

## Clean Water Act Update

By Cory Novak

### Overview of Recent Nationwide Permit Program Changes

On March 28, 2017, former President Donald Trump issued Executive Order 13783, “Promoting Energy Independence and Economic Growth.” The Executive Order directed the U.S. Army Corps of Engineers (“Corps”) to immediately review existing regulations that “potentially burden the development or use of domestically produced energy resources” such as Nationwide Permits (“NWP”). NWPs are general permits issued for categories of activities that have minimal individual and cumulative adverse environmental effects on the environment. The issuance and reissuance of NWPs normally occurs every five years. Most of the current NWPs are set to expire on March 18, 2022. However, in September of 2020, the Corps proposed to revise and reissue 12 NWPs, and create four new NWPs. The final rule, published on January 13, 2021, created and revised the 16 NWPs through the following actions:

1. Create two new NWPs to authorize certain categories of mariculture activities (i.e., seaweed and finfish mariculture) that are not currently authorized by NWP 48;
2. Divide NWP 12 into three separate NWPs that address differences in utility line construction;
3. Create a new NWP to authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities; and
4. Remove the 300 linear foot limit for losses of stream bed from 10 NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51 and 52).

The permits went into effect on March 15, 2021 with a new expiration date of March 15, 2026. The notable change to 10 of the 16 NWPs is the removal of the 300 linear foot limit for losses of stream bed, while more significant changes were made to NWP 48 and NWP 12.

### Removal of Linear Foot Limit for Losses of Stream Bed for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51 and 52

The removal of the 300 linear foot limit for losses of stream bed impacts the Pre-Construction Notification (“PCN”) requirements for activities that impact stream beds. The purpose of a PCN is to give the district engineer an opportunity to review a proposed NWP activity to ensure that the proposed activity qualifies for NWP authorization. The 2017 NWPs limited activities that result in the loss of 300 linear feet of stream bed and 1/2-acre of waters of the United States. In removing the 300 linear foot limit, the Corps intends to rely on the 1/2-acre limit and PCN requirements to ensure that activities authorized by the NWPs will result in no more than minimal adverse environmental effects. In addition to removing the limit, the Corps proposed to remove the provisions regarding the ability of district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when the applicant submits a PCN and requests a waiver of the limit. The revision is tied to the April 2020 change in the Navigable Waters Protection Rule which categorically excluded ephemeral streams from jurisdiction under the Clean Water Act (“CWA”). The new rule and the state of Ohio’s response are discussed in more detail below.

Notably, the PCN requirements do not affect the requirements of Section 401 of the CWA. If a certifying agency does not issue a water quality certification for the issuance of an NWP that does not require a PCN, the project proponent is still required to obtain an activity-specific water quality certification or waiver for the proposed discharge.

### **Nationwide Permit 12 for Utility Line Activities**

The most significant and closely watched NWP reissuance was that of NWP 12 which covers utility line activities, including oil and natural gas pipeline activities. The proposed changes to NWP 12 have come into focus in the context of the controversial Keystone XL Pipeline. The pipeline, proposed in 2008, is a 1,179-mile (1,897 km) pipeline which would run from the oil sands of Alberta, Canada, to Steele City, Nebraska, where it is planned to join an existing pipeline. Litigation surrounding the pipeline has created uncertainty for projects relying on NWP 12. The Corps proposed significant revisions to NWP 12 “partly to address issues raised” in such litigation.

In April of 2020, the U.S. District Court for the District of Montana issued an order staying Keystone XL’s NWP 12 specifically. The court also vacated NWP 12 itself, enjoining the Corps from using NWP 12 to authorize any dredge and fill activities nationwide. The Court held that the Corps had violated the Endangered Species Act (“ESA”) when it reissued NWP 12 in 2017 without consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding the effect of NWP 12 on ESA listed species.

The Corps appealed the decision to the United States Court of Appeals for the Ninth Circuit and requested that the court lift the injunction pending the appeal. The Ninth Circuit denied the request. In July 2020, the United States Supreme Court temporarily overturned the nationwide injunction and stayed the District Court’s order except as applied to the Keystone XL pipeline. The decision meant that the Corps could process NWP 12s, but Keystone XL’s NWP 12 remained stayed.

In September of 2020, the Corps proposed significant revisions to NWP 12 “partly to address issues raised in [the District Court’s decision].” The Corps proposed the division of NWP 12 into three separate NWPs: NWP C, NWP D, and NWP 12 to “address the differences in how different utility line projects are constructed, the substances they convey, and the different standards and best management practices that help ensure those NWPs authorize only those activities that have no more than minimal adverse environmental effects.” As proposed, NWP C covers electric utility lines and telecommunication activities, while NWP D covers utility line activities for water and other substances. NWP 12 remains applicable to oil, natural gas, and other petrochemical activities.

The Corps also proposed to “simplify” the PCN requirements for NWP 12 and “focus the PCN requirements on activities that have a substantive potential to result in more than minimal adverse environmental effects.” Under the final revision, the Corps removed the following PCN thresholds:

1. Utility line activities involving mechanized land clearing in a forested wetland for the utility line right-of way;
2. the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;
3. the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area;

4. permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; and
5. permanent access roads are constructed in waters of the United States with impervious materials.

Though the Corps reduced the PCN requirements, a PCN continues to be required when oil and gas activities potentially implicate the ESA or the National Historic Preservation Act. The Corps also added a new PCN threshold to NWP 12 for new oil or natural gas pipelines greater than 250 miles in length.

### **Ohio EPA Waived Water Quality Certifications**

Under Section 401 of the CWA, a federal agency may not issue a permit, such as a NWP, to conduct any activity that may result in any discharge into waters of the United States unless a Section 401 water quality certification (“WQC”) is issued by a certifying authority such as the Ohio EPA. The certifying authority must timely verify compliance with water quality requirements, or its certification right is waived. A WQC can be waived expressly or by failure to act on a certification request within a reasonable period of time provided by the Corps.

The Corps, in a Public Notice issued on March 8, 2021, took the position that the State of Ohio Section 401 WQC has been waived for the newly issued NWPs. Ohio EPA received a request for certification under Section 401 of the CWA for the proposed issuance the NWPs in October of 2020 with 60 days to respond. Ohio EPA did not respond until March 4, 2021. In its WQC, Ohio EPA provided that “any lowering of water quality in various waters of the state as authorized by these certifications is necessary;” meaning that impacts to waters of the state of Ohio may occur pursuant to activities authorized by the NWPs subject to specified conditions. However, at this point in time, the specified conditions do not apply to NWPs issued for activities in Ohio. Activities that meet the conditions of the current NWPs do not require an individual Ohio Section 401 WQC. Therefore, anyone applying for coverage under the newly issued NWPs need only apply for, obtain coverage under, and comply with the federal NWP requirements.

Ohio EPA’s currently waived WQC for the newly issued permits can be found [here](#).

### **Potential Additional Revisions and Effect on Currently Permitted Activities**

Although the newly issued NWPs went into effect on March 15, 2021, there may be additional changes to the permits. On January 20, 2021, President Joe Biden signed an Executive Order also directing agencies to “immediately review... the promulgation of Federal regulations... during the last 4 years that conflict with these important national objectives.” The Reissuance and Modifications of Nationwide Permits is listed as an agency action that will be reviewed in accordance with the order.

Pending any additional revisions, if a project proponent received an NWP verification under one of the 2017 NWPs, and the activity continues to be authorized by one of the newly issued NWPs, that activity continues to be authorized by the 2017 NWP until it expires on March 15, 2026, unless the district engineer specified a different expiration date in the NWP verification letter.

We will provide updates regarding the status of the NWPs pending any changes resulting from the agency review.

## **Ohio EPA Issues General Permit to Protect Ephemeral Streams and Isolated Wetlands no Longer Protected by the Clean Water Act**

On April 21, 2020, the United States Environmental Protection Agency and the United States Army Corps of Engineers (“Corps”) published the Navigable Waters Protection Rule (“NWPR”) in the Federal Register. The NWPR finalized a revised definition of “waters of the United States” under the Clean Water Act (“CWA”) and replaced the 2015 Clean Water Rule which previously defined the term. The definition of “waters of the United States” in the CWA controls permitting and regulatory requirements for waterbodies that fall within that definition.

Noticeably absent from the new definition, which became effective on June 22, 2020, are ephemeral features and isolated wetlands. Under the NWPR, ephemeral features, including streams, swales, gullies, rills and pools, are not jurisdictional waters, and do not become jurisdictional waters even if they maintain jurisdiction of relatively permanent upstream waters by conveying surface water from those waters to downstream jurisdictional waters in a typical year. The NWPR “reduce[d] the scope of waters subject to CWA permitting compared with the baseline of [previous rules] as implemented.” For example, the definition of “waters of the United States,” as it stood in 2019, regulated certain ephemeral streams found to have a significant nexus with traditional navigable waters, whereas the revised definition categorically excludes ephemeral features.

### **The Ohio General Permit for Filling Category 1 and 2 Isolated Wetlands and Ephemeral Streams**

While individual states normally have the authority to stop a federal agency from issuing a permit for a project that does not comply with that state’s additional requirements in their Water Quality Certification (“WQC”), the NWPR potentially left unprotected the estimated 36,000 miles of ephemeral streams in Ohio. In response, the Ohio Environmental Protection Agency (“Ohio EPA”) issued the Ohio General Permit for Filling Category 1 and 2 Isolated Wetlands and Ephemeral Streams (“General Permit”) on June 25, 2020. Ohio EPA cited Ohio Revised Code (“ORC”) § 6111 as its source of authority to regulate the filing of and discharges into these waterbodies in Ohio that are now explicitly excluded from the CWA. A 2017 letter concerning the proposed changes to the NWPR provides a basis for Ohio EPA’s current actions. Ohio EPA stated:

Due to the broad definition and prohibitions in ORC 6111, ephemeral and intermittent streams would be protected, but there would be no permitting mechanism to allow the placement of dredge and fill material similar to the 404/401 permitting mechanism. The 401 program in Ohio is dependent on the 404 process, so if certain streams were considered not a water of the US (non-jurisdictional), then a 401 WQC could not be issued for placement of dredge and fill material.

The General Permit creates a permitting mechanism to allow the placement of dredge and fill material similar to the 404/401 permitting process. Section 401 WQCs require an applicant to obtain approval from the state where a proposed project is located that discharges resulting from the project comply with the CWA and state specific conditions applicable to “waters of the state.” Section 404 permits are granted by the Corps for discharges into “waters of the United States.” Essentially, Ohio EPA changed the existing permit program to include additional permit conditions for ephemeral streams and isolated wetlands that fall under other Ohio permitting programs.

For isolated wetlands, coverage under the General Permit is limited to:

The filling of, and the discharge of dredged material into, Category 1 and Category 2 isolated wetlands of up to a total of one-half acre or less. The filling of, or discharge of dredged material into, greater than one-half acre of Category 1 or 2 wetlands, or any Category 3 isolated wetlands is specifically not authorized under this general permit.

For ephemeral streams, coverage under the General Permit is limited to the filling of, and the discharge of dredged material into, ephemeral streams that are determined to not be waters of the United States and are not subject to Sections 404 or 401 of the CWA. Additional general requirements that have historically been applicable to projects that impact ephemeral streams when these resources were under federal jurisdiction are included under the General Permit, including pre-notification, site restoration, and mitigation requirements for permanent impacts.

Ohio EPA declared its effort to afford protections that would otherwise be withdrawn as necessary to provide a level of protection to these resources while giving those who need a lawful permit to impact these resources a predictable path forward.

### **Challenges to the General Permit and the NWPR**

The General Permit has been met with challenges. Notably, several Ohio trade associations have appealed the General Permit to the Environmental Review Appeals Commission. Negotiations regarding the General Permit are ongoing between the associations and the Ohio EPA at this time.

In addition, the Ohio House of Representatives has recently acted to attempt to achieve consistency between the CWA and Ohio law. Ohio House Bill 175 (“HB 175”), cosponsored by five House Republicans, seeks to change the definition of “ephemeral stream” in ORC § 3745.114 and then explicitly exclude these waters from the definition of “waters of the state” under ORC Chapter 6111. Specifically, HB 175 as introduced would add a sentence at the end of the current definition of “waters of the state” which reads: “Waters of the state does not include an ephemeral feature.” The implementation of the proposed HB 175 would take away Ohio EPA’s authority to require permits for or prohibit discharging pollutants into ephemeral features in Ohio.

Finally, the NWPR itself is also being reviewed by the White House. On January 20, 2021, President Biden signed an Executive Order directing agencies to “immediately review... the promulgation of Federal regulations... during the last four years that conflict with these important national objectives.” The Executive Order specifically listed “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22250 to be reviewed by the U.S. Department of Defense. Such a review could mean that the definition of “waters of the United States” may be revised once again. As of yet, no changes have been proposed by the Department of Defense, however.

We will provide updates regarding the status of the General Permit as negotiations between the parties proceed. Please contact any of the listed Roetzel attorneys for further information.

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