

Nos. 20-35412, 20-35414 & 20-35415 – Consolidated

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,
Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Defendants-Appellants,

and

TC ENERGY CORPORATION, *et al.*,
Intervenor-Defendants/Appellants.

Appeal from the U.S. District Court for the District of Montana
No. 4:19-cv-00044 (Hon. Brian Morris)

**BRIEF OF *AMICUS CURIAE* AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS IN SUPPORT OF
MOTIONS FOR STAY PENDING APPEAL**

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May 15, 2020

CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association that has no parent corporation, and no publicly-held corporation holds a 10% or greater ownership interest in AFPM.

Dated: May 15, 2020

s/ Andrew C. Sifton
Andrew C. Sifton

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The membership of *Amicus Curiae* American Fuel & Petrochemical Manufacturers (AFPM) comprises most of the refining and petrochemical manufacturing capacity in the United States.¹ AFPM’s members manufacture the petrochemicals needed to produce consumer products that are used daily in homes and businesses, and produce the fuels needed to deliver nearly all consumer goods. AFPM’s members support nearly 4 million American jobs and produce a variety of products that are essential components of medical supplies and equipment.

AFPM supports the motions to stay pending appeal the district court’s overreaching and unjustified orders in this case. The initial remedy summarily ordered below—the invalidation of Nationwide Permit 12 (NWP 12)—was a surprise to all parties to the litigation and to countless stakeholders that were not involved in the litigation but are suffering immediate and adverse consequences. Dist. Ct. Doc. No. 130 at 26. The district court’s subsequent backtracking on its remedy at Plaintiffs’ behest to single out “the construction of oil and gas pipelines” is likewise arbitrary and unsupported by the record. Dist. Ct. Doc. No. 151 at 38. The district court’s order far exceeds what Plaintiffs sought or had standing to

¹ No counsel for any party in this case authored this brief in whole or in part. No party, party’s counsel, or any person other than AFPM and its members has contributed money to the preparation or submission of this brief.

pursue in this litigation, and arbitrarily prohibits only construction of any new oil or gas pipeline while allowing NWP 12 to continue authorizing other projects employing similar types of construction activities. The court’s conclusion that oil and gas pipeline construction projects “likely pose the greatest threat to listed species” has no basis in the administrative record, but instead rests only on Plaintiffs’ self-serving, *post*-summary judgment declarations, which show no ESA violations stemming from NWP 12. *E.g., id.* at 10, 18, 22. Moreover, the district court neither notified nor heard from proponents of such pipeline projects about injunctive relief beyond the Keystone XL pipeline.

Appellants likely will prevail on the merits of their appeal for the reasons stated in their motions for stay pending appeal, and AFPM incorporates their arguments in support of a stay by reference. The district court ignored or misconstrued multiple conditions of NWP 12 that ensure no activity is authorized “in the vicinity of” or that “might” affect listed species or critical habitat unless the Corps and the U.S. Fish and Wildlife Service determine—prior to the start of work that NWP 12 would authorize—that the Endangered Species Act’s (ESA) consultation requirements have been met. 82 Fed. Reg. 1,860, 1,999 (Jan. 6, 2017) (General Condition 18(c)); 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The district court’s opinion modifying its order repeats this error, stating again that “the types of discharges that NWP 12 authorizes ‘may affect’ listed species and critical

habitat,” contrary to NWP 12’s plain terms that ensure the opposite, and to the presumption that agencies and permittees “will comply with all applicable statutes and regulations.” Dist. Ct. Doc. No. 151 at 23; Dist. Ct. Doc. No. 130 at 19.

AFPM submits this brief to bring to the Court’s attention how the district court’s order threatens key national security and public health interests, including essential petrochemical and petroleum supply chains and the response to the current public health crisis. AFPM’s members depend on pipelines to transport refined products, and to move raw materials and feedstock used to manufacture materials used in nearly every sector of the U.S. economy. Many of these materials are indispensable in the production of supplies and protective equipment that are increasingly needed to combat the ongoing COVID-19 pandemic.

Absent NWP 12, construction work on planned pipelines that serve AFPM’s members may be substantially delayed—even where there are de minimis impacts to waters of the United States and no effects on listed species—thereby resulting in potentially significant disruptions to the manufacture of sanitation products, medical supplies, and other critical equipment. This nationwide prohibition, even if ultimately set aside by this Court, also creates enormous uncertainty which by itself will delay and disrupt vital projects. 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.

ARGUMENT

I. The Sudden Loss of Nationwide Permit 12 Harms the Entire Supply Chain for Critically Needed Fuel and Petrochemical Products.

A. Production of Fuel and Countless Products Depends on Pipelines.

Staying the district court's order will avoid disrupting supply chains vital to the American economy and public health. AFPM's members produce fuel needed by first responders, delivery trucks, and airplanes, and to heat homes. They also manufacture six base petrochemicals needed to create plastics, engineered polymers, and ingredients for products used to make necessities found in homes, hospitals, and businesses. Those six base petrochemicals—ethylene, propylene and butylenes, benzene, toluene, and xylenes—are integral to sanitation, food production and delivery, and multiple aspects of public health and the food supply.

These production activities depend on pipelines to move oil, natural gas, and gas liquids like propane and ethane, and to transport fuels and other refined products that are feedstocks for manufacturing petrochemicals used to make a wide variety of products. AFPM's members rely on highly regulated pipelines to bring crude oil to refineries and wet natural gas to processing plants. Once crude oil is refined and after wet natural gas is processed and fractionated, AFPM's members again use pipelines to transport fuel into distribution channels (and ultimately, to local gas stations) and to transport hydrocarbon feedstock—naphtha, ethane,

propane, and butane—to petrochemical plants.² These pipelines, varying in size and length, comprise a network totaling nearly 219,000 miles.³

Once feedstock reaches petrochemical plants by pipeline, AFPM’s members employ various engineering processes to make the six base petrochemicals that are the building blocks for producing plastics and advanced engineering composites that make modern life possible. Petrochemicals and their derivatives permeate numerous supply chains, such that any disruption to the production of base petrochemicals will significantly affect American manufacturing, including the production of personal protective equipment (PPE) and sanitizers needed for the COVID-19 response, as discussed below.

B. The District Court’s Order Threatens the Continuity of Multiple Crucial Supply Chains.

The district court’s ban on NWP 12 authorization of new oil and gas pipeline construction threatens the supply chains described above and creates market uncertainty. Pipelines transporting natural gas, crude oil, and feedstock often cross

² Crude oil, natural gas, and refined products in some instances can be transported by truck or other means, but these alternatives are far less efficient than pipelines. For instance, replacing the capacity of a modest-sized oil pipeline would require the use of 750 tank trucks, loading up every two minutes, twenty-four hours per day, seven days a week. PHMSA, *General Pipeline FAQs*, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last updated Nov. 6, 2018).

³ PHMSA, *Pipeline Facilities and Miles 2010+* (data through May 15, 2020), <https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-mileage-and-facilities> (found in “2010+ Pipeline Miles and Facilities”).

waters of the United States, such that building them requires a Corps permit. *See* 33 U.S.C. §§ 1311(a), 1344. Typically, these carefully planned projects pose negligible or nearly no impacts to such waters, and AFPM's members rely on NWP 12 to build pipelines and to meet marketplace demands while simultaneously advancing national security, safety, and public health. *See* 82 Fed. Reg. at 1,985.

If NWP 12 is unavailable or its status uncertain, activities previously requiring no prior Corps approval, or short Corps verification timeframes, would be subject to an individual permit process averaging 217 days. Cong. Research Serv., *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments 2* (Jan. 12, 2017). Individual permits' additional time and costs will impair AFPM members' ability to manage and build pipelines and to respond to rapidly changing market conditions.

These consequences are already occurring. One AFPM member is in the final stages of a two-year, multi-phase project to transport feedstock from a propylene manufacturing facility to a polypropylene production plant that supplies a variety of plastic products manufacturers. The project involves two lengths of pipeline, the first of which was built pursuant to a verification of authorization under NWP 12. The AFPM member had completed the NWP process and was awaiting the Corps' verification for the second pipeline, only to have it blocked by

the district court's original order. The district court's modified order likely continues to prohibit that NWP 12 authorization.

As a result, this new pipeline may require an individual permit unless this Court grants a stay. The member anticipates that it would take the Corps up to nine months to issue an individual permit once it receives a complete permit application. The project had a planned start date in June and a targeted completion date in November 2020. Now, the start date will be delayed. This delay will slow polypropylene production, which multiple industries need to manufacture critical supplies, including to respond to the current health crisis. Even if the Appellants ultimately prevail in this litigation and NWP 12 is restored, the company will lose many months of precious time in providing an important commodity.

Other members similarly have pending projects for new oil and gas pipeline segments that will likely require individual permits absent a stay. These projects, some of which had been awaiting Corps NWP 12 verifications, may be on hold for as long as two years to allow for the issuance of individual permits. These delays and the requirements of the individual permitting process will substantially increase the members' project costs, and impede these critical materials from reaching the market while permit applications are pending.

II. A Stay Would Avoid Disrupting COVID-19 Response Supply Chains.

Project delays like those described above—resulting from the district court’s order—threaten manufacturing of supplies critical for responding to the COVID-19 pandemic. AFPM’s members produce source components of medical devices, sanitizers, and PPE used by healthcare workers in every hospital and medical office across the country. As shown in Figure 1, manufacturing N95 masks, which provide crucial protection for doctors and nurses, requires components derived from propylene, toluene, and xylene—three of the base petrochemicals.⁴ Face shields, protective gowns, and testing kit components are also made from petrochemical derivatives that AFPM’s members produce, and ventilators use a variety of engineering polymer components made from petrochemicals.

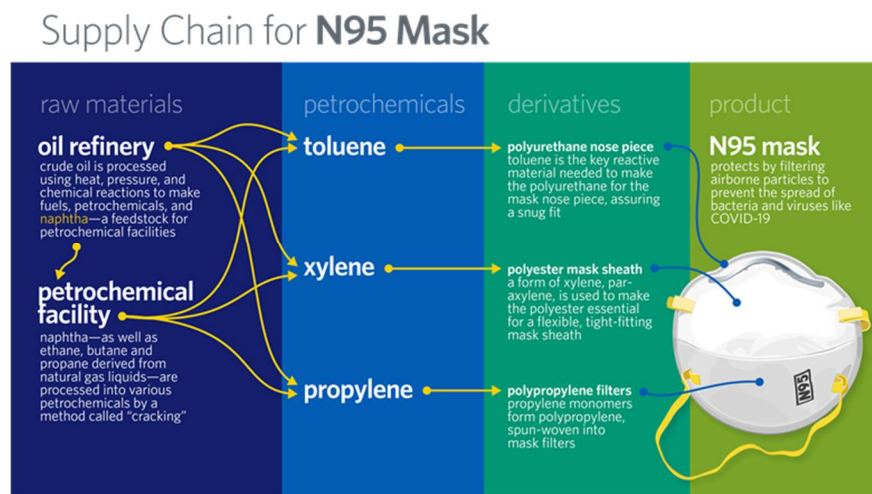


Figure 1

⁴ AFPM, *Supplying Armor in the Battle Against COVID-19* (Apr. 30, 2020), <https://www.afpm.org/newsroom/blog/supplying-armor-battle-against-covid-19>.

The permitting delays and costs that stem from the district court’s order risk exacerbating shortages of supplies needed by COVID-19 patients and frontline medical workers. 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.⁵ 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. These supply chain impacts are in addition to the pandemic’s work force and economic impacts discussed by Appellants in their motions. *See* Fed. Defs.’ Mot. for Stay at 42, ECF No. 11 (No. 20-35412); TC Energy’s Mot. for Stay at 23-24, ECF No. 5 (No. 20-35414).

The unique challenges posed by the COVID-19 pandemic make clear that a stay from this Court is in the public interest. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (factors for granting a stay pending appeal include “where the public interest lies”) (quoting *Nken v. Holder*, 556 U.S. 418, 434

⁵ *See generally, Megan L. Ranney et al., Critical Supply Shortages—The Need for Ventilators and Personal Protective Equipment during the COVID-19 Pandemic*, 482 New Eng. J. Med. e41 (Apr. 30, 2020), available at <https://www.nejm.org/doi/pdf/10.1056/NEJMp2006141?articleTools=true> (describing shortages of ventilators and PPE at hospitals in the United States).

(2009)). Staying the district court's order will ensure that unnecessary permitting delays do not lead to supply chain disruptions that would compound shortages already straining the healthcare system's ability to treat and limit the further spread of COVID-19.⁶

CONCLUSION

The loss of NWP 12 for oil and gas pipeline construction threatens to disrupt supply chains critical to the U.S. economy and to responding to the current public health crisis. Producing medical supplies, PPE, safe food packaging, and numerous other essential goods, as well as the supply of fuel for emergency response vehicles and delivery trucks, depends on AFPM's members being able to continue relying NWP 12. Granting a stay will help protect against unnecessary interruptions to operations while these appeals are heard.

⁶ A stay also would not impact any existing environmental safeguard or alter the Corps' NWP 12 obligation to initiate ESA consultation for any utility line that even "might" affect listed species or habitat, to the extent such consultation has not already been completed in conjunction with other permitting requirements for the project. *See* 82 Fed. Reg. at 1,999-2,000. AFPM and its members are committed to environmental protection and are stewards of the land and water they cross.

Respectfully submitted,

May 15, 2020

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the length limitations in Federal Rules of Appellate Procedure 27(d)(2)(A) and 29(a)(5) because the brief contains 2,184 words as calculated by Microsoft Word, excluding exempted by the Federal Rule of Appellate Procedure 32(f).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman font.

Dated: May 15, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, I caused to be filed electronically the foregoing Brief of *Amicus Curiae* American Fuel & Petrochemical Manufacturers in Support of Motions for Stay Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, that all participants in this case are registered appellate CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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