

Permian Pipeline/Nationwide Permit 12: Sierra Club Complaint for Declaratory and Injunctive Relief



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05/04/2020

The Sierra Club filed on April 30th a Complaint for Declaratory and Injunctive Relief (“Complaint”) against the United States Army Corps of Engineers (“Corps”) challenging the discharge of dredged or fill material into waters of the United States (“WOTUS”) in the construction of the Permian Highway Pipeline (“Pipeline”).

The Complaint filed in the United States District Court for the Western District of Texas alleges that a recent decision by another federal court in regards to Nationwide Permit 12 (“NWP12”) requires that relevant jurisdictional activities be discontinued.

The Permian Complaint describes the Pipeline as a proposed natural gas pipeline. It is further described as being projected as extending 428.54 miles from the Waha Interconnect in Reeves County, Texas, to a delivery point in Colorado County, Texas.

NWP12 is relevant because the Pipeline will cross various jurisdictional WOTUS. The addition of dredged and fill material into the WOTUS is stated to be proceeding pursuant to NWP12.

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 WOTUS 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.

A 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.

NWP12 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 NWP12 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. NWP12 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.

A United States District Court (Montana) (“Court”) addressed in an April 15th decision a challenge to the Corps issuance of a NWP12. 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’ lawsuit opposing Keystone XL pipeline.

The Plaintiffs argued that the Corps’ reissuance of NWP12 in 2017 did not consider relevant impacts under the Endangered Species Act, National Environmental Policy Act, or Clean Water Act. The Court held that the Corps should have considered the effect of the entire agency action at the programmatic level. As a result, it granted summary judgment to the Plaintiffs and remanded NWP12 to the Corps to undertake what it deems the required ESA consultation.

The Sierra Club argues in the Permian Complaint that what it describes as the “verifications” for the Pipeline for the Corps is not allowed to proceed because of the Northern Plains Resource Council case. In other words, the Complaint’s rationale is that NWP12 is no longer valid. It further argues that verifications are invalid because of an alleged failure to comply with the National Environmental Policy Act and applicable regulations.

The Complaint requests that:

- Corps verifications be vacated
- An injunction be issued halting the Pipeline’s dredge and fill of WOTUS until the Corps issued a valid purpose for the activity

A copy of the Complaint can be found [here](#).