



U.S. Army Corps of Engineers Finalizes Modifications to Nationwide Permit Program

January 15, 2021

On January 13, 2021, the U.S. Army Corps of Engineers' (ACOE) rule reissuing and modifying twelve existing Nationwide Permits (NWP) and issuing four new NWP was published in the Federal Register (Final Rule).^[1] ACOE issues NWP to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 (Section 10), where those activities are similar in nature and will result in no more than minimal adverse environmental impacts to aquatic resources separately or on a cumulative basis.

Most notably, the Final Rule splits the existing NWP 12 (previously referred to as "Utility Line Activities") into three separate NWP covering different types of utility lines: (1) the modified NWP 12 is limited to oil or natural gas pipeline activities; (2) the new NWP 57 authorizes electric utility line and telecommunications activities; and (3) the new NWP 58 authorizes utility line activities for water and other substances. The Final Rule provides that this change to existing NWP 12 is partly in response to recent litigation regarding oil and natural gas pipelines. Issuing separate new NWP for electric, telecommunication, and water lines is intended to provide a greater degree of certainty for the regulated communities that construct and maintain those types of utility lines in the event NWP 12 is invalidated or stayed by a federal court.^[2]

Pre-construction notification (PCN) requirements for NWP 12, 57, and 58 are streamlined in the Final Rule. PCN requirements for NWP 12 will be triggered where: (1) a Section 10 permit is required; (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States; or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline along the majority of the distance of the overall project length.^[3] PCN requirements for new NWP 57 and 58 will be triggered where: (1) a Section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States.

Another modification contained in the Final Rule involves existing NWP 51 (Land-Based Renewable Energy Generation Facilities) and NWP 52 (Water-Based Renewable Energy Generation Pilot Projects). The Final Rule removes the 300 linear foot limit for losses of stream bed and the provision authorizing the district engineer to waive the 300 linear foot limit for intermittent and ephemeral stream beds.^[4] The waiver provision is no longer necessary as a result of the Navigable Waters Protection Rule, which took effect in June 2020 and excluded ephemeral streams from jurisdiction under the Clean Water Act.

The sixteen NWP's in the Final Rule go into effect March 15, 2021 and expire five years from that date. Generally, activities authorized by 2017 NWP's remain authorized by those NWP's until March 18, 2022, as long as the activities continue to comply with the terms and conditions of the twelve existing NWP's issued in the Final Rule. Activities authorized by 2017 NWP's that no longer qualify for authorization under any of the twelve existing NWP's that are reissued in the Final Rule continue to be authorized by the 2017 NWP's for twelve months following the Final Rule's effective date, as long as those activities have commenced or are under contract to commence in reliance upon an NWP prior to the date on which the 2017 NWP expires.^[5]

If you have any questions concerning the changes to the Nationwide Permit program, please contact Brendan Mooney at bmooney@cullenllp.com or 516-357-3757, Angela Cascione at acascione@cullenllp.com or 516-296-9102, David Metcalfe at dmetcalfe@cullenllp.com or 516-357-3733, or Michael Lloyd at mlloyd@cullenllp.com or 518-788-9417.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnotes

[1] Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744 (January 13, 2021), available at: <https://www.federalregister.gov/documents/2021/01/13/2021-00102/reissuance-and-modification-of-nationwide-permits>.

[2] Id. at 2,778.

[3] Id. at 2,860. The prior NWP 12, issued in 2017, required a PCN "if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a Section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (*i.e.*, water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials." Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,986 (January 6, 2017).

[4] 86 Fed. Reg. at 2,863.

[5] Id. at 2,747.

Practices

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