

# Utility Line Activities/Clean Water Act: Federal District Court (Montana) Enjoins Nationwide Permit 12



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A United States District Court (Montana) (“Court”) addressed in an April 15th decision a challenge to the United States Corps of Engineers’ (“Corps”) issuance of Clean Water Act Nationwide Permit (“NWP”) 12 (Utility Line Activities). See *Northern Plains Resource Council, et al. v. U.S. Army Corps of Engineers* 2020 WL 1875455.

The issue arose in the context of the Northern Plains Resource Council and other organizations’ (collectively “NPRC”) lawsuit opposing Keystone XL (“Keystone”) pipeline.

The Keystone pipeline must obtain multiple NWP 12s for pipeline crossings of the Yellowstone and Cheyenne Rivers.

Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act the Corps issues NWPs to authorize any category of activities involving discharges of dredged or fill materials into waters of the United States that result in no more than minimal individual and cumulative adverse environmental effects. In contrast, an individual Clean Water Act General Permit authorizes specific activities on a case-by-case basis.

An NWP is a general permit that provides standing permission for all activities that fit the description in the permit. Such permits provide for preauthorized permission for activities that conform to the standards of the NWP. Certain NWPs do require some type of authorization after notice to the Corps prior to starting work. There are approximately 50 NWPs that authorize various types of activities.

NWP 12 authorizes discharges of dredged or fill materials in structures or work in navigable waters of the United States for crossings of those waters associated with construction, maintenance, repair of utility lines in associated facilities, provided that the activity does not result in the loss of greater than one-half acre of waters for each single and complete project. The phrase “utility lines” includes any pipe or pipeline for the transportation of any gaseous, liquid, or liquescent, or slurry substance, including oil and gas pipelines.

Activities encompassed by NWP 12 are typically denominated linear projects. They may cross a waterbody several times at separate and distant locations. Each crossing represents a single and complete project. NWP 12 requires that the permittee submit a preconstruction notification to the Corps’ district engineer before beginning the proposed activity if the activity will result in the loss of greater than one-tenth acre of jurisdictional waters.

NWPs are periodically reissued by the Corps pursuant to notice and comment. NPRC alleged that the reissuance of NWP violated the following:

- Endangered Species Act (“ESA”)
- National Environmental Policy Act (“NEPA”)
- Clean Water Act (“CWA”)

NWP 12 was most recently reissued by the Corps in 2017. See 82 Fed. Reg. 1860 (Jn. 6, 2017).

NPRC argued that the Corps’ reissuance of NWP 12 in 2017 did not consider relevant impacts under the ESA, NEPA, or CWA. Therefore, the Court focused on whether the Corps properly concluded that it did not need to undertake a programmatic determination of whether there would be an effect on ESA listed species or critical habitat.

Pursuant to the ESA, the United States Fish and Wildlife Service maintains lists of endangered and threatened wildlife and plants.

The Corps responded that General Condition 18 of NWP 12 provides that the permit does not authorize an activity that is:

. . . likely to directly or indirectly jeopardize the continued existence of a “listed species” or that “will directly or indirectly destroy or adversely modify the critical habitat of such species.”

Also referenced by the Corps was the fact that the permittee:

- must submit a preconstruction notification to the district engineer if a proposed activity might affect any listed species or critical habitat; and
- may not begin work on the proposed activity until the district engineer notifies the permittee that the activity complies with the ESA and that the activity is authorized.

The Court rejected the Corps’ argument. It held that the Corps cannot:

. . . circumvent ESA Section 7(a)(2) consultation requirements by relying on project-level review or General Condition 18.

The Court held the Corps should have considered the effect of the entire agency action at the programmatic level. As a result, it granted summary judgment to NPRC. The Court remanded NWP 12 to the Corps to undertake what it deems the required ESA consultation.

The impact of this decision is arguably not limited to the Keystone project. Potential impacts associated with this decision include:

- If upheld, it will take some time for the Corps to undertake the ESA consultation
- If upheld, the decision could currently, and in the long term, in the event it is applied nationwide have an impact on the planning and timing of hundreds of projects across the United States, such as:
  - Utility lines
  - Pipelines
  - Transmission lines
- If an individual permit must be utilized, this can trigger lengthy public participation timelines
- Acquisition of individual permits is more complex and resource intensive
- At a minimum, the decision poses uncertainty for any projects attempting to utilize NWP 12

A copy of the decision can be downloaded [here](#).