



Corps Reissues Certain Nationwide Permits with Plan to Reevaluate All NWP's in 2022

On December 27, 2021, the U.S. Army Corps of Engineers (the Corps) published a final rule reissuing 40 existing Nationwide Permits (NWP's) and issuing one new NWP (Water Reclamation and Reuse Facilities) ([86 Fed. Reg. 73522](#)). NWP's authorize certain work in streams, wetlands, and other Waters of the United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, when those activities will result in no more than minimal individual and cumulative adverse environmental effects. This final rule rounds out NWP rulemaking activities that began in September 2020, when the Corps, under the Trump administration, proposed to reissue the 52 existing NWP's and issue five new NWP's. Additional NWP revisions are anticipated in 2022.

As background, in January 2021, the Corps modified and reissued 12 of the existing NWP's and issued four of the five proposed NWP's. The January 2021 final rule also revised and reissued the NWP general conditions and definitions. The focus of that rule was largely to revise and reissue NWP's that relate to the energy industry, including the division of existing NWP 12 (Utility Line Activities) into three NWP's, depending on the type of utility line: oil and natural gas pipeline activities (NWP 12), electric utilities and telecommunications (NWP 57), and utility lines for water and other substances (NWP 58).

This December 2021 rule reissues the remaining 40 existing NWP's and issues the one remaining new NWP (NWP 59). The reissuance makes relatively minor changes to several NWP's, including NWP 13 (Bank Stabilization), NWP 27 (Aquatic Habitat Restoration, Enhancement and Establishment Activities), NWP 36 (Boat Ramps), NWP 41 (Reshaping Existing Drainage and Irrigation Ditches), and NWP 53 (Removal of Low-Head Dams). It also states that the NWP's will be subject to the general conditions and definitions included in the January 2021 rule. Previously, these NWP's had been subject to the general conditions and definitions in effect when these NWP's were reissued in 2017.

The rule does not address the 16 NWP's that were finalized in January 2021. The NWP's in this rule replace the 2017 versions of those permits and complete the rulemaking process to reissue the NWP's, which began under President Trump's administration. These NWP's go into effect on February 25, 2022 and will expire on March 14, 2026, consistent with the expiration date of the NWP's that were reissued in January 2021.

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CONTACT

LISA M. BRUDERLY
lbruderly@babstcalland.com
412.394.6495

EVAN M. BAYLOR
ebaylor@babstcalland.com
202.853.3452

Pittsburgh, PA
Two Gateway Center
603 Stanwix Street
Sixth Floor
Pittsburgh, PA 15222
412.394.5400

Washington, DC
Suite 700
505 9th Street NW
Washington, DC 20004
202.853.3455

BABSTCALLAND.COM

More Changes Expected in 2022

The Biden administration intends to reevaluate the NWP's later this year. According to the Fall 2021 [Unified Agenda](#) of Regulatory Actions, the Corps is planning a comprehensive rulemaking in 2022 to re-examine all NWP's issued in 2021 "to identify NWP's for reissuance, modification, or issuance, in addition to identifying potential revisions to general conditions and definitions in order to be consistent with Administration policies and priorities." Changes to the NWP program are expected to undo Trump administration revisions, which, arguably expanded the permits' applicability, while addressing climate change and environmental justice concerns.

The Corps stated that it is considering whether additional steps should be taken to ensure the NWP program aligns with the Biden administration's policies and priorities moving forward, including [Executive Order 13990](#), "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." The Order directs agencies to review and act to address regulations from the previous administration that conflict with national objections to improve public health and the environment. Further, the Order directs agencies to prioritize environmental justice. According to Assistant Secretary of the Army for Civil Works, Michael L. Connor, "The [Corps] will also be reviewing the overall NWP program to ensure consistency with the administration's policies, including the need to engage affected communities."

The potential revisions to the NWP's, and the impact of these revisions, will undoubtedly be affected by revisions to the definition of Waters of the United States (WOTUS), which are also expected in 2022. The Corps and USEPA published a proposed revision to the WOTUS definition on December 7, 2021 (Rule 1), with the public comment period closing on February 7, 2022. This proposed definition is similar to the pre-2015 definition of WOTUS, with updates to reflect relevant Supreme Court decisions (e.g., *Rapanos*) that occurred in the early 2000s. The Biden administration intends additional revisions to the WOTUS definition in a second rulemaking (Rule 2). As stated in the Fall 2021 Unified Agenda, "[t]his second rule proposes to include revisions reflecting on additional stakeholder engagement and implementation considerations, scientific developments, and environmental justice values. This effort will also be informed by the experience of implementing the pre-2015 rule, the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule."

Babst Calland will continue to track developments and changes to the NWP program. If you have any questions about these developments, please contact Lisa Bruderly at 412.394.6495 or lbruderly@babstcalland.com or Evan Baylor at 202.853.3461 or ebaylor@babstcalland.com.

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