Nationwide Permit 12 in the Crosshairs (Again), and Texas Energy and Infrastructure Projects Hang in the Balance

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Energy and infrastructure projects in Texas and nationwide could be significantly impacted by the outcome of a case currently pending in federal district court in Montana and a revised federal rule recently issued by the Biden administration. A forthcoming ruling in the case and implementation of the new regulations, either in combination or in isolation, may cause projects to be unduly or indefinitely delayed or scrapped altogether.

Pending Nationwide Permit 12 Litigation and Its Implications

In *Center for Biological Diversity v. Spellmon*, environmental groups are challenging a general permit for oil and natural gas pipeline activities that the U.S. Army Corps of Engineers (Corps) reissued in 2021 under Section 404 of the federal Clean Water Act (CWA). CWA § 404 prohibits the discharge of dredged or fill material into waters of the United States unless permitted by the Corps.

In its final days, the Trump administration issued or reissued general permits under CWA § 404(e) – known as nationwide permits (NWPs) – for 16 categories of activities, many of which involve energy-related sectors or activities. NWPs provide a streamlined alternative to individual, project-specific permitting under CWA § 404, allowing projects that qualify for coverage under a NWP to proceed without the full array of administrative processes that apply to individual permits. According to 33 U.S.C. § 1344(e), if activities in a category "involving discharges of dredged or fill material . . . are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment," the Corps may issue a NWP for that category of activities. NWPs are issued for a term of up to five years, at which point they expire unless reissued (with or without revisions).

The plaintiffs in *Center for Biological Diversity* claim that NWP 12, as reissued in 2021, violates the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the CWA. NWP 12 authorizes the discharge of dredged and fill material during "[a]ctivities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project." For linear projects like the pipelines covered by NWP 12, the Corps generally defines, according to 33 C.F.R. § 330.2(i), a "single and complete project" to mean each individual water crossing. Thus, so long as no individual water crossing exceeds the half-acre maximum, NWP 12 can

generally be used multiple times to authorize an entire pipeline with multiple water crossings. When it reissued NWP 12 in 2021, the Corps estimated that the general permit could be used to authorize approximately 47,750 projects during its five-year term, cumulatively impacting an estimated 3,160 acres of jurisdictional waters.

The *Center for Biological Diversity* case challenging the 2021 reissuance of NWP 12 is pending in the same Montana federal district court that in 2020 vacated the 2017 version of NWP 12 for failing to comply with the ESA. In *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Judge Brian Morris ruled that the Corps violated the ESA when it reissued NWP 12 in 2017 without first undertaking a programmatic consultation under ESA § 7 with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (together, the "Services") to consider the potential cumulative adverse environmental effects of NWP 12 on protected species. The court vacated the 2017 NWP 12 as to oil and gas pipelines and remanded the general permit to the Corps for compliance with the ESA. The Trump administration responded by reissuing NWP 12 (along with 15 other NWPs) on Jan. 13, 2021.

But the plaintiffs in the Montana litigation allege that the 2021 version of NWP 12 suffers from the same legal defects as the 2017 version, including the Corps' alleged failure to undertake a programmatic consultation with the Services under the ESA. The plaintiffs claim that the Corps is once again impermissibly attempting to discharge its ESA obligations by relying upon NWP General Condition 18, which requires an applicant to submit a preconstruction notification to the Corps if the project "might affect" listed species or critical habitat. The Corps asserts that reissued NWP 12 will have "no effect" on species or habitats because, per General Condition 18, any such effects from an individual project will be analyzed on a project-specific basis.

Projects meeting the specific conditions of a NWP often may be constructed without providing advance notice to the Corps; however, in prescribed circumstances, a preconstruction notification may be required. If it is required, then an applicant generally must defer commencement of construction until the Corps either verifies that the project satisfies the NWP or fails to respond to the notification within 45 days, in which case "[t]he permittee may presume that his project qualifies for the NWP," according to 33 C.F.R. § 330.1(e)(1). However, for activities where the applicant has identified ESA listed species or designated critical habitat that "might be affected," the applicant cannot begin work until the Corps has provided notification that the proposed activity will have "no effect" on listed species or critical habitat, or until an ESA § 7 consultation or conference has been completed. In such circumstances, if the applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

The *Center for Biological Diversity* plaintiffs contend that the Corps violated the ESA by reauthorizing NWP 12 without first undertaking a programmatic ESA consultation with the Services; that the Corps cannot rely on General Condition 18 and the possibility of project-specific review to discharge its ESA obligations. The plaintiffs maintain that the Corps must first consider the effect of the entire agency action under the ESA – i.e., the reissuance of NWP 12 in its entirety on a programmatic level – not just each individual project that may trigger ESA review; that programmatic consultation is required to

consider the cumulative impacts of using NWP 12 nationwide and to avoid piecemeal, project-by-project destruction of species and habitat. If the plaintiffs prevail on their ESA claims once again, then the availability of NWP 12 to streamline permitting of oil and gas pipeline projects may be jeopardized indefinitely or otherwise curtailed substantially.

If Judge Morris vacates NWP 12 for a second time, then oil and gas pipeline project proponents needing permit coverage under the CWA will be left with some rather unpalatable options unless and until the vacatur is lifted or a revised NWP is issued: (1) pursue an individual CWA permit, which is a far more time-consuming and resource-intensive process than obtaining coverage under a NWP; or (2) put the project on hold until it can proceed under a revised and reissued NWP 12.

A ruling in favor of the plaintiffs may also usher in similar challenges to other NWPs, particularly those available to energy-related sectors. For example, the general condition that the plaintiffs are challenging under the ESA – NWP General Condition 18 – applies to all NWPs. Recognizing the potential for such wider-ranging implications, the Edison Electric Institute (EEI) – the national association of all investor-owned electric companies – filed an amicus brief in *Center for Biological Diversity* in support of the federal defendants. EEI weighed in because a number of the arguments that the plaintiffs put forth "seeking to vacate NWP 12 could strike at the foundations of the nationwide permit program as a whole if interpreted broadly and therefore threaten other nationwide permits on which EEI members rely to construct and maintain the infrastructure necessary to provide increasingly clean electricity to power the nation. … Rulings that would undermine the framework of the nationwide permit program could impede or even eliminate the ability of EEI members and others to obtain timely approval for critical infrastructure projects with minimal impacts on waters of the United States and thereby slow [the] essential clean energy transition."

The Biden Administration's Return to Stringent NEPA Reviews

The plaintiffs in *Center for Biological Diversity* also challenge the Corps' reissuance of NWP 12 on NEPA grounds, arguing that the Corps failed to consider reasonably foreseeably impacts of NWP 12-authorized projects, including climate change impacts. While the Biden administration is defending the Trump-reissued NWP 12 alongside industry stakeholders in the Montana litigation, the current administration just reinstated more expansive NEPA regulations that the Trump administration revised to ease project permitting. On April 20, the White House Council on Environmental Quality published a final rule revising its NEPA-implementing regulations. Among other revisions, the revised rule reinstates the requirement to consider direct, indirect and cumulative effects, which the Biden administration has unequivocally stated includes climate change.

Although the CEQ's recent revisions to its NEPA regulations are not determinative of (and arguably not germane to) the plaintiffs' NEPA challenge to NWP 12 in *Center for Biological Diversity*, the Biden administration's return to a more expansive implementation of NEPA will likely result in a more lengthy review process, particularly as federal agencies amend their own NEPA regulations to conform to the Council on

Environmental Quality's revisions. Furthermore, the Biden administration has already announced a formal review of NWP 12 prior to the general permit's expiration in 2026, and stakeholders should expect the administration's renewed emphasis on more expansive NEPA reviews to inform the next iteration of NWP 12.

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Energy and infrastructure projects throughout Texas and the nation routinely rely on NWP 12 and other NWPs to authorize various activities having minimal environmental impacts. But those activities – and the certainty that they can be undertaken without undue delay – are essential to the development and timely delivery of reliable, safe and affordable energy to Texas and U.S. consumers. And if transitioning to a cleaner energy future is to be fully prioritized in this decade or the next, then the availability of NWPs will play a crucial role in building the infrastructure necessary to realize that future. As the U.S. Chamber of Commerce succinctly and aptly stated in its amicus curiae brief in support of the defendants in *Center for Biological Diversity*:

Without NWP 12, projects to install and maintain pipelines and other infrastructure necessary for transporting and refining petroleum and natural gas products would require other forms of CWA authorization, most likely an individual permit. Applying for individual permits would significantly delay projects, raise costs, and potentially derail projects altogether. Invalidating NWP 12 would therefore result in increased costs and delays for essential energy commodities. It would also undermine the reliable access to energy that businesses (large and small) need to operate, exacerbate supply chain disruption, and make it more difficult to transition to a less greenhouse gas or carbon-intensive economy.

Companies operating in or supporting the energy sector in Texas and elsewhere in the U.S. should monitor NWP developments closely and prepare accordingly. If use of a NWP is curtailed substantially or precluded entirely, even if only for a temporary period, that could cause a project to be significantly delayed or abandoned. While minimizing the environmental impacts of an individual project is essential to both NWP coverage and avoiding or prevailing against project-specific challenges to the use of one or more NWPs, programmatic NWP challenges, such as the one pending against NWP 12, threaten the continued availability of NWPs altogether, and with it the viability of any project that seeks to rely upon a NWP, regardless of the project's environmental impacts (or lack thereof).

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