

## Supreme Court Revives Use of NWP 12 but Uncertainty Remains

Alert

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By Kyle Foote

The Supreme Court's decision on July 6 allows the Corps of Engineers to resume using Nationwide Permit 12 (NWP 12) to authorize certain types of utility line construction impacts to wetlands and waters of the United States in connection with the construction of new oil and gas pipelines, as well as for local utility, cable, transmission and renewable energy projects.

The Supreme Court's involvement came after approximately three months of uncertainty based on an April 15 decision by the U.S. District Court for the District of Montana (*Northern Plains Resource Council v. United States Army Corps of Engineers*) which resulted in vacatur and remand of the Corps' NWP 12 due to its failure to conduct programmatic interagency consultation pursuant to the Endangered Species Act—the absence of which could result in the “piecemeal destruction” of critical habitat and related species.

NWP 12 and the entire NWP Program were established by the Corps to streamline the permitting of various components of industrial and infrastructure projects without the substantial costs and delays associated with a Section 404 Individual Permit—a process that involves an environmental assessment, and potentially an environmental impact statement, and could take years of environmental studies, agency consultation and mitigation to complete.

The District Court's now overturned order not only prohibited the use of NWP 12 for oil and gas pipeline projects, but for all projects impacting wetlands and surface waters, including local utility and renewable energy projects. For these types of projects, the disruption resulting from the NWP 12 vacatur would likely have resulted in the substantial delay or termination of existing projects or preclusion of proposed projects across the United States.

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To prevent such wide-reaching impacts, the District Court amended its order on May 11 and authorized the use of NWP 12 for all utility line projects other than new oil and gas pipeline projects. On May 28, the Ninth Circuit Court of Appeals denied an appeal by the Corps to allow the use of NWP 12 for oil and gas pipeline projects. The Corps subsequently applied to stay the District Court's Order, which was granted in part by the Supreme Court on July 6. The court's partial stay now allows the use of NWP 12 for all projects, including new oil and gas projects, with the exception of the Keystone XL Pipeline Project.

The failure of the Corps to complete its statutorily required evaluation of the NWP 12 Program in conjunction with these recent federal court decisions certainly creates a chilling effect on pending and proposed projects. Until the regulatory pathway is clear, the uncertainty will likely delay future pipeline projects at least until after the November presidential election, when required courses of action will become more evident (based on future presidential directives and executive actions) or sponsors elect to proceed with the longer, more expensive, but more certain, Section 404 Individual Permit process.

Other utility projects, including wind and other renewable energy projects, may proceed under the NWP 12. We recommend, however, that project sponsors explore the use of alternative or complementary NWPs, such as NWP 14 (Linear Transportation Projects), NWP 33 (Temporary Construction, Access and Dewatering), and/or NWP 39 (Commercial and Institutional Developments), along with corresponding modifications to utility design and impacts to waters of the United States, to increase flexibility and assurance of timely project completion.

For more information on this decision, please contact [Kyle Foote](#), [Amy Davenport](#) or the Stinson LLP contact with whom you regularly work.

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