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U.S. Army Corps Publishes Final Rule to Reissue, Modify, Issue Various Nationwide Permits

Legal Update

01.15.2021

On January 13, 2021, the U.S. Army Corps of Engineers (Corps) published its final rule to reissue, modify and/or issue various nationwide permits (NWP). Of particular note for the energy industry, the Corps reissued and modified NWP 51 (land-based renewable energy generation facilities) and has split NWP 12 into separate permits. The new NWP 12 will apply only to oil and natural gas pipeline activities, and a new NWP 57 applies to electric utility line and telecommunications activities. The new rule also includes accompanying revisions to certain General Conditions and Definitions. The changes are slated to go into effect on March 15, 2021.

As it did for the 2017 NWPs, the Corps continues to take the position that it is not required to conduct a national programmatic consultation under Section 7 of the Endangered Species Act. This position is directly challenged in ongoing litigation related to the Keystone XL pipeline. As such, the outcome of that litigation may also have relevance with respect to the new NWPs.

NWP 12

The reissued and modified NWP 12 will authorize discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance or repair of oil and natural gas pipelines, provided the activity does not result in the loss of greater than one-half acre of waters of the United States for each single and complete project and there is no change in pre-construction contours of waters of the United States. Of note, a pre-construction notification is now required for all oil and gas pipelines longer than 250 miles in total length, regardless of impacts.

NWP 51

The reissued and modified NWP 51 will authorize discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion or modification of land-based renewable energy facilities, including attendant features, provided the discharge does not cause the loss of greater than one-half acre of non-tidal waters of the United States. The reissued and modified NWP 51 removes the condition from the 2017 NWP 51 that the discharge must not cause the loss of 300

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linear foot of stream bed.

NWP 57

The new NWP 57 will authorize discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters of the United States, for electric utility line and telecommunications activities. The permit's structure is similar to that of NWP 12, with specific modifications to address differences in utility line sectors. NWP 57 treats each water crossing as separate and distinct and retains the half-acre limit for each separate and distinct crossing and for the construction, maintenance or expansion of substations.

Fredrikson's experienced energy team navigates federal, state and local regulatory matters from initial strategy development through permitting and litigation.