



Montana District Court's Vacatur of NWP 12 Impacts Pipeline Projects Across United States

Repercussions of a Montana District Court's vacatur of the U.S. Army Corps of Engineers (Corps) Nationwide Permit (NWP) 12 continue to unfold. NWP 12 is widely utilized by pipeline developers, other energy project proponents, and utilities to authorize certain 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).

NWP 12 was cast into a state of confusion in mid-April, when a federal judge in Montana, presiding over a challenge to the Keystone XL Pipeline, vacated the nationwide permit, asserting that the Corps failed to comply with the Endangered Species Act (ESA) when the NWPs were last issued in 2017. The court enjoined the Corps from authorizing any activities under the permit, pending completion of Corps consultations with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, Services) regarding the permit's impact on listed species or critical habitat. The order, issued in *Northern Plains Resource Council, et al. v. Army Corps of Engineers*, has resulted in an immediate halt to the review of thousands of pending NWP 12 requests and, unless stayed, is expected to result in lengthy delays and increased costs for companies engaged in the construction and maintenance of pipelines and other utility lines throughout the country.

NWP 12 Scope and Authorization

NWPs are general permits that the Corps issues under Section 404 for certain regulated activities, under certain thresholds of disturbance, which the Corps has determined will have minimal adverse environmental effects. The NWPs are published by the Corps approximately every five years, with the last publication in 2017, when 52 NWPs were issued. Obtaining coverage under a NWP is typically more efficient and less costly than obtaining an individual permit, which triggers project-specific environmental analysis and public comment periods and can take between six months and a year.

NWP 12 is widely relied upon by energy and utility project proponents to permit eligible discharges of dredged or fill material in connection with the construction, maintenance, repair and removal of utility lines, including oil and gas pipelines, water and sewer pipes, and electric, internet, and cable lines. To obtain coverage under NWP 12, the regulated entity must meet the 32 general conditions for all NWPs, as well as any conditions specific to NWP 12, including, in some instances, the submittal of a pre-construction notification (PCN).

The Northern Plains Ruling

In *Northern Plains*, although the Corps authorized coverage under NWP 12, plaintiffs challenged the validity of the permit, asserting that the Corps violated the ESA when it reissued the permit in 2017 without consulting with the Services for a Biological Opinion. The court agreed, noting that Corps regulations require formal consultation with the Services if the Corps determines that an action "may affect" listed species or critical habitat. The court found that the dredged and fill activities authorized by NWP 12 may affect such species or habitat, and concluded that the Corps' failure to initiate formal consultation

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was arbitrary and capricious. Notably, while the plaintiffs sought only to vacate NWP 12 as applied to the Keystone XL Pipeline, the Corps has signaled that it considers the order to broadly enjoin authorization of *any* dredged or fill activities under NWP 12 across the country.

On April 27, 2020, the Corps requested a stay pending appeal of that portion of the court's order that enjoined the Corps from authorizing activities beyond the specific context of the Keystone XL Pipeline, calling the court's ruling "extremely disruptive." The court declined to impose an immediate stay but agreed to consider the motion according to an expedited briefing schedule that would allow the court to rule by May 11, 2020. In its motion, the Corps signaled its intent to appeal the order to the Ninth Circuit Court of Appeals if its request for a stay is denied. Upon filing a Notice of Appeal, the Corps would be able to seek another stay pending appeal, this time from the Ninth Circuit. In support of the Corps, on April 29, 2020, the pipeline developer, the state of Montana and industry groups urged the district court to stay the order vacating NWP 12 until the Ninth Circuit resolves the appeal, claiming that the vacatur would have significant consequences for the state and the energy industry in general.

Repercussions for Proposed and Ongoing Pipeline and Utility Line Projects

The *Northern Plains* ruling and vacatur of NWP 12 broadly affects the permitting of oil and natural gas pipelines, electric utility lines, power lines from wind turbines and generating stations, water and sewer lines and other critical infrastructure. The Corps has reportedly stopped reviewing NWP 12 PCNs, and it appears that the soonest that it could begin processing PCNs again would be after May 11, *if* the judge grants the Corps' request for a stay. The Corps has estimated that approximately 5,500 NWP 12 PCNs are currently awaiting review in Corps district offices. The interruption in obtaining NWP 12 coverage will cause delays and, likely, increased costs for completion of projects. Construction windows may be missed for this year, depending on the length of the delay and restrictions related to weather and certain protected wildlife.

If a stay pending appeal is not granted, the Corps may opt to correct the deficiencies identified by the district court by initiating consultation with the Services and then reissuing NWP 12. Given the lengthy timeframes associated with these options, neither would be welcomed by regulated entities with pending PCNs or with plans to soon submit them. Entities may want to proceed with an individual permit or evaluate whether a proposed project may be eligible for Corps coverage under another NWP (e.g., NWPs for certain linear transportation projects (e.g., roads and trails) (NWP 14), minor discharges (NWP 18) or applicable land-based renewable energy production facilities (NWP 51)).

The ruling also raises issues for entities that have received NWP 12 authorization and are proceeding with construction. NGOs have already cited the *Northern Plains* decision in other lawsuits seeking to stop stream crossing activities for projects authorized under NWP 12. For example, the Sierra Club has filed a lawsuit claiming that prior NWP 12 authorizations issued by the Corps for the Permian Highway Pipeline are no longer valid in light of the Montana District Court decision.

More broadly, the ruling could also affect authorizations under other NWPs, beyond NWP 12, and other types of general permits issued by the Corps, including Pennsylvania's State Programmatic General Permit (PASP-GP-5). We will continue to follow new developments.

Babst Calland's [environmental attorneys](#) have substantial experience with Clean Water Act Section 404 permitting. If you have questions about the ongoing repercussions of the *Northern Plains* order 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.

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