

Congress of the United States
Washington, DC 20515

May 7, 2020

The Honorable William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Attorney General Barr:

The District Court for the District of Montana recently vacated Nationwide Permit 12 (NWP 12) issued by the United States Army Corps of Engineers (USACE) for certain activities under the Clean Water Act and the Rivers and Harbors Act of 1899.¹ The NWP 12 authorizes utility line construction, maintenance, or repair conducted in waters of the United States. If this order is applied nationally, it would have a devastating effect on thousands of projects. USACE would be prohibited from quickly authorizing activity related to linear infrastructure projects across multiple sectors of the economy involving any pipeline, drinking water line, cable line, or wire for the transmission of electricity, energy, telephone, and television.

The Department of Justice (“Department”) has opposed the issuance of such nationwide injunctions “[c]onsistent with the longstanding position of the Executive Branch under Administrations of both parties.”² We support the Department’s effort to challenge the court’s nationwide injunction of NWP 12.

The issuance of a nationwide injunction by a district court is an unconstitutional assertion of judicial authority that exceeds principles of equitable relief. In these circumstances, a district court goes beyond the case and controversy at hand to enjoin the Executive Branch across the nation. Nationwide injunctions undermine equitable relief, unnecessarily affecting non-litigants by providing a remedy beyond what is necessary to redress the plaintiff’s injury.

The national application of this order will jeopardize thousands of utility line projects across several economic sectors, creating unnecessary delays and hindering the ability of the Executive Branch to support responsible infrastructure development. Since NWP 12 entered into effect in 2017, the USACE has verified over 38,000 pre-construction notifications. The vast majority of

¹ *Northern Plains Resource Council et al v. U.S. Army Corps of Engineers et al*, No. 4:19-cv-00044-BMM (D. Mont. 2020)

² Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, on Dep’t Policy on Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions>

these projects are unrelated to the *Northern Plains* case. A nationwide injunction would disrupt reliance on the NWP 12 and require an individual Clean Water Act Section 404 permit for each project site. This is a time-consuming process requiring a case-by-case review that would needlessly extend permitting approvals by over 200 days on average, according to the USACE. This unnecessary delay would be devastating as our economy reopens in response to the COVID-19 pandemic. Clearly the nationwide application of this order is inappropriate as it would unnecessarily extend beyond the equitable relief sought by the *Northern Plains* plaintiffs.

We share the Department's opposition to nationwide injunctions. In a 2018 Department memo, Attorney General Sessions stated, "[a] number of such injunctions in recent years have brought to the fore the problem of judges acting outside the bounds of their authority and granting relief that reaches far beyond the confines of the particular case or controversy before them."³ Supreme Court Justice Clarence Thomas expressed similar concerns in a recent concurring opinion:

Injunctions that prohibit the Executive Branch from applying a law or policy against anyone . . . have become increasingly common. District courts . . . have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system – preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.


I am skeptical that district courts have the authority to enter universal jurisdictions . . . they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.⁴

We support the Department's opposition to nationwide injunctions and its efforts to challenge the court's nationwide injunction of NWP 12. Thank you for your consideration of this important matter.

Sincerely,



Kelly Armstrong
Member of Congress




Steve Scalise
Member of Congress

³ *Id.*

⁴ *Trump v. Hawaii*, 585 US __ (2018) (Thomas, J., concurring)



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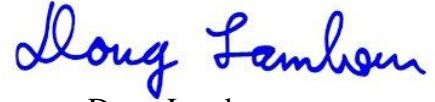
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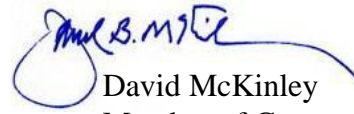
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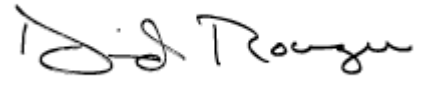
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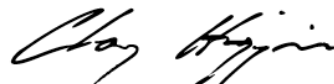
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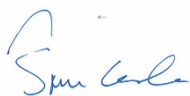
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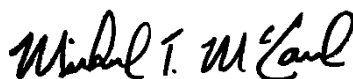
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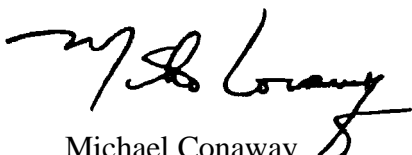
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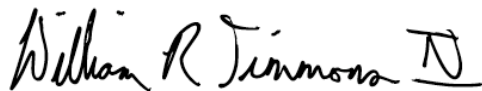
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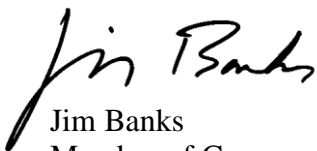
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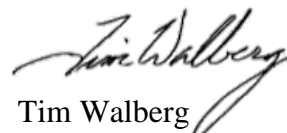
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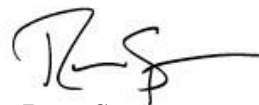
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