

Continuing uncertainty for oil and gas pipelines under nationwide permits

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SECTION 404 OF THE federal Clean Water Act (CWA) governs, among other things, the discharge of fill material into waters of the United States (WOTUS). The U.S. Army Corps of Engineers (Corps) administers most permitting under Section 404 (with oversight from the Environmental Protection Agency (EPA)). Those permits can include the Corps' issuance of general permits for categories of activities provided those activities have minimal cumulative adverse effects on the environment. 33 U.S.C. § 1344(e). Nationwide Permit 12 (NWP 12) is one such general permit authorizing discharges into WOTUS for work on oil and gas pipeline-related activities. NWP 12 has been as controversial as the activities it governs, having been the subject of litigation associated with multiple challenges. Today is no exception; the permit is currently under challenge in Montana federal court. NWP 12 is also being further assessed by the Corps. It is now the subject of an agency-initiated evaluation

that has included stakeholder outreach focusing on possible concerns that the permit does not provide adequate opportunity for notice to affected communities. The outcome of the ongoing NWP 12 scrutiny could impact the future permitting of pipelines and related projects.

NWP 12 Overview

As renewed on March 15, 2021, NWP 12 authorizes fill in WOTUS associated with oil and gas pipeline construction, maintenance, repair and other work. 86 Fed. Reg. 2744. Proposed activities for a single and complete project must not result in the loss of greater than one-half acre of waters. The permit retains the long-standing approach to WOTUS crossings. For linear projects, each water crossing is considered an individual 'single and complete project.' In other words, pipelines that cross multiple drainages or other areas characterized as WOTUS may still be eligible for NWP coverage since those crossings are assessed on a crossing-

by-crossing basis (provided those crossings are separate and distant).

NWP 12 requires submission of a pre-construction notice (PCN) to the Corps under many conditions. PCNs are required for activities triggering a Section 10 permit, discharges resulting in the loss of more than one-tenth of an acre of wetlands, or a new pipeline greater than 250 miles in length. A PCN must include information documenting compliance with the National Historic Preservation Act and the Endangered Species Act (ESA). Additionally, Corps' regions often identify supplemental NWP conditions. For example, the Montana office of the Corps (which is in the Omaha District) has issued specific conditions including those associated with PCN obligations for particular project locations. States or tribes must also certify that the NWPs comply with applicable water quality standards. The CWA 401 water quality certification can trigger additional NWP conditions.

NWP 12 has been controversial. It was the subject of litigation in Montana by environmental groups seeking to invalidate the Keystone XL Pipeline's use of the permit. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, CV-19-44-GF-BMM. In April 2020, Judge Brian Morris of the United States District of Montana vacated the entirety of NWP 12 (which at that time governed multiple types of pipeline project-related activities beyond those associated with oil and gas pipelines), finding that the Corps was obligated to consult with the U.S. Fish and Wildlife Service (USFWS) under the ESA.

A month later, Judge Morris narrowed the holding to apply only to oil and gas pipelines. In July 2020, the U.S. Supreme Court further limited the ruling to apply only to the Keystone XL Pipeline.

NWP 12, as reissued in 2021, includes changes from previous versions. For example, NWP 12 no longer covers multiple types of pipelines – it is limited to oil and gas pipeline-related activities. During the 2021 reissuance process, the Corps promulgated two other nationwide permits to cover utility line activities other than oil and gas pipelines. In turn, NWP 12 includes some additional conditions; for example, PCNs for pipeline projects that exceed 250 miles in length must reference all crossings including those that would not otherwise trigger a notification requirement. The reissued NWP 12 retains the definition of a “single and complete” project.

Renewed Litigation

Shortly after NWP 12 was finalized, it was challenged in court (again). Non-governmental organizations (NGOs) including the Center for Biological Diversity, Sierra Club, Montana Environmental Information Center, Friends of the Earth, and Waterkeeper Alliance sued the Corps in the Montana District Court (again), seeking to invalidate the permit. *Center for Biological Diversity, et al. v. Spellmon*, 4:21-cv-00047-BMM. Other stakeholders, such as the state of Montana and industry groups, have intervened.

The NGOs seek to invalidate NWP 12, arguing that “nothing has changed.” Specifically, they argue that the Corps issued NWP 12 without properly consulting with the USFWS under the ESA, as the permit is an ‘agency action’ that ‘may affect’ listed species, and improperly delegates ESA functions to permittees. The NGOs also argue that the Corps failed to adequately evaluate the cumulative, large-scale environmental effects of pipelines and the elimination of some PCN requirements. The NGOs allege that many activities covered by NWP 12 will have more than minimal effects on WOTUS.

The plaintiffs’ briefing also suggests that treating each water crossing as a single and complete project is an abuse of the Corps’ discretion and that the Corps’ determination to treat crossings as individual projects “lack[s] a substantial basis in fact.” The NGOs argue that multiple crossings associated with linear pipeline projects often are not actually “separate and distinct” from one another because they can be clustered within the same water.

The defendants assert that the Corps properly complied with all applicable statutes before finalizing NWP 12, and that the NGOs’ arguments are based on flawed interpretations of the relevant laws. The defendants urge the court to narrowly tailor any eventual remedy to avoid undue disruption to Corps’ programs.

Currently, the case is at the summary judgment phase. Both sides have briefed and argued cross-motions for summary judgment on the claims. Assuming that summary judgment is not granted, the case may not be decided or resolved for some time, leaving NWP 12—and other NWPs implicated by plaintiffs’ arguments—in an uncertain state.

Formal Rulemaking

At the same time as the Montana litigation ramps up, the Corps announced a formal review of NWP 12. Despite the fact that the permit does not expire until 2026, the Corps announced a reevaluation of the permit, motivated largely by President Biden’s Executive Order 13990, which directed agencies to take a fresh look at environmental rules promulgated under the previous administration. 87 Fed. Reg. 17821. The current administration is keen to address issues associated with environmental justice and climate change. The notice of rulemaking sought input on questions concerning more stringent requirements to qualify for NWP 12, more local control of NWP 12 and PCN requirements, notice to potentially impacted communities, distinguishing oil and gas pipelines for new and existing

projects, and any others that stakeholders wished to address.

The Corps’ request for information has included both hearings and written comments (which were submitted by a May 27, 2022 deadline). At the hearings, many attendees raised general objections to oil and gas pipelines under NWP 12, including criticism of the scope of coverage and the nature and extent of impacts associated with permit issuance for multiple WOTUS crossings. Public Comments Hearing on Corps Proposed Rulemaking (May 12 and 17, 2022) (attended by authors). Some of the comments criticized pipeline proposals like Keystone XL and the Byhalia pipeline. Trade associations have raised issues such as the need for stability and speed in pipeline projects, particularly in light of the current administration’s climate and energy goals. National Mining Association, Comments on the Corps’ Solicitation (May 27, 2022).

The Corps’ outreach is atypical and could result in programmatic changes. The outreach could identify issues that will prompt reconsideration of NWP conditions, like the definition of “single and complete project,” which was debated not only in the ongoing litigation, but considered again in reissuance of NWP 12. 86 Fed. Reg. 2744, 2777-78. A change to the definition of “single and complete project” could drastically narrow the scope of NWP 12 and force linear pipeline projects to seek individual 404 discharge permits, delaying and complicating such work. Given the implications of possible permit changes, the regulated community may want to “stay tuned” to the evolution of the Corps’ permit review process.

Conclusion

Administrative rulemaking and litigation continue to challenge current practices for authorizing oil and gas pipeline activities governed by NWP 12. The outcomes of these challenges may have lasting implications for Corps’ CWA permitting of oil and gas pipeline-related projects. ■