

## E&E Energywire

### A big deal': Keystone XL ruling could threaten other pipelines

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Energy analysts say a decision vacating a water crossing permit for the Keystone XL pipeline last week could mean construction delays for other energy projects. Materials for TC Energy Corp.'s KXL project are pictured in a North Dakota field. Sean Hackbarth/U.S. Chamber of Commerce

A sweeping court ruling last week that halted construction of the Keystone XL pipeline through waterways set off alarm bells for some energy industry analysts.

Experts warned that the U.S. District Court for the District of Montana's broad order withdrawing a nationwide Clean Water Act permit for the crude oil project connecting Canada's oil sands to the Gulf of Mexico could also affect a pair of East Coast natural gas pipelines and an oil sands conduit between Canada and Wisconsin.

"This is a big deal," said Christi Tezak, managing director of ClearView Energy Partners LLC.

Chief Judge Brian Morris for the Montana district court sided with environmental groups' complaints that the Army Corps of Engineers had failed to perform a multiagency consultation mandated under the Endangered Species Act to assess the risks of its Nationwide Permit 12 ahead of the program's five-year renewal in 2017.

The Army Corps has used the nationally applicable permitting program for years to fast-track the review of projects like pipelines and transmission lines that meet specific criteria and are deemed to have minimal impact on federal waterways.

In their lawsuit, which focused on the KXL pipeline but raised broader claims about the Army Corps' general permit, the environmental challengers said the agency approval treats each of the pipeline's water crossings as a distinct project and does not take into account the cumulative harms of building through all the water crossings along the entire project route.

Morris' ruling prevents KXL developer TC Energy Corp., formerly TransCanada Corp., from constructing the pipeline through any stream or waterway in the pipeline's path. Activity that does not affect those waterways, such as construction already underway at the U.S.-Canada border, can move forward.

The judge, an Obama appointee, also barred the Army Corps from authorizing any dredge or fill activities in water crossings covered under the general permit while the agency conducts the ESA consultation ([\*Energywire\*](#), April 16).

The Army Corps should have seen it coming, said Tezak.

Despite a 2002 loss in the U.S. District Court for the District of Columbia over a similar failure, the agency still reauthorized the program in 2017 without that review, she said. The current nationwide permit expires in 2022.

Morris' ruling appears to implicate all of the Army Corps' nationwide permits, since the federal agency did not conduct programmatic ESA consultation for any of the nationwide permits issued in 2017, the law firm Troutman Sanders LLP wrote in a recent analysis.

That's far more than what the environmental groups asked for in their case, which targeted oil pipelines, the firm said.

Other experts say the effect of Morris' order could be muted, at least for projects other than the KXL pipeline.

The Justice Department could try to persuade the court to limit the effect of its ruling or seek to stay the order pending a plea to the 9th U.S. Circuit Court of Appeals, said Larry Liebesman, a senior adviser at the firm Dawson & Associates and a former senior trial attorney in DOJ's environment division.

He said getting a judge to agree to such a limitation on an order is rare.

"When you are dealing with a sweeping ruling like this, when in many ways it is fairly well-reasoned, that judge may not be inclined to do it," Liebesman said. "Although you never know how this judge will react when presented with the effect of this ruling."

The decision drew sharp critiques from industry groups, which said the ruling would also affect broadband cable and water main projects.

"Based on our initial review, one thing is clear: the judge's decision to vacate NWP12 went well beyond what the plaintiffs requested," North America's Building Trades Unions, the

American Petroleum Institute and the Interstate Natural Gas Association of America said in a statement last week.

"The decision creates tremendous uncertainty in an already uncertain time," they said, "and could lead to lengthy delays."

## **KXL on ice**

TC Energy said it is moving full-steam ahead on the KXL's contested crossing of the U.S.-Canada border, a section of the pipeline that is not affected by Morris' ruling last week.

In a statement following the court's order, the company critiqued the decision for its potential impact on a broad range of infrastructure projects, while expressing disappointment that the judge had vacated the pipeline's permit.

"As we determine our next course of action, we will continue with our construction activities currently underway at the border crossing as the ruling doesn't impact our current activities in any way," TC Energy spokesman Terry Cunha wrote in an email.

"We remain completely committed to the Keystone XL project," Cunha said.

The court order could delay the pipeline several months beyond the project's anticipated 2023 in-service date, Height Capital Markets wrote in an analysis released this week.

The length of the delay depends on the extent to which the Army Corps has to redo its analysis, the investment research firm wrote. If the Army Corps has to start consultation with the Fish and Wildlife Service and NOAA Fisheries, Height predicted work on water crossings could be held back by six to eight months.

But that work could be pushed back more than a year, Height projected, if Morris also finds after ESA consultation that the Army Corps permit had also violated the National Environmental Policy Act and the Clean Water Act, as environmental groups have argued in their lawsuit.

ClearView also predicted the consultation process could lead to delays between six months and a year for the KXL pipeline.

Even if TC Energy chose to apply for a permit under Section 404 of the Clean Water Act instead, the firm said, that process would not be any faster than waiting for a revised nationwide permit from the Army Corps.

## **Other pipelines in the crosshairs**

Among the projects that could also be delayed are the Atlantic Coast and Mountain Valley pipelines and Enbridge Inc.'s Line 3 project.

The developers of Atlantic Coast and Mountain Valley had intended to use nationwide permits for water crossings in West Virginia and Virginia, but authorizations were suspended in both states when West Virginia revised its own pipeline regulations, ClearView said.

"In terms of the Mountain Valley pipeline, I think it does threaten their end-of-year schedule," Tezak said of the 300-mile EQM Midstream Partners LP project. "They could lose a construction season, so it could put them into next spring, not this fall."

The neighboring Atlantic Coast pipeline could also be affected by Morris' ruling, though the decision is less of an immediate concern than for Mountain Valley as Atlantic Coast is still awaiting a number of key approvals. One of those approvals, a biological opinion from FWS, is a prerequisite to getting water crossings authorized under the Army Corps general permit.

Atlantic Coast developers Dominion Energy Inc. and Duke Energy Corp. are also awaiting a Supreme Court ruling on the 600-mile project's planned crossing beneath a narrow section of the Appalachian Trail.

A spokesperson for Dominion said the company is still reviewing the scope of Morris' decision.

"We continue to coordinate with the Army Corps to ensure we meet the strong environmental protections for waterbody crossings that are required by the NWP 12," spokeswoman Ann Nallo wrote in an email.

Line 3's schedule may also face some scheduling delays over the ruling. Developers of the project, which carries oil from Canada to Wisconsin, are using the nationwide permit for the North Dakota section of the pipeline, while Minnesota is seeking an individual Clean Water Act permit for water crossings in that state, said Josh Price, a senior analyst with Height.

"North Dakota NWP12 authorization could be susceptible to legal challenges following last week's vacatur," Price wrote in an email.

"The North Dakota segment is only 13 miles so reverting to 404 permits in the event of a challenge may not be the end of the world," he wrote. "In this scenario, Enbridge may also decide to move forward with construction in Minnesota while the situation in ND plays out."

Price said he still expects Line 3 to enter service in the second half of 2021.