



# Federal Court Overturns Nationwide Permit 12, Throws Project Development into Flux

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On April 15, 2020, the U.S. District Court for the District of Montana issued an order that could impact energy and development projects across the United States. In *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, the court held that the U.S. Army Corps of Engineers (“Corps”) was obliged, and failed, to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, “Services”) under section 7 (“Section 7”) of the Endangered Species Act (“ESA”) when the Corps re-issued nationwide permit 12 (“NWP 12”) in 2017. Case No. 4:19-cv-00044-BMM (D. Montana, April 15, 2020). The court’s order remanded NWP 12 back to the Corps for completion of consultation with the Services under Section 7, vacated NWP 12 pending completion of consultation, and enjoined the Corps from authorizing any impacts to jurisdictional waters under NWP 12 until the consultation is complete. Since NWP 12 is the main utility line nationwide permit, this ruling jeopardizes the widespread use of nationwide permits for construction, operations, and maintenance of all types of utility lines (e.g., pipelines, electric transmission lines, etc.). Project proponents may instead have to pursue costly and time-consuming individual permits. In addition, the rationale the court used to arrive at its ruling may create adverse implications for other nationwide permits, including NWP 14 (linear transportation) and NWP 29 (residential developments).

This ruling likely has nationwide import, given the court’s order focuses on the programmatic nature of the Corps’ failure and the fact that NWP 12 is a single permit that applies across the United States. Indeed, just one day after the ruling, the Corps’ headquarters and regional offices have begun issuing guidance that Corps districts should not verify any pre-construction notifications (“PCNs”) under NWP 12 until further notice to the contrary. Some Corps offices have gone further, suggesting that in addition to halting verifications of PCNs under NWP 12, Corps districts should not authorize any actions under NWP 12 until the Corps and the U.S. Department of Justice provide further guidance.

NWP 12 is one of 52 nationwide permits the Corps issued or re-issued in 2017. It authorizes impacts to waters of the United States as a result of construction, repair, maintenance, and removal of utility infrastructure that otherwise would be prohibited by section 404 of the Clean Water Act (“CWA”). As a result, NWP 12 is one of the most commonly used NWPs in energy and other development projects.

*Northern Plains Resource Council v. U.S. Army Corps of Engineers* arose from a challenge to one particular energy project: the controversial Keystone XL pipeline (“Pipeline”), which has been mired in litigation for several years. Plaintiffs alleged both: (1) that the Corps violated the CWA, ESA, and National Environmental Policy Act (“NEPA”) in approving the specific use of CWA NWP 12 to authorize impacts to waters of the United States in connection with the Pipeline; and (2) that, more broadly, the Corps’ re-issuance of NWP 12 in 2017 violated the CWA, NEPA, ESA, and the Administrative Procedure Act due to the agency’s failure to consult under Section 7 (and other alleged shortcomings).

The court agreed with Plaintiffs as to their broader claims concerning the alleged deficiencies in the Corps’ process in re-issuing NWP 12. The court held, among other things, that General Condition 18 (which is applicable to all nationwide permits and requires project proponents to submit a PCN to the Corps when ESA-listed species or designated critical habitat may be affected or is in the vicinity of the jurisdictional activity) is insufficient to ensure that the Corps complies with Section 7. This aspect of the court’s decision raises the possibility that the use of any other nationwide permit that relies on the same PCN structure for addressing protected species impacts, like NWP 14 and NWP 29, could also be at risk.

In light of the court’s decision, the Corps has a number of options available to it, each of which may impact project proponents:

- First, the Corps could request a modification of the court’s order (say, for example, to request the agency not be enjoined from authorizing activities under NWP 12 pending completion of consultation).
- Second, the Corps could appeal the district court’s holding to the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) and seek a stay of the lower court’s decision pending appeal. The Corps could argue the lower court’s decision will disrupt not only the use of NWP 12, but potentially all other nationwide permits that were adopted without programmatic Section 7 consultations. Should a stay be granted, project proponents could continue to use NWP 12 until the Ninth Circuit made a decision on the appeal.
- Third, the Corps could immediately initiate a programmatic Section 7 consultation on NWP 12. The Corps conducted such a consultation in connection with its re-issuance of nationwide permits, including NWP 12, in 2007 and 2012; however, the 2012 consultation resulted in disputes between the Corps and the National Marine Fisheries Service that took many years to work through.

If NWP 12 remains unavailable for use because of the court’s decision, project proponents should keep in mind the following practical considerations:

- Uses of NWP 12 that do not trigger PCN are likely also implicated by the court’s decision, as the court ruled that the Corps improperly delegated the required ESA determination to non-federal project proponents. As we have seen, some Corps offices have already adopted this interpretation.
- The court’s decision instantly puts existing requests for verification of PCNs into flux. This was borne out in guidance the Corps quickly released following the court’s decision, immediately pausing all verification of PCNs under NWP 12. At a minimum, such PCNs in process must sit idle until the Corps’ headquarters issues further guidance to its regions and districts that might limit the national effect.
- If the Corps ultimately accepts the nationwide effect of the vacatur of NWP 12 pending appeal, then projects that cannot utilize other nationwide permits or regional general permits may be forced to seek individual CWA section 404 permits, which can take years to obtain.

- While the other 51 nationwide permits re-issued in 2017 were not directly implicated by the court's ruling, the practical import of the decision is that all remaining nationwide permits are vulnerable to similar challenges.

A final note, for those concerned with the short- and long-term potential impacts of the decision on projects: the 2017 nationwide permits expire in 2022, which means that a new set of proposed nationwide permits should be released to the public in 2021. It is possible that rather than appeal the decision of the district court, the Corps will elect instead to move forward with a programmatic Section 7 consultation on the 2022 nationwide permits, and publish such permits as soon as possible.

If you have questions or concerns about the implications of *Northern Plains Resource Council v. U.S. Army Corps of Engineers* on existing or planned projects, we are available to assist you.