



## U.S. Army Corps – Final Rule Modifies Clean Water Act Nationwide Permit 12 for Oil and Gas Pipeline Activities

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On January 13, 2021, the U.S. Army Corps published a [final rule](#) reissuing and modifying 12 Clean Water Act Nationwide Permits (NWP), including NWP 12, and issuing four new NWPs, effective March 15, 2021. The Corps decided not to reissue or modify the remaining 40 NWPs, which will remain in effect under the January 6, 2017 final rule. This article provides an overview of the changes to NWP 12, applicable to oil and gas pipeline activities, and how the Corps addressed Endangered Species Act consultation issues.

This final rule narrows the scope of NWP 12, which will now authorize oil and gas pipeline activities only, reduces the number of preconstruction notification (PCN) thresholds, and adds a new PCN threshold for oil and gas pipelines greater than 250 miles long.

The Corps' reissuance and modification of NWP 12 also addresses Judge Morris's ruling out of the U.S. District Court for the District of Montana's that vacated the 2017 NWP 12 for an alleged failure to conduct Endangered Species Act (ESA) Section 7 consultation for the 2017 reissuance of NWP 12.

### NWP 12 Changes

Unlike the prior versions of NWP 12, the modified NWP 12 will now cover oil and gas pipeline activities only. Other types of utility line activities will be covered under new NWP 57 and NWP 58. The narrowed scope of NWP 12 arguably makes the oil and gas industry more vulnerable to future legal challenges and judicial activism. However, the Corps justified this change to increase regulatory certainty for utility lines sectors, those other than oil and gas, that are not a frequent target for litigation because of the lower degree of concern about potential direct and indirect environmental impacts of the substances those lines carry.

Pursuant to Executive Order 13783, Promoting Energy Independence and Economic Growth, the Corps reduced the number of PCN thresholds for NWP 12. The Corps' intent in reducing thresholds is both to reduce the burdens on the regulated public and to focus the PCN thresholds on those activities that have "some potential to cause more than minimal adverse environmental effects." Thus, in addition to PCN that may be required by permit conditions, the new NWP 12 will require PCN if the activities: (1) require authorization under Section 10 of the Rivers and Harbors Act; (2) will result in the loss of greater than 1/10 of an acre of waters of the United States; or (3) are associated with an overall project greater than 250 miles long.

Despite many objections, the Corps added a new PCN threshold for oil and gas pipelines greater than 250 miles long. The Corps explained the purpose of this new PCN is to provide information to district engineers to facilitate their review of cumulative effects that may be caused by new long-distance oil or gas pipelines. Accordingly, this new PCN threshold addresses stakeholder concerns about the potential cumulative environmental effects of NWP 12 activities.

### ESA Section 7 Consultation

The Corps prepared a biological assessment to support the final rule. Contrary to Judge Morris's finding in the Montana case, the biological assessment concluded that the rulemaking process to issue or reissue the NWPs does not require national programmatic ESA Section 7 consultation because no activities authorized by any NWPs "may affect" listed species or designated critical habitat without first completing activity-specific ESA Section 7 consultations with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as required by General Condition 18 and 33 C.F.R. § 330.4(f). The Corps explained that past programmatic consultation for NWP rulemakings were voluntary.

The fate of the new NWP 12 is uncertain. It will likely be subject to legal challenge and may be subject to Congressional Review Act repeal. We will provide an update on any significant actions affecting this NWP.

For additional information about NWPs, please contact [Nicole Blevins](#) or [Bret Sumner](#).