



U.S. Army Corps of Engineers Proposes to Reissue Nationwide Permits and Split NWP 12

The U.S. Army Corps of Engineers (Corps) has recently pre-published a [proposed rule](#) to issue and modify its Nationwide Permits (NWP) in a move aimed at clarifying the NWP and reducing the regulatory burden associated with certain authorized activities. NWP are issued pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. They authorize an array of activities that result in a discharge of dredged and fill material into waters of the United States, provided that the activities meet the threshold criteria and fulfill the general and specific conditions of the particular NWP.

Scope of Proposed Rule

The Corps typically reissues the NWP approximately every five years, with the last publication in 2017, when 52 NWP were issued. The Corps is proposing to reissue the permits after only three years to incorporate modifications identified in response to [Executive Order 13783](#), which directed federal agencies to review existing regulations that “potentially burden the development or use of domestically produced energy resources.” Nine NWP¹ were identified as result of this review and are modified in the proposed rule. Modifications generally pertain to changes in thresholds for requiring pre-construction notifications or Corps approvals, elimination of linear foot thresholds for certain NWP, and expansion of criteria for using certain NWP.

In addition, five new NWP are being proposed.² The remainder of the existing NWP are being reissued, without change, to keep all permits on the same five-year cycle.

Proposed Modifications to NWP 12

Of particular interest to the oil and gas industry and utilities is the Corps’ proposal to split NWP 12 (Utility Line Activities) into three NWP, depending on the type of utility line: oil and gas (NWP 12), electric utilities and telecommunications (Proposed NWP C) and water, sewage and other substances (Proposed NWP D). NWP 12 currently permits eligible discharges of dredged or fill material in connection with the construction, maintenance, repair and removal of utility lines, including oil and gas pipelines, water and sewer pipes, and electric, internet, and cable lines.

If adopted as proposed, NWP 12 would only apply to activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States, provided the activity does not

¹ Revised NWP include, but are not limited to, the following: NWP 3 (Maintenance); NWP 12 (Utility Line Activities); NWP 17 (Hydropower Projects); NWP 21 (Surface Coal Mining Activities); NWP 39 (Commercial and Institutional Developments); NWP 49 (Coal Remining Activities); NWP 50 (Coal Remining Activities); NWP 51 (Land-based Renewable Energy Generation Projects); and NWP 52 (Water-Based Renewable Energy Generation Pilot Projects).

² NWP A (Seaweed Mariculture Activities); NWP B (Finfish Mariculture Activities); NWP C (Electric Utility Line and Telecommunications Activities); NWP D (Utility Line Activities for Water and Other Substances); and NWP E (Water Reclamation and Reuse Facilities).

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result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

While the proposed rule does not modify the maximum allowable amount of disturbance to waters of the United States, the proposal would narrow the criteria for requiring a NWP 12 pre-construction notification (PCN) to the Corps to the following three circumstances: (1) a Section 10 permit is required (existing criteria), (2) the discharge will result in the loss of greater than 1/10 of an acre of waters of the United States (existing criteria) or (3) the pipeline activity is associated with an overall project that is greater than 250 miles in length and has the purpose to install new pipeline along the majority of the overall length (new criteria).

The Current Status of Nationwide Permit 12

Oil and gas pipeline permitting under NWP 12 has come under significant scrutiny since mid-April, when, as described in a prior [Alert](#), a Montana district court judge, hearing a challenge to the Keystone XL Pipeline, appeared to vacate NWP 12 in its entirety across the United States and later clarified that the intent to vacate NWP 12 was intended to apply to the construction of only new oil and gas pipelines. Both of these decisions were based on the judge's determination that the Corps failed to comply with the Endangered Species Act (ESA) when NWP 12 was last issued in 2017. On July 6th, the Supreme Court limited the scope of the district court's *vacatur* solely to the construction of the Keystone XL Pipeline pending an appeal of the district court's decision to the Ninth Circuit. This decision allowed pipeline developers to return to utilizing NWP 12 for new oil and gas pipeline projects throughout the United States while the litigation is ongoing, or until the Corps addresses the ESA issues identified by the district court. The Corp's proposed modifications to NWP 12 do not address the ESA concerns that are at issue in the Keystone XL Pipeline challenge, and are therefore not expected to have an impact on the ongoing litigation.

Next Steps

The proposed NWP's are expected to be published in the *Federal Register* in a few weeks. The Corps has invited comment on these proposed modifications and specifically has asked for suggestions for national standards or best management practices for oil and natural gas pipeline activities that would be appropriate to add to NWP 12. Comments are due 60 days from publication of the proposed rule in the *Federal Register*.

We note that, in addition to proposed revisions to the NWP's that would be imposed for regulated activities across the United States, the Corps' Districts may still impose specific region/state conditions and states may impose 401 Water Quality Certification special conditions that could require a PCN or other more stringent requirements.

Babst Calland's [environmental attorneys](#) have substantial experience with Clean Water Act Section 404/ River and Harbors Act Section 10 permitting. If you have questions about this proposed rule or Section 404 permitting in general, please contact Lisa Bruderly at (724) 910-1117 or lbruderly@babstcalland.com, or Ben Clapp at (202) 853-3455 or bclapp@babstcalland.com.

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