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Mont., Energy Cos. Seek Reversal In XL Pipeline Permit Row

By **Emma Whitford**

Law360 (September 17, 2020, 6:12 PM EDT) -- In a flurry of opening briefs, the Keystone XL Pipeline's developer, industry groups and the state of Montana all urged the Ninth Circuit to reverse a federal judge who this spring vacated an expedited Clean Water Act permitting process for oil and gas projects, blocking construction of the Keystone project.

Echoing **arguments** put forward last month by the Army Corps of Engineers, the appellants accused U.S. District Judge Brian Morris of misunderstanding the endangered species protections inherent to Nationwide Permit 12, the national CWA permitting process that he partially vacated in May.

The groups also ran through the negative consequences of the vacature on the Keystone project, oil and gas pipeline projects more broadly, and even renewable energy projects in the state.

"The belt and suspenders approach adopted by the district court makes no sense when only one entity — here, Keystone — is the intended target of this review," Montana claimed, noting that the lower court's ruling **exceeded** the relief environmental groups had sought.

The American Gas Association and other industry groups predicted that this broad decision will cause "significant delays, uncertainties, and financial costs" across numerous projects, accusing the lower court of "focusing its analysis largely on potential environmental, rather than economic, disruption."

Judge Morris initially **handed a win** to environmental groups seeking to block Keystone in April, entirely vacating the nationwide permit on the grounds that the Corps failed to ensure it complies with the Endangered Species Act before issuing it in 2017. The pipeline could harm the pallid sturgeon and the American burying beetle, he said.

Then, in May, Judge Morris **narrowed** the applicability of his order slightly, saying it only applies to new oil and gas pipeline construction.

The U.S. Supreme Court **further limited** Judge Morris' order in July, pausing it as it applies to all projects except the Keystone project until the Ninth Circuit has reached a decision on the appeal.

Keystone developer TC Energy Corp. and the AGA on Wednesday claimed that the permit in question doesn't sanction any activities that could affect a protected species or its habitat until further environmental review has been completed under the Endangered Species Act.

"Any dredge or fill activities that may affect such species or habitat require separate authorization from the Corps," TC Energy claimed.

This safeguard protects the environmental groups from irreparable harm, according to TC Energy. The court should be more concerned about the "hundreds of millions of dollars" a delay in the Keystone project is costing it, the company added.

In its brief, Montana acknowledged Judge Morris' decision to narrow vacature of the permit to oil and gas projects, specifically. But the state expressed concern that "nothing is stopping a future litigant from asserting that another project relying on NWP 12 must be enjoined in light of the alleged

procedural deficiency identified by the district court."

Permitting delays are of particular concern to the renewable energy industry in Montana, the state claimed, due to its "dependence on electricity transmission lines."

Counsel for TC Energy declined to comment Thursday.

The Sierra Club, the Natural Resources Defense Council and others **said in November** that the issuance of the streamlined permit improperly gave TC Energy the authority to construct the Keystone pipeline through several hundred rivers, streams and wetlands.

In comments to Law360 Thursday on TC Energy's brief, Jared Margolis of the Center for Biological Diversity accused the company of ignoring the "purpose and importance" of engaging in a thorough consultation on endangered species impacts before reissuing Nationwide Permit 12.

"If TC Energy had its way," Margolis said, "NWP 12 would allow for activities that jeopardize listed species through death by a thousand small cuts, in direct violation of the Endangered Species Act."

Counsel for the other parties did not immediately respond to requests for comment Thursday.

The Corps is represented by Jeffrey Bossert Clark, Eric Grant, Andrew C. Mergen and Andrew M. Bernie of the U.S. Department of Justice's Environment and Natural Resources Division.

The Sierra Club and Northern Plains Resource Council are represented by Doug Hayes and Eric Huber of the Sierra Club. The Natural Resources Defense Council and Bold Alliance are represented by Cecilia Segal and Alexander Tom of the NRDC. The Center for Biological Diversity and Friends of the Earth are represented by Jared Margolis and Eric Glitzenstein of the CBD. All the groups are also represented by Timothy M. Bechtold of Bechtold Law Firm PLLC.

TC Energy is represented by Joseph R. Guerra, Peter Whitfield and Kathleen M. Mueller of Sidley Austin LLP.

The American Gas Association, American Petroleum Institute, Association of Oil Pipe Lines, Interstate Natural Gas Association of America and National Rural Electric Cooperative Association are represented by Elbert Lin, Deidre G. Duncan and Karma B. Brown of Hunton Andrews Kurth LLP.

Montana is represented by state Attorney General Timothy C. Fox, Deputy Attorney General Rob Cameron and Assistant Attorney General Jeremiah Langston.

The case is Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et al., case number 20-35412, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Morgan Conley, Dave Simpson, Keith Goldberg, Sophia Morris, Juan Carlos Rodriguez and Mike LuSusa. Editing by Jay Jackson Jr.