

Nationwide Permit Injunction Limited in Scope. For Now.

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On Monday, the United States District Court for the District of Montana issued an order amending its previous grant of summary judgment in Northern Plains Resource Council v. U.S. Army Corps of Engineers. The original order of April 15 arose from a challenge to the Keystone XL Pipeline wherein U.S. District Judge Brian Morris determined that the Corps failed to engage in programmatic consultation for Endangered Species Act compliance in issuing Nationwide Permit 12 (NWP-12). In remanding the permit to the Corps, Judge Morris effectively issued a nationwide injunction against the use of NWP-12 to permit new projects. The May 11 amended order revisited the injunction and limited its scope to enjoin the use of NWP-12 only on new oil and gas pipelines that, in the court's opinion, pose more potential for severe risk to endangered species.

NWP-12 has traditionally been used to authorize activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in projects that result in less than ½ acre of loss of waters of the United States. These linear projects include the construction of oil and gas pipelines, as well as cable, internet, and electrical transmission lines (including those associated with renewable energy projects), water and sewer lines, and the necessary maintenance and repair activities associated with ongoing operations of such projects. According to filings by the Corps of Engineers, approximately 5,500 pre-construction notices for NWP-12 projects were pending at the time Judge Morris issued his April 15 injunction. The amended remedy, which was urged by the Plaintiffs as well, would limit the impact of the decision to allow maintenance and repair activities, and new construction on activities that pose less risk than pipelines.

The newly limited injunction comes as a welcome relief to many in the utility industry, which faced the possibility of more expensive and time consuming individual permitting requirements for linear projects in the foreseeable future. But the order also provides a template for those that may want to challenge other projects authorized under NWP-12. As Judge Morris in his amended order, "[the original injunction] comports with law. ... The court properly can grant the presumptive remedy of vacating the

unlawful action[.]” He went on to observe that vacatur “stands as the presumptive remedy when an agency acts unlawfully.” Judge Morris ultimately tempered his vacatur to avoid the “disruptive consequences” that would result from a full injunction. Oddly, this temperance was based in part on the Plaintiff’s urging, and the lack of evidence in the record that projects other than oil and gas pipelines can cause the same adverse impacts to endangered species. Notably, the Judge’s discretion was not based on any legal distinction between oil and gas pipelines and other projects authorized by NWP-12, as all projects under the permit are subject to the same potentially flawed programmatic consultation by the Corps. Should another plaintiff aggrieved by a non-pipeline project raise the same objections as those raised against the Keystone XL Pipeline, the result is uncertain.

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