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Jeremy P. Duehr

Lindsey A. Remakel

Haley Waller Pitts

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Energy & Natural Resources

Federal Court Vacates Nationwide Permit 12

Legal Update

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By Haley Waller Pitts, Lindsey A. Remakel and Jeremy P. Duehr

On April 15, 2020, a Montana federal district court issued a decision in litigation arising from the Keystone XL pipeline that vacated Nationwide Permit 12 (NWP 12). In the case, the plaintiffs asserted several challenges to the U.S. Army Corps of Engineers' approvals related to the Keystone XL pipeline. Among other things, the plaintiffs argued that the Corps failed to comply with the Endangered Species Act (ESA) because it did not consult with the U.S. Fish and Wildlife Service (Service) prior to re-issuing NWP 12 in 2017. Under the ESA, the Corps is required to initiate formal consultation if an action "may affect" listed species or habitat. The court determined there was substantial evidence that the activities authorized under NWP 12 "may affect" listed species or habitat and, as such, the Corps violated the ESA by failing to initiate formal consultation with the Service. The court remanded NWP 12 to the Corps for compliance with the ESA. In the meantime, the court *vacated* NWP 12 and *enjoined* the Corps from authorizing any dredge or fill activities under NWP 12 pending completion of that consultation process and compliance with other environmental statutes and regulations.

Energy projects across the country, including pipeline, transmission and renewable energy projects, rely on NWP 12 for construction activities. NWP 12 authorizes discharges of fill material into jurisdictional waters for the construction, maintenance, repair and removal of utility lines and associated facilities. The impact of the court's decision on these activities is potentially significant, although the complete scope of any impact is, as of yet, unclear, and may differ based on geographic location and whether alternative regional permitting regimes have been adopted.

Fredrikson & Byron's Energy Group continues to analyze the impact of the court's decision, including options available for projects approaching or in the midst of construction activities that were relying upon NWP 12. We will continue to track further developments in the case, including any appeals or opportunities for amicus input, as well as any additional guidance provided by the Corps with respect to projects relying on NWP 12.

A copy of the court's decision is available [here](#).

Fredrikson & Byron's experienced energy team navigates federal, state and local regulatory matters from initial strategy development through permitting and litigation.