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Federal Court Vacates Key Clean Water Act Nationwide Permit

U.S. Army Corps of Engineers Enjoined from Using NWP 12 to Authorize “Utility Line Activities” in Jurisdictional Waters

On April 15, 2020, a federal district court in Montana invalidated the United States Army Corps of Engineers’ Nationwide Permit 12—a key Clean Water Act permit authorizing discharges from the construction and maintenance of utility lines, pipelines, and other critical energy and water infrastructure. See *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-44-BMM (D. Mont.). The decision, which finds the Corps violated the Endangered Species Act (“ESA”) in issuing the permit, specifically “enjoins the Corps from authorizing any dredge or fill activities under NWP [Nationwide Permit] 12” until it consults with federal wildlife agencies under Section 7 of the ESA, a process that could take substantial time to complete. The decision has important implications for anyone involved in energy or water infrastructure projects, including water utilities, pipeline developers, energy transmission companies, and others in the energy and utility sectors.

Although issued in a challenge to a specific project—the controversial Keystone XL Pipeline—the court’s ruling strikes at the “nationwide permit” program itself. Nationwide permits are a type of expedited “general permit” used to authorize categories of activities that are “similar in nature, will only cause minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1). The nationwide permit program provides an alternative to the lengthy and expensive process of securing an individual permit under Section 404 of the Clean Water Act.

The Corps has issued 54 nationwide permits for different categories of activities. 82 Fed. Reg. 1860 (Jan. 6, 2017). NWP 12 covers the construction, maintenance, repair, and removal of “utility lines” and associated facilities. *Id.* at 1985-86. It is used for a wide variety of



infrastructure projects, including pipelines, outfall and intake structures, overhead transmission lines, and associated utility substations and access roads. *Id.* Subject to certain conditions, activities authorized by NWP 12 may proceed without further interaction from the Corps. See *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 3 (D.D.C. 2005).

The National Environmental Policy Act (“NEPA”) and ESA also require the Corps to consider environmental impacts of such projects in reissuing Nationwide Permit 12. Among these requirements, Section 7 of the ESA requires the Corps to ensure that any action that it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). To satisfy this obligation, the Corps must consult with the U.S. Fish and Wildlife Services and/or the National Marine Fisheries Service (“the Services”) if any permitted action “may affect” endangered species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

In the Keystone XL litigation, the environmental plaintiffs challenged the Corps’ permitting for the pipeline on multiple grounds. This included a claim that the Corps violated the ESA because it wrongly determined that NWP 12 would have no effect on endangered species and critical habitat, and thus failed to conduct a required “programmatic consultation” with the Services under Section 7 of the ESA. The district court accepted this argument, finding that the Corps was required to conduct the Section 7 consultation and that its failure to do so was arbitrary and capricious. As a remedy, the court remanded NWP 12 to the Corps for compliance with the ESA and vacated NWP 12 pending the completion of the consultation process. Additionally, the court enjoined the Corps from authorizing any dredge or fill activities under NWP 12 until that is resolved.

The implications of this ruling could be significant. The district court’s ruling did not explicitly apply the injunction nationwide, and stakeholders are already advocating either that the ruling has such consequences or that it should have a more limited effect. When last renewed, the Corps estimated that nearly 70,000 activities could be authorized using NWP 12 over the five-year renewal period, which could impact nearly 9,000 acres of jurisdictional waters. If NWP 12 is not available, each of these projects would require an individual permit to proceed. Existing projects dependent upon NWP 12 could also be affected and may need to be halted until the injunction is lifted or the Section 7 consultation is concluded, a process that will take substantial time to complete.

King and Spalding has significant experience with the permitting and development of energy and infrastructure projects, including under the Corps’ Nationwide Permit program. If you have questions about how this decision may affect a particular project or your business, please contact one of the attorneys above.

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