



Partial Vacation of Nationwide Permit 12 Stands as Ninth Circuit Denies Emergency Stay

The partial vacation of Nationwide Permit 12 (NWP 12) will remain in place for now as the Ninth Circuit today denied emergency motions for a partial stay pending appeal. In its May 28, 2020, Order (available [here](#)) the Ninth Circuit held that appellants “have not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal.”

In the same Order the Ninth Circuit granted motions by numerous states, tribes, business and industrial associations, and nongovernmental organizations to become amicus curiae in the appeal, reflecting again the breadth of interest in the ultimate ruling on this widely-used permit.

District Court’s Restriction of NWP 12

The appeal arose from the U.S. District Court for the District of Montana’s April 15th decision vacating NWP 12 not only as it applied to the Keystone XL pipeline — the subject of the litigation — but as to any and all uses of the permit. (See our earlier update available [here](#))

The District Court’s April 15 order directed that:

- NWP 12 is remanded to the Corps for compliance with the ESA and other applicable environmental statutes and regulations;
- NWP 12 is vacated pending completion of the consultation process and compliance with all environmental statutes and regulations; and
- 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.

On May 11, the District Court amended its April 15 Order by narrowing its earlier vacation of Nationwide Permit 12 (See our earlier update available [here](#)). The Amended Order (available [here](#)) vacates NWP 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.

In its May 11 Order, 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 Ninth Circuit Appeal

Following the District Court's May 11 Amended Order, the government again appealed to the Ninth Circuit for emergency relief and, after consolidating all appeals, on May 14 the Ninth Circuit rejected the Army Corps' request for an administrative stay of the District Court's Amended Order. The Ninth Circuit's ruling did adopt the Army Corps' requested expedited briefing schedule. Under the expedited schedule, the request for a stay was fully briefed by May 22, providing the basis for today's ruling.

Pipeline companies, utilities, engineers, builders and land developers, and other entities that rely on NWP 12 for utility line and trenching activities in and around water bodies and potential wetland areas have been forced to carefully reconsider their ability to conduct work under this general permitting tool. As a result of today's Order, during the pendency of the appeal NWP 12 will be available only for those limited uses reinstated by the May 11 District Court Order.

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