

Client Alert

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DC District Court Upholds Corps' NWP 12 Verification of Wastewater Pipeline But Relies On Plaintiff-Friendly View of Standing To Reach Environmental Groups' Claims

On April 10, 2013, the US District Court for the District of Columbia granted summary judgment for the US Army Corps of Engineers ("Corps") in a suit filed by environmental groups challenging the Corps' verification of a wastewater pipeline project in southern Arkansas under the nationwide permit ("NWP") program. *Ouachita Riverkeeper, Inc. v. Bostick*, No. 12-cv-00803-CKK (D.D.C. Apr. 10, 2013). In her opinion, Judge Colleen Kollar-Kotelly upheld the Corps' conclusions that NWP 12 authorized the pipeline's crossing of more than 30 wetlands, and that the conversion of forested wetlands to scrub/shrub wetlands did not constitute a "loss of waters of the United States" for purposes of NWP acreage thresholds. Although the decision deferred to the Corps' application of its NWP regulations, the court relied on an expansive, plaintiff-friendly view of standing to reach the environmental groups' claims that could make it easier for environmental groups to challenge pipeline development projects in the future.

The suit involved a 23.5-mile pipeline that will transport treated wastewater to the Ouachita River from the city of El Dorado, Arkansas, and three industries. The project will require a 50-foot-wide cleared right-of-way and cross more than 30 wetland areas, impacting a total of 23.65 acres. The Corps Vicksburg District issued verifications that the project is authorized under NWP 7, which applies to the construction of outfall structures and associated intake structures, and NWP 12, which applies to the construction of utility lines (including pipelines) that do not "result in the loss of greater than 1/2 acre of waters of the United States." The Corps found that the project will cause no permanent loss of waters, but required the permit applicant to purchase 241 credits from a mitigation bank based on the loss of wetland function for forested wetlands converted to scrub/shrub wetlands. *Ouachita Riverkeeper* and *Save the Ouachita* challenged the Corps' verification that NWP 12 applies to the project.

As a preliminary matter, the court found that the environmental groups had standing to challenge the Corps' verification based on their members' concern that potential leaks could contaminate their property adjoining the pipeline. Although the plaintiffs had not yet suffered any harm from the pipeline's construction, the court found that their "increased susceptibility" to potential leaks was a sufficient injury to support their cause of action. The court also held that the case was not moot, despite substantial progress on the pipeline, because work remained to be completed and the court could at least order additional mitigation if necessary.

On the merits, the plaintiffs argued that, by converting more than 23 acres of forested wetlands to scrub/shrub wetlands, the project would result in the loss of greater than 1/2 acre of waters of the United States. The court held that the plaintiffs did not demonstrate that the Corps' interpretation, that there is a "distinction between loss of *function* and loss of *waters*," was plainly erroneous or inconsistent with the NWP regulations. Thus, the court deferred to the Corps' determination that a change in wetland function is not sufficient to disqualify a project from authorization under NWP 12. In addition, the court rejected the plaintiffs' argument that, because the Corps' mitigation regulations at 33 C.F.R. Part 332 broadly define "impact" as an "adverse effect," the impact on forested wetlands would constitute a "permanent adverse effect" within the meaning of the definition of "loss of waters." The court held that the definitions in the mitigation provisions of Part 332 are distinct from and do not govern the NWP provisions of Part

330. Judge Kollar-Kotelly also dismissed the environmental groups' argument that the belowground placement of the pipeline itself would cause the loss of greater than 1/2 acre of wetlands, noting that all the soil removed for the installation of the pipeline would be returned to preexisting contours and elevations.

The plaintiffs in this case challenged only the Corps' verification of NWP 12 for the wastewater pipeline project and did not facially challenge the validity of NWP 12 itself, which is the subject of the ongoing *Sierra Club v. Bostick* litigation in the Western District of Oklahoma. Although the decision is deferential to the Corps and allows the wastewater pipeline to go forward, it also embodies an expansive view of standing that could make it easier for environmental groups to challenge pipeline development projects. By holding that a mere increased risk of spills is sufficient to support legal standing, this decision could allow more plaintiffs who have not yet suffered any concrete harm to use the legal system to slow or block pipeline development, even where pipeline construction is already partially complete.

Hunton & Williams LLP lawyers are available to discuss the implications of this case with you.

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