



Army Corps Proposes Renewal of Nationwide Permits for Work in Waters of the U.S.

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Introduction

On May 23, 2016, the U.S. Army Corps of Engineers (“Corps”) released a [pre-publication version](#) of its “Proposal to Reissue and Modify Nationwide Permits” (the “Proposal”). The Proposal presents a draft version of the Corps’ latest renewal of its program for “Nationwide Permits” (NWP) that authorize general categories of construction in waters of the United States. This begins the process for renewing and revising the 2012 NWP that are set to expire on March 18, 2017.

The Corps has proposed changes to several existing NWP, as well as the issuance of two new NWP and modification to some of the General Condition and Definitions. The Corps’ proposed modifications to existing NWP, which are tabulated in the Corps’ [summary table](#) for the Proposal, aim largely to clarify the terms of the NWP rather than change their substantive authorization. More significant, however, are the comments the Corps has solicited, which address critical issues such as the relationship between the NWP program and the definition of the phrase “waters of the United States” (“WOTUS”) (which defines the scope of the Corps’ jurisdiction); potential changes in acreage limits for certain NWP; potential changes in the Corps’ use of waivers; and potential changes in the pre-construction notifications (“PCN”) process.

Once the Proposal is published in the *Federal Register*, the Corps will provide a 60-day comment period. Parties interested in the NWP renewal process should begin preparing to submit comments now. Permittees with coverage under an existing NWP may wish to consider seeking to “grandfather” their rights by entering into a contract by March 18, 2017 to perform the work authorized by the NWP, and/or by commencing construction by that date, and must complete construction by March 18, 2018.

Background

Section 404(e) of the Clean Water Act (“CWA”) authorizes the Secretary of the Army to “issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material.” 33 U.S.C. §1344(e)(1). Activities that qualify for a general permit must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative environmental effects. 33 C.F.R. § 325.5(c).

The most common general permits are NWP, which provide streamlined review and authorization for categories of activities that the Corps has determined have minimal impacts on the aquatic environment. NWP automatically expire unless renewed every five years. 33 U.S.C. §1344(e)(2). The 2012 NWP became effective on March 19, 2012 and authorized 50 different categories of activities. The EPA maintains a [web page](#) that provides a chronology of NWP issued to date and related materials.

NWP Renewals and Revisions

The Corps’ Proposal states that, unless a particular NWP is specifically discussed in the Proposal’s preamble, the Corps is proposing to reissue the NWP without changing any of its terms.

The Corps’ [summary table](#) describes the proposed changes to individual NWP. A few of the key changes include:

- NWP 12 (Utility Line Activities):

- Authorize the use of temporary mats. Add note referencing definition of “single and complete linear project” and 33 C.F.R. §330.6(d). Add note with reference to Corps regulations for required minimum clearances of overhead electric power transmission lines over navigable waters.
- Clarify that NWP 12 only authorizes crossings of waters of the United States associated with the construction, maintenance, and repair of utility lines. In cases where Department of the Army authorization is required, NWP authorizes inadvertent returns of drilling muds through sub-soil fractures (frac-outs that might occur during directional drilling operations to install utility lines). Add note stating that NWP authorizes utility line maintenance and repair activities that do not qualify for the CWA §404(f) exemption for maintenance.
- NWP 14 (Transportation Projects)
 - Add note referencing definition of “single and complete linear project” and 33 C.F.R. §330.6(d).
 - Does not authorize storage buildings, parking lots, train stations, aircraft hangars, or other non-linear transportation features.
- NWP 29 (Residential Developments)
 - Clarify that any losses of stream bed are applied to the 1/2-acre limit.
- NWP 33 (Temporary Construction, Access, and Dewatering)
 - Require PCNs only for activities in section 10 waters.
- NWP 39 (Commercial and Institutional Developments)
 - Clarify that any losses of stream bed are applied to the 1/2-acre limit. Add wastewater treatment facilities to the list of examples of attendant features.
- NWP 43 (Stormwater Management Facilities)
 - Stormwater or wastewater management facilities that meet the criteria at 33 C.F.R. §328.3(b)(6) are not waters of the United States, and maintenance does not require a section 404 permit. Clarify that any losses of stream bed are applied to the 1/2-acre limit.
- NWP 44 (Mining Activities)
 - For mining activities in non-tidal open waters, the 1/2-acre limit applies to the mining area. The loss of non-tidal wetlands plus the mining area in non-tidal open waters cannot exceed 1/2-acre. Clarify that any losses of stream bed are applied to the 1/2-acre limit. Final reclamation plan required for PCN, if reclamation is required.
- NWP 51 (Land-Based Renewable Energy Generation Facilities)
 - Clarify that any losses of stream bed are applied to the 1/2-acre limit. Revise Note 2 to include NWP 14 activities.
- NWP 52 (Water-Based Renewable Energy Generation Pilot Projects)
 - Add floating solar panels in section 10 waters to the list of activities authorized by this NWP, with 1/2-acre limit. Clarify that any losses of stream bed are applied to the 1/2-acre limit. Add note stating that hydrokinetic renewable energy generation projects authorized by the Federal Energy Regulatory Commission under the Federal

Power Act of 1920 do not require separate authorization under Section 10 of the Rivers and Harbors Act of 1899.

Two New Proposed NWP

In addition to these proposed modifications to existing NWPs, the Corps has proposed to add two new NWP categories:

- NWP A (Removal of Low-Head Dams) would authorize removal of low-head dams, which is defined as a dam built to pass upstream flows over the entire width of the dam crest on an uncontrolled basis) for river restoration and public safety.
- NWP B (Living Shorelines) would authorize construction and maintenance of living shorelines (natural and man-made materials to establish and maintain marsh fringes or other living elements to reduce erosion while retaining or enhancing ecological processes) for shore erosion control.

“Single and Complete Project”

The Corps is proposing to add a note regarding the term “single and complete project” to NWP 12 (Utility Line Activities). The Corps applies the term “single and complete project” when determining the scope of NWP 12’s coverage for linear projects such as utility lines and transportation projects. NWP 12 is routinely used to help expedite the permitting of energy development projects.

The following definition of “single and complete project” was added during the 2012 NWP process:

that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization.

In order to qualify for coverage under NWP 12, each single and complete project cannot result in the loss of more than 1/2-acre of jurisdictional waters. Thus, for very large linear projects (including utility, cable, telephone, etc. lines as well as pipelines used to move oil, gas, slurry, etc.), there may be hundreds of separate NWP 12 verifications issued by the Corps, one for each crossing.

Importantly, the Proposal does not propose to modify the definitions of single and complete linear or non-linear projects. The Proposal does, however, include a “clarification” of how single and complete projects are to be construed to address situations where both NWPs and Individual Permits are used for one project. For example, while an overall project may qualify for the use of NWPs, one or two of the project’s components (crossings) may still require an Individual Permit (e.g., where greater than 1/2-acre of wetlands will be lost). Note 2 reminds applicants of the Corps’ regulations at 33 C.F.R. §330.6(d), which can require an Individual Permit for all crossings if one triggers an Individual Permit and the others do not have “independent utility.” While the proposed Note 2 is consistent with the definition of single and complete project and the Corps’ historic treatment of these types of projects, it is unclear why Corps has chosen to emphasize this issue, which may be worthy of public comment.

Grandfathering Jurisdictional Determinations

According to the Proposal, activities that were authorized by the 2012 NWPs that have commenced or are under contract to commence by March 18, 2017, will have one year (i.e., until March 18, 2018) to complete those activities under the terms and conditions of the 2012 NWPs. However, activities that were previously authorized by the 2012 NWPs that have not commenced or are not under contract to commence by March 18, 2017, will require reauthorization under the 2017 NWPs, provided those activities qualify for authorization under the 2017 NWPs.

Additionally, those projects with approvals under the 2012 NWP should look for specific language in their verification letters, which, according to 33 C.F.R. §330.6(a)(ii), should include a statement that the verification will remain valid if the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. In such cases, a permittee under an existing NWP might not need to seek reauthorization under the 2017 NWPs.

Request for Comments on Other Important Issues

The Corps has solicited comments on a number of potentially-significant changes and other issues, including the following:

- *"WOTUS" issue*
 - The Corps is seeking the views of NWP users on how the 2015 revisions to the definition of "waters of the United States" might affect the applicability and efficiency of the proposed NWPs.
- *Acreage and Linear Foot Limitations*
 - The Corps is seeking comment on whether to retain the 1/2-acre limit that has been imposed on certain NWPs (i.e., NWPs 12, 14, 21, 29, 39, 42, 43, 44, 50, 51, and 52), or to impose different acreage limits on these NWPs.
- *Pre-construction notification ("PCN")*
 - The Corps is soliciting comments on changing the PCN thresholds for those NWPs that require pre-construction notification.
 - The Corps is also proposing to develop a standard form PCN that will be released in a separate notice and comment rulemaking.
- *Waivers*
 - The Corps is soliciting comment on five aspects of waivers: (1) making changes to the numeric limits that can be waived; (2) whether to retain the authority of district engineers to issue activity-specific waivers of certain NWP limits; (3) whether to impose a linear foot cap on certain waivers; (4) whether to impose a linear foot cap on losses of intermittent and ephemeral stream bed potentially eligible for certain waivers; and (5) whether to require compensatory mitigation.

Pre-Construction Notifications

Many NWPs require the submittal of PCNs to the District Engineer before the prospective permittee may act pursuant to the permit. Notification is required under General Condition 18(c), for example, if any species listed under the Endangered Species Act or designated critical habitat may be affected by or is in the vicinity of the project.

The procedures for PCN are set forth in General Condition 31. In general, the Corps must be notified that a project proposed for authorization under a NWP requiring PCN is being undertaken. The District Engineer must determine if PCN is complete within forty-five (45) calendar days of the receipt. If the application is not complete, PCN review does not commence until all of the requested information has been received. The prospective permittee may proceed if he/she is notified in writing that the activity may proceed under the NWP or if forty-five days have passed from the District Engineer's receipt of the complete PCN and the permittee has not received written notification from the District or Division Engineer. However, if the prospective permittee was required to notify the Corps pursuant to General Condition 18 (Endangered Species) or General Condition 20 (Historic Properties), he/she cannot begin the activity until receiving written notification. The Corps always retains the right to modify or revoke authorization under a NWP by following procedures specified at 33 C.F.R. §325.7. Where PCN is not required, obtaining written verification from the Corps that a project meets all the applicable criteria and

conditions for authorization under a NWP may be helpful to avoid a Corps' investigation of potential violations.

As noted above, the Corps is proposing to eliminate the PCN requirement for certain NWPs; is proposing to develop a standard form PCN that will be released in a separate notice and comment rulemaking; and is soliciting comments on changing the PCN "thresholds" for those NWPs that require pre-construction notification. All of these PCN-related topics are worthy of public comment, especially for frequent users of particular NWPs.

Other Conditions on the Use of NWPs

In addition to proposing changes to certain NWPs, the Corps also is proposing to modify a number of General Conditions ("GCs"). GCs apply to all NWPs and currently there are 32 of them. The Corps proposes to modify GCs 12 (Soil Erosion and Sediment Controls), 16 (Wild and Scenic Rivers), 18 (Endangered Species), 19 (Migratory Birds and Bald and Golden Eagles), 20 (Historic Properties), 23 (Mitigation), 30 (Compliance Certification), 31 (Activities Affecting Structures or Works Built by the United States), 32 (Pre-Construction Notification).

There are also regional and state conditions that may apply to project proponents seeking to utilize the NWP process. Each Corps District can adopt regional conditions specific to NWPs implemented within their Districts. Similarly, each state is required to issue water quality certifications under section 401 of the CWA and a consistency determination under the Coastal Zone Management Act for all permits under section 401 of the CWA, including NWPs. Thus, states also have the authority to deny, preapprove, or establish conditions for the use of the NWPs.

Next Steps

The changes included in the Proposal appear relatively minor, especially compared to the breadth and depth of issues for which the Corps is seeking comment. It would not be surprising, especially considering the drastic changes the Corps and the Environmental Protection Agency made between the proposed and final WOTUS rule, to see the Corps implement some of the "Important Issues" flagged above. It will be very important for interested parties to carefully review and draft comments on the specific issues for which the Corps is seeking comments that are most likely to impact business and project development plans.

Finally, project proponents who have received coverage under one of the 2012 NWPs and have concerns about potential changes in the 2017 NWPs may wish to consider entering into contracts to complete all authorized work before the 2012 NWPs expire on March 18, 2017, arranging to have all of the work completed by March 18, 2018, or obtaining Corps verification of continued coverage under the 2017 NWPs.

For more information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the proposed changes to the NWP program, please contact [Brent Carson](#), [Duncan Greene](#), [Erin Bartlett](#), or any member of the firm's [Environmental](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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