



Ninth Circuit Denies Emergency Motion for Partial Stay of Montana District Court's NWP 12 Vacatur

Yesterday, the Ninth Circuit denied the U.S. Army Corps of Engineers' (Corps) request for an emergency stay pending appeal of a Montana district court's vacatur of Nationwide Permit (NWP) 12 in *Northern Plains Resource Council, et al. v. Army Corps of Engineers*, a challenge to the Keystone XL Pipeline. As a result of the denial, NWP 12 remains unavailable for the construction of new oil and gas pipelines. The ruling means continued permitting delays are likely for pipeline developers seeking federal authorization for stream and wetland crossings and any resulting discharge of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act (CWA).

As discussed in detail in a prior [Alert](#), a Montana district court's April vacatur of NWP 12 was based on the judge's determination that the Corps failed to comply with the Endangered Species Act (ESA) when NWP 12 was last issued in 2017. The decision was interpreted as a broad vacatur of NWP 12, extending beyond permitting of the Keystone XL Pipeline. In a significant positive development for permittees proposing work on existing pipelines, on May 11, 2020, the district court narrowed the scope of its original vacatur "to the construction of new oil and gas pipelines" with NWP 12 remaining "in place during remand insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects."

For pipeline developers, however, the stay sought by the Corps represented the final possibility of continuing to conduct work under NWP 12 during the long appellate process. The Ninth Circuit denied the Corps' request on grounds that the Corps had not demonstrated a likelihood of success on the merits or probability of irreparable harm if the stay was not granted.

The likely consequences of the denial are significant to pipeline developers and the producers that may have been relying on the construction of certain infrastructure. The ruling increases the possibility that construction windows will be missed for this year, resulting in potential cost overruns and liabilities for failure to meet construction milestones. Until this matter is resolved judicially or the Corps issues a new NWP 12 consistent with the Montana district court's remand, pipeline developers will likely need to apply for an individual Section 404 permit to proceed with stream and wetland crossings, generally a far more costly and time-consuming process than receiving authorization to work under an NWP. The timeframes for processing individual permit approvals may be further extended due to a likely influx of applications for projects that can no longer use NWP 12. Another option may be seeking coverage under a different NWP, if applicable.

Babst Calland's [environmental attorneys](#) have substantial experience with Clean Water Act Section 404 permitting and are well-equipped to assist pipeline developers in developing tailored solutions to the challenges raised by this ruling. If you have questions about the ongoing repercussions of the *Northern Plains* litigation or Section 404 permitting in general, please contact Lisa Bruderly at (724) 910-1117 or lbruderly@babstcalland.com, or Ben Clapp at (202) 853-3455 or bclapp@babstcalland.com.

MAY 29, 2020

CONTACT

LISA M. BRUDERLY

lbruderly@babstcalland.com

724.910.1117

BEN CLAPP

bclapp@babstcalland.com

202.853.3455

Pittsburgh, PA

Two Gateway Center
603 Stanwix Street
6th Floor
Pittsburgh, PA 15222
412.394.5400

Washington, DC

Suite 700
505 9th Street NW
Washington, DC 20004
202.853.3455

BABSTCALLAND.COM

PITTSBURGH, PA | CHARLESTON, WV | HOUSTON, TX | SEWELL, NJ | STATE COLLEGE, PA | WASHINGTON, DC

Babst Calland was founded in 1986 and has represented environmental, energy and corporate clients since its inception. Our attorneys concentrate on the current and emerging needs of clients in a variety of industry sectors, with focused legal practices in construction, corporate and commercial, creditors' rights and insolvency, emerging technologies, employment and labor, energy and natural resources, environmental, land use, litigation, public sector, real estate and transportation safety. For more information about Babst Calland and our practices, locations or attorneys, visit babstcalland.com.

This communication was sent by Babst Calland, headquartered at Two Gateway Center, Pittsburgh, PA 15222.

This communication is privately distributed by Babst, Calland, Clements and Zomnir, P.C., for the general information of its clients, friends and readers and may be considered a commercial electronic mail message under applicable regulations. It is not designed to be, nor should it be considered or used as, the sole source of analyzing and resolving legal problems. If you have, or think you may have, a legal problem or issue relating to any of the matters discussed, consult legal counsel.

This communication may be considered advertising in some jurisdictions. To update your subscription preferences and contact information, please [click here](#). If you no longer wish to receive this communication, please [reply here](#). To unsubscribe from all future Babst Calland marketing communications, please [reply here](#).

©2020 Babst, Calland, Clements and Zomnir, P.C. All Rights Reserved.