



U.S. Supreme Court limits Nationwide Permit 12 injunction to Keystone XL pipeline

July 7, 2020

Update July 7, 2020: On July 6, 2020, the U.S. Supreme Court granted in part and denied in part the U.S. Army Corps of Engineers' application for stay of the order issued by the U.S. District Court of Montana. The one-paragraph U.S. [Supreme Court order](#), authored by Justice Elena Kagan, stayed the lower court order except as it applies to the Keystone XL pipeline. The stay is to remain in place pending disposition of the appeal currently pending before the Ninth Circuit Court of Appeals and any such future writ of certiorari that may be sought and granted by the U.S. Supreme Court.

Update June 17, 2020: On June 15, 2020, the U.S. Army Corps of Engineers filed an [application](#) to the U.S. Supreme Court for a stay of the April 15, 2020, order (amended May 11, 2020) issued by the U.S. District Court of Montana. The Army Corps requests that the stay be issued pending consideration and disposition of the appeal currently pending in the Ninth Circuit, as well as pending any further proceedings that may be filed in the U.S. Supreme Court. In support of its application, the Army Corps asserts three primary reasons why the lower court order would not survive a U.S. Supreme Court review:

1. the order grants nationwide equitable relief that is inconsistent with Article III of the Constitution and traditional principles of equity
2. the order was issued without fair notice that the court itself would unilaterally grant relief beyond the equitable remedies that respondents had sought
3. the order lacks any sound basis in the Endangered Species Act

The Corps further asserts that absent a stay pending appeal, the Corps and the public will face irreparable harm.

Update May 29, 2020: On May 28, 2020, the U.S. Court of Appeals for the Ninth Circuit [issued](#) an order denying the appellants' emergency motions for a partial stay of the district court's April 15, 2020, and May 11, 2020, orders pending appeal. In a concise one-page opinion, the court reasoned that appellants had not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal.

Update May 14, 2020: As a result of the April 15, 2020, court order vacating NWP12 and remanding the permit back to the Corps to complete a programmatic consultation pursuant to ESA Section 7, on April 27, 2020, the federal government filed a motion requesting that the court issue a stay of those portions of its April 15 order that vacate NWP12 and enjoin the Corps from authorizing activities pursuant to the NWP12, or at a minimum, to stay the vacatur and injunction as they relate to activities beyond those impacting the Keystone XL pipeline.

On May 11, 2020, the court [issued](#) an order denying the motion for partial stay but amending the remedy set forth in its prior April 15 order. More specifically, in its May 11 order, the court specified that NWP12 is vacated as it relates to the construction of new oil and gas pipelines, pending completion of the consultation process, but that NWP12 is still to remain in place for non-pipeline construction activities and routine maintenance, inspection and repair activities on existing NWP12 permitted projects. In so ordering, the court reasoned: "To narrow the vacatur of NWP 12 to a partial vacatur that applies to the construction of new oil and gas pipelines strikes a reasonable balance... while still redressing the potential harms to listed species and habitat that those projects pose." (See May 11 order, page 15.)

On April 15, 2020, the U.S. District Court for the District of Montana [issued](#) an order with potentially broad-sweeping implications for energy-related projects across the country. The case centers on the permitting of the Keystone XL Pipeline, with plaintiffs raising multiple challenges involving the Endangered Species Act, the Clean Water Act and the National Environmental Policy Act. In resolving the plaintiffs' particular claim that the U.S. Army Corps of Engineer's 2017 reissuance of Nationwide Permit 12 (NWP12) violated the Endangered Species Act (ESA), the court's order broadly implicates the validity of the Corps' NWP12, which authorizes activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in U.S. waters. In its order, the court found that the Corps failed to comply with the ESA when issuing NWP12 by failing to conduct a programmatic ESA Section 7 consultation. The court vacated NWP12 and remanded the permit back to the Corps, ordering it to complete a programmatic consultation pursuant to ESA Section 7.

As a result, the decision potentially calls into question all pending pre-construction notices for compliance with NWP12, as well as projects with existing NWP12 coverage. In response to the decision, on April 17, 2020, Army Corps Headquarters instructed Corps Districts across the country not to verify any pending pre-construction notices for compliance with NWP12 pursuant to 33 C.F.R. 330.6 until further direction from headquarters.

The full impact of the court's decision is not yet clear. Entities with projects involving NWPs and NWP12 in particular should pay close attention to any additional guidance issued or resulting litigation.

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