

Client Alert

February 2012

New Clean Water Act Section 404 Nationwide General Permits Continue Important Permitting Mechanisms But Establish Additional Requirements

The U.S. Army Corps of Engineers announced the issuance of final nationwide general permits (“NWP”) for the next five-year cycle. The new nationwide permits were published in the Federal Register on February 21, 2012, and will take effect on March 19, 2012. A copy of the Federal Register notice issuing the new NWPs is available [here](#).

Nationwide permits are issued under Section 404 of the Clean Water Act. Section 404(e) authorizes the Corps to issue general permits for categories of activities involving discharges of dredged or fill material into waters of the United States, provided that the Corps determines that the discharges will cause only minimal adverse environmental effects. The purposes of the NWPs, as stated by the Corps, are to provide “timely authorizations for the regulated public” and to “reduce administrative burdens on the Corps and the regulated public by efficiently authorizing activities that have minimal adverse environmental effects.” The new NWPs are in many ways successful in furthering this important statutory goal. For example, they retain the thresholds and special conditions for many of the NWPs and do not increase the stringency of most of the general conditions.

Some highlights of the 2012 NWPs include the following:

- **New NWPs for Renewable Energy Projects.** Two new NWPs — 51 and 52 — have been issued for “Land Based Renewable Energy General Facilities” and “Water Based Renewable Energy Generation Pilot Projects.”
 - The final rule provides important clarifications for related linear features. With respect to linear features connecting to these facilities (such as transmission lines, pipelines or roads), each “separate and distant” crossing of a waterbody constitutes a separate and complete linear project that may be authorized under NWP 12.
 - Accordingly, NWPs 51 and 52 (and potentially other NWPs) may be utilized for a renewable energy facility, and NWP 12 may be separately utilized for each waterbody crossing by linear features serving the facility, provided each crossing is at a “separate and distant” location.
- **Mining Industry.** NWPs important to the mining industry have been reissued.
 - NWP 21 is reissued, including for the six-state eastern coal region consisting of Ohio, Kentucky, Pennsylvania, Tennessee, Virginia and West Virginia, where the Corps had suspended its use since June 18, 2010.
 - For activities authorized under the existing NWP 21, the Corps provides an additional 12-month grandfather period for completion of projects that have been commenced or will commence prior to expiration of the existing permit on March 18, 2012. For those authorized activities that will not be completed upon

expiration of the grandfather period, the Corps will consider reauthorizing without imposing the new limitations, upon written request for reauthorization to the district engineer by February 1, 2013.

- New threshold limitations are imposed on activities authorized after March 19, 2012. NWP 21 is limited to discharges with impacts not greater than a half acre of waters, including no more than 300 linear feet of streambed. The district engineer may waive the 300-linear-foot limit by making a written determination that the discharge will result in minimal individual and cumulative adverse effects.
- NWP 21 is not available for discharges associated with construction of valley fills. The term “valley fill” is broadly defined as a fill structure that is typically constructed within valleys in steep, mountainous terrain and associated with surface coal mining activities.
- NWP 44 is reissued for non-coal mining with threshold limits and waiver provisions consistent with NWP 21. Applications require inclusion of a reclamation plan with the pre-construction notice if such a plan is a requirement of other statutes.
- NWP 49 is reissued for remining and reclamation of previously mined areas, provided the total area disturbed by the new mining does not exceed 40 percent of the total acreage impacted. In making this determination, the Corps will consider the Surface Mining Control and Reclamation Act (“SMCRA”) agency’s decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The permittee must include a document describing how the overall mining plan will result in a net increase in aquatic resource functions.
- NWP 50 is reauthorized for discharges associated with underground coal mining and reclamation activities with the same threshold and waiver provisions.
- Mitigation. Compensatory mitigation to offset the loss of aquatic resources must comply with the Corps’s 2008 mitigation rule, which is codified at 33 C.F.R. Part 332.
 - The final rule requires that District Engineers determine appropriate and practical mitigation to ensure that adverse effects on the environment are minimal, but also provides the District Engineer with discretion to, for example, require compensation below a one-for-one ratio where adverse effects of the activity are minimal; allow restoration along only one side of an affected stream; and decline to require long-term management of mitigation sites.
 - The final rule clarifies that the Corps may require compensatory mitigation only for those portions of projects that are subject to the Corps’s regulatory jurisdiction.
- Linear Projects. Linear projects may utilize separate NWP authorizations for each “separate and distant” crossing of a waterbody, provided that the project is a “single and complete linear project,” and the acreage and other applicable limits for each NWP would apply to each crossing, if the crossings are far enough apart to be “separate and distant.”
 - However, each separate and distant crossing will be evaluated to determine if the cumulative effects of the overall utility line are more than minimal and therefore do not qualify for NWP authorization.

- Jurisdiction. The preamble clarifies that the NWP's are not to be read to assert jurisdiction over waters and wetlands, and that determining geographic jurisdiction under the Clean Water Act or the Rivers and Harbors Act is separate from the NWP authorization process.
- Greenhouse Gases. The preamble explains that any greenhouse gas emissions that occur other than as a result of the discharge of dredged or fill materials are outside the Corps's National Environmental Policy Act ("NEPA") scope of analysis because the Corps does not have the legal authority to control those emissions.

The February 21, 2012, *Federal Register* notice will begin the 60-day Clean Water Act Section 401 water quality certification and the 90-day Coastal Zone Management Act ("CZMA") consistency determination processes. Beginning on March 19 and until either the end of these periods or a state issues its programmatic 401 certification and CZMA concurrence (whichever is earlier), the use of an NWP will be contingent upon obtaining individual water quality certification or a case-specific waiver and (where the CZMA is applicable) obtaining an individual CZMA consistency determination or a case-specific presumption of CZMA concurrence.

Hunton & Williams Natural Resources Practice

Hunton & Williams regularly counsels and represents industry and government clients who rely upon Clean Water Act permits, including NWP's. Our attorneys have experience with virtually every aspect of the Clean Water Act, including the National Pollutant Discharge Elimination System ("NPDES") permit program, and other natural resources laws often associated with Clean Water Act permits, including the NEPA and the Endangered Species Act. We routinely represent regulated businesses in legislative, regulatory, litigation and enforcement matters arising under the Clean Water Act, the NEPA, Endangered Species Act and related laws.

If you have questions about the developments discussed in this client alert, or other natural resource or environmental issues, please contact us.

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