



## Daylight Shines on Nationwide Permit 12, but Dark Clouds Still Loom

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In a recent special alert addressing *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, we reported that the federal district court for Montana vacated the U.S. Army Corps of Engineers (Corps) Nationwide Permit 12 (NWP 12) and seemed to do so in all respects, enjoining use of NWP 12 for any covered projects. (NWP 12 is a permit used for a utility linear project's discharge of dredge or fill material to wetlands and other waters regulated pursuant to the federal Clean Water Act.) As discussed in our special alert, the Court based its ruling on the failure of the Corps to subject the NWP 12 when last proposed in 2017 to the interagency programmatic consultation process as required under Section 7 of the federal Endangered Species Act (ESA).

Since the decision was issued, however, and upon petition by the Corps and affected utility industries, the district court scaled back the scope of its decision to those projects it expects to present the greatest potential risk to protected species given the lack of programmatic consultation: oil and gas pipeline projects. (The controversial Keystone Pipeline, for which the case was brought by the plaintiffs, is just this sort of project.) The court acknowledged that other linear utility projects – including aboveground and underground power, cable, water and sewer line projects – generally do not present the same level of disturbance or risks to species or their habitats. In turn, the court balanced the interests of allowing these types of projects to continue under what it still deems a faulty NWP 12 pending correction by the Corps against the harm of not allowing these projects to proceed. The court's amended decision therefore offers many linear utility projects substantial relief from the initial decision. This relief allows these projects to proceed pursuant to the more efficient and less expensive NWP 12, which means they are now more likely to stay on track for completion as planned and with the financing already allotted. Interestingly, the environmental group plaintiffs in the case were amenable to this revised approach, so it appears some common ground was achieved in this outcome.

Naturally, the original decision by the district court is the subject of appeal to the Ninth Circuit Court of Appeals. Indeed, the Circuit Court has most recently denied the Corps' and utility industry's emergency motions for a stay of the district court's decision, even though it is now limited only to oil and gas pipelines. In denying the stay, the Circuit Court held that "the Appellants had not demonstrated

a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal.? The Circuit Court therefore seemed to agree with the district court, at least at this stage, that the underlying concerns about the lack of programmatic consultation under the ESA when renewing NWP 12 in 2017 were likely fatal to that rulemaking, even if the NWP 12 program was allowed to continue in most respects pending the Corps? correction of its alleged procedural errors.

On a related front, EPA gave formal notice on May 21, 2020 that it is reconsidering and taking public comments as to whether the ESA consultation process must be followed when EPA reviews state and tribal requests to administer the Clean Water Act wetland permit program in lieu of the Corps. In the past, EPA has held that such consultation was not necessary. EPA?s move to reconsider its position may reflect its anticipated outcome of the appeal of the *Northern Plains* case in the 9<sup>th</sup> Circuit. Comments are due by July 6, 2020.

As if these developments weren?t enough, they come as the new Navigable Waters Protection Rule, issued by the Corps and EPA, just took effect June 22. As discussed in our May 2020 newsletter, this rulemaking made major changes to the scope of federally regulated waters, including wetlands, under the Clean Water Act. Not surprisingly, that rulemaking is now being challenged in several courts by multiple parties using various legal arguments, adding even more uncertainty for wetland permitting generally.

In any event, with the next renewal of NWP 12 (and other NWPs) due in 2022, the Corps will need to initiate administrative action soon, one way or the other, and, in turn, try to resolve any remaining concerns about ESA programmatic consultation as part of the wetland permitting process. For regulated industry, and for the many linear utility and other projects subject to permitting for wetland impacts, such resolution and restored certainty in the NWP program process needs to come as soon as possible, even if other aspects of wetland permitting are still unsettled.

*Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Order Amending Summary Judgment Order (Doc. 130) and Order Regarding Defendants? Motions for Stay Pending Appeal, CV 19-44-GF-BMM (D. Mont. May 11, 2020).

*Northern Plains Resource Council v. U.S. Army Corps of Engineers et al*, Nos. 20-35412, 20-35414 & 20-35415 (9<sup>th</sup> Cir. May 28, 2020).

Request for Comment on Whether EPA?s Approval of a Clean Water Act Section 404 Program is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation, 85 Fed. Reg. 30953 (May 21, 2020).

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