

## E&E Energywire

### Court is urged to keep Army Corps permit on ice

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Environmental groups this week affirmed that — yes, in fact — they would like federal courts to temporarily block a nationwide permitting program for oil and gas pipelines.

The Northern Plains Resource Council and other groups countered arguments from the Army Corps of Engineers and industry groups that Chief Judge Brian Morris for the U.S. District Court for the District of Montana exceeded the remedy they sought in their challenge of the Keystone XL pipeline.

"Defendants' attempt to reframe this case as pertaining only to Keystone XL is a patent misrepresentation of the proceedings below," the groups wrote in a Wednesday [filing](#) with the 9th U.S. Circuit Court of Appeals.

Morris, an Obama appointee, issued an amended order earlier this month blocking the Army Corps from using its Nationwide Permit 12 (NWP 12) to authorize dredge-and-fill activities across waterways for new oil and gas pipelines. The stay remains in effect pending completion of interagency consultation under the Endangered Species Act.

The Army Corps and industry groups are asking the 9th Circuit to thaw Morris' freeze on the program pending appeal, warning of the effects on a wide variety of smaller projects posing minimal threats to vulnerable species ([Energywire](#), May 18).

Several of their briefs noted that even the environmental groups had not asked for the court to broadly block the use of the permitting program.

The green groups countered that their argument from the beginning of the case was that the Army Corps had failed to evaluate the cumulative impact on endangered species of all projects under the nationwide permit. The agency should have completed programmatic ESA review before reauthorizing the program for a five-year term beginning in 2017, they said.

"[W]hile Defendants complain of procedural irregularities by the district court in reaching those decisions, their complaints are groundless — Plaintiffs challenged NWP 12 on its face and emphasized throughout the case the harms resulting from NWP 12's use for the construction of new oil and gas pipelines," the groups wrote.

They noted that the Army Corps was well aware that it should undergo the consultation process but chose not to, resulting in a serious ESA violation. Instead, the agency stated that

relying on project-level analysis of harms to species was sufficient and issued a "no effect determination."

The failure to assess the impact of the nationwide permit was even more egregious this time around, the environmental groups said, because in 2012, NOAA Fisheries issued a jeopardy determination finding that the permitting program was not adequately protecting endangered species. That prompted the Army Corps to conduct a fresh analysis and introduce new protective measures to correct the other agency's concerns in 2014.

"That the Corps agreed to apply some, but not all, of those protective measures to the 2017 iteration of the NWP's ... also undermines the Corps' 'no effect' determination, given that all of these measures were necessary to reverse [NOAA Fisheries'] 2012 jeopardy determination," the groups wrote.

The groups also emphasized the importance of addressing the use of the program for oil and gas pipelines and other projects.

They noted that before 2012, the Army Corps had "routinely required" major interstate oil and gas pipelines to acquire individual permits under Section 404 of the Clean Water Act.

Overall, use of the program has grown more than 45%, from 7,900 annual uses under the 2012 permit to 11,500 under the 2017 permit.

The environmental groups added that while proponents of the Keystone XL project defended the economic benefits of constructing oil and gas pipelines, they did not address the high importance Congress placed on protecting endangered species from harm.

"Here," the groups wrote, "the public interest is best served by barring the Corps and the project proponents from relying on a permit that violates the ESA."