic consultation out of the regulations.

In sum, the Corps's argument that consultation with the Services on the reauthorization of NWP 12 was unnecessary because there would be future site-specific consultations triggered by the issuance of pre-construction notifications is both deeply flawed, AOB 35, 53-54 (arguing nationwide consultation would add no benefit), and belied by the Corps's 10-year history of compliance with the ESA's programmatic consultation requirement. The Court should reject the Corps's strained arguments here.

C. General Condition 18 Does Not Excuse the Corps from Its Independent Statutory Obligation Under the ESA

For the same reasons, the Corps cannot justify its unlawful action by relying on General Condition 18 of NWP 12, as it attempts to do. AOB at 32. General Condition 18 requires a pre-construction notification if any "listed species or designated critical habitat might be affected or is in the vicinity of the activity or if the activity is located in designated critical habitat." 82 Fed. Reg. at 1999. But that limited permit condition does not excuse failure with the ESA's comprehensive programmatic consultation mandate.

First, as the district court correctly held, the Corps's interpretation of section 7(a)(2) is misguided. 1 ER 57. General Condition 18, when invoked, triggers only project-specific review, which, as described above, does not satisfy the requirements for programmatic consultation. Reliance on General Condition 18 to avoid programmatic consultations would effectively allow the Corps to delegate to permittees the initial determination whether their proposed activities under NWP 12 "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a). Such determinations, which must be made "at the earliest possible time," are the responsibility of the Corps and the Services. 50 C.F.R. § 402.14(a). But by opting not to engage in programmatic consultation on the issuance of NWP 12, the only opportunity the Corps will have to make initial "may affect" determinations under the ESA will be when a permittee provides the Corps with pre-construction

notification of those proposed activities that *the permittee* has determined, in the first instance, "may" affect listed species or critical habitat. *See* 82 Fed. Reg. at 1999; 33 C.F.R. § 330.4(f)(2); AOB at 29 ("To be sure, General Condition 18 does rely on prospective permittees to identify those activities for which such a determination might be necessary"). As the district court recognized, it is the Corps, not a project proponent, that has a statutory duty under Section 7 to consult with wildlife agencies to ensure that activities it authorizes do not harm listed species. 1 ER 54-59.

Second, General Condition 18 is not a lawful substitute for the Corps's duty to consult under section 7(a)(2) and the ESA regulations. As discussed above, the ESA's consultation requirement could not be clearer. *See Tenn. Valley Auth. v. Hill*, 437 U.S. at 173 ("[O]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act."). Under the ESA's regulations, the Corps must determine "at the earliest possible time" whether any "action" it takes "may affect" endangered species; if the answer is yes, it must consult with the Services. Period. *Brownlee*, 402 F. Supp. 2d at 3; 50 C.F.R. § 402.14(a).

Indeed, it would be difficult to imagine a situation where programmatic ESA consultation would ever be required for the issuance of a nationwide permit of this kind if the Corps were correct that it could rely on General Condition 18 (and

"other General Conditions, regional restrictions, and additional site-specific circumstances triggering [pre-construction notification] requirements," AOB at 32) to evade the requirement that the Corps consult with the Services before reauthorizing the nationwide permit. Instead, the Corps could always put off that consultation until the pre-construction notification is issued for specific projects approved under the nationwide permit. But *Brownlee* and cases like it demonstrate that this is not the law.

The district court's holding in *Brownlee*, 402 F. Supp. 2d 1, underscores the point. *Brownlee* involved an ESA challenge to the Corps's failure to consult with FWS on the issuance of four nationwide dredge-and-fill permits. The nationwide permits at issue in *Brownlee* were subject to General Condition 11, which had terms virtually identical to the relevant provisions of General Condition 18. *Compare Brownlee*, 402 F. Supp. 2d at 3, with 82 Fed. Reg. at 1999-2000 (General Condition 18). Relying in large part on Condition 11 and "other protective measures," the Corps contended in *Brownlee,* as it does here, that, although actions authorized by the NWPs "may affect" the endangered Florida panther, it did not need to consult with FWS regarding the issuance of the NWPs at the programmatic level, because it would be consulting with FWS "for each specific dredge-and-fill activity that it determines 'may affect' panthers." 402 F. Supp. 2d at 10. In

rejecting that argument, the court declined to conclude that the existence of Condition 11 obviated the Corps's obligation to consult with FWS. *Id*.

Similarly, in *Conner v. Burford*, 848 F.2d at 1455, this Court held that FWS's failure to issue a comprehensive biological opinion relating to an oil and gas leasing program, in reliance on stipulations in leases mandating consultation, violated the ESA. In so holding, the Court declined to "carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion – in this case one addressing the effects of leasing and all post-leasing activities – be completed before initiation of the agency action." *Id*. The ESA and case law thus establish that no such exception to the ESA's consultation requirement applies. The Corps's refusal to consult represents an unlawful abdication of its responsibilities under the ESA. *See* 50 C.F.R. § 402.14(a).

CONCLUSION

State *Amici* respectfully submit that this Court should affirm the district court's Order and judgment.

Dated: December 22, 2020

Respectfully submitted,

/s/ Jamie Jefferson

Xavier Becerra
Attorney General of California
Ed Ochoa
Senior Assistant Attorney General
David A. Zonana
Supervising Deputy Attorney General
Jamie Jefferson
Laura Zuckerman
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Telephone: (510) 879-0280
Fax: (510) 622-2270
E-mail: Jamie.Jefferson@doj.ca.gov
Attorneys for the State of California

Additional Counsel

William Tong
Attorney General
STATE OF CONNECTICUT

Kathleen Jennings
Attorney General
STATE OF DELAWARE

Brian Frosh
Attorney General
STATE OF MARYLAND

Gurbir S. Grewal
Attorney General
STATE OF NEW JERSEY

Hector Balderas
Attorney General
STATE OF NEW MEXICO

Letitia James
Attorney General
STATE OF NEW YORK

Ellen F. Rosenblum
Attorney General
STATE OF OREGON

Peter F. Neronha
Attorney General
STATE OF RHODE ISLAND

Thomas J. Donovan, Jr.
Attorney General
STATE OF VERMONT

Robert W. Ferguson
Attorney General
STATE OF WASHINGTON

Laura Healey
Attorney General
COMMONWEALTH OF MASSACHUSETTS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-35412, 20-35414, 20-35415, 20-35432

I am the attorney or self-represented party.

This brief contains 4541 words, excluding the items exempted by Fed. R. App. P. 32(f).

The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ *Jamie Jefferson* **Date** December 22, 2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that on December 22, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 22, 2020 */s/ Ryan Mallard*