

# THE CORP'S NATIONWIDE PERMIT 12 FOR OIL AND GAS PIPELINES IS VACATED AND ENJOINED

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## I. Introduction

Chief Judge Brian Morris of the United States District Court for the District of Montana issued an order on April 15, 2020 in *Northern Plains Resource Council v. Army Corps of Engineers*, the ongoing litigation regarding permitting of the Keystone XL pipeline, which has far-reaching nationwide implications for pipeline projects beyond Keystone. The order vacated the Corps of Engineers' ("Corps") Nationwide Permit No. 12 ("NWP 12"), remanded NWP 12 to the Corps for completion of consultation under Section 7 of the Endangered Species Act ("ESA"), and enjoined the use of NWP 12 pending completion of the ESA consultation process and compliance with all environmental statutes and regulations.

Judge Morris later limited the vacatur to new construction of oil and gas pipelines, allowing NWP 12 to be used to authorize activities for other projects such as electric transmission lines, fiber optic and internet cables and lines, and maintenance and repair activities. The case is now on appeal at the Ninth Circuit, which on May 28, 2020 refused to issue a stay pending appeal, noting that appellants had not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm.

The case has serious implications for the continued viability of NWPs as an expedient authorization tool for dredge and fill activities under Section 404 of the Clean Water Act ("CWA").

## II. Nationwide Permits and NWP 12

NWP 12 is a commonly used form of Section 404 CWA authorization by the Corps. NWP 12 authorizes "[a]ctivities required for the **construction, maintenance, repair, and removal** of utility lines and associated facilities in waters of the United States [WOTUS], provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for **each single and complete project.**" (Emphasis added.) A "utility line" is defined to include pipes and pipelines that carry gases, liquids, liquescent or slurry substances, cables, electric transmission lines, telephone and internet lines, and the like.

NWPs are intended to be used to authorize only those discharges that will result in minor direct, indirect, and cumulative impacts, and to provide a speedy and efficient permit verification mechanism for such activities. There are currently 54 NWPs, each of which addresses a category of work in WOTUS that the Corps has concluded will result in only minor impacts. The Corps has adopted 32 general conditions that apply to NWPs, and imposes Pre-Construction Notification ("PCN") requirements on some NWPs, including NWP 12. The Corps has typically reviewed, revised, and reissued the NWPs every five years, with programmatic NEPA and other regulatory compliance completed prior to reissuance. Thus, the authorizations for categories of work are issued at the national level, and project-specific review by Corps district staff involves verifying that a specific proposal meets the terms and conditions of one or more NWP.

### **III. Failure to Consult Under the Endangered Species Act**

The district court enjoined the use of NWP 12 because the Corps failed to consult with U.S. Fish and Wildlife Service (“FWS”) under the ESA on whether the use of NWP 12 “may affect” listed species when the NWP was reissued in 2017. The Corps faced this same issue in prior NWP reissuances (*e.g.*, 2002, 2007, and 2012). In 2005, a federal district court found that the Corps should have consulted with FWS when it reissued NWP 12 in 2002. The Corps initiated formal programmatic consultation when it reissued NWP 12 in 2007 and again in 2012. The current administration chose not to pursue ESA consultation prior to reissuing the NWPs in 2017.

### **IV. Focus on Cumulative Impacts of Multiple “Single and Complete Projects”**

The crux of the issue is the way that the Corps interprets the “single and complete project” provision of NWP 12. NWP 12 authorizes fill in WOTUS for activities related to linear utility lines such as pipelines that each result in no more than 1/2 acre of fill in WOTUS for each “single and complete project.” The Corps’ interpretation is that every single crossing of a WOTUS of a pipeline is itself a “single and complete project” for purposes of application of the NWP. Thus, NWP 12 can be used multiple times to authorize many waterway crossings by the same pipeline. For Keystone, there were 1,200 crossings that were each authorized by NWP 12.

The court’s focus was on the cumulative effect of such an approach on listed species, and the Corps’ lack of consultation with the FWS on this issue prior to issuing the NWP in 2017. The NWP reissuance was dependent on the Corps’ conclusions that the NWP would result in “no more than minimal individual and cumulative adverse effects on the aquatic environment,” and that it complied with the ESA by finding that NWP 12 would not have an effect on listed species.

### **V. The Court Rejected Case by Case Review**

The Corps asserted that its PCN provision and NWP Condition No. 18 ensure that the Corps’ case-by-case review under NWP 12 is sufficient to ensure no effect on listed species. The PCN provision requires the project proponent to submit a PCN, and bars the proposed fill from occurring until the Corps confirms authorization, if the project triggers certain criteria, including more than 1/10 acre of fill. Condition 18 provides that no fill is authorized under a NWP and consultation with the FWS is required if a proposed activity “may affect” a listed species or critical habitat. The Corps concluded these provisions were adequately protective and would result in no effect to listed species. The district court concluded there was substantial evidence to the contrary, and that project-specific analyses cannot substitute for the Corps’ obligation to address this potential effect when it reissues a NWP that applies nationwide.

The court found that the Corps’ failure to initiate programmatic consultation under ESA Section 7(a)(2) prior to reissuing NWP 12 violated the ESA. A programmatic consultation with the relevant resource agencies (here, FWS) under Section 7 of the ESA is appropriate to address potential impacts of programs that “provide a framework for future proposed actions.” The court concluded there was “resounding evidence” that the Corps’ reissuance of NWP 12 “may affect” listed species and their habitat, including the Corps’ own admissions that that discharges authorized by NWP 12 will result in incremental contributions to cumulative impacts. Relying

on project-level review can lead to piecemeal harm to species and destruction of habitat through failure to make a cumulative analysis of the program as a whole.

## **VI. Implications for NEPA and CWA Analysis**

In light of its ESA findings, the court did not address in depth the NEPA and CWA claims, but provided some interesting remarks. First, the court acknowledged the Corps had prepared an Environmental Assessment (“EA”) rather than a lengthier Environmental Impact Statement (“EIS”) and issued a Finding of No Significant Impact (“FONSI”) on the NWP 12 reissuance. The court noted that “[a]rmed with more information, the Corps may decide to prepare an EIS because NWP 12 represents a major federal action that significantly affects the quality of the human environment.” The court also opined that the Corps’ ESA consultation will inform its CWA assessment of NWP 12’s environmental effects, and that the Corps’ CWA compliance determination may change after the consultation brings more information to light. Cumulative impacts are key considerations for both NEPA and CWA analyses.

## **VII. The Court Found that Partial Vacatur Strikes a Reasonable Balance**

Judge Morris breathed partial life back into NWP 12 in his May 11, 2020 decision limiting the vacatur and injunction of NWP 12 to construction of oil and gas pipelines. The order reinstates NWP 12 for authorization of dredge and fill activities for projects such as electric transmission lines, fiber optic and internet cables and lines, and maintenance and repair activities.

In retaining the vacatur and injunction for oil and gas pipelines, Judge Morris found that the Corps committed serious error in failing to engage in programmatic consultation and that the scales should tip in favor of listed species under the ESA. In addition, the court found that it should focus on potential environmental disruptions rather than economic disruptions, and that allegations of financial harm will not have a determinative effect because claims of lost profits and industrial inconvenience are the “nature of doing business, especially in an area fraught with bureaucracy and litigation.”

Judge Morris concluded the balance of equities and public interest factors always tip in favor of the protected species when evaluating a request for injunctive relief to remedy an ESA procedural violation. The court found that its narrowing of the vacatur and injunction will avoid harms to the public from burdens on projects other than oil and gas pipelines and will avoid harms to listed species and critical habitat from such pipelines, but will allow other projects to proceed under NWP 12 authorization. The court concluded that the public’s interest in ensuring that the Corps follows the ESA “trumps any purported tax and energy security benefits of new oil and gas pipelines” and “beyond doubt Congress intended endangered species to be afforded the highest of priorities.”

## **VIII. Implications for Affected Industries**

The use of NWP 12 to authorize WOTUS crossings for new oil and gas pipelines is no longer available for the foreseeable future. The Corps will need to consider authorization under individual permits unless the work can be authorized under one or more other NWPs or district-specific general permits. Individual permits trigger project-specific NEPA review and

compliance, which take time and involve public input that opens doors for project opponent to raise objections.

The court's narrowing of its vacatur and injunction responds to and alleviates some of the general outcry and criticism regarding Judge Morris's sweeping April 15 order. NWP 12 is once again a viable CWA permitting mechanism for construction through WOTUS for electric transmission, internet, cable and fiber optic lines, and for routine repair, inspection and maintenance activities for such facilities. The court's language leaves some uncertainties that the Corps will need to address. It is unclear if extensions or looping of existing pipelines will be treated as "new" pipelines and excluded from NWP 12 authorization. Further, although the express language of NWP 12 also includes "removal" of such facilities, neither of the district court's orders includes that specific activity in either its prohibition or allowance of authorization under NWP 12. Corps districts may choose to construe the court's narrowing of the vacatur and injunction expressly to "new" pipelines, and its silence regarding removal to not prohibit them from using NWP 12 to authorize removal activities associated with pipelines and other facilities that meet the terms and conditions of the NWP

The key issues on appeal will likely be focused on cumulative impacts to listed species and critical habitat from new oil and gas pipelines, particularly those that involve multiple crossings of WOTUS, and the predominance of the ESA's mandates to protect listed species. In addition, the district court's analysis provides a blueprint for additional challenges of cumulative impact coverage under the ESA due to that statute's strong substantive mandate, and to a lesser degree under NEPA, which is primarily procedural and does not mandate a particular outcome. This case bears watching for natural resource companies that may require Section 404 permits.