

U.S. Army Corps Issues 2017 Clean Water Act Nationwide Permits

Modifications and updates to the general permits will impact both new and ongoing projects, including in energy, mining, transportation, and construction sectors.

Key Points:

- Nationwide Permits 12 and 14, which deal with linear utility and transportation projects, have received particular attention.
- Non-Governmental Organizations are likely to challenge some of the new and revised Nationwide Permits in court.

On March 19, 2017, new nationwide permits (NWP)s¹ issued by the U.S. Army Corps of Engineers (Corps) pursuant to Section 404(e) of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 went into effect. The 2017 NWP)s, which replace the Corps' 2012 NWP)s and will be in effect for the next five years, provide a streamlined general permit process governing discharges of dredged or fill material from covered activities into jurisdictional "waters of the United States," including wetlands.² The 54 NWP)s cover a broad range of activities, including oil and gas pipelines, transmission lines, linear transportation projects, mining activities, and residential development. Tens of thousands of new projects are authorized under the NWP)s every year. The 2017 NWP)s establish two new permits (for living shorelines and removal of low-head dams), and make important changes to a number of the preexisting permits as well as the General Conditions (GCs) applicable to all NWP)s.

This *Client Alert* discusses some of the key changes in the 2017 NWP)s, how those affect industry, the salient issues raised in the process of their development, and prospects for litigation challenging the NWP)s. We give particular emphasis to key issues relating to NWP) 12 (which governs linear utility projects, including oil and gas pipelines and transmission lines), NWP) 14 (linear transportation projects), NWP) 21 (surface coal mining), and NWP)s 51 and 52 (renewable energy projects). In addition, we highlight issues that may arise in future litigation. Environmental Non-Governmental Organizations (NGOs) unsuccessfully challenged several of the Corps' 2012 NWP)s³ and are likely to challenge many of the 2017 NWP)s as well. NGOs submitted extensive adverse comments on the proposed 2017 NWP)s, raising a spectrum of issues, including claims that the Army Corps' issuance of the NWP)s violates the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

Successful defense and effective implementation of the NWP)s will be of critical importance to companies in a range of industries, including oil and gas, electric power, renewable energy, transportation infrastructure, and residential development. Latham & Watkins' Environment, Land and Resources attorneys participated directly and intensively in the development of the new 2017 NWP)s, and have

substantial experience in securing and defending NWP authorizations for new projects. The Latham team stands ready to advise clients on the new permits and how they may affect current and future projects.

Overview of the 2017 NWPs, Including NEPA and ESA Issues

Section 404 of the CWA requires a permit when development activities place dredged or fill materials into jurisdictional waters of the United States, such as filling a wetland area for project construction. To satisfy Section 404, developers must seek either an individual permit or, if the project meets certain criteria, authorization under an NWP or other general permit. CWA Section 404(e) authorizes the Corps to establish general permits and requires that the activities in each general permit be similar in nature, cause only minimal adverse environmental effects when performed separately, and cause only minimal cumulative adverse effects on the environment.⁴ Section 10 of the Rivers and Harbors Act of 1899 requires a Corps permit for regulated activities conducted in or over navigable waters of the United States, or affecting the course, location, condition, or capacity of such waters.⁵

The NWPs are designed to simplify and expedite approval of specific categories of activities.⁶ Each NWP describes covered activities and prescribes requirements. The NWPs are available only for activities below a defined impact threshold — typically ranging from less than one-tenth of an acre and up to five acres of disturbance (with some permits also establishing linear footage limits to allowable impacts to stream beds⁷), depending upon the category of NWP at issue.⁸ As explained below, the Corps has authority to waive these impact thresholds for certain permits. In addition, the Corps has issued GCs applicable to all of the NWPs — including obligations related to the ESA, National Historic Preservation Act (NHPA), tribal consultation, preconstruction notification requirements, and compensatory mitigation.

As part of the 2017 NWPs, the Corps issued two new NWPs: NWP 53 authorizes the removal of low-head dams to restore rivers and streams, and for public safety,⁹ and NWP 54 authorizes the construction and maintenance of living shorelines to protect coastal property from erosion while providing aquatic habitat and water quality benefits.¹⁰ The Corps made changes to 27 preexisting NWPs, leaving the remaining 23 permits unchanged from 2012. The Corps also made a number of important changes to GCs, several of which are discussed below.

As required by CWA Section 404(e), the NWPs are effective for no more than five years and must be reissued in order to provide coverage beyond their expiration date.¹¹ The Corps last issued NWPs on March 19, 2012, and those permits expired on March 18, 2017. The proposed new and amended permits were first published in the Federal Register on June 1, 2016.¹² On January 6, 2017, the Corps published the final rule issuing and reissuing the NWPs, subject to certain modifications (Final Rule).¹³

In the course of adopting the new NWPs, the Corps conducted an environmental assessment of each of the NWPs under NEPA. For each of the 2017 NWPs, the Corps made a finding of no significant impact, such that an environmental impact statement is not required under NEPA.¹⁴ In addition, when the Corps issues or reissues an NWP, the Corps local divisions are required to prepare supplemental decision documents to provide regional analyses of the environmental effects of those NWPs on that district.¹⁵ Notably, based on these supplemental decision documents, the division engineers have the authority to modify or revoke the NWPs in their regions. Divisions have also prepared regional analyses of the effects specific to their district, and have issued regional conditions for activities within individual districts.¹⁶

Further, in adopting the NWPs, the Corps concluded that the NWPs have “no effect” on threatened or endangered species — such that the Corps is not required to consult with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) — because any effects on these species (and any potential consultation requirements) will be addressed in the use of the NWPs by individual projects.¹⁷

In comments on the proposed NWP, environmental NGOs assert that the Corps has failed to take the “hard look” at cumulative environmental impacts required by NEPA,¹⁸ or consult with the FWS and NMFS on issuance of the NWPs as required by the ESA.¹⁹ Environmental groups have successfully challenged NWPs on NEPA grounds in the past. In *Kentucky Riverkeeper, Inc. v. Rowlette*, environmental groups claimed that the Corps violated the CWA, NEPA, and the Administrative Procedure Act by issuing two coal-mining waste discharge permits (NWPs 21 and 50) in 2007.²⁰ Specifically, the plaintiffs alleged that the Corps’ cumulative impacts analysis was insufficient in that it: (1) bypassed the necessary NEPA consideration of the present effects of past permit authorizations, and (2) failed to explain properly how compensatory mitigation would ensure cumulatively minimal impacts.²¹ The Sixth Circuit held that “an environmental assessment that omits consideration of past impacts, followed by a conclusory suggestion that past impacts did not matter, cannot be in conformance” with NEPA.²² The Sixth Circuit also found that the Corps did not provide adequate documented information supporting the finding that post-issuance mitigation procedures would minimize environmental impacts.²³ The Sixth Circuit invalidated the 2007 reissuance of NWP 21 as arbitrary and capricious,²⁴ and remanded the matter to the Corps for further consideration.²⁵ Comments on the Final Rule suggest that NGOs are likely to challenge at least some of the NWPs on NEPA grounds.

Coverage under an NWP can save substantial time and costs for project proponents. The Corps estimates that in FY2016, the average evaluation time for a request for coverage under an NWP was 40 days, as compared with 217 days for an individual permit.²⁶ Further, because the Corps has satisfied NEPA’s review requirements in issuing the NWPs at the national level, project proponents are not required to conduct additional NEPA review for covered activities. In contrast, individual CWA Section 404 permits require NEPA review. Applicants should be aware, however, that they are still subject to compliance with other federal statutes, as applicable, including the ESA and the NHPA, in addition to any applicable state law requirements.

For a number of the NWP activities, applicants are required only to fulfill the NWPs’ requirements in order to receive coverage. Several of the NWPs, however, include preconstruction notification (PCN) requirements if certain triggers are met, and there is also a General Condition governing PCNs across the board. For NWP 12, for example, a PCN is required if any of the following criteria are met:

- The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way
- The activity requires a Rivers and Harbors Act Section 10 permit
- The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet
- The utility line is placed within a jurisdictional area, and runs parallel to or along a stream bed that is within that jurisdictional area
- The activity involves discharges that result in the loss of greater than one-tenth of an acre of jurisdictional waters
- Permanent access roads are constructed above grade in jurisdictional waters for a distance of more than 500 feet
- Permanent access roads are constructed in jurisdictional waters with impervious materials²⁷

If a PCN is required, the applicant must provide the Corps with at least 45 days’ notice before commencing the covered activity, giving the Corps an opportunity to review the proposed activity to

ensure that it is covered by the NWP and will not cause more than minimal adverse effects on the environment. For many activities, if the Corps fails to act within 45 days, the proposed activity is deemed authorized. This does not apply, however, for NWPs 21, 49, and 50, or for proposed NWP activities that require ESA Section 7 consultation and/or NHPA Section 106 consultation.²⁸ Overall, the Corps anticipates that the 2017 NWPs will slightly reduce the number of PCNs required for activities authorized by NWPs as compared to the 2012 NWPs.²⁹

Impact Thresholds and Interactions with Waters of the United States Rule

One of the key issues the Corps teed up for comment in the development of the 2017 NWPs was whether the impact thresholds that determine eligibility for various NWPs should be changed. Many industry commenters supported increasing the impact thresholds for various NWPs, while environmental NGOs recommended that thresholds should be reduced or maintained. In the final 2017 NWPs, the Corps ultimately decided to leave the impact thresholds unchanged.

Some industry commenters on the proposed NWPs argued that impact thresholds should be considered in relation to the ultimate fate of the joint EPA-Corps Clean Water Rule — finalized in June 2015 — that amended the regulatory definition of “waters of the United States” subject to coverage under the CWA.³⁰ The Clean Water Rule was challenged shortly after it went into effect, and on October 9, 2015, it was stayed by the U.S. Court of Appeals for the Sixth Circuit pending further action.³¹ Some commenters argued that the Clean Water Rule expanded CWA jurisdiction and that, if the rule were ultimately upheld and implemented, the Corps should reopen the NWPs to expand their coverage so as to mitigate the effects of this regulatory change.

In the final 2017 NWPs, the Corps attempted to preempt these potential issues by changing “the text of some NWPs, GCs, and definitions so that they do not cite specific provisions of 33 CFR part 328 [Definition of Waters of the United States], unless those provisions were not addressed in the 2015 [Clean Water] rule.”³² The preamble to the Final Rule states that all applications for NWPs submitted before the Clean Water Rule stay is lifted, or another definition is implemented, will be processed in accordance with current regulations; and that once the stay is lifted or another definition is adopted, the Corps will determine if any NWPs need to be modified.

On February 28, 2017, President Trump issued an Executive Order ordering the EPA and the Corps to review the Clean Water Rule,³³ and on March 6, 2017, EPA and the Corps announced their intent to review and rescind or revise the rule.³⁴ While such revision will likely alter the scope of waters to which CWA permitting requirements apply, there is no indication that the rulemaking will directly affect the NWPs or require that they be revised.

Waivers of Certain Nationwide Permit Limits

Another key cross-cutting issue that may be the subject of litigation is the district engineers’ authority, under several NWPs, to waive impact thresholds determining the availability of the permit. Consistent with the 2012 NWPs, several of the 2017 NWPs allow for the district engineer to waive impact thresholds based on the linear foot losses of stream beds in certain circumstances. NWPs for which such waivers are authorized include:

- 13 (bank stabilization)
- 21 (surface coal mining activities)
- 29 (residential developments)
- 36 (boat ramps)
- 39 (commercial and institutional developments)

- 40 (agricultural activities)
- 42 (recreational facilities)
- 43 (stormwater management facilities)
- 44 (mining activities)
- 50 (underground coal mining activities)
- 51 (land-based renewable energy generation facilities)
- 52 (water-based renewable energy generation pilot projects)
- 54 (living shorelines)

The 2017 NWP revisions added NWPs 21, 44, 50, 51, 52, and new NWP 54 to the list of NWPs eligible for waivers. Waiver was authorized for the other seven NWPs (13, 29, 36, 39, 40, 42, and 43) by the 2012 NWP revisions.³⁵

In order to grant a waiver, the district engineer must: (i) review the specific NWP activity; (ii) conclude that a waiver is appropriate and that the proposed NWP activity would result in only minimal individual and cumulative adverse environmental effects; and (iii) provide a written determination of such findings.³⁶ The district engineer may require compensatory mitigation for waivers, but only on a case-by-case basis dependent upon whether the waiver will result in more than minimal environmental effects.

Environmental NGOs argued in comments that the waivers should be eliminated or capped, asserting that in both individual cases and collectively, the waivers result in more than minimal adverse impacts.³⁷ In response, the Corps agreed to develop quarterly reports showing summary statistics pertaining to the use of each NWP, including information on the use of waivers. While this may provide a greater degree of transparency regarding the use and impacts of waivers under the NWPs, this issue may nevertheless be raised if groups choose to challenge the NWPs that authorize waivers.

Key Issues for NWPs 12 (Pipelines, Transmission and Other Utility Lines) and 14 (Linear Transportation Projects)

During the development of the 2017 NWPs the Corps and stakeholders focused particularly on NWPs 12 and 14 — two of the most important and broadly used NWPs. Based on historic data from 2012-2015, for example, the Corps estimates that NWP 12 will be used approximately 11,500 times per year on a national basis.³⁸ Recent controversies regarding pipeline development have focused significant attention on NWP 12. One of the most critical issues relating to these two “linear” NWPs is how to treat large projects that involve multiple crossings of one or more jurisdictional waters of the United States.

In the 2017 NWPs, the Corps reaffirmed and further clarified its longstanding position (dating from 1991) that each “separate and distant” crossing of waters of the United States for linear projects will be considered a “single and complete” project for purposes of NWP authorization.³⁹ The Corps’ NWP implementing regulations explain that the definition of “single and complete project” for linear projects “appl[ies] to each crossing of a separate water of the United States (*i.e.*, single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project.”⁴⁰ The term “separate and distant,” is not defined, despite voluminous comments on this subject. The Corps’ Decision Document reiterated, consistent with the NWP implementing regulations, that “separate and distant” applies to both crossing a single waterbody more than one time at a separate and distant location, as well as crossing multiple waterbodies at separate and distant locations.⁴¹ The Corps’ position is based on the understanding that cumulative impacts on any given waterbody will be minimal so long as separate crossings are sufficiently distant from one another; and similarly, that crossings of separate water bodies will have minimal effects on any individual water body. The upshot of the Corps’ policy is that even large-scale covered linear

projects with multiple crossings can proceed utilizing the NWP, so long as the impact of each individual (separate and distant) crossing is below the required threshold — one-half acre for NWP 12, and one-half or one-third of an acre for NWP 14 for non-tidal and tidal waters, respectively.⁴²

Environmental NGO commenters argued that this policy improperly fails to account for the cumulative impacts of linear projects. They assert that the impact thresholds should instead be applied to entire projects — not to each individual separate and distant crossing — in order to ensure that the NWPs are available only for activities that cause minimal individual and cumulative adverse environmental impacts.⁴³ The NGOs' comments expressed particular concern about the potential of the Corps approving numerous separate and distant crossings of large pipeline projects under NWP 12.⁴⁴ The 2012 version of NWP 12 was challenged on a similar basis (the cumulative impacts of oil spills), but was dismissed for the parties' failure to raise the issue in their comments.⁴⁵ Therefore, the comments to the 2017 version of NWP 12 are most likely a preview of future litigation claims by these NGOs. The approach these groups advocated would, of course, dramatically reduce the availability of these NWPs, as lengthy linear projects would be much more likely to exceed the one-half or one-third acre thresholds in the permits.

The Corps further clarified a number of points to NWP 12 as well. Revised NWP 12 extends authorization to discharges of dredged or fill material necessary to remediate inadvertent returns of drilling fluids that occur during horizontal directional drilling operations to install utility lines under jurisdictional waters or wetlands. This revision could have potentially significant ramifications for oil and gas developers that frequently lay pipelines in areas that may have inadvertent returns of drilling fluid. This revision also provides more specificity than the 2012 NWPs, which had no clear guidance on or coverage of inadvertent returns. Notably, this expansion of NWP 12 does not extend to drilling fluid returns from any activity besides installing utility lines. Revised NWP 12 also adds "internet" as a form of communication carried by utility lines. This change does not appear to be significant, but rather a codification of the Corps' past understanding.

Changes to NWP 21 (Surface Coal Mining)

The 2012 version of NWP 21 (covering surface coal mining activities) included a grandfather clause in paragraph (a) that extended the authorization for surface coal mining activities previously authorized by the 2007 version of NWP 21, provided certain conditions were met. The 2017 NWP removed paragraph (a), such that surface coal mining activities that were authorized under the 2007 and 2012 NWP 21 will no longer be authorized under the terms and conditions of the original permit. Going forward, only activities specifically covered by the new 2017 permit will be covered. Under the new permit, surface coal mining activities may still be encompassed in NWP 21 if they do not cause the loss of greater than one-half acre of non-tidal water (including the loss of no more than 300 linear feet of stream bed) and the discharge is not associated with the construction of "valley fills."⁴⁶

Changes Impacting Renewable Energy Projects

Revised NWP 51 (covering land-based renewable energy generation facilities) now requires a PCN for any project that will cause the loss of greater than one-tenth of an acre of waters of the United States. A PCN submission can subject the developer to certain General Condition requirements, such as analyzing impacts on endangered species and historical properties. The Corps retained the one-half acre limit for impacts on waters of the United States for NWP 51.

Revised NWP 52 (covering water-based renewable energy generation pilot projects) has been expanded to cover floating solar panels and wave energy devices that impact less than one-half of an acre of waters of the United States. The Corps considered whether to remove the requirement that the activity be a pilot project, but ultimately decided to retain it.

Revised General Conditions

While several of the GCs applicable to the NWP were revised, the revisions to GC 17 (concerning tribal rights) and GC 18 (concerning endangered species) are of particular interest to infrastructure projects.

GC 17 provides that no NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. The Corps revised GC 17 to be consistent with the 1998 Department of Defense American Indian and Alaska Native Policy (DOD Policy). The prior version of GC 17 provided that activities may not “impair” tribal rights.⁴⁷ This now aligns with the DOD Policy for tribal consultation, which is required when an action “may have the potential to significantly affect” protected tribal resources, rights, or land.⁴⁸ The preamble to the Final Rule states that district engineers must monitor the use of NWPs and if more than a minimal cumulative effect is observed, the district engineer should recommend regional conditions or the suspension or revocation of the applicable NWP. The revision to GC 17 suggests that impacts to tribal rights may be a greater concern going forward, and an issue that developers should address as early as possible in the development process.

GC 18 requires PCNs for all NWP activities that might affect listed endangered or threatened species or their designated critical habitat.⁴⁹ GC 18 reflects the ESA Section 7 requirement for consultation with the FWS on any federal actions that “may affect” listed species. To evaluate if Section 7 consultation is required, FWS evaluates whether the action will directly or indirectly affect listed species. This year, GC 18 has been revised to define the terms “direct effects” and “indirect effects” to ensure that both types of effects on ESA-listed species are considered when the Corps determines whether an activity “may affect” listed species or critical habitat. Direct effects are defined as “the immediate effects on listed species and critical habitat caused by the NWP permit activity.”⁵⁰ This definition was adapted from the FWS and NMFS 1998 Endangered Species Consultation Handbook.⁵¹ Indirect effects are defined as “effects on listed species and habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur,”⁵² which was adapted from the FWS and NMFS definition of indirect effects in the ESA Section 7 consultation implementing regulations at 50 C.F.R. § 402.02.⁵³

Additionally, GC 18 includes a new requirement that non-federal permittees with a valid incidental take permit under ESA section 10(a)(1)(B) and an approved Habitat Conservation Plan provide these approvals to the Corps with the PCN. The district engineer will then notify the non-federal permittee within 45 days of receipt of the complete PCN, whether the incidental take permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

New General Condition 31

Pursuant to new GC 31, developers are now required to secure permission from the Secretary of the Army for the alteration, occupation, or use of structures or works built by the United States, in compliance with Section 14 of the Rivers and Harbors Act. This is commonly referred to as a “Section 408 review.” The NWP regulations already state that the “NWPs do not authorize interference with any existing or proposed federal project,”⁵⁴ so this new GC 31 is effectively an expansion of that prohibition. The Section 408 review must be completed before an NWP verification may be issued. The preamble for the new NWPs states that the Corps does not have any statistics on how long Section 408 reviews will take.⁵⁵ Therefore, developers should monitor how this GC impacts new developments that alter, occupy, or use structures or works built by the United States.

Compensatory Mitigation

A district engineer can impose mitigation requirements if a proposed activity will result in more than minimal individual and cumulative adverse environmental effects. Mitigation requirements can include permit conditions (such as time-of-year restrictions), or compensatory mitigation. Compensatory mitigation requirements for NWP activities must comply with the applicable provisions of 33 CFR Part 332. Compensatory mitigation can include “the restoration, establishment, enhancement, and/or preservation of wetlands[,] ... the rehabilitation, enhancement, or preservation of streams, as well as the restoration, enhancement, and protection/maintenance of riparian areas next to streams and other open waters.”⁵⁶ Several commenters on the proposed 2017 NWPs suggested that compensatory mitigation should be required for all activity under all NWPs. However, the Corps ultimately determined that compensatory mitigation can only be required after a district engineer determines that it is necessary to comply with the “no more than minimal adverse environmental effects” requirement for NWPs.⁵⁷

Compensatory mitigation can be provided through mitigation banks, in-lieu fee programs, and permittee-responsible mitigation.⁵⁸ If the required compensatory mitigation will be provided through mitigation banks or in-lieu fee program credits, then the conditions in the NWP verification must specify the number and resource type of credits that the permittee needs to purchase.

Grandfathering of Certain Projects Authorized under 2012 NWPs

In issuing the 2017 NWPs, the Corps included a grandfathering provision applicable to some projects that are currently authorized under the prior 2012 NWPs. Activities that were authorized under the 2012 NWPs, that commenced or were under contract to commence by March 18, 2017, will have until March 18, 2018, to complete the activity under the terms and conditions of the 2012 NWP.⁵⁹ Activities that did not commence by March 18, 2017, and/or will not be complete by March 18, 2018, must seek authorization under the new NWPs.⁶⁰ In light of this provision, developers with projects with authorizations under the 2012 NWPs must either: (1) complete work prior to March 18, 2018; or (2) work with the Corps promptly to ensure timely issuance of new authorizations.

Conclusion

In summary, the 2017 NWPs largely preserve the availability of these critical general permits without major changes. The revised permits do incorporate a number of new features, however, that may affect both new and existing projects in key industry sectors. Further, environmental groups likely will challenge the NWPs in court on a number of grounds, including NEPA, the ESA, and consistency with the requirements of CWA Section 404(e). Successful defense and effective implementation of the new permits will be of critical importance for multiple sectors — including oil and gas, electric utilities, and mining.

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Endnotes

- ¹ See 2017 Nationwide Permits Final Decision Documents, U.S. Army Corps of Engineers, http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/2017_NWP_FinalDD/ (last visited March 21, 2017) (“Decision Documents”); see also 82 Fed. Reg. 1,860 (Jan. 6, 2017); 33 U.S.C. § 1344.
- ² 33 U.S.C. § 1344.
- ³ For example, environmental groups challenged 2012 NWP 12 on a number of grounds, including compliance with NEPA and the CWA. Plaintiffs’ claim that the Corps neglected to consider the risk of oil spills and cumulative environmental impacts, was dismissed for failure to object on those grounds during the public comment period. The court also rejected plaintiffs’ claim that NWP 12 violated the CWA by authorizing activities with more than minimal environmental impacts and that NWP 12 unlawfully deferred a portion of the minimal impacts analysis to project-level personnel. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1051 (10th Cir. 2015). Similarly, conservation groups unsuccessfully challenged the Corps’ decision to reissue NWP 13, which authorizes bank stabilization activities, for alleged NEPA and CWA violations. *National Wildlife Federation v. United States Army Corps of Engineers*, 170 F. Supp. 3d 6 (D.D.C. 2016). Environmental groups also challenged the 2012 version of NWP 21, which covered discharges from surface coal mining operations, on the grounds that the Corps underestimated its environmental effects. During the litigation, the Corps determined that it did underestimate the acreage of waters that would be affected by projects authorized under NWP 21, and the matter was remanded to the Corps for a more accurate assessment of NWP 21’s potential impacts. See *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*, 781 F.3d 1271 (11th Cir. 2015).
- ⁴ 33 C.F.R. § 322.2(f).
- ⁵ 33 U.S.C. § 403.
- ⁶ 82 Fed. Reg. at 1,860.
- ⁷ The 2017 NWPs retained the 300 linear foot limit for losses of stream bed in those NWPs that include these limits. 82 Fed. Reg. at 1,871.
- ⁸ See *id.* at 1,984 to 1,998.
- ⁹ 82 Fed. Reg. at 1,933. A “low-head dam” is defined as a dam built to pass upstream flows over the entire width of the dam crest on a continual, uncontrolled basis. 81 Fed. Reg. at 1,934. NWP 53 does not authorize regulated activities for restoration of the stream or river in the vicinity of the former impoundment, or bank stabilization activities (though these activities may be covered by NWP 13).
- ¹⁰ 82 Fed. Reg. at 1,938. Living shorelines can be natural or man-made, and may include stone or reef structures that protect the shore from low to moderate energy waves. Living shorelines must include a substantial biological component of either wetlands or reef structures. NWP 54 does not authorize beach nourishment or land reclamation. Any associated discharges of dredged or fill materials into waters of the United States must be the minimum necessary for the establishment and maintenance of the living shoreline.
- ¹¹ 33 U.S.C. § 1344(e)(2); 33 C.F.R. § 330.6(b).
- ¹² 81 Fed. Reg. 35,186 (June 1, 2016).
- ¹³ 82 Fed. Reg. at 1,860.
- ¹⁴ See Decision Documents; see also 81 Fed. Reg. at 35,187.
- ¹⁵ See 82 Fed. Reg. at 1,860 to 1,861.
- ¹⁶ See, e.g., Corps, Special Public Notice: Announcing the Alaska District’s Regional Conditions to the New Nationwide Permits (March 15, 2017), available at http://www.poa.usace.army.mil/Portals/34/docs/regulatory/specialpns/POA-2016-6,%20New%20Nationwide%20Permit%20Conditions_SPN.pdf?ver=2017-03-15-173904-040.
- ¹⁷ 82 Fed. Reg. at 1,873 to 1,875.
- ¹⁸ Letter from Jan Goldman-Carter, Dir. Wetlands and Waters Resources, National Wildlife Federation, to Army Corps re: Comments in Response to Department of the Army Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, Docket COE-2015-0017 at 16 (July 22, 2016) (NWF Letter).
- ¹⁹ *Id.* at 46.
- ²⁰ 714 F.3d 402 (6th Cir. 2013).
- ²¹ *Id.* at 406.
- ²² *Id.* at 410.
- ²³ *Id.* at 413.
- ²⁴ The challenge to NWP 50 was moot because it expired before the decision. See *id.* at 407.
- ²⁵ *Id.*
- ²⁶ 82 Fed. Reg. at 1,862 to 1,863.

27 Decision Document for NWP 12, at 3 (2016), *available at*
http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_12_2017_final_Dec2016.pdf?ver=2017-01-06-125514-797.

28 82 Fed. Reg. at 1,878.

29 *Id.* at 1,980.

30 Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 3,7054 (June 29, 2015) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

31 *In re Environmental Protection Agency and Department of Defense Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015).

32 82 Fed. Reg. at 1,868.

33 Exec. Order No. 13,778, 82 Fed. Reg. 12497 (March 3, 2017).

34 Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (March 6, 2017) (to be codified at 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

35 77 Fed. Reg. 10,184, 10,188 (Feb. 21, 2012).

36 82 Fed. Reg. at 1,872, 1,877 to 1,878.

37 *Id.* at 1,872.

38 Decision Document for NWP 12, at 69-70.

39 82 Fed. Reg. at 1,951.

40 33 C.F.R. § 330.2(i).

41 Decision Document for NWP 12, at 3, 7.

42 *Id.*, at 1; Decision Document for NWP 14, at 1 (2016), *available at*
http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_14_2017_final_Dec2016.pdf?ver=2017-01-06-125515-403.

43 82 Fed. Reg. at 1,883; *see also* Letter from Doug Hayes, Sierra Club, to Corps re: Comments on the U.S. Army Corps of Engineers’ Proposal to Reissue and Modify Nationwide Permit 12 at 1, Docket No. COE-2015-0017 (Aug. 1, 2016) (Sierra Club Letter).

44 *See, e.g.*, Sierra Club Letter at 1.

45 *Sierra Club v. Bostick*, 787 F.3d at 1061.

46 “Valley fill” is defined as “a fill structure that is typically constructed within valleys associated with steep, mountainous terrains, associated with surface coal mining activities.” *See* Decision Document Nationwide Permit 21 at 1 (Dec. 2016), *available at*
http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_21_2017_final_Dec2016.pdf?ver=2017-01-06-125515-483.

47 82 Fed. Reg. at 1,876.

48 Department of Defense, American Indian and Alaska Native Policy at 1 (1998), *available at*
<http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/DoDPolicy.pdf>.

49 82 Fed. Reg. at 1,873.

50 *Id.* at 1,999.

51 81 Fed. Reg. at 35,208; *see also* FWS and NMFS, Endangered Species Consultation Handbook at 4–25 (1998), *available at*
https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

52 81 Fed. Reg. at 35,208.

53 *Id.*

54 33 C.F.R. 330.4(b)(5).

55 82 Fed. Reg. at 1,968.

56 *Id.* at 1,862.

57 *Id.* at 1,865.

58 *Id.* at 1,862.

59 *Id.* at 1,863.

60 *Id.*