

Trump Nationwide Permit Move Could Interrupt Pipeline Suit

By **Yvonne Hennessey**

The Trump administration is proposing a number of key changes to the nationwide permit, or NWP, program.[1] The proposal starts the process for modifying and reissuing NWPs for the next five-year cycle.

Although the current program, which includes 52 NWPs, was set to expire in 2022, the administration has proposed these updates in response to various presidential orders, as well as recent litigation over the use of the NWP program for controversial oil and gas pipelines.

Background

NWP 12, a longstanding nationwide permit that allows pipelines, cables and other utility lines to cross federally protected waters without having to undergo a lengthy review for each crossing, has been a key permitting tool for energy projects across the country. Those opposed to these infrastructure projects, however, have long disfavored the use of NWP 12 because, in their view, it allows for the environmental impacts of these projects to be virtually ignored.

This issue came to the forefront in recent litigation over the Keystone XL project.[2] There, in a challenge brought by several environmental groups, U.S. District Judge Brian Morris of the U.S. District Court for the District of Montana found that the U.S. Army Corps of Engineers violated the Endangered Species Act by failing to initiate consultation under Section 7(a)(2) when it reissued NWP 12 in 2017.

In doing so, the court found that the obligation of the Army Corps to consult on the issuance of NWP 12 at the programmatic level was not obviated by either General Condition 18 — providing that a NWP does not authorize any activity that is likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat — or the need for preconstruction notice, or PCN — requiring Endangered Species Act consultation if a proposed activity might affect any listed species or critical habitat.

The court therefore vacated NWP 12 in its entirety, and enjoined the Army Corps from authorizing any dredge or fill activities under NWP 12, pending completion of the consultation process and compliance with all environmental statutes and regulations — an injunction that the court later narrowed to only oil and gas pipelines. The U.S. Supreme Court, however, stayed even this limited injunction pending appeal before the U.S. Court of Appeals for the Ninth Circuit.

The executive branch has also played a role in the revisions to NWP 12. In particular, Executive Order 13783, issued March 28, 2017, directed all federal agencies to: [R]eview all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the



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development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.

In response, the Army Corps identified nine NWP (3, 12, 17, 21, 39, 49, 50, 51 and 52) that could be modified in order to reduce regulatory burdens on the energy industry.

Other executive orders and administrative agendas being addressed in the Army Corps' proposed NWP updates include EO 13777, Enforcing the Regulatory Reform Agenda, issued Feb. 24, 2017, the Legislative Outline for Rebuilding Infrastructure in America, Part 3, issued Feb. 12, 2018, and EO 13921, American Seafood Competitiveness and Economic Growth, issued May 7 of this year.

Modifications to NWP 12

The Army Corps is proposing to modify NWP 12 by limiting its application and issuing two new NWPs. Specifically, the proposal would limit NWP 12 to oil and natural gas pipeline activities only.

New NWPs are being proposed to authorize electric utility line and telecommunications activities — proposed new NWP C — and utility lines that convey substances other than oil or natural gas or electricity — proposed new NWP D. According to the Army Corps: The intent of this proposal is to tailor these NWPs to more effectively address potential differences in how the different types of utility lines are constructed, maintained, and removed, and to potentially add industry-specific standards or best management practices that would be appropriate to add as national terms to the applicable NWP to help ensure that the NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects.

The same PCN thresholds are being proposed for NWPs 12, C and D. This includes the proposed removal of the following PCN thresholds that currently exist under NWP 12:

- Utility line activities involving mechanized land clearing in a forested wetland for the utility line right of way;
- Utility lines in waters of the U.S., excluding overhead lines, that exceed 500 feet;
- Utility lines placed within a jurisdictional area (i.e., waters of the U.S.) that run parallel to or along a stream bed that is within that jurisdictional area;
- Permanent access roads constructed above grade in waters of the U.S. for a distance of more than 500 feet; and
- Permanent access roads constructed in waters of the U.S. with impervious materials.

The deletion of these triggers for PCN are significant for project proponents, and will help expedite project timelines. Their deletion is also expected to elicit comments from groups opposed to the use of NWP for certain projects, given their assertion that NWPs improperly reduce even further the Army Corps' review of the environmental impacts.

The Army Corps is also proposing a new PCN threshold for NWP 12 for proposed oil or natural gas pipeline activities where the overall project is greater than 250 miles in length, and the purpose of the project is to install new pipeline along the majority of the overall project length.

For these activities, the Army Corps is proposing to require the project developer to identify, as part of the PCN, the locations and proposed losses of waters of the U.S., for all crossings of waters of the U.S. that require Army Corps authorization, including those crossings that would not require preconstruction notification.

The Army Corps is proposing to add this PCN threshold:

[T]o provide the district engineer the opportunity to review all crossings of waters of the United States for long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects.

Comment on the 250-mile threshold is specifically being sought, and likely to be a source of significant public comment and disagreement over the proper threshold for PCN.

Notably, under the Army Corps' proposals, division engineers will continue to have the authority to modify or lower the PCN thresholds for NWP 12 if they believe that lower PCN thresholds are necessary. This will allow district engineers to make activity-specific determinations of NWP eligibility, and impose mitigation requirements on these activities if they have the potential to result in more than minimal individual and cumulative adverse environmental effects in a Corps district, watershed or other geographic region.

District engineers will also retain their authority to modify, suspend or revoke NWP 12 authorizations on a case-specific basis, in accordance with the procedures in Title 33 of the Code of Federal Regulations, Section 330.5(d).

Recommendations in Response to EO 13783

In addition, based on its recommendations in response to EO 13783, the Army Corps is also proposing the following changes:

- Retain the 1/2-acre limit for the NWPs identified in the report that currently have that limit — i.e., NWP 12, concerning utility line activities; NWP 21, concerning surface coal mining activities; NWP 39 concerning commercial and institutional developments; NWP 50, concerning underground coal mining activities; NWP 51, concerning land-based renewable energy generation projects; and NWP 52 concerning water-based renewable energy generation pilot projects.
- Modify NWP 3, concerning maintenance, to authorize small amounts of riprap to protect those structures and fills, without a PCN requirement.

- Modify NWP 12, concerning utility line activities, to simplify the PCN thresholds, by reducing the number of PCN thresholds from 7 to 2.
- Modify NWP 17, concerning hydropower projects, to change the generating capacity threshold in paragraph (a) from 5,000 kilowatts to 10,000 kW, to be consistent with the definition of "small hydroelectric power project" in Title 16, U.S. Code Section 2705(d).
- Remove from NWP 21, concerning surface coal mining activities, the 300 linear foot limit for losses of stream bed. Remove the provision requiring the permittee to receive a written authorization from the Army Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Army Corps district does not respond within 45 days of receipt of a complete PCN.
- Modify NWP 39, concerning commercial and institutional developments, to remove the 300 linear foot limit for losses of stream bed.
- Remove from NWP 49, concerning coal remining activities, the provision requiring the permittee to receive a written authorization from the Army Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Army Corps district does not respond within 45 days of receipt of a complete PCN.
- Remove from NWP 50, concerning underground coal mining activities, the 300 linear foot limit for losses of stream bed. Remove the provision requiring the permittee to receive a written authorization from the Army Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Army Corps district does not respond within 45 days of receipt of a complete PCN.
- Remove from NWP 51, concerning land-based renewable energy generation projects, the 300 linear foot limit for losses of stream bed.

- Remove from NWP 52, concerning water-based renewable energy generation pilot projects, the 300 linear foot limit for losses of stream bed.

Reissuance of NWPs

Importantly, the Army Corps is not only reacting to the Keystone XL decision and recent directives from the Trump administration. It is also proposing to reissue all of its existing NWPs and associated general conditions and definitions well in advance of their current 2022 expiration date.

The Army Corps maintains that this will ensure that all NWPs, including the new and revised ones they have proposed, will run on the same five-year cycle. Despite this alleged intent, the breadth of Judge Morris' decision is hard to miss.

While the Keystone XL decision vacated and remanded only NWP 12 back to the Army Corps for further review, the underlying rationale is not necessarily limited to just NWP 12, and suggests the potential vulnerability of the entire NWP program. It is, therefore, not surprising that the Army Corps has sought to reissue the entirety of its NWP program.

In addition, issuance of a new NWP by the Army Corps could moot the Keystone XL litigation and require a restart to the so-far successful legal challenge. However, the Army Corps appears not to take Judge Morris' criticism too seriously.

Indeed, in its proposal, the agency has doubled down on its reliance on General Condition 18 and "determined that the NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act."

Public Comment

Once the proposed modifications and updates to the NWP program are published in the Federal Register, which is expected to occur within the next few weeks, the Army Corps will begin accepting public comments.

Given the breadth of the proposal, significant comments are expected, and the November election may dictate how the Army Corps ultimately decides to revise and reissue its NWP program. In the meantime, the Keystone XL appeal and other litigation over NWP 12 will continue.[3]

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[1] Proposal to Reissue and Modify Nationwide Permits, Notice of Proposed Rulemaking, Department of the Army, Corps of Engineers, Dkt. No.COE-2020-0002 (publication in Federal Register pending).

[2] Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers, No. 4:19-cv-00044 (D. Mont.), appeal pending, Nos. 20-35412 (9th Cir.).

[3] See, e.g., Sierra Club v. U.S. Army Corps Of Engineers et al., No. 20-cv-460 (W.D. Tex).