



## Federal Court Halts Wetland Permitting – Nationwide Permit 12 (Utility Activities)

Pipeline companies, utilities, engineers, builders and land developers, and other construction companies that rely on Nationwide Permit (NWP) 12 for utility line and trenching activities in and around potential wetland areas will need to carefully re-evaluate their ability to conduct work under this general permitting tool. This is because on April 15, 2020, a federal district court vacated NWP 12 and determined that the U.S. Army Corps of Engineers (USACE) had not adequately considered impacts in issuing the 2017 permit under the federal Endangered Species Act. As a result of this court ruling, pipeline and utility infrastructure projects that rely on NWP 12 may be impacted.

### Wetland Permitting Overview

The federal Clean Water Act regulates construction and development activities in wetland areas. In particular, [Section 404 of the CWA](#) requires a permit before dredged or fill material may be discharged into waters of the United States. While many activities require a site-specific permit, the federal wetland permitting system also utilizes “general permits” for routine and similar activities nationally that have only minimal individual and cumulative adverse environmental effects. Known as [nationwide permits](#), these permits last for five years and authorize a wide variety of activities such as mooring buoys, residential developments, utility lines, road crossings, mining activities, and wetland and stream restoration activities.

### NWP 12 – Utility Line Activities

One of the most commonly utilized general permits is [NWP 12](#) which authorizes “activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity

does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.” Utility lines include electric, internet, phone, radio, television cables, and related wires, as well as any pipe or pipeline, such as sewer lines or natural gas and oil pipelines.

## **Federal Court Vacates NWP 12**

While the federal lawsuit at issue involves the much debated Keystone XL Pipeline, the court’s ruling will likely reverberate well beyond this notorious project. In *Northern Plains Resource Council, et al. v. USACE, et al.*, 19-cv-000444BGM (D.Mont.) a coalition of environmental groups challenged the USACE’s issuance of NWP 12 on multiple grounds. In the court’s April 15 Order vacating NWP12, 2020 WL 1875455, the federal District Court of Montana determined that the USACE acted arbitrarily and capriciously in not satisfying the Section 7 consultation requirements of the Endangered Species Act (ESA). Consequently, the Court ordered the following:

- NWP 12 is remanded to the Corps for compliance with the ESA.
- NWP 12 is vacated pending completion of the consultation process and compliance with all environmental statutes and regulations.
- The Corps is enjoined from authoring any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations.

While it is likely that the USACE will appeal the ruling and will also likely seek a stay or otherwise attempt to limit the ruling to just Montana-related wetland projects in the federal District Court of Montana, any entity currently seeking or relying on NWP 12 authorization in other jurisdictions should carefully evaluate and consider how this federal court ruling may impact their project.

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