

Montana Federal Court Decision Has “Nationwide” Impacts on Projects Relying on Clean Water Act Nationwide Permit 12

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The energy industry across the country continues to watch the Montana district court case *Northern Plains Resource Council v. U.S. Army Corps of Engineers (NPRC v. Corps)*, given the “nationwide” impact of the Montana court’s April 15th order vacating Clean Water Act Nationwide Permit 12 (NWP 12).

NPRC v. Corps involves a challenge to the Keystone XL Pipeline Project as it relates to NWP 12. NWP 12 is a widely-used general permit that authorizes discharges of dredged or fill material into jurisdictional waters as required for the construction, maintenance, repair, and removal of utility lines and associated facilities. In this case, the Corps used NWP 12 to verify the Keystone XL Pipeline crossings of the Yellowstone and Cheyenne Rivers. NPRC challenged such use of NWP 12, arguing that the Corps violated Section 7 of the Endangered Species Act (ESA) when it reissued NWP 12 in 2017 without conducting a programmatic consultation with the United States Fish and Wildlife Service. NPRC argued that, given that violation, the permit does not provide a valid basis for authorizing the Keystone XL Pipeline work now.

On April 15, 2020, the Montana district court sided with plaintiff NPRC. It found the Corps’s 2017 determination that reissuing NWP 12 would have “no effect” on listed species or critical habitat, and the corresponding decision to forego programmatic consultation with the U.S. Fish and Wildlife Service, violated Section 7(a)(2) of the ESA. Upon concluding that the project-level review by non-federal entities conducted under General Condition 18 of NWP 12 does not fulfill the Corps’s obligation under Section 7(a)(2), the court issued a three-part order. First, the court remanded NWP 12 to the Corps for compliance with the ESA. Second, the court vacated NWP 12 pending completion of the programmatic consultation under Section 7(a)(2). Finally, the order enjoined the Corps from authorizing any dredge or fill activities under NWP 12.

In response to the court’s broad order, on April 27, 2020, the Corps filed a motion for partial stay pending appeal to the Ninth Circuit. The Corps requested an expedited briefing schedule, and further requested that during briefing, the portions of the court’s April 15th order vacating NWP 12 and enjoining the Corps from authorizing dredge or fill activities under NWP 12 be stayed. The Corps’s motion highlights the tremendous impact of the court’s vacatur and injunction, stating that that “[t]he Court has eliminated Nationwide Permit 12 for use by any utility line project anywhere in the country, which has extraordinary and immediate implications for numerous projects.”

On April 28, 2020, the court denied the Corps's request for an immediate administrative stay. However, the court did order expedited briefing on the merits of the Corps's motion. The briefing is due to be completed by May 8, 2020. In the event the court does not reverse course and grant relief from the injunction by May 11, 2020, the Solicitor General has authorized filing an appeal to the Ninth Circuit by May 12, 2020.

This case has widespread impacts not only for those working to maintain and repair existing infrastructure, including electric, internet and cable lines and wires, but also for energy development projects. Without NWP 12, developers may seek authorization under another Clean Water Act Nationwide Permit, where applicable, or obtain an individual Clean Water Act Section 404 permit, a process that typically takes months. In the alternative, developers may decide to redesign projects to avoid impacts to waters of the United States altogether. Given the uncertainty caused by the court's decision and its nationwide implications, we will continue to follow the case going forward. Please watch for further updates on our blog.

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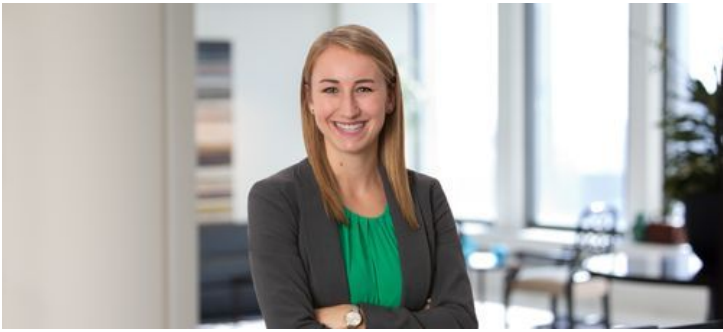
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