



## Corps Seeks Comments on Proposed Reinstatement of Suspended NWP's in Pennsylvania

On May 12, 2021, the Baltimore, Philadelphia and Pittsburgh Districts of the U.S. Army Corps of Engineers (the Corps) jointly issued a 15-day Public Notice (SPN 21-26), requesting comments on whether to reinstate certain 2017 and 2021 Nationwide Permits (NWP's) that are suspended in parts of Pennsylvania. The comment period closes on May 27, 2021.

The reinstatement has been proposed in case the new Pennsylvania State Programmatic General Permit (PASPGP-6) is not finalized and issued prior to the expiration of Pennsylvania's current state programmatic general permit (PASPGP-5) on June 30, 2021. At present, if PASPGP-6 is not issued before July 1, 2021, most projects in Pennsylvania impacting federally regulated waters would be required to obtain individual Section 404 permits. Obtaining an individual permit is typically a more lengthy and complicated process than obtaining coverage under a programmatic general permit or NWP.

### State Programmatic General Permit

The PASPGP is the mechanism that the Pennsylvania Department of Environmental Protection (PADEP) and the Corps rely upon to permit most projects in Pennsylvania that impact federally regulated waters, but do not require an individual Section 404 permit. PASPGP-6 allows applicants to obtain both federal Section 404 permits and state water obstruction and encroachment permits for projects impacting federal and state-regulated waters.

PASPGP-6 has not yet been finalized. The draft PASPGP-6 was published for public comment on September 4, 2020 (SPN 20-57), and the public comment period closed on October 4, 2020. On February 12, 2021, PADEP issued a conditional state water quality certification (SWQC) under Section 401 of the Clean Water Act, which certifies that activities authorized by PASPGP-6 would comply with the Commonwealth's water quality standards if the applicant complies with the following conditions and "constructs, operates and maintains the project in compliance with the terms and conditions of State permits obtained to meet these SWQC conditions:"

1. Prior to beginning any activity authorized by the Corps under PASPGP-6, the applicant must obtain all necessary environmental permits or approvals and submit PADEP environmental assessments and other information necessary to obtain the permits and approvals, as required under state law.
2. Fill material may not contain any wastes as defined in the Solid Waste Management Act.
3. Applicants and projects must obtain all state permits and/or approvals necessary to ensure that the project meets the State's applicable water quality standards, including a project-specific SWQC.

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### **CONTACT**

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## Proposed NWP Reinstatement

With the availability of the state programmatic general permit, many NWP's have typically been suspended in Pennsylvania, except for projects in certain Section 10 waters and, for certain NWP's, when the regulated activity or indirect impact extends across state boundaries. On January 6, 2017, the Corps reissued 54 NWP's, which were effective March 19, 2017. Of these 54 NWP's, 31 NWP's were suspended in Pennsylvania to eliminate redundancy with the PASPGP permitting mechanism or due to lack of applicability. If PASPGP-6 is not issued before PASPGP-5 expires, the Corps is proposing to reinstate 24 of the NWP's suspended in 2017, including NWP7 (Outfall Structures and Associated Intake Structures), NWP14 (Linear Transportation Projects) and NWP18 (Minor Discharges).

On January 13, 2021, the Corps reissued 12 existing NWP's and issued four new NWP's. The 16 reissued/issued NWP's were effective on March 15, 2021. Of those 16 NWP's, nine were suspended in Pennsylvania, except in "areas within Pittsburgh District's area of responsibility in the Commonwealth of Pennsylvania." If PASPGP-6 is not issued before PASPGP-5 expires, the Corps' proposal would reinstate the nine suspended 2021 NWP's, including NWP12 (Oil and Natural Gas Pipelines) and NWP39 (Commercial and Institutional Developments) for the entire state.

If any or all of the NWP's are reinstated, those NWP's would be subject to the applicable 2017 or 2021 regional conditions for Pennsylvania.

## Conclusion

If the PASPGP-6 is not finalized before PASPGP-5 expires (i.e., by June 30, 2021), the reinstatement of certain, currently suspended NWP's will provide flexibility to permit a project impacting regulated waters, without pursuing an often lengthy and complicated individual Section 404 permit. However, the prospective permittee must ensure that the project meets the applicability criteria, general conditions and regional conditions of the selected NWP. These criteria are not the same as under the PASPGP-5, and in some instances, a portion of the project may need to be redesigned to meet NWP requirements.

Should you have questions regarding Clean Water Act Section 404 permitting and how these reinstated Nationwide Permits (NWP's) may affect your operations and/or plans for development, please contact Lisa M. Bruderly at 724-910-1117 or [lbruderly@babstcalland.com](mailto:lbruderly@babstcalland.com).

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