

Client Alert

July 2012

Suit Filed in Federal District Court Seeking to Invalidate Corps Use of Nationwide Permit 12 for Construction, Maintenance, Repair, and Removal of Utility Lines and Associated Facilities

On June 29, 2012, the Sierra Club and two other advocacy groups filed suit in federal district court challenging the U.S. Army Corps of Engineers' (Corps) issuance of nationwide permit ("NWP") 12 and the Corps' reliance on NWP 12 to authorize the Keystone Pipeline Gulf Coast Project. *Sierra Club, Inc. v. Bostick*, 5:12-cv-00742 (W.D. Okla. 2012). The plaintiffs allege that the Corps violated the Clean Water Act (CWA), Administrative Procedure Act (APA) and National Environmental Policy Act (NEPA) by reissuing NWP 12 and authorizing work associated with the Keystone Pipeline Gulf Coast Project. The [complaint](#) is a wholesale attack on the validity of the recent reissuance of NWP 12 and seeks a declaration that NWP 12 is null and void throughout the nation. The complaint also requests that the district court vacate any Corps authorization of the Keystone Pipeline Gulf Coast Project under NWP 12 and issue preliminary and permanent injunctions against any Keystone activities undertaken in reliance on NWP 12.

There was another development in this case on July 13, 2012, when the Sierra Club filed a Motion for Temporary Restraining Order and Preliminary Injunction requesting that the district court enjoin the Corps' authorization of the Keystone Pipeline Gulf Coast Project under NWP 12.

Sierra Club, Inc. v. Bostick could have significant implications for pipeline companies and other industry groups that rely on NWP 12 for construction, maintenance, repair and removal of utility lines and associated facilities, because the case presents a facial challenge to the Corps' issuance of NWP 12, not merely a challenge to the Keystone pipeline. NWP 12 authorizes activities required for the construction, maintenance, repair and removal of utility lines, pipelines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than a half acre of waters of the United States for each single and complete project. It allows linear utility lines, such as pipelines, to use NWP 12 multiple times for separate water crossings along a project's length rather than seek an individual Section 404 CWA permit for the project. If, as Sierra Club requests, the district court declares that NWP 12 is null and void throughout the nation, pipeline companies and other industry groups could be required to go through the burdensome process of obtaining an individual Section 404 permit for many of their projects.

The plaintiffs assert four claims challenging the legality of NWP 12. First, plaintiffs allege that NWP 12 violates CWA Section 404(e) by authorizing projects that will have more than minimal effects on the environment. Second, plaintiffs allege that NWP 12 violates CWA Section 404(e) by deferring its minimal effects determination until after the opportunity for public participation has ended. Third, plaintiffs allege that NWP 12 is arbitrary and capricious, and thus violates the APA, because its definition of "single and complete linear project" allows for linear projects to be "piecemealed" into unlimited losses of waters of the United States without allowing the same for nonlinear projects; it determines that conversion of forested wetlands to scrub wetlands is not considered a loss of waters of the United States; and it does not require interagency coordination for linear projects. Fourth, the plaintiffs allege that NWP 12 was

issued in violation of NEPA on a number of grounds, including that the Corps did not take a hard look at the overall impacts of NWP 12 and that the Corps failed to explain its finding of no significant impact (FONSI) with respect to the overall environmental effects of NWP 12.

Plaintiffs also assert that the Corps' specific authorization of the work associated with the Keystone Pipeline Gulf Coast Project under NWP 12 violates the CWA, NEPA and the APA, claiming, among other things, that the project will individually and cumulatively have more than minimal adverse environmental effects based on the total acreage of wetland impacts and that the Corps failed to prepare project-specific NEPA documentation.

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