

# Client Alert

Latham & Watkins

Environmental, Land & Resources Department

## Compliance with the Clean Water Act: 2012 Modifications and Updates to US Army Corps Nationwide Permits

Recently, the US Army Corps of Engineers (Army Corps) reissued 48 of its 49 existing nationwide permits (NWP) and also announced two new NWPs applicable to land- and water-based renewable energy development projects.<sup>1</sup> The Army Corps issued the NWPs, which became effective on March 19, 2012, pursuant to Section 404 of the Clean Water Act, which governs discharges into "waters of the United States," including wetlands (jurisdictional waters).<sup>2</sup> The Army Corps announcement results in important changes that could impact already-approved projects or projects currently under review by federal and state agencies.

Under the Clean Water Act, the Army Corps requires a Section 404 permit when development activities place dredge or fill materials into jurisdictional waters, such as filling a wetland area for project construction or filling in a streambed to build an access road to a wind turbine. To satisfy Section 404, developers must seek either an individual permit (IP) or, if the project meets certain criteria, authorization under an NWP or other general permit.

### The Nationwide Permit System

Unlike IPs, NWPs are programmatic permits designed to expedite approval of specific types of activities with impacts generally of less than one-half acre (this number can vary depending upon the NWP at issue). The Army Corps has developed various NWPs to regulate particular categories of projects that the Army Corps previously has determined under the National Environmental Policy Act (NEPA) to have minimal impacts. To be eligible for an NWP, a project must fit into a category for which an NWP already exists, such as residential developments or agricultural activities. Since NEPA was satisfied when the Army Corps adopted an NWP, projects that meet NWP criterion do not have to undergo case-by-case NEPA review. An applicant need only seek authorization under the pre-existing NWP for its development activities, which generally is less expensive and time-consuming than obtaining an IP.

Nationwide permits can be granted for no more than five years and automatically expire if they are not modified or reissued within five years of their effective date.<sup>3</sup> The Army Corps last issued NWPs on March 12, 2007. On February 16, 2011, the

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Army Corps published a proposal in the Federal Register to reissue 48 existing NWPs and to issue two new NWPs and general conditions, triggering a public comment period on the proposal.<sup>4</sup>

## **The New NWPs**

The Final Rule issuing the new NWPs includes provisions that are likely to affect both current and future projects. Key aspects of the Final Rule include:

### ***Grandfather Provision***

The Army Corps provided a grandfather clause applicable to some projects that are currently authorized under the existing NWPs. Activities that are authorized under the 2007 NWPs that commenced by March 18, 2012, will have until March 18, 2013, to complete the activity under the terms and conditions of the prior NWP. Activities that will not be complete by March 18, 2013, must seek authorization under the new NWPs. In light of this provision, it is important that projects with authorizations under the 2007 NWPs either: (1) complete work prior to March 18, 2013; or (2) work with the Army Corps promptly to ensure timely issuance of new authorizations.

### ***Revised Definition of "Single and Complete Project"***

The Army Corps clarified what constitutes a single and complete project for purposes of calculating the relevant loss of waters of the United States by providing two separate definitions of "single and complete project" in the context of linear and non-linear projects.<sup>5</sup> Each "single and complete project" is reviewed separately to determine whether it meets the requirements for an NWP.

For linear projects (projects constructed for the purpose of moving goods or services from A to B, *i.e.* as electricity transmission lines), the definition of a single and complete project has been clarified to mean the portion of the project that includes all crossings of a single waterbody at a specific location. Each single and complete linear project need not have independent utility within the overall utility line. As such, there may be many "single and complete projects" along the length of a linear project from its point of origin to its terminal point, so long as each crossing is separate and distant. In contrast, a single and complete non-linear project is generally defined as the entire project. For a portion of a non-linear project to be considered a separate single and complete project, it must have independent utility from other portions of the non-linear project. In other words, single and complete non-linear projects typically cannot be broken into smaller parts in an effort to comply with the limits on NWP authorization.

Although each "single and complete" project along the length of a linear project will be considered separately for purposes of the NWPs, the modified definition clarifies that Army Corps district engineers will consider the cumulative effects of all project crossings on a regional basis.<sup>6</sup> The Final Rule provides that the Army Corps may conduct cumulative effects analysis on a watershed basis, or by using a different geographic area, such as an ecosystem.<sup>7</sup>

Most commenters support the change and agree that the independent utility test does not apply to single and complete linear projects. Even in the absence of the new clarification, the Army Corps generally has distinguished between linear and non-linear projects in practice, applying the independent utility test only to non-linear projects. The Army Corps believes that the new definitions are consistent with NWP regulations and does not expect that the clarified definitions will have an effect on current practices on the ground.<sup>8</sup>

### ***General Condition 19***

To qualify for an NWP, an applicant must comply with all applicable general conditions imposed by the Army Corps, as well as any regional or project-specific conditions imposed by the division or district engineer. The Army Corps has included a new General Condition in the Final Rule, providing that a developer is responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Treaty Act. Developers are responsible for applying for and obtaining any appropriate permit from the US Fish and Wildlife Service (including for "take" if available) in order to ensure compliance.<sup>9</sup>

Based on the Final Rule and comments, the general condition appears to only clarify that it is the responsibility of the permittee, *not* the Army Corps, to obtain the necessary permits. It does not appear to require such permits as a pre-requisite to the issuance of the authorization. It will be important to monitor how this general condition is ultimately implemented.

### ***NWPs For Renewable Energy***

The Army Corps issued two new permits (NWPs 51 and 52) authorizing certain categories of renewable energy generation projects, reflecting the Army Corps' belief that the construction, expansion or modification of these facilities has minimal impacts on the aquatic environment, individually and cumulatively.<sup>10</sup>

NWP 51 applies to the construction, expansion or modification of land-based renewable energy generation projects, including solar, wind, biomass<sup>11</sup> and geothermal projects.<sup>12</sup> All activities authorized under NWP 51 require that a pre-construction notification be filed to allow district engineers to evaluate the activities and add any necessary conditions to ensure minimal individual and cumulative effects on the aquatic environment.<sup>13</sup>

Previously, only hydropower projects had a specially-developed nationwide permit (NWP 17). However, renewable energy projects with very minor impacts may qualify for other NWPs, such as the "Minor Discharge" category of NWP 18 or the "Minor Dredging" category of NWP 19. Utility lines transporting electricity from a renewable energy project may be separately authorized under NWP 12, Utility Line Activities. The Army Corps emphasizes that authorizations for land-based renewable energy projects may still be sought under other NWPs.<sup>14</sup>

NWP 52 applies to water-based wind and hydrokinetic renewable energy pilot projects, which are defined as experimental projects where the renewable energy generation units will be monitored to collect information on their performance and environmental effects.<sup>15</sup> For each project, no more than 10 generation units (such as wind turbines or hydrokinetic devices) are authorized in an effort to ensure that the activities result in minimal adverse effects.<sup>16</sup> As with NWP 51, pre-construction notification is required. At the pilot project's completion, all structures must be removed, unless they become authorized separately by the Army Corps.

NWPs 51 and 52 place certain eligibility limits on project activities. For instance, dredge and fill in non-tidal waters must be limited to one-half acre, including 300 linear feet of stream beds.<sup>17</sup> Projects also must meet all General Conditions set forth by the Army Corps, as well as any regional or case-specific conditions imposed by the division engineer or district engineer. The NWPs also contain certain exceptions. For instance, for intermittent and ephemeral stream beds, an exception to the 300-foot limit exists if the district engineer determines that "the discharge will result in minimal adverse effects." In all cases, the district engineer retains the discretionary authority to require the applicant to apply for an IP if the project raises environmental or public interest concerns.<sup>18</sup>

### ***Department of Defense Notification Requirements***

Commenters expressed concern that that new NWPs 51 and 52 and existing NWP 12 could be used to authorize overhead activities that have the potential to interfere with the Department of Defense's long range surveillance, homeland defense, testing, and training missions.<sup>19</sup> Thus, the Army Corps has added a new notice requirement to NWPs 12, 51, and 52.<sup>20</sup> For any activity that involves the construction of a wind turbine, solar tower, or overhead transmission line, a copy of the pre-construction notification and NWP verification<sup>21</sup> will be provided by the Army Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

### **Implications for Industry**

The Army Corps' modifications to the NWPs have a heightened potential to impact renewable energy and energy infrastructure industry clients who have or are considering applying for Section 404 coverage for their projects because they will impact how the Army Corps determines which projects are eligible for NWP authorization. Latham & Watkins Environment, Land and Resources Department attorneys will be tracking the Army Corps' implementation of the new NWPs and are available to advise clients on the potential impacts to particular projects.

#### **Endnotes**

<sup>1</sup> 77 Fed. Reg. 10184 (Feb. 21, 2012).

<sup>2</sup> 33 U.S.C. § 1344.

<sup>3</sup> 33 C.F.R. § 330.6(b); 33 U.S.C. § 1344(e)(2).

<sup>4</sup> 76 Fed. Reg. 9174 (Feb. 16, 2011).

<sup>5</sup> 77 Fed. Reg. at 10263.

<sup>6</sup> 77 Fed. Reg. at 10263-64.

<sup>7</sup> 77 Fed. Reg. at 10264.

<sup>8</sup> 77 Fed. Reg. at 10263.

<sup>9</sup> The Army Corps also notes that Draft Land-based Wind Turbine Guidelines released by the US Fish and Wildlife Service could apply to some projects seeking NWP authorization; however, it recognizes that the Draft Guidelines are voluntary and the Army Corps lacks the authority to require applicants to comply with the Draft Guidelines.

<sup>10</sup> 77 Fed. Reg. at 10236.

<sup>11</sup> Land clearing for the harvesting, planting, and replanting of trees that provide fuel for biomass energy facilities are not authorized by this NWP. See 77 Fed. Reg. at 10236.

<sup>12</sup> 77 Fed. Reg. at 10281.

<sup>13</sup> 77 Fed. Reg. at 10236.

<sup>14</sup> *Id.* If more than one NWP is used to authorize a land-based renewable energy generation project, the project must comply with General Condition 28, use of multiple nationwide permits, which provides that the loss of jurisdictional waters cannot exceed the acreage limit of the NWP with the highest specified limit. 77 Fed. Reg. at 10237.

<sup>15</sup> 77 Fed. Reg. at 10281-82.

<sup>16</sup> 77 Fed. Reg. at 10239.

<sup>17</sup> For NWP 52, the 300 linear foot limit does not apply to the oceans, Great Lakes, or large navigable rivers. See 77 Fed. Reg. at 10240.

<sup>18</sup> 33 C.F.R. § 330.1(d) and § 330.4(d).

<sup>19</sup> 77 Fed. Reg. at 10241.

<sup>20</sup> 77 Fed. Reg. at 10272, 10281, 10282.

<sup>21</sup> Nationwide permittees may, and in some cases must, request from confirmation from a district engineer that an activity complies with the terms and conditions of an NWP. A verification is valid for a specific period of time, but generally no more than two years. 33 C.F.R. § 330.6(a).

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