



## News & Publications

### Court Narrows Ruling Regarding Nationwide Permit for Utility Crossings to Oil and Gas Pipelines

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Events continue to unfold for the future of Nationwide Permit 12. As we reported in our earlier alert, Nationwide Permit 12 is used by developers to streamline the permitting of utility line projects with minimal impacts to wetlands and other “waters of the United States.” A Montana District Court judge roundly criticized Nationwide Permit 12, finding that the U.S. Army Corps of Engineers failed to comply with the Endangered Species Act when the Corps “reissued” the permit in 2017. The effects of that court’s decision have reverberated throughout the nation, as it eliminated the use of this permitting approach for oil and gas pipeline and other kinds of utility line crossings. In a significant twist to this continuing saga, earlier this week the court narrowed the scope of its order, making it so that the decision to vacate Nationwide Permit 12 applied only to oil and gas pipeline projects.

On May 11, 2020, the United States District Court for the District of Montana amended its order in *Northern Plains Resources v. U.S. Army Corps of Engineers* to limit its applicability to the construction of oil and gas pipelines. This case concerns the Keystone XL Pipeline project and, ultimately, the Corps’s decision to reissue Nationwide Permit 12 for utility line crossings without initiating Section 7 consultation under the Endangered Species Act. Nationwide Permit 12 is one of the most important of the Corps’ 50+ nationwide permits, relied on for all types of utilities across the country on a daily basis. The court’s decision is a welcome relief to cities, counties and other public

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agencies and utilities who rely on the permit to serve their citizens.

In its April 15, 2020 order, the court – in a far-reaching decision with sweeping implications – vacated Nationwide Permit 12 in its entirety pending completion of the consultation and enjoined the Corps from authorizing any dredge or fill activities under Nationwide Permit 12. The court’s recent modification of that order now limits that decision to oil and gas pipelines.

The court’s modified order narrows the scope of its earlier decision such that Nationwide Permit 12 is vacated only as it relates to the “construction of new oil and gas pipelines.” Accordingly, the Corps is now enjoined only from “authorizing any dredge or fill activities for the construction of new oil and gas pipelines under [Nationwide Permit] 12.” Importantly, **“[t]he Corps remains able to authorize dredge or fill activities for non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects.”**

While it is unclear what constitutes an “existing NWP 12 project,” the court’s ruling indicates that the Corps may continue to authorize a broader set of non-pipeline activities under NWP 12. The court’s modified order is explicitly tied to “the construction of new oil and gas pipelines,” due to concerns over potential significant species- and habitat-related impacts stemming from oil and gas construction. The court notes that other routine and minor projects pose much less of a risk to species. As to oil and gas pipeline projects, the Corps is still not allowed to issue Nationwide Permit 12 authorizations, and must engage in a broad, programmatic consultation process under the Endangered Species Act to examine that nationwide permit’s potential impacts before being allowed to issue it for any such projects.

The federal government has already appealed the court’s original decision to the Ninth Circuit Court of Appeals, despite the modified order, asking for a stay to allow oil and gas projects to continue without interruption.

For additional information on Nationwide Permit 12 or the effects of the Montana District Court’s decision on your project, please contact a member of Cox Castle’s Land Use team.