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January 15, 2021

Army Corps Reissues Clean Water Act Nationwide Permits With Energy, Infrastructure Project Implications

The U.S. Army Corps of Engineers published in the Federal Register changes to its Clean Water Act Nationwide Permits (NWP). The [final rule](#), published on January 13, 2021, reissues 12 existing NWPs and issues four new NWPs. Major changes to existing NWPs include removing limits on stream loss measured in linear feet from 10 permits and dividing coverage for various types of linear utility infrastructure into three separate permits. Also notable is that the Corps opted not to finalize several other changes from its [September 2020 proposed rule](#).

The new and reissued NWPs will take effect March 15, 2021. Forty other NWPs issued in 2017 and not impacted by this final rule will remain in effect until March 2022 unless subject to earlier modifications to the NWP program by the incoming Biden administration.

Background

Section 404(e) of the Clean Water Act allows the Corps to issue NWPs for certain categories of activities in order to streamline the environmental review process. Activities authorized by NWPs must have no more than minimal impact on the aquatic environment. The Corps generally reissues NWPs on a five-year cycle but occasionally will modify one or more NWPs off-cycle. The most recent reissuance was in January 2017 and addressed 52 NWPs.

In September 2020, the Corps issued a [proposed rule](#) to reissue and modify some, but not all of the NWPs under the Corps purview. The Corps described this off-cycle change to the NWP program as responsive to Trump administration executive orders to promote energy independence and other economic interests, as well as district court rulings that vacated NWPs concerning utility lines and aquaculture.

New Nationwide Permits

The Corps rule creates the following four new NWPs:

- **Electric Utility Line and Telecommunications Activities ([NWP 57](#))**: Covers activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States, except those that would result in the loss of greater than 1/2-acre of waters of the United States.
- **Utility Line Activities for Water and Other Substances ([NWP 58](#))**: Covers activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. This NWP also covers associated utility line facilities in waters of the United States that do not result in a loss greater than 1/2-acre.
- **Seaweed and Finfish Mariculture Activities ([NWP 55](#) and [56](#))**: allows for the construction of certain structures in marine waters for growing seaweed and cultivating fish.

Revisions/Replacements to Existing Nationwide Permits

The Corps reissued 12 NWPs with notable revisions including to NWP 12, as well as removing the 300-linear-foot limit for losses of stream bed from 10 NWPs. The Corps also published a [summary table](#) of changes

between the 2017 NWP's and the 2021 NWP's.

The reissued NWP's are:

- NWP 12 (oil or natural gas pipeline activities)
- NWP 21 (surface coal mining activities); NWP 29 (residential developments)
- NWP 39 (commercial and institutional developments)
- NWP 40 (agricultural activities)
- NWP 42 (recreational facilities)
- NWP 43 (stormwater management facilities)
- NWP 44 (mining activities)
- NWP 48 (commercial shellfish mariculture activities)
- NWP 50 (underground coal mining activities); NWP 51 (land-based renewable energy generation facilities)
- NWP 52 (water-based renewable energy generation pilot projects)

Narrowing and Splitting of NWP 12

The Corps narrowed the scope of NWP 12 to apply only to oil or natural gas pipeline activities, splitting permitting for electric and telecommunications facilities and utility lines containing water and other substances into the new NWP 57 and 58, respectively. The Corps explained this split as "enhance[ing] regulatory certainty for utility line sectors that are not a frequent target for litigation because of the lower degree of concern about the potential direct and indirect environmental impacts of the substances those utility line sectors carry (e.g., electricity, potable water, wastewater)." NWP 12 has been the subject of litigation in recent years, including as part of challenges to the Keystone XL pipeline.

Other changes to NWP 12 include the removal of preconstruction notification (PCN) requirements for five out of the seven activities that required notice in the previous version and the addition of one new notice requirement. PCN is no longer required for (1) activities that involve mechanized land clearing; (2) utility lines in covered waters greater than 500 feet; (3) utility lines that run parallel to or along a stream bed; (4) permanent access roads constructed above grade in covered waters for a distance of more than 500 feet; and (5) permanent access roads in covered waters with impervious materials.

Permit holders must now provide notice only for: (1) projects for which a section 10 permit is required; (2) discharges that result in greater than 1/10 of an acre; and (3) the construction of new oil or gas pipelines that are greater than 250 miles in length. Permit holders for NWP 57 and 58 are only required to provide notice for the first two categories of projects.

Removal of 300-Linear-Foot Limit for Losses of Stream Bed

For 10 of the existing NWP's, the Corps also eliminated the requirement that a discharge must not result in the loss of more than 300 linear feet of streambed to qualify for NWP coverage. Eliminating this requirement shifts the quantification of losses for the purpose of NWP qualification towards the remaining 1/2-acre impact limitation. In the Corps' view, quantifying impacts based on acreage or square feet is more effective than using linear feet due to the varying widths of rivers and streams. The NWP's affected by this change are: 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

Proposals NOT Adopted

The Corps did not adopt in the final rule several other changes it had originally proposed. In particular, the final rule does not contain the proposed "NWP E" for discharges associated with construction, expansion, and maintenance of water reclamation and reuse facilities. The most recent NWP [summary table](#) released by the Corps clarifies (in the "Changes" column) which proposed modifications to 2017 NWPs it did not carry forward with this final rule. The Corps did not explain its decision not to finalize all of its proposed modifications, nor did it respond to comments on those items.

Potential Changes in the New Administration

Because the changes will not go into effect until after the Biden administration takes office, we may see further revisions to these new and reissued NWPs before their effective date. The Biden administration could subject the new NWPs to an initial regulatory freeze or grant formal requests for administrative reconsideration. In addition, the Biden administration will also oversee reissuance of the 40 existing NWPs that expire in 2022 and were not impacted by this final rule—that reissuance will be another opportunity to revisit the changes in this final rule.

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