

INSIGHTS

Montana District Court Vacates and Remands Clean Water Act Nationwide Permit 12

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In a surprisingly broad decision, the District of Montana vacated the U.S. Army Corps of Engineers (“Corps”) Nationwide Permit (“NWP”) 12 on April 15, 2020. NWP 12 authorizes impacts from “utility line activities” to jurisdictional waters that have minimal individual and cumulative adverse environmental effects. “Utility line” is broadly defined to include pipelines and any cable, line, or wire for the purpose of transmitting electricity or communication. The court found that the Corps failed to comply with the Endangered Species Act (“ESA”), and thus remanded NWP 12 to the Corps for consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the “Services”) in accordance with Section 7 of the ESA. The court’s order prohibits the Corps from authorizing “any dredge or fill activities under NWP 12 pending completion of the [ESA Section 7] consultation process.”

This case relates to the Keystone XL Pipeline. In July 2019, environmental groups filed a lawsuit challenging the Corps’ authorization of the pipeline, as well as the Corps’ 2017 issuance of NWP 12. The court found that, without programmatic consultation, NWP 12 impermissibly requires the project proponent, rather than the Corps, to determine whether a project “may affect” a listed species or critical habitat, which is the trigger for ESA Section 7 consultation. According to the court, a project-specific determination made by the applicant does not alleviate the Corps’ ESA programmatic consultation obligations. Rather, “[p]rogrammatic review of NWP 12 in its entirety, as required by the ESA for any project that ‘may affect’ listed species or critical habitat, provides the only way to avoid piecemeal destruction of species and habitat.”

On its face, the court’s order is not limited to the Keystone Pipeline or any particular region or jurisdiction and, as such, could have nationwide implications for any project that would traditionally require coverage under NWP 12. Additionally, because the Corps did not conduct programmatic ESA consultation for any of the NWPs issued in 2017, this case has implications beyond NWP 12.

Notably, the relief ordered by the court (the vacatur of NWP 12 and remand for Section 7 consultation) goes well beyond the relief the plaintiffs were seeking. The plaintiffs made clear that their concern was the use of NWP 12 to approve “massive oil pipelines,” and that their

challenge was “not meant to affect other uses of NWP 12 that provide a public benefit and would have only minimal environmental impacts.” One of the issues raised by plaintiffs (and a longstanding criticism of NWP 12) is that while NWP 12 addresses wetland and stream crossings with impacts of less than ½ acre, projects such as pipelines often involve multiple crossings. The Corps views each crossing as a stand-alone project; according to plaintiffs, this practice ignores the cumulative impacts of the project. This topic is likely to be considered during the ESA consultation.

Due to the broad scope of the court’s order, suggesting a nationwide applicability for the vacatur and associated injunction, we anticipate that the Department of Justice (“DOJ”) respond in the immediate future. Given DOJ’s recent statements criticizing the use of national injunctions, it is likely DOJ will seek clarification from the court as to the scope of the order’s applicability.

The court declined to rule on petitioners’ other challenges brought under the CWA and National Environmental Policy Act and recognized that the Corps may need to revisit its CWA and NEPA decisions based on its ESA consultation. The court similarly plans to consider the pipeline-specific challenges at a later date.