

# Oil and Gas Pipeline Construction: Environmental Organizations File Judicial Challenge to U.S. Corps of Engineers Nationwide Permit 12



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The Sierra Club and other environmental organizations filed a Complaint for Declaratory and Injunctive Relief (“Complaint”) in the United States District Court for the District of Montana against the United States Army Corps of Engineers (“Corps”) challenging its reissued Clean Water Act Nationwide Permit (“NWP”) 12.

NWP 12 is a general permit issued pursuant to Section 404(e) of the Clean Water Act relevant to oil and gas pipeline construction.

The NWP 12 reissued in 2021 replaces a 2017 version of the permit.

The United States District Court for the District of Montana previously determined that the Corps violated the Endangered Species Act (“ESA”) by failing to undertake a programmatic ESA Section 7 consultation with the United States Fish and Wildlife Service to consider the cumulative adverse environmental effects of discharges on protected species and their critical habitat in issuing the 2017 NWP 12. See Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers, No. 4:19-cv-00044 (D. Mont.), appeal pending, No. 20-35412 (9th Cir.).

The Complaint describes the reissued NWP 12 as providing:

... a streamlined process to permit oil and gas pipelines to cross rivers, streams, and wetlands. Projects using NWP 12 may proceed without undergoing the comprehensive environmental review ordinarily required by Section 404(a) of the Clean Water Act, and there is no opportunity for public involvement when projects are approved under NWP 12.

Under Section 404 of the Clean Water 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.

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.

The Complaint alleges in challenging the reissued NWP 12 that it authorizes oil and gas pipeline construction projects without undergoing the comprehensive environmental review ordinarily required by Section 404(a) of the Clean Water Act. It further argues that there is no opportunity for public involvement for projects approved under a NWP 12. This is based on the allegation that aside from causing direct, indirect, and cumulative impacts to United States waters, NWP 12 activities also cause environmental harm from oil and gas spills and global climate change.

The Complaint objects to the Trump Administration's reissuing NWP 12 without what is described as refusing to initiate ESA consultation on the 2021 NWP 12. It is states in part:

The Corps, flouting this Court's ruling on the 2017 NWP 12, once again determined that the issuance of the 2021 NWP 12 has "no effect" on listed species. In doing so, the Corps reiterated the same erroneous argument previously rejected by this Court, contending that programmatic consultation is not required because all NWP 12 projects that "may affect" listed species are subject to project-specific consultation and therefore the issuance of NWP 12 has "no effect" on listed species.

Also alleged is a violation of the National Environmental Policy Act because of the issuance of an Environmental Assessment that included a Finding of No Significant Impact for NWP 12.

A declaration is sought from the Court that the Corps' issuance of NWP 12 violates the ESA, National Environmental Policy Act, Clean Water Act, and the Administrative Procedures Act, and asks for a vacatur of the NWP 12.

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