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Federal Judge Prohibits Use of U.S. Army Corps of Engineers' Nationwide Permit 12 for Utility and Pipeline Projects

In an April 15 ruling in *Northern Plains Resource Council, et al. v. Army Corps of Engineers*, Judge Brian Morris of the U.S. District Court for the District of Montana vacated the U.S. Army Corps of Engineers' Clean Water Act Nationwide Permit 12 and enjoined the Corps from using NWP 12 to authorize any dredge and fill activities. Judge Morris concluded that the Corps violated the Endangered Species Act when it re-issued NWP 12 in 2017, and remanded NWP 12 to the Corps for an ESA consultation with federal wildlife agencies, a process which may take some time. The opinion does not state that it is limited to Montana.

This decision may have an impact on the planning and timing of thousands of projects across the nation, including pipelines, transmission lines, and any projects that include utility lines (e.g., solar, wind, real estate) that rely on the streamlined NWP 12 to avoid the lengthy process of obtaining site-specific Clean Water Act 404 permits. NWP 12 is frequently used to quickly permit stream or creek crossings that might involve minor disturbances to "waters of the United States." Project-specific permitting not only takes time, but also may trigger public participation opportunities for project opponents. The impact of this decision on projects that already relied on the 2017 NWP 12 remains to be determined.

In dismissing without prejudice the claim that the Corps violated the National Environmental Protection Act when it reissued NWP 12 in 2017 without conducting a full Environmental Impact Assessment, Judge

Morris suggested that the Corps might decide to conduct a NEPA EIS based on what it learns during the ESA consultation. This implies that NWP 12 may be vulnerable to a NEPA challenge.

Both the substance of this decision, and its potential nationwide applicability, may be appealed; but for the moment, NWP 12 does not appear to be available.

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