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Blog Post

New Pipelines and Other Utility Line Projects in Limbo Pending Federal Court Review of Nationwide Permit

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On April 15, 2020, a federal district court in Montana vacated the Army Corps of Engineers' 2017 Nationwide Permit ("NWP") 12, which authorizes certain utility line activities under § 404 of the Clean Water Act ("CWA") and is widely used in infrastructure projects such as in the construction of oil and gas pipelines. On May 11, 2020, the court narrowed its ruling to allow the Corps to continue to use NWP 12 for non-pipeline construction work and routine activities on existing projects, making non-pipeline projects safe for now, pending an expected appeal to the Ninth Circuit. The court's invalidation of NWP 12 pending consultation with the Fish and Wildlife Service (the "Service") under the Endangered Species Act ("ESA") could have ripple effects on numerous projects, and in particular pipeline projects, seeking to come online before 2022.

Background: Nationwide Permits and NWP 12

The Corps of Engineers has developed a series of general permits to implement § 404 of the CWA and authorize certain dredge and fill activities in federal jurisdictional waters (including wetlands) that are expected to have minimal adverse environmental effects. NWPs are valid for five years, at which time the Corps can renew each NWP or allow them to expire. The NWPs were last issued in January 2017 and are expected to be renewed in early 2022.

All NWPs are subject to general conditions, including general condition 18, which prohibits the use of a NWP for any activity that is likely to jeopardize the continued existence of species listed as threatened or endangered under the ESA or that will adversely modify or destroy the critical habitat of such species.

NWP 12 is applicable to activities required for the construction, maintenance, repair and removal of utility lines and associated facilities. NWP 12 authorizes discharges of dredged or fill material impacting up to 1/2 acre; permittees may impact up to 1/10 of an acre without any prior notice to the Corps. NWP 12 applies to each single and complete project, which has been interpreted to allow linear projects such as pipelines to utilize NWP 12 at each stream or wetland crossing along a pipeline route.

Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers

The case, *Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers*, No. 4:19-cv-44-GF-BMM (D. Mont.) – which involved claims by environmental groups seeking to upend the Corps’ CWA permit for Keystone XL pipeline crossings over the Yellowstone and Cheyenne Rivers – raised challenges at both the project-level and to NWP 12 itself. Three of plaintiffs’ claims challenged NWP 12, alleging that the Corps failed to consult with the Service on the NWP’s potential impacts on threatened and endangered species.

NWP 12 was first issued in 1977 and has been reissued at each five-year interval since. When the Corps issued NWP 12 in 2002, the agency concluded that a programmatic ESA consultation with the Service was not required, leading to the 2002 NWP 12 being struck down for failure to comply with the ESA. The Corps then engaged in a programmatic ESA consultation for the 2007 and 2012 NWP 12. In the Corps’ review of NWP 12 before reissuing it in 2017, the agency concluded that the permit would have a minimal impact on threatened and endangered species and did not conduct the programmatic ESA consultation.

Noting this change in course, the court found that at least two expert declarations explaining the impact of NWP 12 on ESA species constituted “resounding evidence” that NWP 12 may affect listed species and their habitat, triggering the Corps’ obligation to consult with the Service under the ESA. The court also relied upon the similar factual circumstances presented in *Western Watersheds Project v. Kraayenbrink* where the Ninth Circuit affirmed the invalidation of the Bureau of Land Management’s national grazing regulations because the agency failed to conduct an ESA Section 7 consultation. 632 F.3d 472, 472 (9th Cir. 2011).

The court’s invalidation of NWP 12 has broad implications beyond the Keystone XL Project plaintiffs challenged; the Corps’ is enjoined from authorizing actions under

NWP 12 throughout the country under the court's order, leaving countless projects scrambling to determine a path forward.

On May 11, 2020, the court denied the Corps' request to stay the order invalidating NWP 12 pending appeal to the Ninth Circuit. However, the court did narrow its ruling prohibiting any use of NWP 12. While the Corps may not authorize any new oil and gas pipelines under NWP 12 until the ESA consultation is complete, NWP 12 may be used for non-pipeline construction activities as well as routine maintenance, inspection and repair activities on existing projects that were authorized under NWP 12.

Looking Ahead

Given that there is little more than a year and a half before the Corps will need to reissue NWP 12 in January 2022, it is unlikely as a practical matter that NWP 12 will be reissued in the interim. Without NWP 12 as an option for new oil and gas pipelines, utility project developers will have to turn to other permitting options such as utilizing other NWPs that may be applicable, modifying projects to avoid impacts and the need for a permit, or seeking individual permits from the Corps, which is typically a more time-consuming and costly process.

As it relates to renewable energy generation and other non-pipeline projects, they may continue to be authorized by the Corps under NWP 12 pending the appeal to the Ninth Circuit. It is also possible that certain renewable energy generation projects may also be able to utilize NWP 51, which covers discharges for the construction, expansion, or modification of land-based renewable energy production facilities, including solar, wind, biomass, and geothermal energy projects. However, the use of NWP 51 has not been allowed in the past when the only jurisdictional crossings involve utility lines and/or road crossings and not the generation facility itself. Some commentators have suggested that the Corps may have flexibility to interpret NWP 51 more broadly going forward to provide an avenue for utility lines to proceed alone now that the validity of NWP 12 is uncertain.

The effects of this ruling are already apparent. The Sierra Club filed suit challenging approval of Kinder Morgan's Permian Highway project that has 449 planned jurisdictional water crossings in Texas on the basis that, among other things, the approval under NWP 12 is invalid.

Impacted developers should consult their environmental counsel to discuss the effect of the invalidation of NWP 12 on their projects.

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