

U.S. District Court for Montana Enjoins Key Army Corps of Engineers' General Permit for Energy Infrastructure Projects

by Michael Drysdale and Kayla Weiser-Burton

On April 15, 2020, Judge Morris of the United States District Court for the District of Montana issued a ruling invalidating Nationwide Permit 12 (“NWP 12”), a permit issued by the Army Corps of Engineers (“Corps”) covering activities related to any linear energy infrastructure project, provided that the activity does not result in the loss of more than one half acre of waters of the United States for each single and complete project.

In *Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et al.*, environmental groups challenged the use of NWP 12 to authorize the discharge of dredge and fill material into waters of the United States for construction of the Keystone XL pipeline.

The court found that the Corps erred by not engaging in consultation under the Endangered Species Act (“ESA”) when it reissued NWP 12 in 2017. The court remanded the decision to reissue NWP 12 and enjoined the Corps “from authoring[sic] any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations.” This broad injunction of the use of NWP 12, which is used by all aspects of the energy sector in constructing electric transmission and oil and gas pipeline infrastructure, will likely have far-reaching impacts on proposed and planned energy infrastructure projects.

The Decision

When the Corps reissued NWP 12 in 2017, it concluded that the reissuance would have no effect on listed species or critical habitat, and therefore no ESA Section 7 consultation was required. The Corps relied on General Condition #18 of the permit, which provides that the nationwide permit does not authorize an activity that is “likely to directly or indirectly jeopardize the continued existence of a [listed species]” or that “will directly or indirectly destroy or adversely modify the critical habitat of such species.”

Plaintiffs argued, and the court agreed, that relying on subsequent project level evaluations to avoid consultation in making a programmatic decision that may affect

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threatened or endangered species is improper. The decision relies on both the regulatory record establishing the process for Section 7 consultations and judicial decisions holding that consultation cannot be deferred when making a programmatic decision, including decisions that remanded a prior reissuance of NWP 12. *See Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C 2005). The court noted that “the Corps cannot circumvent ESA Section 7(a)(2) consultation requirements by relying on project-level review.” It further noted that the Corps reliance on Condition #18 improperly “delegates the Corps’ initial effect determination to non-federal permittees.”

Thus, the court vacated NWP 12, remanded it to the Corps, and enjoined the Corps from authorizing any activity under NWP 12. The Court’s injunction was not expressly labeled as a nationwide injunction, and the Court did not attempt to satisfy the Supreme Court’s requirements for issuing injunctive relief established in *Monsanto v. Geertson Seed Farms*, 561 U.S. 139 (2010), and extended to Endangered Species Act claims in the Ninth Circuit by *Cottonwood Envtl. Law Center v. United States Forest Service*, 789 F.3d 1078 (9th Cir. 2015). Consequently, there is some uncertainty as to the practical scope of the injunction, which will likely lead to requests for clarification or a request to stay the decision pending appeal.

Implications of the Decision

NWP 12 covers activities related to the construction, maintenance, repair, and removal of linear utility lines and supporting infrastructure, provided that the activity does not result in the loss of more than one half acre of waters of the United States for each single and complete project. NWP 12 provides a broad definition to include pipelines and transmission lines, covering a range of utility lines, oil and gas lines, and renewable energy lines. It is widely used nationwide to authorize the construction of linear energy infrastructure projects. If the injunction stands, electric transmission, pipeline, and renewable energy projects that would have otherwise relied on NWP 12 will be required to apply for individual permits under Section 404 of the Clean Water Act, until the Corps can address the issues on remand.

Companies with linear energy infrastructure projects across the country should assess the impact of this decision on their permitting strategy and track the progress of any motions for clarification and appeals of the injunction. Dorsey’s team of environmental lawyers are available to assist in that evaluation.