

Updates

July 14, 2020

Supreme Court Revives Clean Water Act General Permit for Pipeline and Utility Line Projects



The U.S. Supreme Court delivered near-term relief to project developers on June 6, reinstating one of the U.S. Army Corps of Engineers' key nationwide Clean Water Act permits in [*U.S. Army Corps of Eng'rs v. Northern Plains Resource Council*](#). Nationwide general permit 12 (NWP 12) authorizes the discharge of dredge and fill materials necessary for the construction, repair, and maintenance of utility lines, including oil and gas pipelines. Those ineligible for NWP 12 or another general permit must apply for an individual permit, which involves both delay and greater cost.

Background

The ability of the Corps and the regulated community to rely on the permit had been subject to uncertainty since a May ruling by the U.S. District Court for the District of Montana in litigation involving the Keystone XL Pipeline. In an initial April 15 ruling, the District of Montana vacated NWP 12 and enjoined use of it for any purpose nationwide. *Northern Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 19-cv-44 (D. Mont.). The district court ruled reissuance of NWP 12 violated the Endangered Species Act, first promulgated in 1977, because the Corps had failed to conduct a programmatic consultation with relevant wildlife agencies. That ruling rejected the government's argument that general permit conditions requiring site-specific consultation obviated the need for a programmatic consultation. NWP 12 is not available to those who plan to disturb more than one-tenth of an acre of waters of the United States. General Condition 18 also requires proponents to notify the Corps in advance if their activities "might affect" a listed species or critical habitat. The district court characterized this regulatory approach as an unlawful "delegation" of the Corps' regulatory authority.

The issuance of nationwide injunctions by district courts is a sore point for the administration and several Supreme Court justices, and the ruling prompted considerable controversy. The District of Montana on May 11 begrudgingly narrowed its ruling to pipelines only. After appealing on the merits to the U.S. Court of Appeals for the Ninth Circuit, the Corps requested an emergency stay pending appeal, which a two-judge motions panel denied on May 28. *Northern Plains Res. Council v. U.S. Army Corps*, No. 20-35412 (9th Cir. May 28, 2020). The Corps then asked the Supreme Court for interim relief on June 15.

In his [Application for a Stay Pending Appeal](#), Solicitor General Noel Francisco argued that granting nationwide equitable relief violated Article III's requirement that courts address only specific "cases and controversies." He also noted that the plaintiffs originally disclaimed any intent to seek relief unrelated to the Keystone XL pipeline. The brief also mentioned the practical consequences of a nationwide injunction; in 2018, general permit verifications took an average of 45 days, while standard individual permits required 264 days.

Takeaways

The Supreme Court's order stays the Montana court's order and reinstates NWP 12, except as it applies to the Keystone XL pipeline itself. The Supreme Court's order will remain in effect until the Supreme Court either addresses the merits following the Ninth Circuit proceeding or declines to do so pursuant to a petition for writ of *certiorari*.

NWP 12 accordingly will remain an available tool for several years. The current Ninth Circuit briefing schedule stretches into October, and a panel ruling could readily take at least six months. Depending upon whether any of the litigants seeks rehearing *en banc* or *certiorari*, the Supreme Court's interim order could easily remain in place until 2022.

Individual project developers cannot rest too easily, however. The Solicitor General's brief salvaged NWP 12 in part by stressing the authority given to the Corps to demand an individual permit under General Condition 18. Project opponents undoubtedly will be invoking that authority to challenge project approvals while we await further guidance from the Supreme Court.

© 2020 Perkins Coie LLP

Authors

Explore more in

[Environment, Energy & Resources](#) [Real Estate & Land Use](#) [Infrastructure Development](#) [Oil & Gas](#)
[Forest Products](#) [Energy Infrastructure & Clean Technology](#)

Related insights

Update

California Court of Appeal Casts Doubt on Legality of Municipality's Voter ID Law

Update

February Tip of the Month: Federal Court Issues Nationwide Injunction Against Trump Executive Orders on DEI Initiatives