



Corps of Engineers Issues Proposal on Nationwide Permits

07.19.2016

In early June, the U.S. Army Corps of Engineers (“Corps”) proposed to reissue its nationwide permits (“NWP”) for certain wetland impacts. The proposed changes present some interesting issues and new opportunities for wetland permitting at the federal level.

Nationwide permits issued by the Corps are general permits authorizing certain categories of activities impacting navigable waters under the Rivers and Harbors Act or “waters of the United States” under the Clean Water Act. NWPs are designed to reduce the administrative review associated with these activities because their impacts are well-understood and minimal. Fifty NWPs currently are available, and the activities authorized range from installing aids to navigation to hazardous and toxic waste cleanup to linear transportation and utility projects. These existing NWPs expire in March 2017.

The Corps plans to reissue all 50 NWPs, although with important revisions to key conditions and definitions of some of them. The NWPs proposed for revision or for which comments are being solicited include NWPs 3 – Maintenance, 12 – Utility Line Activities, 13 – Bank Stabilization, 14 – Linear Transportation Projects, 19 – Minor Dredging, 21 – Surface Coal Mining Activities, 32 – Completed Enforcement Action, 33 – Temporary Construction, Access, and Dewatering, 35 – Maintenance Dredging of Existing Basins, 39 – Commercial and Institutional Developments, 40 – Agricultural Activities, 41 – Reshaping Existing Draining Ditches, 43 – Stormwater Management Facilities, 44 – Mining Activities, 45 – Repair of Uplands Damaged by Discrete Events, 48 – Commercial Shellfish Aquacultural Activities, 51 – Land-based Renewable Energy Generation Facilities, and 52 – Water-based Renewable Energy Generation Pilot Projects. New NWPs being proposed address removal of low-head dams (Proposed NWP A) and installation of living shorelines (Proposed NWP B).

The proposed changes to the NWPs raise several key concerns. Of particular note is whether and how to incorporate the new definition of “waters of the United States” under the Clean Water Rule. Because that rule is being litigated in courts around the country, with the Sixth Circuit having stayed the rule’s effectiveness until its fate is decided, the Corps is asking for comments on how to bring the existing NWP definition of “waters of the United States” in line with its Clean Water Rule. The Corps is also seeking comment on potential increases in allowable impacted acreage and Pre-Construction Notification thresholds. The thought is that increasing allowable impacts and thresholds may facilitate greater use of NWPs while still ensuring protection of regulated waters. Further, the Corps is asking for input on whether to change the conditions (particularly involving linear feet of stream impacts) under which a district engineer may grant waivers for NWPs to be used. Additionally, the Corps is seeking comment on whether to require compensatory mitigation for all losses of intermittent and ephemeral stream bed. At present, some NWPs require no or minimal compensatory mitigation for these losses.

The proposed NWP's also present important procedural implications. First, if a permittee under a NWP has begun authorized activities or has entered into a contract for such activities, that work must be completed within one year of the March 18, 2017 expiration of the current NWP, or else the remaining work is subject to the new NWP, assuming it still qualifies. Second, if authorized activities have not commenced or are not under contract by the March 18, 2017 NWP expiration, then the activity will have to qualify for and be re-permitted under the new applicable NWP or, if no longer qualified, be authorized under a regional general permit, if one is available.

Also, public notices are being separately issued by each district engineer as to potential deviations from the proposed revisions to the NWP's. This is because the Corps' divisional and district engineers can revoke, revise or suspend an NWP within their respective jurisdictions (i) based on concerns about regional or localized individual or cumulative effects, (ii) to take into account state water quality standards and coastal zone management considerations, or (iii) to avoid conflicts with state programmatic general permits ("SPGP's").

The public comment period for the Corps' proposed action ends August 1, 2016.

81 Fed. Reg. 35186 (June 1, 2016).

Related People

- Henry R. "Speaker" Pollard, V – 804.420.6537 – hpollard@williamsmullen.com

Related Services

- Environment & Natural Resources