

Army Corps Finalizes Certain Nationwide Permits Two Years Ahead of Schedule

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Introduction

On January 13, 2021, the U.S. Army Corps of Engineers (Corps) published a [final rule](#) modifying the Corps' Nationwide Permit (NWP) program (the Final Rule). Consistent with the Corps' draft rule, which was discussed in a [prior VNF Alert](#), the Final Rule will replace several of the 2017 NWPs and add several new NWPs. As explained below, however, the Final Rule is likely to be challenged in court, and it could be withdrawn or modified by the Corps or Congress after President-elect Biden takes office.

The Corps states that the Final Rule is supported by a [biological assessment](#) concluding that the rulemaking has “no effect” on listed species and designated critical habitat under the Endangered Species Act (ESA). Despite a recent federal district court decision holding that the Corps was required to undertake a national programmatic ESA Section 7 consultation when it modifies the NWP program, the Corps concluded that it was not required to support the Final Rule with such a programmatic consultation.

Background and Overview

NWPs are general permits issued by the Corps that are designed to streamline the agency's review of certain categories of activities in jurisdictional waters and wetlands that have no more than minimal individual and cumulative adverse environmental impacts. The ultimate goal of the NWP program is to establish standard terms and conditions for protection of jurisdictional waters and wetlands, while also allowing the activities to proceed with minimal delay and paperwork.

NWPs automatically expire every five years. The Corps usually reissues the NWPs on a five-year cycle. The current 2017 NWPs are not scheduled to expire until March 18, 2022, but the Final Rule would reissue and revise twelve of the NWPs (NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, and 52) and add four new NWPs (NWPs 55, 56, 57, 58) nearly two years ahead of schedule.

In its draft rule, the Corps proposed that in addition to reissuing certain NWPs in revised form, it would also reissue all “remaining NWPs,” apparently without modification, “so that all of the NWPs remain on the same 5-year approval cycle.” In its Final Rule, the Corps abandoned that approach, stating that it is not reissuing or modifying the forty 2017 NWPs unaffected by the Final Rule. With the Final Rule, the NWPs will be split into two separate five-year cycles for expiration and reissuance. For the 16 NWPs covered by the Final Rule, the Corps also reissued the general conditions and definitions, with some changes. As explained below, several of the changes relate to NWPs for various kinds of utility lines.

Changes to the NWP Program for Utility Lines

The Corps’ decision to reissue this set of NWPs early was driven in part by recent court decisions that partially enjoined the use of two NWPs—NWP 12 (covering utility line activities) and NWP 48 (covering commercial shellfish activities). The Corps’ approach to NWP 12 has broad implications for a wide variety of industries and stakeholders, from oil and gas to electric and telecommunications to water, sewer, and other utilities.

The Final Rule restructures the NWP program for utility lines by splitting existing NWP 12 into three separate NWPs covering different types of utility lines and associated facilities: (1) oil and gas, (2) electrical/telecommunication, and (3) water/sewer and other utilities. The segregation of oil and gas pipelines from other utility lines recognizes potential differences in how the different types of utility lines are constructed, maintained, and removed, and helps ensure that the activities authorized within each NWP are substantially similar in nature.

As the Corps acknowledges, this change also could help reduce regulatory uncertainty for electric utility line operators, telecommunications providers, water authorities, and others, whose activities might otherwise be caught up in litigation challenging NWPs for oil and gas pipelines. This benefit is particularly important as the need for electric infrastructure to move renewable energy is projected to continue to increase. While this alert highlights key terms of the revised NWP 12 and the two new utility line NWPs, practitioners should note that the Final Rule includes detailed activity-specific requirements and other measures that may warrant closer review for specific industries. The Final Rule also notes that additional best management practices may be imposed in the future, either as (i) regional conditions imposed on NWPs; or (ii) activity-specific conditions imposed on particular projects seeking verification of coverage under an NWP.

Under the new framework created by the Final Rule, utility line activities would be covered by the following three NWPs:

- **NWP 12 (Oil or Natural Gas Pipeline Activities) (formerly “Utility Line Activities”).** The revised version of NWP 12 covers only activities required for the construction, maintenance, repair, and removal of pipelines for the transportation of oil and natural gas (including products “derived from oil or natural gas,” such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt) and associated facilities (including pipeline substations and access roads in non-tidal waters). Two new NWPs (discussed below) cover (i) electric utility and telecommunication line activities (NWP 57); and

(ii) other utility line activities, such as water, sewer, and non-petrochemical industrial product pipelines (NWP 58).

To help simplify and expedite the NWP process, the Corps removed several existing Pre-Construction Notice (PCN) triggers under NWP 12, including mechanized land clearing in forested wetlands, paralleling streambeds in jurisdictional areas, and certain permanent access roads. Under the revised NWP 12, oil and gas pipeline permittees will be required to provide PCN only if the utility line activities: (1) require authorization under section 10 of the Rivers and Harbors Act of 1899; (2) will result in a loss of greater than 1/10-acre of waters of the United States; or (3) are associated with an overall project of more than 250 miles in length, where the project purpose is the installation of new pipeline (rather than repair or maintenance) along the majority of the distance of the overall project length. This third new threshold requires the permittee to identify in the PCN the locations and proposed impacts for all crossings of waters of the United States that require Corps authorization, including crossings that would not require PCN; it would not, however, require full PCNs for non-PCN crossings. According to the Corps, the purpose of this new threshold is “to provide information to district engineers to facilitate their review of the cumulative effects that may be caused by new long-distance oil or natural gas pipelines that have waterbody crossings that require NWP 12 authorization.”

As anticipated, these changes to the PCN thresholds for NWP 12 drew significant attention in the commenting process. In the Final Rule, the Corps made clear that division engineers can, through regional conditions, restore the removed PCN thresholds if they deem it necessary to ensure that adverse environmental effects are no more than minimal.

As with the 2017 NWP 12, in order to be authorized under the revised NWP, the activity may not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project. The Corps retained a note from the 2017 NWP 12 stating that, “[f]or oil or natural gas pipeline activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization.” The Corps declined a request to define the phrase “separate and distant,” leaving it for district engineers to determine on a case-by-case basis.

Also, as with the 2017 NWP 12, the revised NWP 12 generally prohibits any change in pre-construction contours and elevations, except for access roads, which must be constructed to minimize such changes and be properly bridged or culverted to maintain surface flows.

- **New NWP 57 (Electric Utility Line and Telecommunications Activities).** In conjunction with its limitation of NWP 12 to oil and gas pipeline activities, the Corps moved electric utility line and telecommunications activities, which had been covered by NWP 12 since 1977, to a new, separate NWP 57. The rule defines “electric utility line and telecommunication line” as “any cable, line, fiber optic line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.”

NWP 57 authorizes discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters of the United States, for a range of activities associated with the construction, maintenance, repair, and removal of electric utility and telecommunication lines, as well as associated facilities, including: substation facilities in non-

tidal waters; foundations for overhead electric utility line or telecommunication line towers, poles, and anchors; and access roads for the construction and maintenance of these lines and substations.

Temporary sidelaying of material during trench excavation is allowed, for up to 3 months (with limited extensions), provided that the location would not allow the material to be dispersed by currents or other forces. A trench excavation may not result in the draining of a water of the United States.

As with NWP 12, in order to be authorized under NWP 57, the activity may not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project. For electric utility line or telecommunications activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of authorization under the new NWP.

Retaining the basic structure of the 2017 NWP 12, the Corps includes the following limitations on the use of NWP 57:

- There must be no change in pre-construction contours, except for access roads, which are required to minimize changes and provide appropriate bridges/culverts for surface flows;
- Access roads and foundations may only be placed in non-tidal waters;
- Discharges into non-tidal wetlands adjacent to tidal waters for substation facilities or access roads are not permitted;
- Access roads must be the minimum width necessary and constructed to minimize adverse effects on waters of the United States and maintain surface flows; and
- Foundations must be the minimum size necessary and separate footings for each tower leg must be used where feasible

PCN will be required prior to commencing an activity under NWP 57 only if: (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. As noted above, the Corps eliminated other PCN thresholds under the 2017 NWP 12 that applied to electric utility lines, although they can be added back in as regional conditions. The Corps declined to include any additional PCN thresholds, including the new NWP 12 threshold for certain long-distance projects, on a nationwide basis.

- **New NWP 58 (Utility Line Activities for Water and Other Substances).** New NWP 58 covers activities required for the construction, maintenance, repair, and removal of utility lines that convey water and other substances that are not covered by either (i) NWP 12 (as now limited to oil or natural gas pipeline activities); or (ii) the new NWP 57 for electric utility line and telecommunications activities, and associated facilities including substations, above-ground utility line foundations, and access roads. Examples of activities that can be authorized under this NWP include utility lines that convey the following substances, whether

gaseous, liquid, liquescent, or slurry: potable water; irrigation water; stormwater; sewage/wastewater; non-petrochemical industrial products; and brine. The Corps clarified that regulated activities associated with pipelines that carry “products derived from oil or natural gas” should be authorized under NWP 12 rather than NWP 58, but that hydrogen, methanated hydrogen, carbon dioxide pipeline activities are properly addressed under NWP 58. The Corps also declined to include canals and ditches, which may be authorized under other NWPs.

This new NWP retains the basic structure of the 2017 version of NWP 12, and includes terms similar to those that apply to the new NWP 57, including the language prohibiting changes to pre-construction contours of waters of the United States and the revised PCN requirements.

The Corps’ draft rule had proposed a new NWP “E” for Water Reclamation and Reuse Facilities, but the Final Rule did not include that NWP.

Other Changes to the NWP Program

The Final Rule also changes several other existing NWPs and adds two other new NWPs:

- **NWP 21 (Surface Coal Mining Activities) and NWP 50 (Underground Coal Mining Activities).** The Corps removed the provision in NWP 21 and NWP 50 requiring the permittee to “receive a written authorization” from the Corps before commencing the activity. In its draft rule, the Corps explained that the change was proposed “to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.” In practice, many Corps districts do not recognize such “default authorizations,” but the 45-day clock is nevertheless an important milestone in the regulatory process. The Final Rule notes that despite this change, the Corps did not remove any PCN requirements from these NWPs.
- **Multiple NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52) (removal of 300-linear-foot limit on loss of stream bed).** One key change that applies to multiple NWPs is the Corps’ removal of the 300-linear-foot limit for losses of stream bed. The Corps removed the 300-foot-limit from the following NWPs:
 - 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 50 (Underground Coal Mining Activities);

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- NWP 51 (Land-Based Renewable Energy Generation Facilities); and
 - NWP 52 (Water-Based Renewable Energy Generation Pilot Projects).

Under the Final Rule, these NWPs would instead rely on the 1/2-acre limit and PCN requirements to ensure that activities authorized by these NWPs result in no more than minimal adverse environmental effects.

- **NWP 48 (Commercial Shellfish Mariculture Activities) (formerly “Commercial Shellfish Activities”).** The Corps made several key changes to NWP 48, including “removing the 1/2-acre limit for new commercial shellfish mariculture activities that directly affect submerged aquatic vegetation in the project area”; “substituting a PCN requirement for new and existing commercial shellfish mariculture activities that directly affect more than 1/2-acre of submerged aquatic vegetation”; removing the definition of “new commercial shellfish aquaculture operation,” such that the new 1/2-acre PCN threshold applies to both new and existing commercial shellfish mariculture activities; and adding language to the rule's preamble stating that “[f]ill material does not include the placement or release of living organisms, such as bivalve larvae and juvenile bivalves, into waters of the United States.” The Final Rule states that, “[i]f the operator will be conducting commercial shellfish mariculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area.”
- **New NWPs 55 and 56 (Seaweed Mariculture Activities and Finfish Mariculture Activities).** The Corps issued these new NWPs to “complement the existing NWP on shellfish mariculture” by authorizing “all three major sectors of mariculture in coastal waters: shellfish, seaweed, and finfish.” In its Final Rule, the Corps confirmed its position that the post-construction operation of these types of facilities does not constitute “work” under the Rivers and Harbors Act of 1899; and that, accordingly, these NWPs only authorize “structures,” not “work.”

The Corps’ draft rule had proposed modifications to NWP 3 (Maintenance Activities) and NWP 17 (Hydropower Projects), but the Final Rule did not modify those NWPs.

Changes to General Conditions

For the 16 NWPs included in the Final Rule, the Corps also reissued the nationwide “General Conditions” (GCs) and related definitions, with some changes. Those changes are summarized below.

For the forty remaining NWPs not covered by the final rule, “the general conditions and definitions published in the January 6, 2017, final rule (82 FR 1860) continue to apply.”

- **GC 13 (Temporary Structures and Fills).** The Corps clarified the scope of GC 13 to include temporary “structures” within the general requirement for timely removal. In the Final Rule, the Corps changed the text of this general condition to state that temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. The Final Rule recognized that “it might not be feasible to completely remove the structure after its use has been discontinued” and that “attempting to remove a temporary structure in its

entirety has the potential to cause more substantial adverse environmental effects than leaving a portion of the structure in place.”

- **GC 17 (Tribal Rights).** The Corps modified the text of this general condition to “eliminate any confusion about the applicable standards that apply when considering potential impacts to tribal treaty rights when consulting with tribes, and when determining the applicability of an NWP for a proposed activity.” The Final Rule states that, “[b]y using the word “impair” instead of ‘no more than minimal adverse effects on’ the general condition will be clearer that the NWPs do not change existing tribal trust duties of the Corps, or the rights of tribes.” This change focuses the Corps’ inquiry more squarely on the legal standard for impairment of reserved tribal rights and the specific types of rights most commonly raised in Corps proceedings: water rights, and treaty hunting and fishing rights.
- **GC 18 (Endangered Species).** The Corps has largely retained the existing GC 18 language addressing compliance with consultation requirements under ESA Section 7. However, the Corps changed to the terms of GC 18 to align with its [recent revisions to the ESA consultation regulations](#). As with those revisions, the changes to GC 18 focus on what is considered an “effect” of the proposed action that is reasonably certain to occur and therefore warrants analysis under Section 7.
- **GC 19 (Migratory Birds and Bald and Golden Eagles).** The Corps revised the text of GC 19 to require permittees to contact the USFWS to determine “what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles,” whereas the former language had required permittees to contact USFWS to determine “applicable measures to reduce impacts” to those birds. The Corps retained this change even though the Solicitor’s Opinion concluding that the Migratory Bird Treaty Act (MBTA) does not prohibit incidental take of migratory birds, which provides the legal basis for this change was [vacated](#) by a federal district court. The U.S. Fish and Wildlife Service (USFWS) [proposed](#) and [finalized](#) a rule that would codify that Solicitor’s Opinion as part of its regulations. That rule, like the Final Rule changing the NWP program, is likely to be frozen by the incoming Biden Administration and could be disapproved by Congress under the Congressional Review Act, as further explained below.
- **GC 23 (Mitigation).** In its draft rule, the Corps proposed adding a 1/10-acre threshold for triggering compensatory mitigation for stream impacts, similar to the 1/10-acre threshold for wetland impacts. In response to comments, the Corps changed the threshold in the Final Rule from 1/10-acre to 3/100-acre. The Corps calculated the 3/100 figure by “estimating the average width of stream fills (4 feet) authorized by the 2017 NWPs under the 10 NWPs and multiplying that figure by 300 linear feet.” The Corps described its establishment of the 3/100-acre threshold as “an administrative decision to facilitate consistent implementation across districts” that is “intended to be a conservative threshold.”
- **GC 25 (Water Quality) and GC 26 (Coastal Zone Management).** The Corps made minor clarifications to the text of GC 25 and GC 26. The change focus on what happens when a permittee cannot comply with all of the conditions of an existing water quality certification or coastal zone management consistency determination for a specific NWP. In such instances, the permittee must obtain a separate, individual water quality certification/coastal zone management consistency concurrence (or a waiver) for the proposed discharge in order to be authorized to proceed under the applicable NWP.

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- **GC 28 (Use of Multiple NWP).** The Corps changed the text of GC 28, which covers projects operating under multiple NWPs. In cases where only one NWP has a maximum acreage limit, that limit will apply for all authorized activities. In cases where each of the NWPs used has a different acreage limit, each acreage limitation must be met. The Corps changed the example provided in the rule, which previously referred to “a residential subdivision” under NWP 29, to instead refer to a “commercial development” under NWP 39.

“Grandfathering” of Rights under the 2017 NWPs

The Final Rule has no effect on forty NWPs that were not revised by the Final Rule, including commonly used NWPs such as NWP 3 (Maintenance), NWP 14 (Linear Projects), and NWP 18 (Minor Discharge), which are set to expire on March 18, 2022. Those NWPs continue to be subject to the provisions of the 2017 NWPs. Likewise, the Final Rule has no effect on verification letters issued by the Corps Districts confirming coverage for a specific activity under one of these forty NWPs.

As for verification letters issued for coverage under one of the twelve 2017 NWPs revised and reissued under the Final Rule, the validity of such letters depends on the expiration date established in that verification letter and whether the activity still qualifies under the revised and reissued NWP. The Corps states: “If a project proponent received an NWP verification under one of the 2017 NWPs, and the activity continues to be authorized by one of the existing NWPs that was reissued, that activity continues to be authorized by the 2017 NWP until it expires on March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter (see 33 CFR 330.6(a)(3)(ii)).”

Permittees should carefully review their verification letters to confirm the NWP on which it was issued, and the expiration date established in that letter. Permittees may also want to consult with the Corps’ Project Manager who issued the verification letter to confirm that the activity continues to be authorized under the revised and reissued NWP.”

The Corps goes on to state: “If the activity is not authorized by the reissued NWP, then the project proponent has 12 months to complete the authorized activity after the 16 final NWPs go into effect as long as the project proponent has commenced construction or is under contract to commence construction before the new expiration date for the twelve 2017 NWPs that are reissued in this final rule (see 33 CFR 330.6(b)).”

If the activity is no longer authorized under the reissued NWP and cannot be completed in the 12-month grandfather period, a new application for coverage under the reissued NWP may be necessary. The Corps notes that “project proponents can work with Corps districts to efficiently obtain NWP verifications under the reissued NWPs.” In particular, for utility related activities that were covered under the 2017 NWP 12, the Corps states: “The information previously submitted to Corps districts via PCNs can be used to provide NWP verifications for many of the activities that will be authorized by the new NWPs for different types of utility line activities that were previously authorized by NWP 12.”

Potential Challenges to the 2020 NWPs and Other Potential Barriers to their Use

Assuming no further action by the Corps or Congress, the Final Rule will take effect on March 15, 2021. When President-elect Biden assumes office on January 20, however, the new Administration

is likely to freeze the rule as part of a governmentwide regulatory freeze pending review, just as the Trump Administration [froze](#) the rule updating the 2017 NWP. If the Final Rule is frozen, it could be withdrawn or modified through the Corps' rulemaking processes before it takes effect.

In addition, the Final Rule could be subject to review by Congress under the Congressional Review Act (CRA), which allows Congress to "disapprove" such agency rules. Under the CRA, a subsequent rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law. As a practical matter, the programmatic, cyclical nature of the NWP program makes it unlikely candidate for CRA review, since both political parties have generally supported the NWP program for decades.

If the Final Rule is allowed to take effect as issued, it is very likely to be challenged in court. As noted above, the Corps' early reissuance of the NWPs is expressly intended to address pending litigation over two NWPs (NWP 12 and NWP 48), and the Final Rule itself is likely to result in new litigation. Some of the same arguments used against the 2017 NWPs, such as ESA compliance, could be raised again in litigation challenging the Final Rule; and the Final Rule may provide new grounds for a challenge. If successful, litigation could lead to an injunction prohibiting the use of the covered NWPs in whole or in part; remanding the Final Rule for further consideration of the terms of the NWPs, or to conduct further environmental reviews as to the NWPs' potential effects on protected resources. Alternatively, the Biden Administration could potentially enter into a settlement in which it agrees to withdraw the rule and conduct such reviews.

Once effective, any modified or new NWPs would remain subject to further restrictive terms and conditions imposed by Corps district offices, State agencies, and Indian Tribes to ensure that activities authorized by the NWPs result in no more than minimal individual and cumulative adverse environmental effects.