

In the Midst of Suit to Void NWP-12, Army Corps of Engineers Proposes Reissuance of Nationwide Permits

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The Army Corps of Engineers issued a prepublication version of its Proposal to Reissue and Modify Nationwide Permits (NWPs) on August 3, 2020. The proposal would reissue all 52 existing nationwide permits, some with modifications, and add five new NWPs. Most notably, in light of ongoing litigation, the proposal seeks to split NWP-12, the nationwide permit for utility line activities, into three distinct NWPs (NWP-12 and proposed new NWPs C & D), leaving NWP-12 to cover only oil and natural gas pipelines and creating two new permits covering electrical/telecommunication lines and water and sewer utility lines, respectively. The other newly proposed NWPs would authorize two new categories of mariculture activities and the discharge of dredge or fill material related to construction, maintenance, or expansion of water reclamation facilities.

In April, a federal judge in Montana issued a ruling that effectively enjoined the use of NWP-12 nationwide in a suit involving the Keystone XL Pipeline. Judge Brian Morris found the Corps failed to engage in programmatic consultation with resource agencies in violation of the Endangered Species Act. Based on additional arguments from both the defendants and plaintiffs, Judge Morris later limited his original order to prohibit the use of NWP-12 to authorize new oil and gas pipeline construction, but allowed the use of NWP-12 for other projects and for maintenance activity on existing utility lines—activities the court viewed as less likely to pose risks to endangered species. On July 6, the Supreme Court stayed the district court's order, except as applied to Keystone XL. Additional cases have been filed in other jurisdictions utilizing Judge Morris' reasoning to challenge reliance on NWP-12.

The existing NWPs do not expire until 2022, and are typically reissued every five years. In its proposal, the Corps notes that "there have been three times where the Corps issued or modified NWPs outside of the normal 5-year cycle." The Corps' proposal cites Executive Order 13783, directing heads of agencies to review existing regulations that potentially burden the development or use of domestically produced energy as the

impetus for the revisions. A report issued in response to EO 13783 identified nine NWPs that could be modified to alleviate such burdens, and the proposal adopts these recommendations. The Corps' proposal also contemplates removing preconstruction notification requirements from federal agency applicants. In addition to these changes, the Corps seeks to reissue the remaining NWPs to keep all permits on the same five-year lifecycle. Despite the offered justification, the timing of the reissuance is well situated to moot ongoing litigation over the existing permit, since those suits are based on the 2017-2022 version of NWP-12, and generate a host of new litigation.

The Corps' proposal will be published in the Federal Register in the coming weeks. Stakeholders will have 60 days from publication to offer comments.