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COURT'S NATIONWIDE INJUNCTION AGAINST WATER-EMISSIONS PERMIT: A Q&A WITH TOM JACKSON

On April 15 in *Northern Plains Resource Council v. U.S. Army Corp of Engineers*, District of Montana Judge Brian Morris issued a stunning opinion and order in litigation involving the construction of the Keystone XL Pipeline. The plaintiff challenged the legality of the Corps' decision to reissue a general permit for discharges of dredged or fill material into waters or wetlands, Nationwide Permit 12 (NWP 12) in 2017 and the Corps' verification that pipeline construction could proceed under NWP 12.

The court held that the Corps' reissuance of NWP 12 was arbitrary and capricious and violated Section 7(a)(2) of the Endangered Species Act (ESA). Instead of granting the relief the plaintiffs sought—"narrowly tailored relief to ensure adequate environmental review of oil pipelines, especially Keystone XL"—and without any opportunity for the parties to weigh in regarding the appropriate remedy or even any legal explanation, Judge Morris vacated NWP 12 pending the Corps' completion of the ESA Section 7 consultation process and enjoined the Corps from authorizing any dredge or fill activity under the permit.

The Corps filed a Motion for Partial Stay Pending Appeal, which asked for an administrative stay of the permit's vacatur and the nationwide permitting injunction, as well as an expedited briefing schedule. After briefing from the parties and *amici*, Judge Morris issued a ruling on May 11 revising his previous order and limiting the scope of the vacatur of NWP 12 and the injunction against its use. Two days later, the Corps filed an appeal of Judge Morris's April 15 decision, followed shortly thereafter by a motion for a stay. TC Energy and several trade groups have likewise filed appeals. The U.S. Court of Appeals for the Ninth Circuit has agreed to an expedited briefing schedule for the stay motions, with briefing scheduled to be completed by May 22.

Below, Mr. Jackson Baker Botts L.L.P. Special Counsel Tom Jackson answers our questions on the decision and its national impact.

WLF: Tom, what is a nationwide permit and what benefits does such a permit offer to both regulators and regulated entities?

Jackson: Nationwide permits are general permits for various categories of activities that are periodically issued by the Corps to authorize discharges of dredged or fill material to "waters of the United States" (*i.e.*, wetlands and water bodies such as streams that are subject to federal jurisdiction under the Clean Water Act) in those situations where the Corps has determined that the activities

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in a given category would have only minimal environmental impacts. The permits apply across the country and are subject to various conditions that are designed to ensure that environmental impacts remain minimal. There are currently 54 of these nationwide permits applying to a wide variety of activities, ranging from repair of existing facilities to construction of boat ramps to construction of renewable energy projects under certain conditions. NWP 12 applies to utility lines of various kinds, including pipelines for oil, gas, water, and wastewater, electrical transmission lines, and telecommunications cables, as long as the crossing of a particular stream or wetland satisfies the conditions associated with the permit (e.g., limits on the acreage of wetlands impacts). The benefit of these nationwide permits is that they provide a streamlined way to obtain authorization for a discharge of dredged or fill material to a regulated water. In some instances, if a company determines that its project meets the conditions for a nationwide permit, it can simply proceed with the project. In other instances, the company must notify the Corps before proceeding, but the regulations are intended to ensure that in most cases the company will not have to wait more than 45 days before being able to proceed. This timeline is far shorter than the 12-18 months that companies often can expect to wait before receiving an individual Section 404 permit.

WLF: Why wouldn't the court accept the Corps' case-by-case determinations of how an NWP 12 permittee's actions impact endangered species as sufficient "consultation" under the ESA?

Jackson: The district court determined that ESA Section 7 requires an agency such as the Corps to consider the effects of its proposed activity "as a whole." In this case, the court found that putting in place conditions to ensure that the impacts of individual projects on endangered and threatened species would be considered was not a substitute for evaluating the potential overall effects of NWP 12 on listed species. The court put it this way: "[p]roject-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the programmatic level." According to Judge Morris, the Corps had conceded that on a collective basis the use of NWP 12 would result in impacts to wetlands, streams and other aquatic resources. Plaintiffs' experts opined that the affected aquatic areas serve as habitat for various endangered and threatened species and that the use of NWP 12 may therefore affect these species. Given the low threshold for triggering Section 7 consultation—"may affect" listed species—Judge Morris found that this was sufficient to require a programmatic Section 7 consultation regarding the reissuance of NWP 12.

WLF: Does the court's holding and rationale put other nationwide permits in jeopardy?

Jackson: It certainly does. All the nationwide permits are subject to the same general condition that is designed to ensure compliance with the Endangered Species Act. General Condition 18 requires companies to notify the Corps before proceeding with a project under any nationwide permit if the discharge of dredged or fill material into waters of the U.S. might adversely affect endangered or threatened species, and it provides that the use of the nationwide permit is not authorized until the ESA issues are resolved. If those protections were not sufficient in Judge Morris's view to satisfy the requirements of the ESA with respect to NWP 12, the same conclusion could be drawn regarding other nationwide permits. In fact, the language of the district court's opinion—"project-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the programmatic level"—encompasses all nationwide permits.

WLF: What impact does the court's holding have on other projects and businesses whose dredge and fill activities are authorized by NWP 12?

Jackson: At this stage, we must look to the amended order issued by the district court on May 11. The amended order states that "NWP 12 is vacated as it relates to the construction of new oil and gas pipelines pending completion of the consultation process and compliance with all environmental statutes and regulations. NWP 12 remains in place during remand insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects."

The language concerning the injunction on the Corps' use of NWP 12 to authorize projects is similar. Under the terms of that amended order, any uses of NWP 12 related to repair or maintenance of any pipelines or other structures that were constructed pursuant to a previous Section 404 authorization (either by way of a nationwide permit or an individual permit) are allowed. In addition, any uses of NWP 12 related to construction of anything other than a pipeline continue to be authorized.

It seems clear that the intent of the amended order is to prohibit construction of new oil and gas pipelines such as Keystone XL; the district court's May 11 ruling focuses on the potential for harm associated with oil and gas pipelines, and the briefs subsequently filed by the parties in the Ninth Circuit certainly focus on oil and gas pipelines. Nevertheless, questions have been raised about the effect of the amended order on construction of pipelines other than oil and gas pipelines, such as water utility lines. Likewise, issues have been raised regarding the impact of the order on construction of oil and gas pipelines or sections of pipelines that are intended to replace existing, aging pipelines. The regulated community is awaiting guidance from the Corps on these questions pending further action by the Ninth Circuit.

WLF: Does a federal district court have the authority to impose a nationwide injunction on the award of a permit in the context of a specific, individual legal challenge? What would have been a more appropriate remedy?

Jackson: Many questions have been raised in recent years regarding the authority of federal district courts to issue injunctions or other forms of remedy that by their terms apply nationwide. District courts have been issuing these kinds of orders with increasing frequency over the last decade. Some have questioned whether nationwide injunctions are consistent with the general principle that federal courts are to decide the disputes of the parties before them, and two Supreme Court justices (Justice Thomas and Justice Gorsuch) have in recent opinions cast doubt on the authority of district court judges to issue these types of broad injunctions. However, the Supreme Court has not yet taken up the issue and it remains unresolved.

In light of these questions, the more prudent course for the district court would have been to remand NWP 12 to the Corps for the purpose of conducting a Section 7 consultation while declining to vacate NWP 12 in the meantime (or at most limited the scope of its remedy to the project before it). The court could have established a timetable for the consultation to address any concerns that the Corps and the Services might not move quickly enough to conduct and complete the consultation.

WLF: If the Ninth Circuit refuses to stay the district court's vacatur of NWP 12 as to construction of oil and gas pipelines, what will be the Corps' next step, and what will be the pipeline construction businesses' next step?

Jackson: If the Ninth Circuit declines to stay the district court's vacatur of NWP 12 and its related injunction, the parties to the case will proceed to briefing on the merits. Under the schedule established by the court, that briefing would commence in August and continue into the fall. A decision from the court would likely not come until sometime next year.

In the meantime, the Corps would need to provide further guidance to the regulated community regarding allowed and prohibited uses of NWP 12. That guidance would come in the form of general guidance issued by Corps Headquarters and/or project-specific guidance issued by Corps Districts. At the same time, the Corps would need to decide how to proceed with the Section 7 consultation mandated by the district court regarding the current version of NWP 12, a decision that will undoubtedly be influenced by the fact that the Corps is already in the process of renewing at least some of the nationwide permits—including NWP 12—on an accelerated schedule in response to an Executive Order. While members of the regulated community watch these developments unfold, those who have historically relied on NWP 12 for a wide range of activities that are critical to supplying essential energy and other services to the public—particularly those with oil- and gas-related projects—will need to assess whether their projects are in fact impacted by the district court's amended order, a process that may include discussions with Corps District project managers and counsel.

WLF: How do you think the Corps and the private parties will fare on appeal to the Ninth Circuit?

Jackson: It's not clear how the Ninth Circuit will respond to the request of the Corps and others to stay the vacatur of NWP 12 with respect to construction of new oil and gas pipelines. The Corps and the various industry groups supporting it have certainly informed the court about the disruptive consequences of any decision not to issue a stay. On the merits, there is a strong case to be made that the conditions built into NWP 12 provide effective protections for endangered and threatened species and that a Section 7 consultation between the Corps and FWS and NMFS was not necessary.

The district court held that the Corps could not rely on project-level review to ensure that activities authorized under NWP 12 would not adversely affect endangered and threatened species. Courts of Appeals have previously rejected this type of argument in the context of the Corps' determination that a nationwide permit would not have more than minimal impacts on the environment, which is a requirement of Section 404 of the Clean Water Act.

Moreover, the Corps has already pointed out to the court that even if a Section 7 consultation was arguably required, as part of the reissuance of NWP 12 in 2017 it engaged in discussions in which FWS and NMFS participated. The Corps agreed at that time to keep in place measures that it had added to the nationwide permits to resolve issues raised by NMFS during a Section 7 consultation regarding the 2012 reissuance of the NWPs. Since the essential parameters of NWP 12 have not changed since 2012, another Section 7 consultation would have added little to the protectiveness of the permit. While it is always hard to predict how a court will rule, there is certainly ample basis for the court to rule in the Corps' favor.