

Current Events and Roiling Waters: A Series Update on Recent Clean Water Act Developments

Part 4: Nationwide Permit 12 – Still Standing...At Least For Now [Updated]

This is Part 4 in a five-part series addressing the latest changes in legal standards regulating water resources in the United States. Part 4 addresses the fallout from recent decisions in a lawsuit over the Keystone XL Pipeline, beginning with an order issued in the District Court for the District of Montana and ending in the U.S. Supreme Court. Though the underlying dispute centered specifically on the Keystone project, the court orders that followed have far-reaching impacts for utility line projects nationwide.

To view the other articles in this series, [click here](#).

Update: On August 3, 2020, the United States Army Corps of Engineers announced a Proposal to Reissue and Modify Nationwide Permits (NWP) that would implement several important changes to this critical permitting scheme, particularly as it relates to the controversial NWP 12 for utility line activities.

This proposal would have the Army Corps of Engineers (the Corps) break up the activities authorized by the existing NWP 12 into three separate NWPs based on different types of utility line projects. NWP 12 would be modified to cover only oil and natural gas pipeline activities. Two entirely new NWPs would be issued to authorize other kinds of utility line activities affecting waters of the United States:

- NWP C would authorize electric utility line and telecommunications activities; and
- NWP D would authorize other utility line activities that convey other substances, such as potable water, sewage, wastewater, stormwater, brine, or other industrial products that are not petrochemicals.

The Corps contends that the differences in how these utility lines are constructed—thereby causing differing impacts for environmental concerns during construction—warrant different NWP authorizations.

The revised rule also proposes to reduce the circumstances where pipeline developers must notify the Corps about certain activities before starting construction under NWP 12. The rule would eliminate some existing terms and requirements under other NWPs and the General Conditions too. The relaxation of existing procedures is likely to become a new source of contention between environmental protection groups, the Corps, and stakeholders developing projects.

Once the proposed rule is published in the Federal Register, which is expected to occur in a few weeks, the Corps will accept public comments on these changes for at least 60 days.

What is a Nationwide Permit?

Section 404 of the Clean Water Act (CWA) establishes a permitting system to regulate discharges of dredged or fill material into [waters of the United States \(WOTUS\)](#). Under this system, the U.S. Army Corps of Engineers (the Corps) may issue general permits authorizing discrete categories of activities that have minimal adverse environmental impacts.

These general permits, known as Nationwide Permits (NWP), authorize specific activities across the country. The Corps reevaluates and reissues the NWPs every five years. Last issued in 2017, there are 54 different NWPs and they are crucial tools for efficiently regulating activities that affect WOTUS, without which regulated entities and the Corps would drown in the paperwork and procedures necessary to issue individual permits.

What Does NWP 12 Cover?

NWP 12 authorizes discharges associated with activities “required for the construction, maintenance, repair, and removal of utility lines and associated facilities” in a WOTUS, provided the activity “does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.” The utility lines covered by NWP 12 are defined broadly to include oil and gas pipelines, electric lines, and any TV, telephone, telegraph, radio, or internet cables. NWP 12 is routinely relied upon for energy and development projects across the country for utility line work in CWA-regulated waters.

All NWPs are subject to a series of General Conditions (GC). GC 18 prohibits the use of NWPs for activities that would “jeopardize the continued existence” of a species listed, or proposed for listing, as “threatened” or “endangered” under the Federal Endangered Species Act (ESA), or for activities that would “destroy or adversely affect the critical habitat” of those species. When a permittee’s proposed activity under the NWP “might” affect any listed species or their critical habitat, the permittee must submit a pre-construction notification (PCN) to the Corps and cannot begin work until the Corps verifies and authorizes the activity. NWP 12 also carries several additional requirements for when a PCN must be submitted, such as when the activity would cause a loss of more than one-tenth of an acre of a WOTUS.

Environmental groups have taken issue with NWP 12, particularly as it relates to pipeline construction, claiming the permit fails to account for the permitted activity’s cumulative impacts on the environment. They criticize the rule that NWP 12 requires a pipeline to refrain from losing more than a ½-acre of the affected WOTUS but that each water crossing is treated as a separate project even when a single pipeline crosses the same waterbody in multiple places. Environmental groups contend that NWP 12 was not meant to streamline large infrastructure projects they view as environmentally problematic, and that pipelines should have to undergo the larger environmental assessment required outside of the NWP scheme.

For the controversial Keystone XL Pipeline (Keystone Pipeline), these concerns became the foundation of several claims by plaintiffs seeking to block the pipeline’s construction. The effect of those claims, and the court rulings about them, have the potential to eliminate NWP 12 altogether (at least temporarily) and raise concerns about continued viability of the other NWPs as well.

What Happened to NWP 12 and Where Are We Now?

On April 15, 2020, the U.S. District Court for the District of Montana issued a far-reaching order in Northern Plains Resource Council, et al., v. U.S. Army Corps of Engineers, et al. that impacted NWP 12 utility line projects across the country (the Order). In this case, a nonprofit conservation group called the Northern Plains Resource Council (NPRC) challenged the Corps’ 2017 reissuance of NWP 12 and the Corps’ verification for TC Energy Corporation’s (TC Energy) Keystone Pipeline to cross the Yellowstone and Cheyenne Rivers.

NPRC argued, among other things, that the Corps’ reissuance of NWP 12 violated the ESA because the Corps did not first conduct the “programmatic consultation” process with the U.S. Fish and Wildlife Service (USFWS). Specifically, ESA Section 7(a)(2) requires an agency to initiate formal consultation with USFWS for any activity that “may affect” a listed species or critical habitat. However, the Corps determined that NWP 12 would not affect listed species or critical habitat and that it complied with the ESA, the CWA, and the National Environmental Policy Act (NEPA), and therefore, the Corps did not consult with USFWS at all before reissuing NWP 12. In making this “no effect” determination, the Corps stated

that GC 18 would preclude effects on listed species or critical habitat from NWP 12-authorized activities, rendering Section 7(a)(2) consultation unnecessary.

The District Court disagreed. The lengthy April 15 Order found that the Corps cannot circumvent ESA Section 7(a)(2) consultation by relying on project-level review or GC 18 because the Corps cannot delegate to permittees its own obligation to decide the “initial effect” of the action, nor does it relieve the Corps of its duty to consult about NWP issuance at the programmatic level. The District Court also found “resounding evidence” that the Corps’ reissuance of NWP 12 “may affect” listed species and their habitat. Based on its findings, the District Court held the Corps’ “no effect” determination and resulting decision to forego programmatic consultation proved arbitrary and capricious” and that the Corps violated the ESA by failing to initiate Section 7(a)(2) consultation before reissuing NWP 12 in 2017. As discussed further below, this rationale spells trouble not just for NWP 12, but also the rest of the NWPs the Corps reissued in 2017 without first conducting programmatic consultation with the USFWS.

Significantly, the District Court’s Order remanded NWP 12 to the Corps to conduct the ESA consultation process but also vacated NWP 12 altogether pending completion of that consultation process. Furthermore, the Order enjoined the Corps from authorizing any dredge or fill activities under NWP 12 until those actions were completed. The relief ordered by the District Court created confusion about the scope of its impact on development projects across the country. Did the Order apply to vacate and enjoin NWP 12 nationwide, or just within the District of Montana, or just for the Keystone Pipeline at issue?

Recognizing a need for clarity in the aftermath of the Order, the Corps stated it would refrain from verifying any pending PCNs for compliance with NWP 12 “out of an abundance of caution.” The Corps (through the U.S. Department of Justice) and TC Energy quickly filed requests to stay the Order pending their appeals to the Ninth Circuit Court of Appeals. The Corps sought to stay the Order except against the Keystone Pipeline, emphasizing the impropriety of the Order to limit projects other than the one litigated by NPRC and expressing sharp concerns about the costs that would be incurred (both time and money) if the Order were applied against all projects nationwide. A coalition of industry groups whose members routinely use NWP 12 intervened and supported the Corps’ requested stay. However, TC Energy requested a stay of the Order to cover its Keystone Pipeline project as well.

On May 11, 2020, the District Court denied any stay on the Order but decided to amend the relief it had granted to only vacate NWP 12 and enjoin the Corps from authorizing dredge and fill activities that relate to construction of “new oil and gas pipelines” pending completion of the ESA consultation process and compliance with other environmental laws (the Amended Order). Helpfully, the District Court ruled NWP 12 would remain valid for all existing NWP 12 projects involving non-pipeline construction activities and routine maintenance, inspection, and repair activities. However, the scope of the Amended Order remained a pressing concern for oil and gas projects across the country.

The Corps appealed the vacatur and injunction against NWP 12 to the Ninth Circuit Court of Appeals, seeking a stay of those portions of the Amended Order to allow oil and gas pipelines to continue using NWP 12. The Ninth Circuit denied the request. The Corps then appealed to the U.S. Supreme Court.

On July 6, 2020, the Supreme Court stayed the Amended Order vacating and enjoining the use of NWP 12 except as it applies to the Keystone Pipeline. This means that (except for the Keystone Pipeline) all utility line activities that would normally seek authorization under NWP 12 can continue to do so while the Corps’ and TC Energy’s appeals proceed through the Ninth Circuit.

Where Are We Going?

The rationale and conclusions initially set forth in the Montana District Court’s April 15 Order are proving to be a useful tool for utility project opponents. Furthermore, the procedural gaps identified by the Montana District Court pose serious

concerns about the continued viability of NWP 12 and the other existing NWPs.

On April 30, 2020, the Sierra Club sued in the Western District of Texas for a preliminary injunction to halt construction of the Permian Highway Pipeline (Permian Pipeline). That project received NWP verification in February 2020 and work began on the pipeline. However, pointing to the Montana District Court's April 15 Order, the Sierra Club argued the ongoing dredge and fill activities for the Permian Pipeline were occurring without a CWA permit, should be declared unlawful, and that the prior NWP 12 verifications should be declared invalid. A decision has not yet been issued for this request and, in the meantime, construction the Permian Pipeline has continued.

The litigation over NWP 12 also contributed to cancellation of the Atlantic Coast Pipeline project, which occurred on July 5, 2020. The two energy companies responsible for that project indicated they made their decision in part because of the legal uncertainties caused by the Keystone Pipeline litigation. Company officials viewed the Supreme Court's decision the next day as a "victory" for the time being, but the heightened litigation risks and extended timeline for the pipeline resulted in increased costs, delays, and uncertainty that were too much to continue with the project.

In addition, while the District Court did not decide NPRC's other claims arguing NWP 12 violates NEPA and the CWA, the District Court did state it "anticipates that the Corps may need to modify its NEPA and CWA determinations based on the Corps' ESA Section 7(a)(2) consultation" with USFWS. The Corps had determined NWP 12 would not have a significant environmental impact under NEPA and that discharges authorized by NWP 12 comply with CWA Section 404's requirement that the permit only covers activities causing minimal individual and cumulative adverse environmental impacts. Thus, the District Court's rationale about the ESA concerns call into question whether the Corps' prior NEPA and CWA assessments for NWP 12 will need to be repeated, which would significantly extend the timeline for consultation and reissuing NWP 12. Entities using NWP 12 should be aware of these additional vulnerabilities signaled by the District Court that may compromise the permit's legal underpinnings, and by default, the legal authorizations for a utility line project relying on NWP 12.

Lastly, extra caution is warranted for entities relying on any other NWPs because of the District Court's April 15 Order. In reissuing all the NWPs in 2017, the Corps made the same "no effect" determination that the Montana District Court found insufficient, so the Corps did not conduct programmatic consultation with the USFWS for any of the NWPs. Therefore, appellate court decisions affirming the District Court's Order in Northern Plains Resource Council could open new doors to challengers for other NWPs as well.

If you have questions about this series, please contact any [attorney](#) in the [Environmental and Energy practice](#) or the attorney at the firm with whom you are regularly in contact.



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