

Client Alert

June 2016

Corps Releases Proposal to Modify and Reissue Clean Water Act Nationwide Permits

On June 1, 2016, the US Army Corps of Engineers (Corps) published a [proposal](#) to reissue and modify the nationwide permits (NWP). 81 Fed. Reg. 35,186 (Jun. 1, 2016) (Proposed Rule). To comply with the Clean Water Act (CWA), projects with minimal adverse environmental effects can obtain authorization for the discharge of dredged or fill material into waters of the United States through the Corps' streamlined NWP process. NWPs authorize such activities as utility line installation (including pipelines and electrical transmission), agricultural production, industrial development and general maintenance. With the current permits set to expire on March 18, 2017, the Corps proposes to reissue all 50 of the NWPs with some revisions, issue two new permits, revise some of the general conditions (GCs) and add a new GC. Comments must be submitted within 60 days of publication or by August 1, 2016.

In recent years the Corps, on average, authorized over 30,000 projects through the NWP program.¹ The reissuance process, therefore, attracts significant attention from non-governmental organizations and industry, alike. It is expected that some groups will file comments raising concerns that the NWP approval process does not adequately address impacts to natural resources, and more specifically to endangered species.² It will be important, therefore, for regulated entities to file strong comments illustrating the significance of NWPs to their industry and paying particular attention to the aspects of the Proposed Rule highlighted below.

Key Aspects of the Proposed Rule

- **Acreage Limits and Pre-Construction Notice Thresholds.** The Corps seeks comment on whether to increase or decrease the acreage limits and pre-construction notification (PCN) thresholds for several permits, including NWPs 12 (Utility Line Activities), 14 (Linear Transportation Projects), 51 and 52 (Land- and Water-Based Renewable Energy Generation Facilities).³ The Corps requests that recommendations to increase or decrease the acreage limits be accompanied by data demonstrating why the change is warranted.
- **Waters of the United States (WOTUS) Rule.** The proposal makes little mention of the implications of increased jurisdiction under the new WOTUS rule (e.g., with respect to ditches and other features). An increase in jurisdiction under the new rule will mean that activities that previously required no CWA authorization may now need permits, and that some activities that previously qualified for NWPs may no longer be able to meet the acreage thresholds. The Corps is soliciting comment on how the WOTUS rule "might affect the applicability and efficiency of the proposed NWPs."

¹ The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources, at 45 (October 2015).

² See Bridget DiCosmo, Corps' Draft CWA Permits Could Revive Concerns On Endangered Species, InsideEPA.com (May 25, 2016).

³ The Corps has drafted a new PCN form that will be published in a separate Federal Register notice and made available for public comment.

- **Compliance with Endangered Species Act.** The Corps stands by its prior position that the issuance of the NWP does not necessitate consultation under Section 7 of the Endangered Species Act (ESA) because promulgation of the rule itself has “no effect” on listed species.
- **Information Collection Requirements.** The White House Office of Management and Budget (OMB) seeks comment on the accuracy of the Corps’ estimate of the burden of the information collection requirements in the Proposed Rule. The Proposed Rule states that comments to OMB would be most effective if submitted within 30 days, or around July 1.
- **Appropriate Scope of Cumulative Effects Analysis.** The Corps properly recognizes that its scope of analysis is limited to the activities authorized by an NWP, e.g., the discharge of dredged or fill material. The language in the Proposed Rule is intended to counter any arguments raised by non-governmental organizations that a broader analysis that goes beyond the Corps’ regulatory jurisdiction and control is required.

Key Revisions to Existing Nationwide Permits and Two New Permits

- **NWP 3 – Maintenance.** The Corps proposes to amend the permit to authorize *removal* of structures or fills in jurisdictional waters and to clarify that NWP 3 authorizes the use of temporary (swamp) mats in jurisdictional waters when the mats are used to minimize impacts during maintenance activities.
- **NWP 12 – Utility Line Activities.** The Corps proposes to amend the permit to authorize inadvertent returns of drilling fluids (or “frac-outs”) that can occur during directional drilling operations to install utility lines below jurisdictional waters. The Corps also proposes to clarify that NWP 12 does not authorize the construction, maintenance or repair of utility lines, but instead “only authorizes those components of utility lines” where the activity is under the Corps’ jurisdiction.
- **NWP 13 – Bank Stabilization.** The Corps proposes to clarify that the permit authorizes a wide variety of stabilization measures including structural measures, such as bulkheads, as well as vegetative techniques (e.g., bioengineering).
- **NWP 21 – Surface Coal Mining Activities.** The Corps proposes to change the terms of the permit to clarify that all activities, even those previously authorized under the 2007 NWP 21, are subject to the half-acre limit for losses of non-tidal waters, a 300 linear foot limit for losses of stream bed and a prohibition of discharges for the construction of valley fills.
- **NWP 33 – Agricultural Activities.** The Corps is not proposing any changes to this NWP but is soliciting comments on whether any further clarification of this permit is necessary.
- **NWP 44 – Mining Activities.** The Corps proposes to change the terms of the permit to clarify that the loss of non-tidal wetlands and the mined area in open non-tidal waters, together, may not exceed a half acre.
- **NWP A – Authorize Removal of Low-Head Dams.** This new permit would authorize the removal of smaller structures “built across a stream to pass flows from upstream over the entire width of the dam crest on an uncontrolled basis.”
- **NWP B – Authorize Construction and Maintenance of Living Shorelines.** The Corps intends to compliment NWP 13 with this new permit, which offers a wider variety of shoreline stabilization and erosion control measures.

Key Revisions to NWP General Conditions and One New Condition:

- **GC 16 – Wild and Scenic Rivers.** The Corps proposes to modify the GC to require PCN for any NWP activity that will occur in a component of the National Wild and Scenic River System or in a river designated as a “study river” for possible inclusion in the system.
- **GC 19 – Migratory Birds and Bald and Golden Eagles.** The Corps proposes to modify the GC to state that the permittee is responsible for ensuring compliance with the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act.
- **GC 23 – Mitigation.** The Corps proposes to clarify that if the district engineer determines the adverse environmental effects of the proposed activity will be more than minimal, the applicant may 1) apply for an individual permit or 2) prepare a mitigation proposal to reduce effects to no more than minimal.
- **Proposed GC 31 – Activities Affecting Structures Built by the United States.** This new condition addresses compliance with Rivers and Harbors Act § 408, which requires Corps approval before structures or works built by the United States are altered, occupied or used.

This alert provides a high-level overview of key provisions in the Proposed Rule. For a more detailed and/or comprehensive analysis or additional information please contact Hunton & Williams LLP’s natural resources lawyers below.

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