



July 13, 2020

SENT VIA EMAIL

Jason Brown
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Re: Notification of Invalid 404 Authorization for Robeson LNG Pipeline Project; Action Id. SAW-2019-01960

Dear Mr. Brown,

This letter serves to notify Piedmont Natural Gas Co., Inc. ("PNG") of the change in status for the Verification pursuant to Nationwide Permit 12 ("NWP 12"), issued by the United States Army Corps of Engineers ("Corps") for any dredge and fill activity associated with the construction of the Robeson LNG Pipeline Project ("RLNG"), pursuant to Section 404 of the Clean Water Act. Currently, PNG lacks valid legal authorization to carry out any activities regulated under Section 404 of the Clean Water Act for the construction of RLNG.

I. Factual and Legal Background

A. USACE's Verified RLNG Construction Pursuant to Nationwide Permit 12.

On February 20, 2020, the Corps issued a verification pursuant to Nationwide Permit 12 ("NWP 12"), authorizing dredge and fill activities associated with the construction of RLNG and regulated pursuant to Section 404 of the Clean Water Act. Action Id. SAW-2019-01960. *See* Exh. A. This type of verification is required before such dredge and fill activities can commence. The Clean Water Act prohibits the discharge of fill materials into the "waters of the United States" unless authorized by a Corps permit issued pursuant to 33 U.S.C. § 1344. 33 U.S.C. § 1311(a). "Wetlands adjacent to navigable waters" and their tributaries are included within the definition of "waters of the United States." 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s).

B. A U.S. Federal Court has Vacated Nationwide Permit 12 and Prohibited its Use for Authorizing the Construction of New Oil and Gas Pipelines.

On April 15, 2020, United States District Court Judge Brian Morris held that NWP 12 was unlawful because it violated the consultation requirements under Section 7(a)(2) of the Endangered Species Act. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Case No. 4:19-CV-00044-GF-BMM (D. Mont. April 15, 2020). U.S. Dist. LEXIS 66745. Judge Morris vacated and remanded NWP 12, pending the completion of ESA consultation and compliance with all environmental laws, pursuant to 5 U.S.C. 706(2)(A). *Id.*



The word “vacate” is synonymous with the word “annul,” or to make void and legally invalid. *See, e.g., Black’s Law Dictionary* 1404 (10th ed. 2014). Vacatur is the standard remedy for agency action found to be arbitrary and capricious pursuant to the Administrative Procedure Act, simply undoing the government’s rules found to be unlawful and restoring the *status quo* prior to the unlawful action. *See, e.g., Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.”). When agency action is found to be deficient as a matter of law, the ordinary result is vacatur of the entire agency action. This vacatur applies widely, impacting not just the Plaintiffs in the instant action but all parties to which the vacated action applies. *See, e.g., Nat’l Min. Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C.Cir.1989)).

Indeed, on May 11, 2020, Judge Morris amended his Order in the *Northern Plains* case after reviewing a motion to stay. Specifically, Judge Morris clarified:

NWP 12 is vacated as it relates to the construction of new oil and gas pipelines pending completion of the consultation process and compliance with all environmental statutes and regulations. NWP 12 remains in place during remand insofar as it authorizes non-pipeline construction activities and routine maintenance, inspection, and repair activities on existing NWP 12 projects.

See Exh. B at 38. Judge Morris’ Order plainly states that NWP 12 has been neutralized of any legal effect as it relates to unconstructed gas pipelines. Furthermore, it clarifies that, to the extent that NWP 12 remains in force during remand, it only authorizes activities that do not involve construction of new pipelines.

Federal and industry defendants appealed Judge Morris’ decision to the Ninth Circuit Court of Appeals on May 13, 2020. On May 28, 2020, the Ninth Circuit denied a requested stay, providing a stark preview of the appellants’ low likelihood of overturning the lower court’s decision: “Appellants have not demonstrated a sufficient likelihood of success on the merits” Order at 3; *see* Exh. C. In other words, a federal court has vacated and invalidated NWP 12 due to flawed environmental review. The appellate court has made abundantly clear that this decision is unlikely to be reversed on appeal.

C. Vacatur of a Nationwide Permit for One Project Also Voids the Verifications Issued Pursuant to the Nationwide Permit for Other Projects.

The courts of the United States have examined the impact of the vacatur of a nationwide 404 permit on authorizations issued by the Corps pursuant to the vacated permit. In *Ky. Riverkeeper, Inc. v. Rowlette*, the Sixth Circuit considered a NEPA challenge to the Army Corps of Engineers’ issuance of a nationwide permit authorizing coal mining operations to discharge dredge and fill material into waters of the United States. 714 F.3d 402 (6th Cir. 2013). The court found that the Corps’ Environmental Assessment for the nationwide permit failed to assess the cumulative impacts of the reauthorization, in violation of NEPA regulations. *Id.* at 410. To remedy this error, the court “set aside the Corps’ reauthorization of [the permit] as arbitrary and capricious,” citing its “duty” to do so under 5 U.S.C. § 706(2)(A). *Id.* at 411.

On remand, the district court vacated a separate project permit that was issued pursuant to the invalid nationwide permit. *Kentucky Riverkeeper v. Colonel Luke Leonard*, No. 203, CV 05-181-DLB, at 2 (E.D. Ky. Aug. 22, 2013). After the Sixth Circuit vacated the nationwide permit, the District Court in *Kentucky Riverkeeper* found an affirmative duty on the part of the Corps to issue a stop work order to the now-



unauthorized permittee. On remand, the district court ordered the Corps to “notify [the operator] that any activities authorized by that reauthorization must cease immediately.” *Id.*

II. Argument

A. PNG Lacks Authorization Under 404 to Construct RLNG

In the present instance, the courts of the United States have explicitly vacated NWP 12 as it relates to the construction of new oil and gas pipelines and indicated that there is no realistic prospect of reversal. As a result, PNG is currently unable to lawfully proceed with dredge and fill activities for construction of RLNG through the Gum Swamp, without further authorization.

With the vacatur of NWP 12 vis-à-vis new oil and gas pipeline construction, the Corps’ February 20, 2020 verification for RLNG has been rendered null and void. *See, e.g., Ky. Riverkeeper v. Colonel Luke Leonard*, No. 203, CV 05-181-DLB, at 2 (E.D. Ky. Aug. 22, 2013). The logic supporting this legal conclusion is straightforward. The U.S. federal court system has determined that NWP 12 was invalid from the point of its inception due to violations of the Endangered Species Act. It follows that any verification issued pursuant to that invalid permit – including the verification at issue here – is likewise invalid.

Because it lacks proper authorization under Section 404 of the Clean Water Act, PNG is unable to lawfully proceed with dredge and fill activities associated with the construction of RLNG in the Gum Swamp and adjacent waters. To be able to commence these activities, PNG must obtain a valid project-specific 404 permit; or a verification pursuant to a new, valid nationwide permit that fulfills the mandates of all applicable environmental laws.

B. The Corps has an Affirmative Duty to Immediately Issue a Stop Work Order to PNG for RLNG

Just as the District Court in *Kentucky Riverkeeper* found an affirmative duty on the part of the Corps to issue a stop work order to the permittee after the underlying nationwide permit for the permittee’s authorization was vacated, so too does the Corps have an affirmative duty to immediately issue a stop work order to PNG, due to the vacatur of NWP 12. The undersigned have notified the Corps of this affirmative duty, and PNG has every reason to expect to receive a stop work order for RLNG from the Corps.

Furthermore, irrespective of any action taken or not taken by the Corps to issue a stop work order to PNG, the clarification of the *Northern Plains* court that “NWP 12 is vacated as it relates to the construction of new oil and gas pipelines” underscores that PNG lacks legal authorization to carry out any dredge and fill activities for the construction of RLNG. Exh. B at 38. PNG is officially on notice that it lacks valid legal authorization to conduct dredge and fill activities regulated under Section 404 of the Clean Water Act for the construction of RLNG.

C. Coordinated Opposition, Including Legal Challenges Against USACE, Recently Resulted in Considerable Setbacks for Domestic Pipeline Projects.

Setting aside the significant legal issues with USACE’s reliance on the invalid NWP 12 to validate RLNG, the undersigned would be remiss if we did not highlight the series of recent decisions and actions that



denounce domestic pipelines, each of which should have bearing on USACE's flawed decision to allow the RLNG project to move forward. A recent article in the New York Times summarizes that pipeline projects "are being challenged as never before as protests spread, economics shift, environmentalists mount increasingly sophisticated legal attacks and more states seek to reduce their use of fossil fuels to address climate change." These challenges – to which the undersigned are involved – have culminated into a number of setbacks for pipeline projects across the country.

First, on July 5, 2020, Dominion Energy and Duke Energy – two of the nation's largest utilities – announced their decision to cancel the Atlantic Coast Pipeline due to "too much legal uncertainty to continue moving forward with this project." Press Release, *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline* (July 5, 2020), <https://atlanticcoastpipeline.com/news/2020/7/5/dominion-energy-and-duke-energy-cancel-the-atlantic-coast-pipeline.aspx>. The announcement followed a July 1, 2020 letter of formal opposition to the Atlantic Coast Pipeline by the North Carolina Department of Environmental Quality's Environmental Justice and Equity Advisory Board. See Exh. D. The letter reaffirms legal shortcomings that the undersigned highlighted in a petition to revoke the 401 Water Quality Certification for the pipeline, and recommends that North Carolina officials oppose any attempts to resume its construction. *Id.* at 4.

Second, on July 6, 2020, the U.S. District Court for the District of Columbia issued an order formally shutting down the Dakota Access Pipeline in light of USACE's flawed environmental reviews related to the project. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534 (D.D.C. July 6, 2020). The decision notes "the seriousness of the Corps' deficiencies" in its "highly controversial" decision to approve the project without properly evaluating its environmental impacts. *Id.* at 1, 6. Because USACE allowed the pipeline to move forward despite public outcry and the pending legal challenge, it must now backtrack to complete proper reviews, and in the meantime, the pipeline must be emptied and shut down.

The undersigned have been an integral party to the coordinated efforts to oppose domestic pipeline projects, including by deeply scrutinizing USACE's patterned failure to fulfill federal environmental laws. We have no intention of relenting in this instance. Indeed, on June 18, 2020, the Lumbee Tribe of North Carolina formalized its support of District 5 landowners' opposition to the RLNG project in an effort "to preserve their land, their waterways and future generations from the impacts of the placement of the LNG facility." The undersigned will be joining fellow members of the Lumbee Tribe at a forthcoming meeting to further discuss our opposition with the Applicant on July 14, 2020.

III. Conclusion

The undersigned parties call upon PNG to honor the orders of the courts of the United States and acknowledge the public outcry and significant legal uncertainty that the RLNG project faces. To that end, it must immediately cease any activities regulated under Section 404 of the Clean Water Act for the construction of RLNG, and await further, valid legal authorization from the Corps before proceeding with these activities. PNG must acquire a new and valid authorization from the Corps via a project-specific 404 permit, or via a new and valid nationwide permit, before any dredge and fill activities may be lawfully commenced for the construction of RLNG. Any 404 activities conducted pursuant to the construction of RLNG prior to the issuance of a new and valid authorization by the Corps will be in violation of 33 U.S.C. § 1311(a).



If PNG fails to immediately cease 404 activities for the RLNG, the undersigned are considering taking legal action to obtain appropriate injunctive relief, declaratory relief, and formal vacatur of the PNG's invalid verification. If you have any questions about this communication, please do not hesitate to contact us directly.

Sincerely,

A handwritten signature in black ink, appearing to read "MK", written over a horizontal line.

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Attachments/Exhibit A NWP 12 Verification for RLNG

Exhibit B Judge Morris' May 11, 2020 Order clarifying vacatur

Exhibit C Ninth Circuit May 28, 2020 Order denying stay

Exhibit D NC DEQ Environmental Justice and Equity Advisory Board July 1, 2020 Letter

Exhibit E Lumbee Tribe of NC June 18, 2020 Resolution

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