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 TECHNOLOGY CORPORATION, *et al.*,

Intervenor-Defendants/Appellants.

On Appeal from the United States District Court
for the District of Montana
Case No. 4:19-cv-00044

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ENERGY EQUIPMENT AND INFRASTRUCTURE ALLIANCE IN SUPPORT OF APPELLANTS' MOTION FOR STAY PENDING APPEAL

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The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Energy Equipment and Infrastructure Alliance ("EEIA") is an association of suppliers of construction, equipment, materials, and services for energy production and infrastructure. EEIA has no parent corporation, and no publicly held company has 10% or greater ownership in EEIA.

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STATEMENT OF INTEREST[1]

Amici have an interest in this case because it raises issues of vital importance to their members.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the Country. A vital function of the Chamber is to represent the interests of its members in matters before the courts. The Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases implicating the development of pipelines and other critically needed infrastructure.

The Energy Equipment and Infrastructure Alliance ("EEIA") represents the energy infrastructure supply chain, which includes contractors, equipment suppliers, and providers of materials and services

[1] No person or party or their counsel, other than *amici* and their counsel, authored this brief in whole or in part; and no person or party or their counsel, other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

for, among other things, building natural gas and liquids pipelines, upstream production complexes, and downstream storage, processing, power generation, and export facilities. EEIA's members include companies, trade associations, and labor unions encompassing thousands of businesses (mostly smaller local and regional firms), along with millions of workers in the construction trades and in technical and administrative support roles within construction companies and with equipment and materials manufacturers, distributors, and service companies.

INTRODUCTION

The District Court's sweeping order threatens to disrupt critical infrastructure projects and destroy the vast web of economic activity generated by those projects. Trillions of dollars and hundreds of thousands of high-quality jobs are at stake without a stay. Yet, the District Court ignored those concerns while halting a permitting program that has existed in similar form since 1977 and then refusing to stay its ruling pending appeal. In order to avoid widespread and devastating economic harm, this Court should restore the *status quo ante* by staying the order while this appeal runs its course.

ARGUMENT

As the Federal Defendants ably explain in their motion, each of the four traditional factors warrants a stay. Rather than repeat their compelling arguments on the merits, *amici* focus on the balance of equities, and particularly why a stay is necessary to avoid the economic ruin that the order threatens to unleash on the Nation's energy infrastructure and the complex economy that supports oil and gas pipelines like those at issue here.

I. The District Court's Order Threatens To Strand Critical Energy Supplies And Stifle Vast Economic Activity.

The order threatens enormous harm to an already struggling American economy. By precluding all new oil and gas utility projects that would otherwise be authorized under Nationwide Permit ("NWP") 12, the District Court's order will stall complex and necessary infrastructure development that has relied on 40 years' worth of settled expectations. Not only will the ruling grind America's oil and gas projects to a halt, it will cause severe downstream effects on other economic activity that supports and depends on those projects. Billions of dollars of gross domestic product ("GDP") and hundreds of thousands of high-quality jobs may be lost. A stay pending appeal would prudently avoid those harms, while affording this Court the necessary time to address the merits of this appeal.

A. Oil and Gas Pipelines Are Significant Drivers of Economic Growth, Job Creation, and Affordable Domestic Energy.

Oil and gas infrastructure projects are engines of economic growth. They create billions of dollars in economic activity and support hundreds of thousands of jobs—both during and after construction.[2] One industry study shows, for example, that the nearly $26 billion spent constructing natural gas pipelines in 2015 stimulated 348,789 jobs and contributed nearly $34 billion dollars to U.S. GDP.[3] Another study anticipates that capital expenditures for new oil and gas infrastructure will total approximately $791 billion from 2018 through 2035—including approximately $154 to $190 billion to construct 26,000 miles of additional natural gas pipelines.[4] That total investment is projected to support

[2] Am. Petroleum Inst., *Impacts of the Natural Gas & Oil Industry on the US Economy in 2015* 12 (July 2017), *available at* https://bit.ly/2UdY8FS.

[3] IHS Economics, *The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector* 38-39 (May 2016), *available at* https://bit.ly/2U22rFm.

[4] The INGAA Found., Inc., *North American Midstream Infrastructure through 2035, Significant Development Continues* 2, 48 (Jun. 18, 2018), *available at* https://bit.ly/392bSsX.

658,000 U.S. jobs annually and contribute more than $1.1 trillion to U.S. GDP.[5] And these positive economic effects would be felt throughout the Nation, as "indirect and induced benefits" ripple to other industries and the service sector.[6]

A few examples underscore how even a single new pipeline can generate widespread economic growth and job creation. The Keystone XL project, alone, will contribute an estimated $3.4 billion to the U.S. economy and create approximately 42,100 manufacturing and construction jobs.[7] Other recent pipeline projects yield similar contributions. For example, the PennEast Pipeline's design and construction expenditures of $1.2 billion are expected to generate a total economic impact of more than $1.6 billion and more than 12,000 jobs in

[5] *Id.* at 63–64.

[6] INGAA Found., Inc., *North American Midstream Infrastructure Through 2035: Leaning into the Headwinds* 11 (April 12, 2016), *available at* https://bit.ly/3cEdWdm.

[7] Global Energy Institute, U.S. Chamber of Commerce, *Benefits of Keystone XL*, *available at* https://bit.ly/2T5XNFI (last visited May 15, 2020).

Pennsylvania and New Jersey alone.[8] And the Atlantic Coast Pipeline's construction will result in $2.7 billion in economic activity and 17,240 construction jobs, while yielding $377 million in annual consumer energy cost savings and more than 2,200 long-term jobs over a 20-year period.[9]

Moreover, oil and natural gas pipelines reduce domestic energy costs. Without pipelines, producers are forced to rely on more expensive methods of transporting fuel to power generators or consumers—or forego production entirely.[10] Thus, a robust pipeline system has significantly helped lower energy costs, which in turn has incentivized massive downstream industrial investment. One study projected that over $100 billion in new investment will occur between 2013 and 2025 in new chemical, plastics, and related manufacturing facilities to take

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[8] PennEast Pipeline, *Economic Impact Report & Analysis* 10-11 (Feb. 9, 2015), *available at* https://bit.ly/33xvAvl.

[9] ACP, *Powering the Future, Driving Change Through Clean Energy* 2, 8 (last visited May 15, 2020) *available at* https://bit.ly/3cz8KHl.

[10] *See* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil & Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 1015 (2015); Suedeen Kelly & Vera Callaham Neinast, *Getting Gas to the People*, in BEYOND THE FRACKING WARS, at 81 (2013).

advantage of lower natural gas prices.[11] The residential sector is likewise heavily dependent on the natural gas industry and benefits from lower energy costs resulting from pipeline operations, given that half of all American households use natural gas for heating their homes and water, cooking, and drying clothes.[12] Now, more than ever, the American economy is fueled by oil and gas pipelines.

B. The District Court's Order Will Halt Pipeline Construction and Operation, Which Are Crucial to the Nation's Economic Recovery.

The risks posed by the District Court's order will seriously jeopardize the currently stable and booming American oil and gas industry. The past decade has seen an expansion of oil and gas production in the United States, which is now the leading producer of petroleum and natural gas in the world.[13] That growth has created

[11] IHS Economics, *The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector* 21 (May 2016), *available at* https://bit.ly/2U22rFm.

[12] EIA, *Natural Gas Explained, Use of Natural Gas*, *available at* https://bit.ly/2wapNzH (last visited May 15, 2020); EIA, *The U.S. Leads Global Petroleum and Natural Gas Production with Record Growth in 2018*, *available at* https://bit.ly/3fRJ36Y (last visited May 15, 2020).

[13] Since 2016, natural gas has accounted for the largest share of domestic electricity generation. EIA, *Today in Energy – U.S. Natural Gas*

hundreds of thousands of jobs and billions of dollars in economic activity. Yet, by halting pipeline production in its tracks, the District Court's order would destroy that complex economic web, at a time when the Nation is dependent on its strength.

Although pipeline construction and operation are essential to maintaining the oil and gas industry, current pipelines are insufficient to meet the increasing outputs and needs of producers and consumers.[14] Partly by sheer increased capacity, and partly by the mismatched locations of drilling, refineries, and consumers, the American energy infrastructure is badly in need of further development.[15] Without more pipelines, the industry will fail to reach its full potential and billions of dollars and hundreds of thousands of jobs will be lost.[16] One study found

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Consumption Sets New Record in 2019 (Mar. 3, 2020), *available at* https://bit.ly/3b8295L.

[14] Robert K. Cowan, Note: *Has the MLP reached Its Limit? America's Pipeline Shortage*, 15 TEX. J. OIL GAS & ENERGY L. 55, 57 (2020).

[15] *Id.* at 58-60.

[16] Global Energy Institute, *Infrastructure Lost: Why America Cannot Afford to 'Keep It In the Ground'* 2–3, 8, *available at* https://bit.ly/3dOLBkK (last visited May 15, 2020) (total economic cost of lost opportunities through August 2018 due to delays, opposition, or

that, without pipeline and other oil and gas infrastructure development, the Northeast United States alone will lose 78,400 jobs, have more than $4.4 billion in labor income displaced, and see nearly $7.6 billion in GDP destroyed.[17] The nationwide impact is even more severe.

The District Court's order and denial of a stay ignored these harsh realities. Without a stay pending appeal, the District Court's order will halt any pipeline project that is already authorized under NWP 12 or that anticipated NWP 12 authorization in the near future. As explained above, that result could cost the economy billions of dollars and hundreds of thousands of high-quality American jobs—at an especially inopportune time. A modest stay to avoid those severe and untimely consequences is clearly in the public interest.

The District Court downplayed the disruption its order will cause, suggesting that the individual permit process provides an adequate alternative. *See* Dist. Ct. Op. at 16 (May 11, 2020). But that process is exceedingly time consuming and would function as a *de facto* hold on any

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cancelation of oil and gas infrastructure projects amounted to $91.9 billion and 728,079 jobs).

[17] Institute for 21st Century Energy, *What If . . . Pipelines Aren't Built into the Northeast?* 11 (2017), *available at* https://bit.ly/3fR8QMv.

pipeline project. *See* Appellant's Stay Mot. at 41 (May 13, 2020). Given the time and money required to construct oil and gas pipelines, such incremental delays can cumulatively destroy an entire project.[18] Thus, the cumbersome and unexpected case-by-case process would inject uncertainty and unpredictability into billion-dollar pipeline projects that thrive on precise planning and execution. And, without the predictability that 40 years' worth of accepted practice under NWP 12 has long offered, it will become increasingly more difficult to convince investors and developers to pursue future projects in the first place.

Perhaps most troubling of all, inhibiting the development and maintenance of the Nation's oil and gas pipelines would threaten the energy grid's reliability and resiliency. Ensuring that pipelines can connect producers to consumers is especially critical during extremely cold weather, when pipelines are needed to ensure "availability, reliability, and system stability."[19] When demand spikes without the

[18] Global Energy Institute, *Infrastructure Lost: Why America Cannot Afford to 'Keep It In The Ground'* 9-11, *available at* https://bit.ly/3dOLBkK (last visited May 15, 2020).

[19] Institute for 21st Century Energy, *What if . . . Pipelines Aren't Built in the Northeast?* 25 (2017), *available at* https://bit.ly/2WU1pfa.

necessary infrastructure, prices spike as well.[20] And the lack of needed pipelines can contribute to greater economic harm if power generators revert to less environmentally friendly fuels, while producers either burn off gas they cannot get to the consumer or revert to more risky means of transport.[21] Updating the Nation's pipelines is critical to avoiding these harms. Yet, the District Court's order threatens to halt that progress in its tracks.

For all of these reasons, a stay of the District Court's order would prevent enormous economic harm and disruption to not only the parties in this case but to the American public writ large. Oil and gas pipelines like those at issue here benefit every energy consumer in the country, and they stimulate valuable economic growth and employment. While the Nation faces an economic downturn and rising unemployment, the most equitable approach is to avoid the sweeping harm that the District Court's order would cause while this Court has a chance to conduct a full appellate review.

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[20] *Id.* at 14.

[21] *See* Klass & Meinhardt, *Transporting Oil & Gas*, at 1015; Suedeen Kelly & Vera Callaham Neinast, *Getting Gas to the People*, in BEYOND THE FRACKING WARS, at 81 (2013).

II. A Stay Would Have The Modest Effect Of Restoring The *Status Quo Ante* By Preserving A Longstanding Nationwide Permit.

Against the substantial economic disruptions the order would undoubtedly cause, a stay would have the modest effect of preserving a reasonable balance that Congress struck long ago and that private parties have relied on for decades.

The core legal regime at issue has been in place for over 40 years. While amending the Clean Water Act, in 1977, Congress explicitly authorized the Corps to issue "general" permits, such as NWP 12. *See* 33 U.S.C. §1344(e). The plain text of the statute and its accompanying regulations set forth a system that allows nationwide permits to eliminate "delay" for activities that "will cause only minimal adverse environmental effects." *Id.* § 1344(e)(1); 33 C.F.R. § 330.1(b). NWP 12's long history confirms that it adheres to that careful structure. *See* 42 Fed. Reg. 37,122, 37,146 (July 19, 1977). It has survived multiple administrations and been re-adopted time and again with bipartisan support. *E.g.*, 77 Fed. Reg. 10,184, 10,197 (Feb. 21, 2012). Experience and history thus confirm that NWP 12 eliminates unneeded delay while protecting the environment—just as Congress intended.

Moreover, NWP 12's very structure is *designed* to avoid any adverse effects on listed species or critical habitats. The ESA requires that the Corps engage in consultation if its proposed action "*may* affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Yet NWP 12 expressly requires prospective permittees to submit a pre-construction notice ("PCN") and obtain Corps approval for any activity that "*might*" affect a listed species or critical habitat and cannot proceed until the Corps determines that there will be no effect. 82 Fed. Reg. 1860, 1999 (Jan. 6, 2017). In other words, a developer can avoid the need for a PCN only if the activity has zero chance of affecting a listed species or critical habitat. Enjoining NWP 12 thus will achieve few if any additional protections for those species and habitats, while crushing a critically important sector of our economy during a period of economic upheaval.

* * *

In short, the District Court's order would cause severe and irreversible economic consequences. A stay would prevent that harm while temporarily restoring the longstanding legal landscape in this area. Faced with that choice, the equities clearly favor a stay.

CONCLUSION

For all the above reasons, *amici* respectfully urge this Court to grant a stay pending appeal.

Dated: May 15, 2020

By: /s/ Michael H. McGinley

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(5) and contains 2,542 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

By: /s/ Michael H. McGinley
Michael H. McGinley

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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