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U.S. ARMY CORPS OF ENGINEERS REISSUES KEY NATIONWIDE WATER PERMITS

by Thomas Jackson

On January 13, 2021, the U.S. Army Corps of Engineers finalized the process of making some significant revisions to its nationwide permit ("NWP") program when it published the changes in the Federal Register. The changes include the modification of a key nationwide permit, the reissuance of several other nationwide permits and revisions to some permit conditions and definitions. If not rescinded or modified, this set of reissued and revised NWPs could help facilitate the buildout of renewable energy facilities and other forms of infrastructure the Biden Administration is seeking to promote while continuing to minimize impacts on waters of the United States and the environment generally.

Background

The nationwide permit program is a critical part of the Corps' overall program for permitting activities that involve discharges of dredged or fill material to waters of U.S. (under Section 404 of the Clean Water Act) or work in waters that are navigable (under Section 10 of the Rivers and Harbors Act of 1899). Nationwide permits are general permits that are periodically issued by the Corps to authorize various categories of activities subject to regulation under Section 404 or Section 10. The Clean Water Act provides that the Corps can issue these general permits in those situations where the Corps has determined that the activities in a given category would have only minimal environmental impacts. The permits apply across the country and are subject to various conditions that are designed to ensure that environmental impacts from use of the NWPs remain minimal. Until the Corps' recent action, there were 54 of these nationwide permits applying to a wide variety of activities, ranging from repair of existing facilities to building boat ramps to construction of renewable energy projects.

The benefit of these nationwide permits is that they provide a streamlined way to obtain authorization for a discharge of dredged or fill material to a regulated water. In some instances, if a company determines that its project meets the conditions for a nationwide permit, it can simply proceed with the project. In other instances, the company must notify the Corps before proceeding, but the regulations are intended to ensure that in most cases the company will not have to wait more than 45 days before being able to proceed. This timeline is far shorter than the 12-18 months that companies often can expect to wait before receiving an individual Section 404 permit.

By statute the nationwide permits are only issued for a period of five years and therefore must periodically be reissued. The NWPs had last been reissued in 2017 and were due to be reissued

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again in 2022. However, in response to two Executive Orders issued by President Trump in 2017 requiring agencies to identify and eliminate regulations that burden production of domestic energy sources and that impose excessive costs, the Corps identified a number of NWP that warranted further examination and potential revision. The culmination of this effort was the recent publication of revisions to certain NWPs over a year before they were due to expire.

NWP 12 Gets a Makeover

Perhaps the most significant revision concerns NWP 12, which for years has applied to utility lines of various kinds, including pipelines for oil, gas, water, and wastewater, electrical transmission lines, and telecommunications cables, as long as the crossing of a particular stream or wetland satisfies the conditions associated with the permit (e.g., limits on the acreage of wetlands impacts allowed for a particular discharge authorized under NWP 12). This NWP has now effectively been split into three different NWPs. The new version of NWP 12 applies to discharges of dredged or fill material into waters of the U.S. (or work in navigable waters) in connection with the construction, maintenance, repair or removal of oil and gas pipelines. A new NWP – NWP 57 – covers discharges associated with the construction, maintenance or repair of electric utility lines and telecommunications lines. Finally, new NWP 58 authorizes discharges related to construction, maintenance, repair or removal of utility lines carrying water, wastewater or other substances that are not oil, natural gas or electricity. In each case, the NWP also authorizes discharges associated with ancillary facilities such as substations and access roads. In addition, the Corps revised the conditions under which those seeking to rely on these NWPs to authorize a discharge must provide notice to the Corps (a preconstruction notification) before proceeding with the activity.

According to the Corps, providing three separate NWPs for different kinds of utility lines will help further ensure that the NWPs comply with the statutory requirements that (i) the activities authorized under an NWP be similar in nature, and (ii) the activities authorized result in no more than minimal adverse effects on the environment both individually and cumulatively. The trifurcation of NWP 12 may also provide greater certainty for electric utilities and other entities that rely on NWP 12 – entities that will now rely on NWP 57 to build out transmission lines – given that court challenges to NWP 12 that have been filed by environmental groups in recent years have focused on the use of NWP 12 to authorize discharges associated with large oil and gas pipelines.

Other Changes to the NWP Program

The final NWP revisions include the reissuance of eleven other existing NWPs (including NWPs related to renewable energy projects, mining, residential development, and commercial/industrial development projects) and the issuance of two other new NWPs (both related to mariculture). In addition, the Corps has modified some of the conditions that apply to a number of the NWPs or in some cases all of the NWPs. Most notably, a number of the NWPs had been subject to a limit on impacts to stream beds of 300 linear feet. That limitation has now been removed, with stream bed impacts now being included in the overall limits on impacts to waters of the U.S. that apply to many NWPs. At the same time, the Corps has added a requirement to mitigate for impacts to stream beds that exceed 0.03 acres.

The ESA Consultation Issue

One issue that many in the regulated community had been monitoring was how the Corps would address the requirement of Section 7 of the Endangered Species Act that federal agencies ensure that their actions – including issuance of permits – do not jeopardize the continued existence of endangered or threatened species or adversely modify critical habitat and the related requirement

that agencies consult with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service if their actions may affect listed species or critical habitat. The Corps has historically taken the position that the issuance of an NWP in and of itself does not affect listed species or critical habitat because of procedures that are built into the NWP program that are designed to ensure that any Section 7 consultation that might be required is conducted on a project-specific basis. In April 2020, a federal district court in Montana rejected that argument in a case challenging the use of NWP 12 to authorize discharges associated with the construction of the Keystone XL pipeline. The court ordered the Corps to engage in Section 7 consultation with FWS and NMFS and limited the availability of NWP 12 for use in authorizing projects in the meantime. That decision is now on appeal.

Despite the uncertainty created by this court decision, in issuing the new NWPs and reissuing other NWPs the Corps has maintained its position that a Section 7 consultation is not required. The Corps prepared a biological assessment pursuant to ESA Section 7 regulations, which concluded that the issuance or reissuance of an NWP in and of itself would have no effect on endangered or threatened species because of the various processes and other protections built into the NWP program. Accordingly, the Corps did not engage in any consultation with FWS or NMFS before finalizing the new and reissued NWPs. It remains to be seen whether this issue will continue to create uncertainty for all the NWPs.

Looking Ahead

These changes to the NWP program are scheduled to go into effect on March 15, 2021. However, the revisions have been placed on a list of rules and other actions taken under the Trump Administration that the Biden Administration plans to review for consistency with the new Administration's policies. The Biden Administration could postpone the effective date of the changes and modify the program revisions before it allows them to go into effect. At the same time, the Corps will still need to reissue the 40 remaining NWPs before they expire in March 2022. While it is highly unlikely that the Administration would simply let the NWPs expire without replacing them (under those circumstances the entire Corps permitting program would grind to a halt and new infrastructure projects the Biden Administration wants to encourage would be stymied), the new Administration may use that as an occasion to institute its own set of modifications to the NWP program, which could include changes to the general conditions to address climate change and environmental justice, which are two of the Administration's top priorities.

In the meantime, those with projects that are already under construction or that are about to put shovels in the ground can proceed under the current NWPs. However, those with projects in the planning stages will need to keep an eye on what the Administration does with the new changes to the NWP program, and consider what it may do over the next year as the Corps prepares to reissue the rest of the NWPs. There is also the possibility of a court challenge to the new and reissued NWPs. As a result, the forecast for the NWP landscape remains partly cloudy.