

Industry: Army Corps ruling will limit virus protective gear

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Manufacturing and energy groups are arguing that blocking a federal permitting program for oil and gas pipelines could affect the transfer of petrochemical-based products, including sanitizer, ventilators and personal protective equipment. Army Sgt. 1st Class Tyrone C. Marshall Jr. /Department of Defense

A court order that brought a key permitting program for oil and gas pipelines to a standstill could stifle production of personal protective equipment and severely delay pending projects, manufacturing and energy groups said last week.

Oil and gas industry interests told a federal appeals court that it should overturn an amended ruling from the U.S. District Court for the District of Montana that barred the Army Corps of Engineers from using its Nationwide Permit 12 (NWP 12) for new pipelines pending an Endangered Species Act consultation ([Energywire](#), May 12).

The decision is now under consideration in the 9th U.S. Circuit Court of Appeals.

The Montana district court's order could stymie the creation of protective gear to respond to the coronavirus pandemic, the American Fuel & Petrochemical Manufacturers (AFPM) said in a "friend of the court" [brief](#) Friday.

AFPM said blocking the permitting program for oil and gas pipelines for the duration of the ESA consultation could also affect the transfer of feedstock for petrochemical-based

products. That in turn could hurt production of a wide variety of consumer products, including sanitizer and personal protective equipment, or PPE.

"This nationwide prohibition, even if ultimately set aside by this Court, also creates enormous uncertainty which by itself will delay and disrupt vital projects," the industry group wrote. "These disruptions — and the harm they would cause to public health and the economy — can be avoided by staying the district court's order while this Court considers the merits of the filed appeals."

Production of N95 masks, which filter 95% of airborne particles, requires supplies of the petrochemicals propylene, toluene and xylene, AFPM said. Petrochemicals and their derivatives are also critical to the production of face shields, protective gowns, test kit components and ventilators, the group wrote.

Without access to the Army Corps' nationwide permit, AFPM said, pipeline developers will have to resort to seeking individual permits that carry an average processing time of 217 days.

The brief pointed to at least one pipeline project carrying feedstock for plastic products that had been blocked by the Montana district court's original order preventing any use of the nationwide permit. AFPM said it was likely the project would remain blocked even under the court's amended order, which said the permitting program could still be used for cable and internet lines and other utility projects, as well as for routine maintenance.

"Hospitals' needs for N95 respirator masks, ventilators, and other equipment have outstripped available supplies, thereby hindering the pandemic response and putting both patients and healthcare workers at risk," the group wrote.

"This problem will become more acute if AFPM's members encounter delays — like those described above — in building pipelines necessary to meet the increasing demand for the base petrochemicals from which the components of medical devices and PPE are made," the brief concluded.

The district court trivialized the consequences of the ruling when it said developers would still be able to seek individual permits for projects, said a group of states led by West Virginia.

"But this is cold comfort in light of the magnitude of difference — in time and dollars — between obtaining authorization through NWP-12 and undergoing the full individual permitting process under Section 404 of the [Clean Water Act]," the states **wrote** in their "friend of the court" filing with the 9th Circuit.

Similarly, the U.S. Chamber of Commerce and the Energy Equipment and Infrastructure Alliance said requiring pipeline builders to seek individual permits amounted to a "de facto" hold on the projects.

"Given the time and money required to construct oil and gas pipelines, such incremental delays can cumulatively destroy an entire project," they wrote in another [brief](#).

Intervenors in the 9th Circuit appeal warned that the lower court's order did not clearly draw a line between construction of new oil and gas pipelines and construction that was part of "routine maintenance, inspection, and repair activities" for projects already authorized under the program.

"The inevitable end result is increased costs and delay — whether due to court challenges, or because regulated entities choose to err in favor of seeking an individual permit," [wrote](#) a group of energy industry associations known as the NWP 12 Coalition.

The coalition noted that the Army Corps appeared likely to bar not only new oil and gas pipelines going forward, but also projects that are under review or in the planning stages. The group added that the restrictions don't take into account the size of a project or its purpose, instead requiring developers to seek individual permits.

The NWP 12 Coalition said the order had already invited litigation over projects under construction. Last month, the Sierra Club sued to block the Permian Highway pipeline over its use of a nationwide permit ([Energywire](#), May 1).

Continued ambiguity, the coalition argued, will likely lead to more lawsuits.

"Unfortunately, the District Court's last-minute blue-penciling of the remedy did not definitively reduce the affected activities, as it hoped," the group wrote. "It simply created vast uncertainty, which is no better than its original improperly broad remedy."

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