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News Alert

Federal Court Nullifies Clean Water Act General Permit for Pipelines and Other Linear Projects

In an order with serious and immediate national implications for the construction of pipelines, electrical lines, fiber optic cable, and other utility projects, a Montana federal court has vacated Clean Water Act (CWA) Nationwide Permit (NWP) 12 on the basis that the U.S. Army Corps of Engineers failed to uphold its obligations under the Endangered Species Act (ESA) when it reissued NWP 12 in 2017. Industries rely on NWP 12 thousands of times each year. If the court's decision is not narrowed, stayed, or overturned, utility projects across the country that require NWP 12 authorization must postpone their activities until the Corps complies with the ESA or must secure separate authorization under the time- and resource-intensive individual CWA 404 permitting process. The ruling creates new legal risks for other types of projects that rely on other NWPs as well.

The order, issued in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044-BMM (D. Mont.), held that the Corps failed to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) as required by Section 7(a)(2) of the ESA. This provision of the ESA requires federal agencies "to insure that the actions they authorize, fund, or carry out do not jeopardize the continued existence of endangered or threatened species or destroy or adversely modify critical habitat," and its implementing regulations require federal agencies to consult with the Services when their actions "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14. The Corps had conducted voluntary programmatic consultation for prior 5-year iterations of NWP 12, but maintained that NWP 12 would have no effect on ESA-listed species or critical habitat because NWP 12's conditions do not authorize projects that might have such effects without first completing project-specific consultation. When the Corps reissued NWP 12 in 2017, it conducted no further consultation based on the same no effect rationale.

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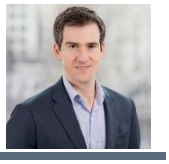

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The court found the Corps' conclusion to be arbitrary and capricious and faulted the Corps for purportedly ignoring its own conclusions that both temporary and permanent fills often impact aquatic ecosystems. The court explained that these acknowledgements of ecosystem impacts exceeded the "low threshold for Section 7(a)(2) consultation." Slip op. at 12.

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The court also concluded that the Corps' ability to review individual projects that require submission of a preconstruction notification (PCN) did not obviate the Corps' obligation to conduct a programmatic consultation for NWP 12 itself. The order further called into question General Condition 18 (applicable to all NWPs), which requires project proponents to submit a PCN for projects that "might" impact listed species or critical habitat. In the court's view, requiring private parties to assess whether a project might have impacts that could require consultation constituted an impermissible delegation of the Corp's duty under ESA to assess whether its actions "may affect" listed species and critical habitat.

Based on these findings, the order vacated NWP 12, remanded it to the Corps to consult with the Services, and prohibited the Corps from authorizing projects under NWP 12 until consultation is complete. The Court did not receive separate briefing on remedy. The order does not explicitly state that its effect is nationwide; the Corps will likely file a motion advocating that the order should apply only in Montana, similar to the strategy successfully used to limit the scope of a similar vacatur of NWP 21 several years ago. The Corps and intervenors in the case are also expected to appeal this ruling and seek a stay of NWP 12's vacatur pending appeal.

If the Montana court's order is not stayed and an appeal is unsuccessful, the Corps may reopen ESA consultation for NWP 12 to comply with the court's order. Yet it could take several months to complete consultation; the ESA's 135-day timeline for completing consultation is often extended. Plaintiffs may also subsequently challenge the sufficiency of any programmatic consultation. The court also expressed concerns regarding the Corps' compliance with the CWA and the National Environmental Policy Act (NEPA) for NWP 12, and deferred ruling on those separate claims.

This uncertainty will require developers of pipeline and other utility projects to more proactively reassess their permitting options for both active projects and future projects that seek to use NWP 12 for Section 404 authorization. Some activities authorized by NWP 12 may be eligible for coverage under a different NWP. Project developers may also need to reassess how projects are routed or adjust project timelines to allow for individual permitting. Proponents of projects impacted by this ruling may also seek leave to participate as *amici* in any appeal.

Finally, the ruling currently does not affect projects that rely on other Corps NWPs or State Programmatic General Permits. That said, with this novel ESA precedent now in hand, project opponents likely are already lining up to initiate similar challenges to the Corps' other NWPs and federal general permits.

Beveridge & Diamond's Endangered Species and Wildlife Protection practice group provides strategic counseling and compliance advice to project proponents in all industries to minimize the impacts of threatened and endangered species listings and critical habitat designations on our clients' activities. For more information or to discuss submitting comments to EPA or filing amicus briefs, please contact the authors.