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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION**

///

CENTER FOR BIOLOGICAL  
DIVERSITY, et al.,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS  
OF ENGINEERS, et al.,

Defendants,

and

AMERICAN GAS ASSOCIATION,  
et al.,

Defendant-Intervenors,

and

STATE OF MONTANA,

Defendant-Intervenors.

Case No. CV 21-47-BMM

**BRIEF OF AMICUS CURIAE  
THE CHAMBER OF  
COMMERCE OF THE UNITED  
STATES OF AMERICA**

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## **CORPORATE DISCLOSURE STATEMENT**

The Chamber of Commerce of the United States of America (“Chamber”) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

## **STATEMENT OF INTEREST**

The Chamber files this amicus curiae brief in support of Defendants and Defendant-Intervenors. The Chamber is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation’s business community.

Plaintiffs challenge the United States Army Corps of Engineers’ (“Corps”) reissuance of Nationwide Permit 12 (“NWP 12”), a general permit issued under Clean Water Act (“CWA”) section 404,<sup>1</sup> which applies to many projects undertaken

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<sup>1</sup> 33 U.S.C. § 1344.

by the oil and gas industry in constructing and maintaining pipeline facilities.<sup>2</sup> Plaintiffs ask this Court to “vacate NWP 12.”<sup>3</sup> The Chamber’s members and their customers rely—directly and indirectly—on NWP 12 for the timely, affordable, and reliable delivery of oil and gas. Without NWP 12, projects to install and maintain pipelines and other infrastructure necessary for transporting and refining petroleum and natural gas products would require other forms of CWA authorization, most likely an individual permit. Applying for individual permits would significantly delay projects, raise costs, and potentially derail projects altogether. Invalidating NWP 12 would therefore result in increased costs and delays for essential energy commodities. It would also undermine the reliable access to energy that businesses (large and small) need to operate, exacerbate supply chain disruption, and make it more difficult to transition to a less greenhouse gas or carbon-intensive economy.

These impacts will not be limited to companies operating in the domestic oil and gas industry. Instead, the increased costs will be passed on to consumers in the form of higher energy costs and steeper prices for products manufactured using petrochemicals. Unnecessary permitting delays will also result in higher prices at the pump, increased electricity prices, and steeper price tags on everyday items.

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<sup>2</sup> Compl. ¶ 1 (Doc. 1); Prayer for Relief at C (seeking to “[v]acate NWP 12, in whole or in part”).

<sup>3</sup> *See id.*

The Chamber and its members also have a strong interest in the Nationwide Permits more generally. Many of the Chamber's members rely directly or indirectly on other Nationwide Permits that rest on agency decisions that closely mirror those that Plaintiffs allege to be legally deficient and seek to invalidate. For this reason and those expressed above, the Chamber has a direct interest in this case.

### **ARGUMENT**

As demonstrated by the points raised in Federal Defendants' Memorandum in Opposition and Cross-Motion for Summary Judgment (Doc. 60), and by the Defendant-Intervenors, (ECF Nos. 64, 65), NWP 12 fully complies with the law and should be upheld. The Chamber agrees that summary judgment should be granted in favor of the Federal Defendants and submits this amicus curiae brief to explain the negative practical consequences of vacating NWP 12. Vacatur would be inappropriate even if the Court were to find legal flaws in the process that led to the issuance of NWP 12. Instead, any relief the Court grants should be narrowly tailored so that businesses may continue to rely on NWP 12 and the Nationwide Permits not at issue in this case during any potential remand to the Corps.

When determining whether to vacate an agency action, the Ninth Circuit weighs any errors in the action "against the consequences of such a remedy."<sup>4</sup> Here,

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<sup>4</sup> *California Communities Against Toxics v. E.P.A.*, 688 F.3d 989, 993 (9th Cir. 2012) (applying the two-factor test from *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

the consequences would be severe: The Nationwide Permits, and NWP 12 specifically, play a critical role in ensuring our nation's energy security and economic vitality. Plaintiffs' requested relief would impose detrimental economic burdens in the form of higher energy prices and inflation. These impacts would be particularly acute for small businesses and consumers. It would hinder the energy transition to a more diversified and less carbon-dioxide intensive economy. And it would undermine the scheme Congress designed for timely authorization of activities with minimal environmental impacts.

**I. Efficient permitting is vital to America's energy security.**

**A. Permitting delays are a real obstacle to infrastructure projects and frustrate Congress's goal of streamlined nationwide permitting.**

As described in the Federal Defendants' brief, Nationwide Permits provide businesses with streamlined CWA permitting when certain conditions are met.<sup>5</sup> The ability to reliably receive timely authorization for routine construction activities that have minimal environmental impacts is crucial to the economic viability of these projects. Construction costs can account for roughly 70% of project costs, and according to one study, the total increase in direct cost from delay can exceed 5% per year.<sup>6</sup>

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<sup>5</sup> See 33 U.S.C. § 1344(e); Def. Br. 1–7 (Doc. 60); Moyer Decl. ¶ 7 (Doc. 60-2).

<sup>6</sup> See Philip Howard, Common Good, *Two Years, Not Ten Years: Redesigning Infrastructure Approvals* 7 (2015), <https://bit.ly/3CVbXyZ>.

The Corps estimated that the average processing time for the Nationwide Permit pre-construction notification process was at least 206 days *less* than the average processing time for an individual permit.<sup>7</sup> That number doesn't tell the full story. Given the complexity of these infrastructure projects, even minor permitting delays can have serious consequences for a project schedule, and thus the project's economics. A week-long permitting delay in parts of the country where the ground freezes can delay key aspects of construction for months or even a full year. The same can be true of a permitting delay for projects involving stream-crossing work that must be performed during low-flowing periods for safety and environmental reasons. Permitting delays of even a few weeks or months could mean missing a critical delivery window with an equipment supplier, delaying the project until the next availability. In times of equipment scarcity, such delays could be significant. And many construction contracts have milestones and time-sensitive price collars. Depending on the length of the delay, these contracts may need to be re-negotiated at additional costs and at additional delay. These consequences are more than theoretical; a number of large pipeline projects have been stopped altogether due to

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<sup>7</sup> See Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2745 (Jan. 13, 2021) (estimates for fiscal year 2018). *See also* Moyer Decl. ¶ 11 (Doc. 60-2).

delays in permitting processes, even *after* victories for the proponents of those projects in the Supreme Court.<sup>8</sup>

The Corps estimated that NWP 12 could be used close to 50,000 times over the permit's 5-year life.<sup>9</sup> These uses qualify for NWP 12 only if they meet numerous preconditions to ensure that they have no more than minimal impacts on a wide variety of resources.<sup>10</sup> Plaintiffs' requested relief could have serious consequences for the economics of these projects. And the extra administrative burdens on the Corps—if it had to review individual permit applications for those same projects—

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<sup>8</sup> See, e.g., *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020); *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, prnewswire.com (July 5, 2020), <https://prn.to/3JoLgFt>; *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021); *PennEast Company, LLC Response to FERC Nov. 23, 2021 Letter Requesting Status of the PennEast Pipeline Project*, Docket Nos. CP15-558-000 and CP20-47-000 (Nov. 30, 2021).

<sup>9</sup> Moyer Decl. ¶ 3 (Doc. 60-2). As specified in the Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. at 2744, 2877 (Jan. 13, 2021), each separate and distant crossing of a single water of the United States counts as a separate use.

<sup>10</sup> Examples of these measures include limiting the loss of waters to under 0.5 acre, limiting the trench excavations being placed in jurisdictional waters or wetlands to less than three months, segregating topsoil in wetlands, prohibiting drainage effects on wetlands hydrology, prohibiting use in tidal waters or their adjacent non-tidal wetlands, limiting the size of any foundations for aboveground pipelines, limiting the size and placement of access roads, and limiting the temporary placement of fill to protect against erosion and flooding impacts. 86 Fed. Reg. at 2860. These are in addition to over thirty general conditions that apply to all NWPs to protect against adverse impacts to navigation, aquatic life movements and spawning areas, migratory birds and their breeding areas, shellfish beds, water supply intakes, flooding risks within the 100-year floodplain, soil erosion, wild and scenic rivers, tribal rights, endangered species, and historic properties, among other resources. *Id.* at 2867–74.

would be significant. The Corps would be required to individually process thousands of additional applications for projects where the Corps' experience indicates effects are not more than minimal, leading to further delays and backlogs.<sup>11</sup>

Congress designed the Nationwide Permits to avoid these very delays, particularly when they are without environmental justification. When amending the CWA in 1977, Congress explicitly authorized the Corps to issue "general" permits, such as NWP 12.<sup>12</sup> The plain text of the statute and its accompanying regulations set forth a system that allows the Corps to regulate with "little, if any, delay" for activities that "will cause only minimal adverse environmental effects."<sup>13</sup> In other words, the core legal regime that Plaintiffs challenge has been in place for over 40 years.<sup>14</sup> Multiple administrations of both political parties have endorsed it and it has been re-adopted time and again with bipartisan support.<sup>15</sup> NWP 12's long history confirms that it adheres to the structure Congress designed, eliminating unneeded delay while protecting the environment.<sup>16</sup> By preventing any oil and gas infrastructure projects from proceeding under NWP 12, Plaintiffs' requested relief

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<sup>11</sup> See Moyer Decl. ¶¶ 11–13 (Doc. 60-2) (estimating almost a year in processing delays for additional individual permits if NWP 12 were vacated).

<sup>12</sup> See 33 U.S.C. § 1344(e).

<sup>13</sup> *Id.* § 1344(e)(1); 33 C.F.R. § 330.1(b).

<sup>14</sup> See 42 Fed. Reg. 37,122, 37,145, 37,146 (July 19, 1977); 86 Fed. Reg. at 2744, 2745.

<sup>15</sup> *E.g.*, 77 Fed. Reg. 10,184, 10,197 (Feb. 21, 2012) ; 86 Fed. Reg. at 2,744.

<sup>16</sup> See NWP 12 Coalition Mem. in Opp'n 4–11 (Doc. 65).

would stall or even permanently halt necessary infrastructure development that relies on 40 years of settled regulatory expectations, frustrating Congress's intent. Plaintiffs' desired outcome is thus at odds with the congressional scheme intended to avoid such delays.

**B. The inability to authorize and construct new pipeline infrastructure has serious consequences for America's energy security.**

In *California Communities Against Toxics*, the Ninth Circuit explained that vacatur of federal approval of a state plan under the Clean Air Act was unwarranted in part because such vacatur could prevent a power plant from coming on line as scheduled, and without that plant, "the region might not have enough power next summer, resulting in blackouts."<sup>17</sup> Here, Plaintiffs' requested relief would result in far broader threats to the ability of American businesses to receive reliable and affordable energy.

As the energy market has become increasingly global, the U.S. economy has grown more vulnerable to foreign actions that interrupt the market.<sup>18</sup> When domestic production can quickly respond to disruptions in the global energy markets, our energy security is improved.<sup>19</sup> Supply diversity, for example, "reduces the

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<sup>17</sup> 688 F.3d at 993–94.

<sup>18</sup> U.S. Department of Energy, *Valuation of Energy Security for the United States: Report to Congress 2*, 12 (Jan. 2017), <https://bit.ly/3JtSEiI> [hereinafter "Valuation of Energy Security"].

<sup>19</sup> *Id.*

likelihood that disruptions to supply or threats to production areas, trade, or distribution routes—whether caused by weather, terrorism, or geopolitics—significantly disrupt U.S. access to physical energy supplies.”<sup>20</sup>

Luckily, the U.S. oil and gas industry is already “highly diversified because it is comprised of many privately held businesses that respond to market forces to increase or decrease production of oil and natural gas.”<sup>21</sup> The Department of Energy has found that increased production of oil and natural gas has “improved domestic, and thus global, energy security in a variety of ways” and has “repeatedly prevented spikes in energy prices that could threaten both the U.S. and global economy.”<sup>22</sup>

Indeed, our nation’s robust infrastructure system—including the availability of multidirectional and cross-border pipelines—supports supply diversity and allows oil and gas to be transported from points of production and import to centers of demand.<sup>23</sup> The U.S. has one of the most advanced and complex energy infrastructures in the world, with nearly 2.6 million miles of pipelines.<sup>24</sup> This network, and the ability to improve and maintain it in a timely manner, is profoundly important to our national economy and our energy security. As the Department of Energy has explained, “[t]he majority of natural gas used domestically is transported

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<sup>20</sup> *Id.* at 44.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 44–45.

<sup>24</sup> *Id.* at 3.

by pipeline from domestic U.S. producers and from Mexico and Canada, making pipeline infrastructure vital to maintaining supply security and resilience.”<sup>25</sup>

Without NWP 12, the oil and gas industry cannot effectively and efficiently scale production to align with demand in response to a global economic crisis or domestic interruptions.<sup>26</sup> Put simply, pumping more oil and gas does little good when there aren’t enough pipelines to transport it to refineries and markets. Even if upstream production increases to meet rising demand, the demand can quickly outstrip transportation capacity in areas where pipeline infrastructure does not already exist or additional capacity is not already in the advanced stages of development.<sup>27</sup> By providing a timely process for authorizing construction activities that have minimal environmental impacts, NWP 12 supports the ability of private businesses to respond to present and forecasted demands for these vital resources.

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<sup>25</sup> *Id.* at 46.

<sup>26</sup> See John H. Brewer et al., DOE/NETL-PUB-22483, *Reliability, Resilience, and the Oncoming Wave of Retiring Baseload Units, Volume II-C: Fuel-Electricity Interaction in the Northeast and Midcontinent 2* (Apr. 2019), <https://bit.ly/3qHggJF>.

<sup>27</sup> See *id.* See also Letter from EQT to Secretary Granholm 2 (Feb. 16, 2022), <https://bit.ly/38elZQu> (“The problem is very straight forward: the pipelines heading to New England are full, and as a result, we cannot physically flow that gas needed to meet growing demand without more infrastructure. That’s it. And the way to solve this problem is equally straight forward: allow the completion of pipeline projects such as those in the table noted above, many of which are substantially complete, and let us provide the natural gas ... while also reducing New England’s emissions.” (emphasis omitted)).

The ability to respond to rising demand is critical to ensuring that businesses and consumers have the fuel necessary to heat their homes and businesses and power the vehicles that deliver their products or allow them to commute to work. It is equally important to providing reliable and affordable electricity. Natural gas is the largest source of power for electric generation, accounting for about 40% of generation.<sup>28</sup> And natural gas pipelines will become increasingly important as our nation transitions away from older, more carbon-intensive forms of power.<sup>29</sup> Since 2000, the use of natural gas to generate electricity has more than doubled, and is expected to continue to increase.<sup>30</sup> As a result, the reliability and resiliency of the nation's electrical system is "increasingly linked to the performance and capabilities of the natural gas delivery system."<sup>31</sup> Indeed, "it will be difficult to maintain adequate fuel availability to meet that demand when more coal and nuclear resources are lost."<sup>32</sup> And there is an estimated need to invest between \$470 million and \$1.1

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<sup>28</sup> See U.S. EIA, *Electricity Explained: Electricity in the United States* (Mar. 18, 2021), <https://bit.ly/3J2rVZB>.

<sup>29</sup> See U.S. EIA, *Annual Energy Outlook 2022* 6, 7 (Mar. 2022), <https://bit.ly/35yBbqH>.

<sup>30</sup> See *id.* at 7; U.S. EIA, *Natural Gas Explained: Use of Natural Gas* (Dec. 7, 2021), <https://bit.ly/3qWw9fo>.

<sup>31</sup> National Energy Technology Laboratory, U.S. Department of Energy, *Additional Pipeline Capacity and Baseload Power Generation Needed to Secure Electric Grid* (Feb. 20, 2020), <https://bit.ly/3Iq1soo>.

<sup>32</sup> *Id.*

billion in additional pipeline capacity.<sup>33</sup> The natural gas pipeline network, and NWP 12, therefore play a vital role in our energy security and in meeting our nation’s energy needs during the transition to a lower carbon economy.

## **II. Plaintiffs’ requested relief would detrimentally impact the American economy.**

As in *California Communities Against Toxics*, vacatur is inappropriate here because of the severe economic impacts that would result.<sup>34</sup> Oil and gas pipeline projects create billions of dollars in economic activity and support hundreds of thousands of jobs—both during and after construction.<sup>35</sup> In 2019, the industry’s “total impact on US GDP was nearly \$1.7 trillion, accounting for 7.9 percent of the national total.”<sup>36</sup> Capital expenditures from 2018 through 2035 for new oil and gas infrastructure have been estimated to total approximately \$791 billion—including approximately \$154 to \$190 billion to construct 26,000 miles of additional natural

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<sup>33</sup> *Id.* See also Paul W. Parfomak & John Frittelli, R46414, *Rail Transportation of Liquefied Natural Gas: Safety and Regulation* 1, Congressional Research Service (July 28, 2020) <https://bit.ly/3ilkvWI> (“Domestic transportation of natural gas occurs mainly by pipeline and some parts of the United States may have insufficient pipeline capacity to meet expected demand.”); Robert K. Cowan, *Note: Has the MLP reached Its Limit? America’s Pipeline Shortage*, 15 TEX. J. OIL GAS & ENERGY L. 55, 57 (2020).

<sup>34</sup> See *California Communities Against Toxics*, 688 F.3d at 994 (“Stopping construction would also be economically disastrous. This is a billion-dollar venture employing 350 workers.”).

<sup>35</sup> PWC & Am. Petroleum Inst., *Impacts of the Oil and Natural Gas Industry on the US Economy in 2019* 7–10 (July 2021), <https://bit.ly/3uvjtNx>.

<sup>36</sup> *Id.* at E-2.

gas pipelines.<sup>37</sup> In Montana alone, the oil and gas industry is directly or indirectly responsible for more than 21,000 jobs.<sup>38</sup>

**A. Businesses and consumers rely on our Nation’s pipeline network for affordable energy.**

In addition to the pipeline industry’s direct economic role in providing jobs and economic returns, a robust pipeline infrastructure is vital to the overall U.S. economy, in sectors well beyond the oil and gas industry itself. “Due to their high capacity and economies of scale, pipelines are the most economic transportation mode for shipping most gaseous and liquid commodities.”<sup>39</sup> Without pipelines, producers are forced to rely on more expensive methods of transporting fuel to power generators or consumers—or forego production entirely.<sup>40</sup> Because natural gas accounts for such a high share of electric generation, “natural gas prices directly influence wholesale electricity prices.”<sup>41</sup> A robust pipeline system has thus

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<sup>37</sup> See ICF & The INGAA Foundation, Inc., *North America Midstream Infrastructure through 2035, Significant Development Continues* 2, 48 (June 18, 2018), <https://bit.ly/392bSsX>; see also U.S. Chamber of Commerce Global Energy Institute, *Infrastructure Lost: Why America Cannot Afford to ‘Keep It In the Ground’* 2–3, 8, <https://bit.ly/3dOLBkK>.

<sup>38</sup> PWC & Am. Petroleum Inst., *supra* note 35, at E-3 Table E-2.

<sup>39</sup> Paul Parfomak, R46700, *Pipeline Transportation of Hydrogen: Regulation, Research, and Policy* 5, Congressional Research Service (Mar. 2, 2021).

<sup>40</sup> See John Frittelli et al., R43390, *U.S. Rail Transportation of Crude Oil: Background and Issues for Congress* 4, Congressional Research Service (Dec. 4, 2014).

<sup>41</sup> *Hearing on the Causes, Outlook, and Implications of Domestic and International Energy Price Trends Before the S. Comm. on Energy and Natural Resources*, 117th

significantly helped lower energy costs. This in turn facilitates downstream industrial investment and economic growth.<sup>42</sup>

Energy costs also represent a sizable portion of consumer budgets, whether in the form of home use or fuel for transportation.<sup>43</sup> Half of all American households use natural gas for heating their homes and water, cooking, and drying clothes.<sup>44</sup> In addition, “transportation is the second-largest expense in their annual budgets, costing as much as 20 to 25 percent of their annual income” and “consumers are unable to make many accommodations over the short term in response to changes in transportation fuel prices.”<sup>45</sup> Because “[c]onsumers can’t easily cut consumption on short notice, as they can with discretionary purchases, [] higher prices act as a tax, draining the money they have available to spend on other goods and services.”<sup>46</sup> For example, customers in New England pay significantly more for natural gas due to

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Cong. (Nov. 16, 2021) (statement of Stephen Nalley, Acting Administrator, U.S. Energy Information Administration, at 6).

<sup>42</sup> See IHS Economics & NAM, *The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector* 21 (May 2016), <https://bit.ly/2U22rFm>.

<sup>43</sup> See Josh Mitchell, *Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy*, WALL ST. J. (Oct. 10, 2021), <https://on.wsj.com/3N57qPq>.

<sup>44</sup> U.S. EIA, *Natural Gas Explained, Use of Natural Gas* (Dec. 7, 2021), <https://bit.ly/2wapNzH>; U.S. EIA, *EIA Forecasts U.S. Natural Gas Production Will Establish a New Monthly Record High in 2022* (Dec. 16, 2021), <https://bit.ly/3ug5mvn>.

<sup>45</sup> Valuation of Energy Security at 33.

<sup>46</sup> Josh Mitchell, *supra* note 43; see also Valuation of Energy Security at 32.

repeated opposition to new pipeline projects, which has limited capacity and has forced the region to rely on imported natural gas subject to international pricing.<sup>47</sup>

When consumers have less disposable income, they reduce spending. That rational choice carries negative consequences for the economy and helps explain why “high energy prices have often preceded recessions.”<sup>48</sup>

When crude oil prices increase, households and businesses pay more for transportation fuels and the other inputs that depend on transportation, all of which constitute the direct costs. As a result of those higher input prices, households and businesses are able to spend less on other goods and services and invest less. Those decisions create indirect cost on the economy, with effects that can last for several quarters.<sup>49</sup>

Because transportation costs are so closely tied to the price of consumer goods, a rise in gas prices will also mean an increase in the costs of many other products, at a time when inflation is already a major economic concern.<sup>50</sup> The U.S. faced inflation and cost concerns before recent events abroad brought additional attention to these issues. Plaintiffs’ requested relief would further exacerbate such concerns. When oil and gas producers can’t efficiently and affordably get their products to market and can’t respond to increased demand, the resulting costs

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<sup>47</sup> See Letter from EQT to Secretary Granholm 1–2 (Feb. 16, 2022).

<sup>48</sup> Josh Mitchell, *supra* note 43.

<sup>49</sup> Valuation of Energy Security at 32.

<sup>50</sup> See *id.*

reverberate through the U.S. economy. Any remedy granted by the Court should therefore be narrowly tailored to avoid such rippling impacts.

**B. Many other industries rely on oil and gas products.**

The negative practical effects of Plaintiffs' requested relief would also flow down to manufacturers who need natural gas as a feedstock or as a fuel for production. These harms would also be felt by petrochemical facilities that use these products to create plastics, rubbers, resins, synthetic fibers, adhesives, dyes, detergents, pesticides, petroleum-derived paints and coatings, and many other products.<sup>51</sup> Indeed, petrochemicals can be found in everything from food packaging and diapers to clothing, paper, detergent, and housewares.<sup>52</sup> Because these petrochemicals are necessary to produce so many everyday consumer goods, increased costs in constructing pipeline infrastructure or increased transportation costs for oil and gas will result in higher prices for a broad range of products that Americans rely on, at a time when our nation is already facing supply chain issues and inflation.

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<sup>51</sup> See Canada Energy Regulator, *Market Snapshot: Petrochemical Products in Everyday Life* (Oct. 17, 2018), <https://bit.ly/3ueevEq>.

<sup>52</sup> U.S. Department of Energy, *Ethane Storage and Distribution Hub in the United States: Report to Congress* 47, 48, Figure 15 (Nov. 2018), <https://bit.ly/3N4wmq7>; see also Zhou Peng et al., *Petrochemicals 2020: A Year of Resilience and the Road to Recovery*, MCKINSEY & COMPANY (May 21, 2021), <https://mck.co/3Ij8Z8N>.

**C. Plaintiffs' requested relief would be detrimental to the environment.**

The permitting delays that would inevitably result from Plaintiffs' requested relief would cause their own harmful environmental impacts. The ability to construct new pipelines in a timely way is vital to the energy transition and to our nation's ability to further diversify its domestic energy sources. Natural gas pipeline constraints can result in the use of more carbon-intensive fuels to meet electric demand.<sup>53</sup> They can also result in regions *importing* liquified natural gas, as is the case in the Northeast, with a higher greenhouse gas footprint:

Rather than relying on natural gas sourced from Appalachia with some of the lowest methane emissions and smallest carbon footprints on the planet, New England instead has to source foreign supply shipped from over 2,000 miles away.<sup>54</sup>

And pipelines are not just useful for transporting oil and gas. Pipelines provide the critical foundation for a low-emission hydrogen and carbon capture and storage network across our nation—both key components of the Administration's greenhouse gas reduction goals.<sup>55</sup> Converting existing natural gas pipelines into

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<sup>53</sup> See, e.g., U.S. EIA, *New England Natural Gas and Electricity Prices Increase on Supply Constraints, High Demand* (Feb. 3, 2022), <https://bit.ly/3tkXsBw>; see also Philip Howard, *supra* note 6, at 3 (noting that obsolete infrastructure results in greater carbon emissions); cf. Compl. ¶ 2 (Doc. 1) (asserting that NWP 12 activities cause climate change); Letter from EQT to Secretary Granholm 3 (Feb. 16, 2022).

<sup>54</sup> See Letter from EQT to Secretary Granholm 2 (Feb. 16, 2022).

<sup>55</sup> The White House, FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and

dedicated hydrogen pipelines could significantly reduce hydrogen transmission costs—by 20% to 60%, compared with constructing new hydrogen pipelines—according to one study.<sup>56</sup> “Such conversions could facilitate hydrogen market development by providing high-volume, networked transportation capability for hydrogen with limited additional capital investment.”<sup>57</sup>

### **III. Plaintiffs’ legal arguments have implications for the other Nationwide Permits.**

As explained in greater detail by amicus curiae Edison Electric Institute, NWP 12 is just one of many general permits that perform the vital function of streamlining construction (when such activities will have minimal environmental impacts).<sup>58</sup> Indeed, the Nationwide Permits are a collection of more than 50 general permits that have some overlap in the general conditions that apply to their use. The Corps currently uses Nationwide Permits in a variety of contexts far afield from oil and gas pipelines. These uses include agricultural activities, hydropower projects, commercial and industrial developments, land- and water-based renewable energy generation facilities, electric utility lines, and telecommunication activities.<sup>59</sup> And

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Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://bit.ly/3K9rnT3>.

<sup>56</sup> See Paul Parfomak, *supra* note 39, at 1, 6–8.

<sup>57</sup> *Id.* at 8.

<sup>58</sup> See generally Edison Electric Institute Br. as Amicus Curiae (Doc. 68).

<sup>59</sup> See U.S. Army Corps of Engineers, Summary of the 2021 Nationwide Permits (2021), <https://bit.ly/3Ioj0kP>.

these permits are critical to achieving many of the Administration’s clean energy goals, such as increasing wind, solar, and hydrogen in our current energy mix.<sup>60</sup>

Plaintiffs may claim that they seek only vacatur of NWP 12.<sup>61</sup> But this ignores their repeat statements that the same infirmities exist for all Nationwide Permits. For example, Plaintiffs argue that:

- “As with the individual permitting process, the Corps must comply with the ESA and NEPA *when issuing a NWP*,”<sup>62</sup>
- “Project-level review does not relieve the Corps of its duty to consult on the issuance of *nationwide permits* at the programmatic level;”<sup>63</sup>
- The Corps “must consider the effect of the entire agency action” because “[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat.”<sup>64</sup>
- “[T]he Services reiterated that programmatic consultation was appropriate for national programs, *including the NWPs*,”<sup>65</sup> and
- NWP 12 environmental assessment’s “cumulative effects analysis is so generalized that it uses almost verbatim language as the other NWP

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<sup>60</sup> See The White House, FACT SHEET: Biden-Harris Administration Advances Cleaner Industrial Sector to Reduce Emissions and Reinvigorate American Manufacturing (Feb. 15, 2022), <https://bit.ly/36SEHwR>; The White House, FACT SHEET: Biden-Harris Administration Races to Deploy Clean Energy that Creates Jobs and Lowers Costs (Jan. 12, 2022), <https://bit.ly/3KY6ien>.

<sup>61</sup> See Compl. Prayer for Relief at C (Doc. 1).

<sup>62</sup> Pls.’ Mem. in Supp. of Mot. for Summ. J. 5 (Doc. 45) (emphasis added).

<sup>63</sup> *Id.* at 20.

<sup>64</sup> *Id.* (internal quotation marks omitted) (emphasis added).

<sup>65</sup> *Id.* at 26 (emphasis added).

Decision Documents, even though they authorize vastly different types of activities. . . . NEPA demands more.”<sup>66</sup>

These and other statements by Plaintiffs make clear that the logical implications of their claims go much further than merely attacking NWP 12. Instead, Plaintiffs’ claims rest on propositions that implicitly challenge the legal viability of all Nationwide Permits. Plaintiffs also attack NWP 12’s reliance on General Condition 18, which applies to all nationwide permits, arguing that: “the scheme for ESA compliance that the Corps has created through General Condition 18 is insufficient, and an unlawful abdication of the clear duty that all federal agencies have to prioritize the protection of listed species through the mandatory Section 7 consultation process for all agency actions that may affect listed species.”<sup>67</sup>

Plaintiffs’ legal arguments, if broadly accepted, therefore would threaten the Administration’s goals of updating the electric grid and transforming our energy infrastructure to address climate change.<sup>68</sup> This Administration has stressed the importance of fast and efficient reviews of clean energy projects, and agencies are

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<sup>66</sup> *Id.* at 45–46; Compl. ¶¶ 97–98 (Doc. 1) (discussing authorization of entire Nationwide Permits and noting Plaintiffs’ comments to the Corps’ outlined “violations of the ESA, NEPA, and the CWA *regarding the NWPs, including NWP 12*” (emphasis added)).

<sup>67</sup> Pls.’ Mem. in Supp. of Mot. for Summ. J. 24.

<sup>68</sup> *See* The White House, President Biden’s Bipartisan Infrastructure Law (Nov. 2021), <https://bit.ly/3CY4mQv>.

already coordinating to improve the efficiency of permitting these projects.<sup>69</sup> But the theory that underlies Plaintiffs' request for relief—which calls into question the legal underpinnings of the Nationwide Permits necessary for these renewable projects—would result in the same project delays described in Section I.A. of this brief.

Likewise, the Administration's push to ensure every American has access to reliable high-speed internet by expanding broadband infrastructure would be hindered without the ability to use the a Nationwide Permit.<sup>70</sup> It would also threaten the economic viability of many other industries and sectors of the economy that depend on the predictable and timely use of authorizations made available through the Nationwide Permits and that are necessary for routine activities that will have minimal environmental impacts. In sum, the relief sought by Plaintiffs could have significant consequences beyond the oil and gas sector.

### **CONCLUSION**

As set forth in the Federal Defendants and Defendant-Intervenors' briefs, NWP 12 complies with the law and should be upheld. NWP 12 is both legally sound and vital to the U.S. economy. Even if this were not the case, Plaintiffs' requested

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<sup>69</sup> See The White House, FACT SHEET: Biden-Harris Administration Races to Deploy Clean Energy that Creates Jobs and Lowers Costs (Jan. 12, 2022), <https://bit.ly/3KY6ien>.

<sup>70</sup> See The White House, President Biden's Bipartisan Infrastructure Law (Nov. 2021), <https://bit.ly/3CY4mQv>.

relief—vacatur of NWP 12—is not appropriate in light of the severe impacts that it would have on the U.S. economy and consumers. Any relief grant to Plaintiffs should be narrowly tailored and allow for the continued use of NWP 12 while the Corps addresses any infirmities found by the Court, and avoid putting any of the other vital Nationwide Permits at risk. The Chamber respectfully requests that the Court deny Plaintiffs’ motion for summary judgment and grant Federal Defendants’ cross-motion for summary judgment.

DATED this 5th day of April, 2022.

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**CERTIFICATE OF COMPLIANCE**

I certify that the BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman 14-point typeface. The total word count is 4968 words, excluding captions and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/Rachel Parkin  
Rachel H. Parkin

**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2022, I filed this BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA in the Court's CM/ECF system, which will send notice to all counsel of record.

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