



Nationwide Permit 12 Restored for Most Non-Pipeline Uses by Trial Court, While the Ninth Circuit Expedites Briefing on Emergency Motion for Stay

This week the U.S. District Court for the District of Montana restored use of the U.S. Army Corps of Engineers' Nationwide Permit 12 for some utility line construction and maintenance activities (primarily for non-pipeline projects) by restricting the scope of its earlier vacation of the permit, while the Ninth Circuit ruled on an initial round of briefings in the government's request for an emergency stay. The District Court's April 15 decision has been the source of significant disruption because it not only blocked application of the popular nationwide permit to the Keystone XL pipeline (the subject of the litigation), but also barred any and all other uses of the permit. See our earlier alert [here](#).

Following the District Court's original April 15 Order, the Army Corps immediately appealed to the Ninth Circuit Court of Appeals and requested an administrative stay of the lower court's decision. The Army Corps also asked the District Court for a stay pending appeal, and for revisions to the original ruling. While the plaintiff environmental groups opposed the requested stay, they joined in portions of the request for revision to the District Court.

On Monday May 11 the District Court amended its April 15 Order by narrowing its earlier vacation of Nationwide Permit 12. The Amended Order vacates Nationwide Permit 12 only as it relates to the construction of new oil and gas pipelines, or to dredge and fill activities related to such new construction, and only until the Army Corps completes the required Endangered Species Act consultation process and complies with all other environmental statutes and regulations. The Amended Order allows continued use of Nationwide Permit 12 for: 1) non-pipeline utility construction activities; 2) routine maintenance, inspection, and repair activities on existing NWP 12

projects; and 3) dredge and fill activities for such non-pipeline utility construction and existing NWP 12 projects. The May 11 Amended Order is available [here](#). The District Court declined to stay its decision pending appeal, finding that the defendants did not demonstrate that application of the ruling would result in irreparable harm. This finding was based in part on the District Court's amendment of its earlier decision.

The government again appealed to the Ninth Circuit for emergency relief, and after consolidating all appeals, the Court rejected the Army Corps' request for an administrative stay of the District Court's Amended Order. But the Ninth Circuit's May 14 ruling did adopt the Army Corps' requested expedited briefing schedule. Under the expedited schedule, the motion will be fully briefed by May 22, suggesting that the appellate court may resolve the emergency appeal by the government's requested decision date of May 29. The Ninth Circuit's Order denying the stay and setting the briefing schedule is available [here](#).

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