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The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments

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Summary

Permits issued by the U.S. Army Corps of Engineers (the Corps) authorize various types of development projects in wetlands and other waters of the United States. The Corps' regulatory process involves two types of permits: general permits for actions by private landowners that are similar in nature and will likely have a minor effect on jurisdictional waters and wetlands, and individual permits for more significant actions. The Corps uses general permits to minimize the burden of its regulatory program: general permits authorize landowners to proceed with a project without the more time-consuming need to obtain standard individual permits in advance. More than 97% of the Corps' regulatory workload is processed in the form of general permits.

Nationwide permits are one type of general permit. Nationwide permits, which number 52, are issued for five-year periods and thereafter must be renewed. They were previously reissued in total in March 2012. In advance of their scheduled expiration in March 2017, the Corps reissued the 2012 permits, with some revisions and modifications, in January 2017.

The current nationwide permit program has received criticism from multiple stakeholders and has few strong supporters, for differing reasons. Developers and other industry groups say that it is too complex and burdened with arbitrary restrictions that limit opportunities for an efficient permitting process and have little environmental benefit. Environmentalists say that it does not adequately protect aquatic resources, because the review procedures and permit requirements are less rigorous than those for individual permits and because the Corps fails to adequately track impacts on aquatic resources. At issue is whether the program has become so complex and expansive that it cannot either protect aquatic resources or provide for a fair regulatory system, which are its dual objectives. Controversies also exist about the use of specific nationwide permits for authorizing particular types of activities, such as pipeline and utility line projects and surface coal mining operations.

In addition to general objections, interest groups have a number of specific criticisms of the permit program, such as requirements that there must be compensatory mitigation for impacts of some authorized activities and impacts of regional conditioning through which local aquatic considerations are addressed. Coordinating implementation of the nationwide permits between federal, state, and tribal governments also raises a number of issues. Of particular concern to states is tension over whether their authority to certify the nationwide permits is sufficient to assure that state water quality standards or coastal zone management plans will not be violated. Whether the Corps adequately ensures protection of endangered or threatened species and critical habitat is an issue of concern to some stakeholders.

It has been more than 15 years since Congress examined the nationwide permit program in oversight hearings or in connection with bills to fund the Corps' regulatory program. While the Obama Administration's initiatives concerning some activities that are authorized by nationwide permits drew congressional attention and criticism—such as initiatives concerning surface coal mining activities in Appalachia—that attention has not extended to oversight of the Corps' regulatory program generally. The nationwide permit program has continued to evolve and to generate wide-ranging concerns among stakeholder and interest groups. Recent controversies about the Corps' use of nationwide permits to authorize large pipeline and utility line projects could lead to greater congressional interest in the program.

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Introduction

Federal laws require government approval prior to beginning any work in or over waters of the United States that affects the course, location, condition, or capacity of such waters, or prior to discharging dredged or fill material into U.S. waters. Regulatory programs that implement these laws are administered through permits issued by the U.S. Army Corps of Engineers (the Corps), which shares responsibility with the Environmental Protection Agency (EPA), under the authority of the Clean Water Act; the Rivers and Harbors Act; and the Marine Protection, Research, and Sanctuaries Act.

The Corps' regulatory process involves two types of permits: general permits for actions by private landowners that are similar in nature and will likely have a minor effect on waters and wetlands, and individual permits for more significant action. A nationwide permit (NWP) is a form of general permit that authorizes a category of activities throughout the nation and is valid only if the conditions applicable to the permit are met. The NWP program is intended to provide timely authorizations for the regulated public while protecting the nation's aquatic resources. These permits are issued under authority of Section 404(e) of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 (RHA). Under Section 404, permits are required for discharges of dredged or fill material into jurisdictional waters of the United States, including wetlands, such as fills to convert waters and wetlands to dry land.[1] Under Section 10, permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States, such as piers, dredging, and aids to navigation.[2]

Nationwide permits, which number 52 and cover a range of activities, can be issued for a period of no more than five years and cannot be extended. They automatically expire and become null and void if they are not modified or reissued within five years of their effective date. They were last reissued in total in 2012. In advance of their scheduled expiration in 2017, the Corps issued a proposal to reissue and modify the existing nationwide permits on June 1, 2016, and issued final permits on January 6, 2017.

At issue in the program is the balance of two objectives: providing regulatory protection to ensure minimal impacts on aquatic resources, and providing a fair and efficient regulatory system. For several years, interest groups of differing perspectives have criticized the program and increasingly questioned whether either objective is being achieved, much less both objectives. Stakeholders involved in this debate include, on the one hand, industry groups (e.g., members of building—especially homebuilding—design, realtor, and petroleum and mining organizations) and, on the other, environmental advocacy groups, along with many state water quality, water resources, and environmental agencies.

Particularly under the CWA, the Corps' regulatory authority is broadly defined. It covers waters of the United States, including the territorial seas, and includes traditionally navigable waterways capable of supporting interstate and foreign commerce, plus their tributaries, and adjacent wetlands and isolated waters where the use, degradation, or destruction of such waters could affect interstate or foreign commerce.[3] In fact, much of the public concern about the nationwide

[1] 33 U.S.C. §1344.

[2] 33 U.S.C. §403.

[3] The jurisdictional reach of the CWA generally, including the Corps' regulatory program, has been a controversial policy and judicial issue for some time and was addressed in regulations issued by EPA and the Corps in 2015. It is beyond the scope of this report, but for additional information see CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*, by (name redacted) .

permit program—with regard to impacts of authorized activities, and terms and conditions intended to limit impacts—often focuses on permits for projects that affect the nation's wetlands. Controversies about the permit program are compounded by disputes about the Corps' assessment that adverse environmental impacts of authorized activities are minimal. Critics, especially environmental advocates, argue that the Corps lacks an effective tracking and monitoring system for evaluating impacts and thus lacks adequate information to assess the permit program.

The nationwide permit regulatory program has drawn Congress's attention several times in the past, but not recently. In 1997, House and Senate committees held oversight hearings to review several issues and controversies. In 1999 and 2000, congressional appropriators directed the Corps to take certain actions concerning its overall regulatory program, and nationwide permits in particular.

This report describes and reviews the nationwide permit program and discusses several major issues that have drawn the attention of stakeholder interest groups, including program complexity, coordination with states, and mitigation requirements.

Background

General permits, including nationwide permits, are a key means by which the Corps seeks to minimize the burden and delay of its regulatory program: they authorize a landowner or developer to proceed with the covered activity without having to obtain an individual, site-specific permit in advance. Individual permits are subject to public notice, public interest review, public hearing, activity-specific environmental documentation, and case-by-case evaluation which typically involve longer time before the activity is authorized. General permits are intended to allow certain activities to proceed with little delay or paperwork, thus reducing regulatory burden on applicants and the Corps. According to Corps data, in FY2016, nationwide and other general permits that required Corps approval entailed average processing time of 40 days, in contrast with standard individual permits, which, on average, took 217 days of processing and evaluation, once an application was completed.

The specific statutory authority for these permits in CWA Section 404(e) emphasizes that to qualify for a general permit, activities must have minimal adverse impact on the environment, individually and cumulatively.

> In carrying out the functions relating to the discharge of dredged or fill material under this section, the Secretary [of the Army] may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

According to the Corps, between 2012 and 2015, the agency authorized an average of 63,000 activities per year; 97% were authorized by nationwide and other general permits. More than half require advance notification to the Corps and written verification by the agency before applicants may proceed for some activities (i.e., 10 NWPs) or all covered activities (i.e., 21 NWPs). For 19 others, proponents may proceed without application to the Corps (about 31,000 authorized activities are "non-reporting" each year), unless advance notification is required to comply with

certain general conditions and related laws such as the Endangered Species Act or the National Historic Preservation Act. The following are examples of nationwide permits:[4]

- Placement of aids to navigation approved by, and installed according to, U.S. Coast Guard requirements (NWP 1);
- Stream or river bank stabilization activities necessary to prevent erosion (NWP 13);
- Minor dredging, that is, dredging of no more than 25 cubic yards of material (NWP 19);
- Activities associated with restoration, enhancement, or establishment of wetlands and riparian areas where the activities result in net increase in aquatic resource functions and services (NWP 27); and
- Discharges of dredged or fill material for the construction or expansion of residential developments (NWP 29).

Many nationwide permits have specific conditions and terms (such as maximum acreage limitations). In addition, a number of general conditions apply to some or all NWPs; for example, no activity may cause more than a minimal adverse effect on navigation; no activity may jeopardize a threatened or endangered species; discharges into spawning areas and migratory waterfowl breeding areas must be avoided, to the maximum extent practicable; and discharges of dredged or fill material must be minimized or avoided through mitigation to offset more than minimal impacts on the aquatic environment, to the maximum extent practicable.

Several permits also require coordination with other federal and state resource agencies, for example, if the activity will result in loss of more than a specified acreage of waters of the United States or linear feet of stream bed.[5] When coordination is required, the Corps will consider the agency's comments concerning the proposed activity's compliance with terms and conditions of the permit, including the need for mitigation. The Corps is not required to adopt another agency's recommendations but is required to record its response to agency comments in the administrative record.

The Corps believes that NWPs provide a benefit by encouraging applicants to minimize a project's environmental impacts in order to qualify for NWP authorization. If NWPs did not exist, or were not reissued prior to expiration (they cannot be administratively extended), project proponents would have to apply for standard individual permits. The Corps believes that the likely result would be greater annual acreages of authorized impacts to aquatic resources, because standard individual permits have no acreage limits.[6]

A project proponent who wants to use one or more of the NWPs to fulfill requirements for authorization by the Corps must comply with regulations that implement the NWP program (at 33 C.F.R. Part 330) and all applicable terms and conditions of the appropriate NWPs, including any regional conditions imposed by the Corps division engineer and any activity-specific conditions

[4] A list of the current nationwide permits, as issued in January 2017, is in the **Appendix** to this report. The full text of the permits and related general conditions is available at http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx.

[5] Most of the NWPs limit impacts to one-half acre or 300 linear feet the area that can be disturbed by the authorized activity.

[6] U.S. Army Corps of Engineers, "Regulatory Impact Analysis for the 2017 Nationwide Permits," December 21, 2016, p. 36. Hereinafter, 2017 RIA.

imposed by the district engineer (see "Regional Conditioning"). If the proponent does not fully comply, the activity is unauthorized, and the person may be subject to an enforcement action.

Nationwide Permits: 1977-2012

The Corps first issued regulations for general permits in the mid-1970s, and Congress codified the concept in amendments to the Clean Water Act in 1977 (P.L. 95-217). Nationwide and other general permits[7] are valid only for a period of five years, as is the case with other Clean Water Act permits. Thus, they were reissued in 1982, 1987, 1992, and 1997. Prior to 1992, the nationwide program involved little individualized review of these permits, as the guiding criterion was that covered activities impose so minimal an environmental impact that the full review given individual permits was not warranted. In the 1992 revisions, however, district engineers were given greater authority to modify, suspend, or revoke nationwide permits for specific activities, and division engineers were authorized to exercise discretionary authority to revoke applicability of specific nationwide permits in high value aquatic areas and to then require individual permits for the activity. Further, preconstruction notification (PCN) to the Corps was required for several of the nationwide permits,[8] and when such notice is required, the applicant was required to provide a wetlands delineation of the project site. Advance notification is intended to give the Corps time to determine that the adverse effects of the discharge or activity will be minimal. The district engineer generally has 45 days to notify the person of approval to proceed or, instead, of the need to obtain an individual permit before the applicant may proceed. Even with those changes, the reissued nationwide permits did not attract significant controversy when they became effective in 1992.

More attention and controversy focused on the Corps' process of reissuing the permits in 1997. The Corps had several substantive purposes behind modifying the permits at that time. One was the need to better ensure that permits have minimal adverse effects, especially on isolated wetland areas. A second was the need to better regionalize the program, by emphasizing that Corps officials (38 district and 11 division engineers) should condition nationwide permits on a local basis with limitations that reflect differences in aquatic ecosystem functions and values that exist across the nation.

[7] CWA §404(e) authorizes the Corps to promulgate general permits on a regional, state, or nationwide basis. The Corps' regulations authorize the issuance of general permits on a regional (sub-state) or statewide basis by district or division engineers, rather than headquarters, which issues the nationwide permits. Regional general permits (RGPs) are issued by the Corps to authorize categories of activities within a specific geographic area, rather than nationwide. The Corps also uses the general permit authority to authorize statewide general permits covering activities in states that are deemed to have sufficient state regulatory authority. These statewide general permits (programmatic general permits, or PGPs) are derived from an existing state, local, or other federal agency program and are designed to avoid duplication with that program. They function as a substitute for full state program authorization to administer the 404 program. Depending on the core state program, state PGPs may encompass all wetlands regulation in a state, certain waters only, or certain types of regulated activities. Once a PGP is approved, the Corps suspends its permit activity in lieu of the authorized state or sub-state entity, although the Corps retains the right to override the PGP and issue a federal permit in individual cases. For example, in the Corps' New England District (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont), all nationwide permits have been suspended and have been replaced with RGPs and PGPs. Similarly, most NWPs have been suspended in Maryland and Pennsylvania since state PGPs are already in place in those states. As of February 2015, there were 224 RGPs and 19 PGPs in effect. Also, some activities qualify for abbreviated permit processing authorization by Corps district engineers in the form of Letters of Permission.

[8] A PCN is a brief document that is intended to provide the Corps district engineer with enough information to determine whether an activity may be authorized by a nationwide permit. Project-specific information must be submitted, but detailed studies or analyses are not required.

A third purpose in the 1997 permits was the Corps' desire to restrict a particular nationwide permit, NWP 26, which authorized discharges in headwaters or isolated waters. Critics had long been concerned that this permit was overly broad and had resulted in large amounts of unmonitored wetland losses. Consequently, in 1997 the Corps re-issued NWP 26 with modifications that reduced the allowed acreage limits and required advance notification by the applicant if the discharge would affect ⅓ acre or more. In 2000, in an action midway before routine permit reissuance was due in 2002, the Corps repealed NWP 26 entirely and replaced it with five specific activity-based permits (e.g., NWP 39, covering residential, commercial, and institutional development).

Also in 2000, the Corps added two general conditions that put limits on the use of nationwide permits for projects within critical resource waters, and for permanent above-grade wetland fills within the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). Critical resource waters are those designated as having particular environmental or ecological significance (such as designated marine sanctuaries and state natural heritage sites).

The Corps reissued the entire NWP package again in 2002, 2007, and 2012. On each occasion, the Corps modified some existing permits and general conditions and added new general conditions and several new permits, bringing the total to 50. Among the newer authorizations, permits now cover discharges in ditches (NWP 46), coal remining activities (NWP 49), underground coal mining activities (NWP 50), and renewable energy generation facilities (land-based facilities, NWP 51, and water-based facilities, NWP 52). And with each reissuance, new issues and controversies arose. For example, in the 2007 permits, the Corps modified NWP 29, which authorizes construction of residential developments, adding certain acreage impact restrictions and requiring preconstruction notification for all applications. Industry groups criticized both changes to this permit, while environmental groups argued that acreage thresholds under the permit should be more stringent.

In 2012, the major issue involved NWP 21, the nationwide permit that authorizes certain discharges associated with surface coal mining activities. The Corps and others had become concerned that the then-existing permit did not adequately protect against loss of aquatic resources, and in the 2012 reissuance, the Corps modified NWP 21 to limit its application. Industry groups, which had generally supported NWP21, criticized restrictions on the permit, while environmental groups favored halting its use altogether (see "Coal Mining Activities" below).

2017 Nationwide Permits

In June 2016, the Corps proposed to reissue and modify the 2012 NWPs, which are due to expire March 18, 2017. The Corps issued final revised permits on January 6, 2017; they go into effect on March 19, 2017, and will expire on March 18, 2022.[9] The reissued permits include the 50 existing NWPs, with modifications to 29 of them, and two new nationwide permits. The reissued permits also modify several existing general conditions and definitions. The new permits are:

- *NWP 53, Removal of low-head dams.* This permit authorizes activities that remove low-head, or run-of-the-river dams, that have small hydraulic heads and storage volumes, as well as short residence times, and where there is little or no control of the rates at which water is released from the dams. Many of the

[9] Department of Defense, Department of the Army, Corps of Engineers, "Issuance and Reissuance of Nationwide Permits, Final rule," 82 *Federal Register* 1860-2008, January 6, 2017.

estimated 2 million small dams in the United States are low-head dams, and the Corps believes that many need to be repaired or replaced. Removing them could help restore rivers and streams by removing barriers that adversely affect ecological processes, as well as enhance public safety. According to the Corps, removal of some low-head dams could be authorized by existing NWP 27 (aquatic habitat restoration activities), but the new permit would authorize removal of larger low-head dams. The Corps estimates that this NWP would be used 25 times per year, resulting in impacts to less than 1 acre of waters of the United States, including wetlands.[10]

- *NWP 54, Living shorelines.* This permit authorizes the construction of living shorelines for bank stabilization activities that control erosion. Two existing nationwide permits, NWP 13 (bank stabilization) and NWP 27, already authorize activities to help protect public and private property from erosion. These permits are generally used for hardened structures such as bulkheads and involve substantial amounts of fill materials. In contrast, a living shoreline provides nature-based erosion control by techniques that incorporate vegetation or other natural elements alone or in combination with some type of harder shoreline structure (e.g., oyster reefs) for added stability. They are not practical or feasible in all coastal environments, as they work best in sheltered coasts that are not subject to high energy erosive forces that occur along open coasts. The Corps believes that this nationwide permit is needed, because the structures, work, and fills associated with constructing living shorelines often do not fall within the terms and conditions of existing NWPs 13 and 27. The Corps estimates that the permit would be used 200 times per year, resulting in impacts to approximately 27.5 acres of waters of the United States, including jurisdictional wetlands.[11]

The Corps believes that most of the changes in the 2017 NWPs are clarifications that are expected to have little impact on the number of activities authorized by nationwide permits. Overall, the agency estimates that, under the reissued permits, about 492 additional activities per year could be authorized by NWPs, rather than standard individual permits, compared with the 2012 NWPs (out of about 63,000 NWP-authorized activities in all).

The Corps prepared a Regulatory Impact Analysis (RIA) for the entire proposal and decision documents containing an environmental assessment for each of the proposed NWPs in order to comply with requirements of the National Environmental Policy Act (NEPA); all of these documents are available in the regulatory docket.[12] The decision documents constitute national-scale analysis that discusses environmental impacts caused by activities authorized by the permit and, in general terms presented similarly in each decision document, the statutory authority for the permits and related laws, alternatives (e.g., no NWP), environmental consequences, public interest review factors, and cumulative effects analysis. These documents and the RIA also present the Corps' estimates of how many times each NWP will be used, plus estimates of impacts to waters of the United States, including jurisdictional wetlands, and estimates of compensatory mitigation acreage, if any, that will be required as part of the NWP's authorization. Compensatory mitigation would be required if the Corps determines that a proposed activity will

[10] 2017 RIA, Appendix B.

[11] Ibid.

[12] See http://www.regulations.gov, docket ID number COE-2015-0017.

have more than minimal individual and cumulative adverse effects on the aquatic environment (see "Mitigation Requirements").

Some NWPs are projected to be used infrequently and have limited acreage impact (for example, NWP 20, authorizing response operations for oil or hazardous substances; NWP 28, modification of existing marinas). Others are projected to be used several thousand times each year and impact several hundred acres of water and wetlands, many with at least partial compensatory mitigation (e.g., NWP 12, authorizing construction, maintenance, repair, and removal of utility lines, is projected to be used for 13,950 activities each year and impact 1,775 acres of water and wetlands annually, with 296 acres of that impact estimated to be mitigated). In total, the Corps estimates that the 2017 NWPs would authorize 63,437 activities annually and impact 20,346 acres annually, with 2,374 acres of required compensatory mitigation.[13]

Issues Concerning the NWP Program

As the nationwide permit program has grown (from 15 permits in 1977 to 52 currently) and become more complex over time, interest groups have increasingly united to argue that the program as it has developed fails to meet its overall objectives, although their reasons for this criticism are very different. For example, one view was expressed by a coalition of environmental advocacy groups.

> The nationwide permit system was presumably developed in order to balance two somewhat contrary objectives: to ensure that the permits issued result in only minimal impacts on aquatic resources, and to provide a predictable, fair, and simple regulatory system for citizens applying for permits. Given the complexity and confusion surrounding the nationwide permit program, together with the clearly more than minimal environmental impacts, we question whether either of these objectives is being achieved.[14]

Critical views of a different sort were expressed by a group representing one set of developers.

> Over time, however, the NWPs have become increasingly restrictive and complex to the point that they faintly resemble the streamlined permitting process Congress envisioned when it enacted Section 404(e).... [T]he program waivers between providing administrative relief and imposing red tape, between a truly streamlined process and one that is so severely limited that few projects can qualify.... The history of the NWP has been a consistent tightening of the eligibility for the program.... Each time the Corps has drawn the line between NWP eligibility and ineligibility, eligibility has been restricted, never relaxed.[15]

[13] 2017 RIA. Two NWPs are estimated to result in net increases in aquatic resources (NWP 27, aquatic resource restoration activities) or are expected to have positive or neutral effects on aquatic resources (NWP 48, commercial shellfish aquaculture activities). Excluding estimated use and acreage impacts of these two nationwide permits, the Corps projects that the remaining permits would authorize 61,714 activities annually and impact 5,490 acres annually, with 2,076 acres of required compensatory mitigation.

[14] Comments of the Gulf Restoration Network et al.; Natural Resources Defense Council et al., Comments Submitted on Docket # COE-2006-0005; and Ohio Valley Environmental Council, "Re: Proposal to Reissue and Modify Nationwide Permits, Docket No. COE-2006-0005," November 27, 2006, pp. 1-2. Hereinafter, Gulf Restoration Network Comments.

[15] National Association of Home Builders, "Advice and Recommendations of the National Association of Home Builders on the Department of the Army, Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits," 2006, pp. 3, 21, 44. Hereinafter, NAHB Comments.

Beyond apparent broad agreement that the program fails to meet its objectives, the views of industry and environmental advocacy groups diverge greatly. Industry groups support the NWP program, or the type of streamlined program that they believe was originally intended, and agree with the Corps that the use of nationwide permits will result in minimal adverse environmental impacts. Nevertheless, they have been highly critical of many of its aspects.

> The Corps' attempt to illegally expand its jurisdiction, the stringent and largely inflexible acreage and PCN [preconstruction notification] thresholds, the lack of a proper administrative process and record to support the proposal, the problematic regional conditions and the overall trend toward the elimination of NWPs all contribute to a permit package that is hardly even a semblance of the streamlined process directed by Congress.[16]

Environmental groups argue that permitted activities will have more than minimal impacts on the environment and that the Corps has no substantial or scientific evidence to conclude otherwise. They argue that the permits are unlawful because they violate the requirements of Section 404(e) that there may be no more than minimal adverse environmental effects on aquatic resources, both individually and cumulatively. Further, they criticize what they view as inconsistent and inadequate PCN requirements, overly vague requirements which will result in weakened regulatory protection, the granting of excessive authority to Corps district engineers to waive permit limits in individual cases, and excessive reliance on compensatory mitigation to offset the harmful effects of permitted activities.[17]

Nationwide Permit 12

One of the current nationwide permits, NWP 12, is used to authorize utility line activities, including the construction, maintenance, or repair of utility lines in waters of the United States. Under this permit, a "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose such as an oil or natural gas pipeline, any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. This permit has long been controversial with environmental critics of the nationwide permit program, and it has recently also drawn critical attention from tribal organizations in connection with several large oil and natural gas pipeline projects, as discussed below.

A PCN is generally required for authorization under NWP 12, and work cannot begin before the Corps district engineer provides written verification to the applicant that the proposed activity will comply with the requirements of the nationwide permit. Generally, the Corps is to provide such verification within 45 days of receiving a complete PCN, but if the proposed activity may affect threatened or endangered species or critical habitat, or historic properties, the Corps must carry out certain procedural steps and consultations, discussed below, that are not limited to a 45-day review.

Under the CWA and the RHA, the Corps' regulatory authority only applies to areas where a pipeline or other utility line activity crosses waters of the United States or federal real property interests acquired and managed by the Corps for flood control and navigation projects—it does not have regulatory jurisdiction over portions of a pipeline that cross upland areas. As a result, for

[16] Ibid., pp. 3-4.

[17] See generally, Gulf Restoration Network Comments.

many pipeline and utility line projects, the Corps has jurisdiction over a very small portion of the overall pipeline.

When the Corps proposes to reissue the nationwide permits, as it did in June 2016, it prepares a Decision Document for each of them for purposes of complying with NEPA. In that document, the Corps estimates that NWP 12 is used on average approximately 14,000 times per year on a national basis, resulting in impacts to approximately 1,750 acres of waters of the United States, including wetlands that are regulated under the CWA. (The total includes an estimated 11,500 times per year for activities that involve PCN to the Corps and about 2,500 that occur each year that do not require a PCN.)[18] While NWP 12 covers the large majority of utility line and pipeline activities, some do not qualify for a nationwide permit—generally because they will have more than minimal individual and cumulative environmental impacts—and thus they must be authorized by individual Corps permits. The Corps does not have a centralized database or other information on the number of individual permits that it issues for pipeline and utility line projects, nor does it have a database on utility line activities that are authorized by NWP 12.

Tribal Rights and Endangered Species and Historic Properties Consultation

As noted previously, activities that may be authorized by the nationwide permit program are subject to a number of general conditions, in addition to permit-specific restrictions. One of these concerns tribal rights: General Condition 17 states that no NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. Other general conditions apply if the project has potential to affect historic properties or a threatened or endangered species or critical habitat. When a PCN is submitted to the district engineer, the applicant must identify endangered species or historic property issues and may not begin work without written verification from the Corps allowing the activity to proceed.

General Condition 18 states that no activity may be authorized if it will directly or indirectly jeopardize a threatened or endangered species or critical habitat. Further, no activity is authorized that "may affect" a listed specifies or critical habitat unless consultation pursuant to Section 7 of the Endangered Species Act (ESA, 16 U.S.C. §1536) has been completed. (See "Endangered Species Act Consultation.")

General Condition 20 states that when an activity may affect properties listed or eligible for listing in the National Register of Historic Places, the activity is not authorized until requirements of Section 106 of the National Historic Preservation Act (NHPA, 54 U.S.C. §306108) have been satisfied. Section 106 requires federal agencies to consider the effects of projects that they carry out, approve, or fund on historic properties. If properties are identified by the applicant in a PCN, the Corps is responsible for initiating Section 106 review and consultation, most of which takes place between the agency and state and tribal or Native Hawaiian historic preservation officials. Agencies also consult with officials of federally recognized Indian tribes when the projects have the potential to affect historic properties on tribal lands or historic properties of significance to such tribes located off tribal lands. Once General Condition 20 is triggered, the activity cannot proceed unless the district engineer completes a site-specific analysis and verifies either (1) that the activity will not actually affect any eligible historic site, or (2) that the consultations required by the NHPA are complete. The Advisory Council on Historical Preservation (ACHP) may be involved in consultation under certain circumstances, such as substantial impacts to important historic properties, but it does not have a veto over the Corps' decision.

[18] U.S. Army Corps of Engineers, *Draft Decision Document, Nationwide Permit 12*, May 2016.

Further, General Condition 21 states that if a permittee discovers previously unknown historical, cultural, or archaeological remains, the permittee must immediately notify the district engineer and, to the maximum extent practicable, avoid construction activities until required coordination has been completed. The district engineer will coordinate with tribes and federal and state agencies to determine if the items or remains warrant a recovery effort, or if the site is eligible for listing in the National Register of Historic Places.

Issues Related to NWP 12

Environmental advocates have frequently criticized several of the current nationwide permits, including NWP 12. Under Corps regulations, nationwide permits can be used for a "single and complete project" that will cause only minimal adverse environmental effects, individually or cumulatively (33 CFR 330.2(i)). A "single and complete project" is a portion of a total project that includes all crossing of a single waterbody at a specific location. Thus, NWP 12 can be used for each individual crossing of a waterbody, even if it is part of a large project that consists of multiple stream crossings.

Because the Corps evaluates pipeline and other utility line water crossings in this segmented fashion, it does not evaluate the environmental or other impacts of the totality of water crossings for an overall pipeline or utility line project. This has led to criticism that, by reviewing discrete geographic segments, the Corps fails to evaluate whether the totality of a project may have adverse environmental effects. Considered in totality, a project's impacts might require authorization under a standard individual permit, not a nationwide permit, critics say. The Corps' response is that under the CWA and the RHA, its regulatory jurisdiction does not cover aspects of a project in upland areas on private property, which often represent the majority of a pipeline's or utility line's length. Critics say that such segmenting of utility line projects fails to account for cumulative effects that can have more than minimal impact on aquatic resources, but legal challenges to use of this permit have been largely unsuccessful.[19]

A related criticism of the Corps' reliance on NWP 12 is that the nationwide permit process does not allow for project-specific environmental review or public input. The Corps' environmental assessment for NWP 12 and other nationwide permits is essentially preauthorization of a group of similar activities on a programmatic level that is done every five years when the permits are issued or reissued. The agency's position in that assessment is that, with the qualifying conditions and limits that attach to the nationwide permits (including regional conditioning by Corps division engineers or states), the Corps is able to determine that environmental impacts will be no more than minimal. Further, the Corps believes that its procedures for addressing possible impacts on threatened or endangered species or historic property meet all requirements of other federal laws, including the ESA and the NHPA. Critics, however, assert that under the nationwide permits, private project proponents can make their own project-specific determinations about threatened or endangered species or historic properties, through submission of a PCN, and that the Corps only responds to information presented in a PCN, as it is not independently responsible for determining their presence on a project site.

Finally, recent legal controversies over several oil and natural gas pipelines, such as the proposed Dakota Access Pipeline, have focused in part on the Corps' compliance with the NHPA in connection with authorizing permits for pipeline projects.[20]

[19] See, for example, Mobile Baykeeper, Inc. v. U.S. Army Corps of Engineers, 2014 WL 5307850 (S.D. Ala. October 16, 2014); and Sierra Club v. Bostick, 787 F.3d 1043 (10th Cir. 2015).

[20] See CRS Insight IN10567, *Dakota Access Pipeline: Siting Controversy*, by (name redacted) .

Mitigation Requirements

An applicant seeking Corps regulatory authorization for a proposed discharge—whether for a standard individual permit or general permit—must demonstrate that all appropriate and practicable steps have been taken to avoid and minimize impacts to aquatic resources. For unavoidable impacts of permitted activities, compensatory mitigation is required to replace the loss of wetland, stream, and/or other aquatic resource functions. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or preservation of aquatic resources, either by the permittee's individual project, or the use of mitigation banks or other consolidated mitigation efforts.

The Corps acknowledges that, although it anticipates minimal adverse effects from the nationwide permit program, the use of NWPs may still affect the aquatic environment. Therefore, the permits include a general condition detailing how district engineers may require compensatory mitigation to offset the authorized impacts. Mitigation requirements incorporated in the nationwide permit program have become more specific over time and are viewed by environmental protection advocates as critically important. Compensatory mitigation will be required for all wetland losses that exceed 1/10-acre and require preconstruction notification. For lesser wetland losses that require preconstruction notification, the district engineer may require compensatory mitigation on a case-by-case basis.

Before reissuance in 2002, this general condition required one-for-one mitigation of adverse impacts to wetlands with a stated preference for restoration of wetland impacts over preservation.[21] In 2002, the Corps revised the mandate to allow a case-by-case waiver of the requirement in cases where the Corps determines that some other form of mitigation, such as establishment of vegetated buffers, is more appropriate. The Corps said that it will require mitigation for impacts based on a watershed approach, often involving a mix of vegetated buffers and other mitigation in non-wetland areas. Thus, for example, a district engineer might authorize a project with impacts on a particular wetland and require mitigation within the overall aquatic environment of the particular watershed involved but not wetland-acre-for-wetland-acre mitigation. However, greater than a one-to-one ratio can be required in some cases to adequately replace aquatic resource functions and values lost as a result of NWP-authorized activities. This approach, the Corps said, allows district engineers to require the mitigation for project impacts that best protects the aquatic environment.[22]

Environmentalists are critical of the Corps' reliance on mitigation as the basis for concluding that impacts of the nationwide permits will be minimal. They have pointed to the incomplete track record of mitigation projects described in a number of reports, including a 2001 report of the National Research Council[23] and a 2005 GAO report, showing that mitigation is not fully successful and does not compensate for wetlands lost to permitted fills.[24] In light of the lack of data that mitigation is performed or that it would successfully replace lost functions and values, they assert that the Corps lacks sufficient evidence to conclude that mitigation will render the

[21] The policy preference for restoration derives from the fact that preservation does not provide new acres and thus cannot compensate for wetlands loss on an acreage basis.

[22] U.S. Department of the Army, Corps of Engineers, "Issuance of Nationwide Permits," 67 *Federal Register* 2063-2067, January 15, 2002.

[23] National Academy of Sciences, National Research Council, *Compensating for Wetland Losses under the Clean Water Act,* Washington, 2001, 267 pp.

[24] U.S. Government Accountability Office, "Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring," GAO-05-898, September 2005.

impacts of authorized activities minimal. If an activity requires mitigation, these critics say, by definition it has more than minimal adverse effects to begin with, and under the Clean Water Act, activities with more than minimal adverse effects can only be authorized by an individual permit. They also note that the Council on Environmental Quality has said that relying on mitigation to assume impacts are reduced below the threshold of significance violates the National Environmental Policy Act.[25] The Corps acknowledges that ecological success of mitigation varies widely, but argues that mitigation is important to ensuring that nationwide permits result in minimal adverse effects. The Corps says that it has increased its compliance efforts to ensure that authorized projects are constructed as authorized, and that mitigation is successful.

Under the NWPs, compensatory mitigation is required for all wetland losses that exceed 1/10-acre, unless the district engineer issues a project-specific waiver. Industry has been critical that the Corps appears to elevate one form of mitigation (compensation) above all others and does not give district engineers sufficient flexibility to determine the extent to which mitigation is needed, on a case-by-case basis. Environmental groups, on the other hand, strongly object to allowing waivers from mitigation requirements and giving discretion to district engineers, particularly because the NWPs contain no criteria or performance standards that would govern mitigation.

In response to much of the criticism about mitigation requirements, in 2008 the Corps and EPA promulgated regulations that set standards for mitigating the loss of wetlands and associated aquatic resources under the Section 404 permit program and detail the requirements for a developer to provide compensatory mitigation. This rule provides one set of regulations for compensatory mitigation instead of numerous separate guidance documents that previously had been in use. Under the rule, all compensation projects must have mitigation plans that include the same 12 fundamental components, such as site selection criteria and a maintenance plan. The rule also clarifies stream mitigation standards and emphasizes that impacts to aquatic resources are to be avoided if possible. Only when impacts are unavoidable does the rule permit mitigation and compensation.[26] In reissuing the nationwide permits in 2012, the Corps modified some language of the mitigation general condition to conform to the 2008 regulation.

Coal Mining Activities

The use of nationwide permits to authorize coal mining activities has been and continues to be controversial, particularly in connection with NWP 21, which authorizes surface coal mining activities. Critics say that the environmental impacts of coal mining are typically far greater than the standard set forth in the Clean Water Act Section 404(e), that authorized activities will cause only minimal adverse environmental effects, individually and cumulatively. The mining industry argues that nationwide permit procedures are necessary to minimize regulatory burdens that would threaten the economics of coal mining and to provide the kind of flexibility needed by industry to respond to quickly changing operating requirements. On several occasions, the Corps has modified NWP 21 to strengthen environmental protection for projects that it authorizes. For example, in 2002, the Corps required explicit authorization before an activity can take place, rather than only requiring preconstruction notification, as in the past. In 2012, the Corps added

[25] Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," March 23, 1981.

[26] Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Compensatory Mitigation for Losses of Aquatic Resources; Final Rule," 73 *Federal Register* 19594-19705, April 10, 2008.

limits of ½-acre or 300 linear feet of loss of stream bed; impacts above those limits could not be authorized with NWP 21.

Despite such modifications, environmentalists have long contended that NWP 21 authorizes disposal of coal mining waste material which buries streams with overburden material, thereby disturbing the natural stream processes and water quality in entire watersheds and resulting in permanent loss of habitat. According to that view, mitigation cannot sufficiently compensate for these impacts, and any use of this permit is inconsistent with ensuring "minimal adverse effects" on the aquatic environment.

For many years, the Corps allowed the use of NWP 21 to authorize mountaintop mining activities in several Appalachian states.[27] This controversial practice involves removing the tops of mountains to expose and remove underlying coal seams. Upon completion of the coal removal, some amount of the overburden, or excess spoil, is placed back on the top of the mountain, while the majority is disposed in nearby valleys where streams and wetlands are filled with the mining waste. Environmentalists have sought to strengthen regulation of mountaintop mining, if not halt it altogether, in part by arguing that the practice should be regulated under more stringent Clean Water Act provisions than Section 404. The mining industry argues that mountaintop removal mining is essential to conducting surface coal mining in Appalachia, which would not be economically feasible there if operators were barred from using valleys for the disposal of mining overburden, and that NWP 21 facilitates effective and timely mining operations. Critics have used litigation to try to halt the Corps' use of NWP 21 for mountaintop mining operations, but with mixed success.

However, in 2009, the Corps took the first of several steps to restrict use of this permit for surface coal mining activities and ensure that it results in no more than minimal adverse environmental impacts. First, the Corps proposed to suspend the use of NWP 21 in Appalachia, explaining its reason as follows:

> [T]he Corps now believes that impacts of these activities on jurisdictional waters of the United States, particularly cumulative impacts, would be more appropriately evaluated through the individual permit process, which entails increased public and agency involvement, including an opportunity for public comment on individual projects.[28]

The suspension was formalized in 2010. Second, as described above, in 2012 the Corps added acreage limits on the use of NWP 21 outside of Appalachia and prohibited its use to construct valley fills.

Two other nationwide permits, 49 and 50, also address coal mining activities. The Corps' intention with these permits, which were added to the program in 2012, was to provide incentives to coal remining and underground mining activities, arguing that for permittees that meet specified terms and conditions such as acreage impact limits, it will be faster to gain authorization under an NWP than it would be to obtain an individual permit and that the environment will benefit from encouraging coal remining in this manner. By allowing such activities to proceed under a nationwide permit, rather than requiring an individual permit, the environmental benefits of remining (such as removing existing sources of water pollution that harm downstream waters) are more likely to occur, according to the Corps. Further, while acknowledging that permits 21, 49, and 50 have the potential to result in more than minimal adverse effects on water quality, the

[27] For information, see CRS Report RS21421, *Mountaintop Removal Mining: Background on Recent Controversies*, by (name redacted) .

[28] Department of Defense, Department of the Army, Corps of Engineers, "Proposed Suspension and Modification of Nationwide Permit 21," 74 *Federal Register* 34313, July 15, 2009.

agency contended that compensatory mitigation, opportunities for division engineers to impose regional conditions, and site-specific evaluation of PCNs will ensure that adverse environmental effects are minimal. In the decision documents accompanying the 2016 NWP proposal, the Corps estimates that permits 49 and 50 will be used to authorize 18 activities annually and are expected to impact 55 acres of wetlands and other waters per year. The Corps also estimates that 39 acres of compensatory mitigation will be required to offset the impacts of those authorized activities. NWP 21 is projected to be used to authorize seven surface coal mining activities nationally per year, and these activities will impact 1.3 acres of waters and wetlands, while 1.6 acres of compensatory mitigation will be required annually to offset these impacts.

Environmental critics continue to assert that the Corps has no factual basis for determining that impacts of the coal mining NWPs will be minimal. They point out that coal mining waste contains chemicals that are toxic to aquatic life: there have been cases of spills of impounded wastes, with impacts that are more than minimal. Underground mining is a destructive practice, they say, which results in loss of stream and wetland functions through subsidence and waste disposal. They also argue that the general permit process is inappropriate for such large-scale activities.

The Permitting Process: Regional Conditioning and Coordination

The nationwide permit program raises additional issues. For example, the program is intended to balance a desire for administrative simplicity and reduced regulatory burden, on the one hand, with protecting aquatic resources. Yet, many industry stakeholders question whether a number of administrative requirements of the permits, such as advance notification to the Corps and other agencies, written verification of permit compliance, and opportunities for regional conditions, are tilted too much in the direction of protecting aquatic resources and not enough in the direction of regulatory relief, while also making the nationwide permit program unduly complicated.

Regional Conditioning of Nationwide Permits

Corps officials have the authority to apply special conditions to the use of any of the nationwide permits or even to revoke use of specific permits in aquatic environments of particularly high value or in specific geographic areas. Indeed, the Corps utilizes regional conditioning to ensure effective protection at the local level of wetlands and other water resources, because aquatic resource functions and values vary considerably across the country, thus requiring more stringent limitations in some regions or watersheds (conditioning cannot be used to make an NWP less restrictive).

One type of regional conditioning is done by Corps division engineers who approve specific conditions if there are concerns for the aquatic environment in a particular district, watershed, or other geographic region. Corps officials also may propose revocation of NWP authorization for all, some, or portions of the nationwide permits within a Corps division. A second type of regional conditioning is imposed by states, tribes, or EPA for Section 401 water quality certification or for coastal zone consistency (see discussion below). Regional conditions might include identifying distinct watersheds or waterbodies where certain nationwide permits should be suspended or revoked, thus requiring landowners to obtain individual project-specific permits; reducing the acreage thresholds in certain types of waters; restricting activities authorized by NWPs to certain times of the year in a particular waterbody; or adding notification requirements for all permitted work in certain watersheds.

For more than 15 years, the NWP program has relied greatly on regional conditioning to adjust the national program to local watersheds. A division engineer can either add special conditions to

the NWP authorization or exercise discretionary authority to require an individual permit. This flexibility continues to cause various concerns among stakeholders, with some environmentalists arguing that more restrictive national standards on the NWPs should be imposed instead of relying upon a discretionary authority process. Some in industry believe that the discretionary authority results in greater complexity and less predictability for regulated entities.

Some environmental groups have been skeptical that the Corps would be able to attach meaningful conditions, while developers have had the opposite concern—that restrictions imposed by Corps regions would be unduly burdensome.[29]

The Corps continues to rely on regional conditioning and review of preconstruction notification of specific projects as a way for regulators to ensure that impacts of activities are no more than minimal. Echoing their concerns about the Corps' reliance on compensatory mitigation, environmental groups have criticized the Corps' expectation that regional conditioning can assure that impacts are minimal. Industry groups contend that regional conditions make the NWPs more complex and burdensome for both the Corps and permit applicants. "As more conditions are placed on the use of NWPs, fewer permit applicants fall outside of the many restrictions and exclusions, thus fewer will qualify for the efficient NWP process."[30]

State Coordination Issues

Implementation of the Corps' regulatory program, including the nationwide permits, requires considerable coordination between federal and state governments. For one thing, many states (and some localities) administer their own wetlands management and protection programs which vary in the way wetlands are defined and the activities that may or may not take place within or near regulated wetlands, and officials attempt to minimize duplication and overlap.

More important, however, is a coordinating responsibility given to states and tribes under Section 401 of the Clean Water Act. This provision requires certification by a state or tribe that a proposed project seeking a federal license or permit, such as a Section 404 permit, will not violate applicable water quality standards.[31] In addition, the 34 states and territories that operate management programs under the Coastal Zone Management Act (16 U.S.C. §1451 et seq.) are required to provide concurrence that the activity is consistent with the state's coastal zone management (CZM) program. Review under the 401 water quality certification process or CZM concurrence is an important means by which states or tribes ensure that their water quality concerns will be considered in federally licensed activities, because a state can use this authority to place its own conditions on the federal permit, or to deny the permit's use in that state.[32] Coordination begins at the time the Corps proposes to issue or reissue the nationwide permit package. However, coordination evidences a number of tensions between the Corps and states, especially when states deny certification or CZM concurrence.

[29] "Six New Classes of Activities Covered Under Proposed Corps Replacement Permits," *Daily Environment Reporter*, June 25, 1998, No. 122, p. AA-1.

[30] NAHB Comments, p. 19.

[31] 401 certification also may be waived, which is effectively the same as issuing an unqualified certification.

[32] For additional information, see CRS Report 97-488, *Clean Water Act Section 401: Background and Issues*, by (name redacted) .

NWP Reissuance Process: Coordination with States and Indian Tribes

Issuance or reissuance of NWPs typically begins approximately 12 months in advance of expiration of existing nationwide permits, when the Corps drafts a proposal for review by the Office of Management and Budget and other federal agencies. After that review, publication of the proposed permits in the *Federal Register* initiates a 60-day public comment period on the draft permits and also serves as the Corps' request to states to issue, deny, or waive certification of the NWPs. Concurrent with the *Federal Register* Notice, Corps district offices solicit comments on proposed regional conditions and also on their proposals to suspend or revoke some or all of the NWPs, if they have issued or propose to issue regional general permits, programmatic general permits, or letters of permission in lieu of NWPs. The comment period for district public notices typically is 45 days.

The 60-day public comment period is arguably brief for any groups or individual to review the draft permits, but is especially so for states and Indian tribes to simultaneously review the draft permits and proposed regional conditions and issue their own 401 certifications and CZM consistency determinations. From the Corps' perspective, the time restrictions are necessary in order to complete the reissuance process before expiration of the current NWPs. If the NWPs were not reissued before expiration, permit holders would have to seek standard individual permits for all activities that are currently authorized by the nationwide permits.

After reviewing public comments on the draft NWPs, the Corps prepares final NWPs, which are subject to another round of review by interested federal agencies (but not the public). The Corps then publishes the final NWPs, which become effective 60 days after publication. During this 60-day period, Corps division engineers approve regional conditions for the final NWPs and issue decision documents which address the environmental considerations related to the use of NWPs in specific Corps districts. The decision documents certify that the NWPs, together with any regional conditions or geographic revocations, will only authorize activities that result in minimal individual adverse effects on the aquatic environmental at the regional level.

Also during the 60-day post-publication period, states and Indian Tribes complete their 401 water quality certification and CZMA consistency decisions. Water quality certifications and/or CZMA consistency determinations may be issued without conditions, issued with conditions, or denied for specific NWPs. Conditions placed as a result of 401 certification or CZMA concurrency automatically become part of a nationwide permit in that state. Many states have denied blanket water quality certification for certain NWPs. For example, many states have opposed NWP 29 (residential developments) since it was first issued in 1997, and about one-third of states have denied 401 certification, because the permit was determined to be inconsistent with state water quality standards or other state wetlands management activities. Some states have prohibited the use of certain nationwide permits in state-designated critical areas or waters. Others have attached additional conditions to the use of NWPs to ensure that water quality impacts are minimal, and to reduce the scope of impacts.

The Corps believes, in general, that activities authorized by NWPs will not violate state or tribal water quality standards and will be consistent with CZM plans. Thus, if a state denies a water quality certification or disagrees that the activities authorized by the NWPs are consistent with a state CZM program, the Corps will deny authorization for the affected activities within that state, but does so without prejudice. Thus, when applicants request approval of such activities, and the Corps determines that the activities meet the terms and conditions of the NWP, the Corps will issue provisional verification letters, notifying the applicant that NWP authorization is contingent upon obtaining the necessary project-specific water quality certificate or waiver thereof, or

CZMA consistency determination, from the state, through a process called "individual certification of NWP use on a case-by-case basis."

An issue of long-standing concern to states is the fact that, if a state denies 401 certification or CZM concurrence, the Corps does not necessarily consider the state's action sufficient cause to deny issuance of the federal permit. When this happens in the case of nationwide permits, the state is forced either to accept the permitted activity, as authorized by the Corps, or to expend its resources to review the project separately and issue a 401 certification or CZM consistency determination with conditions specific to that project. States object that when the Corps issues provisional verification of NWP authorization, this puts pressure on states to certify projects. Many states take the position that, if a state denies certification, the Corps should evaluate the project under the individual permit process. States would like the Corps to treat a 401 denial of an NWP as a veto. The Corps may deny the permit (withdrawing its applicability in a state), but will not always do so. The Corps does not believe that state denial of 401 certification should be the sole basis for requiring an individual permit. The Corps' position is that denial of state water quality certification for a nationwide permit does not necessarily mean that unacceptable adverse effects will occur on a case-by-case basis, and the Corps prefers that the burden of conditioning or restricting the project at that point be with the state through issuance of a project-specific 401 certification or CZM consistency determination.

This tension over state and federal responsibilities does not exist under other Clean Water Act permits. For example, under the act's discharge permit program for industrial and municipal sources (the National Pollutant Discharge Elimination System program in Section 402 of the act), if a state denies 401 water quality certification, EPA insists on changes to the project until it gains certification.

One option for states is to seek approval of a programmatic general permit (PGP; see discussion in footnote 7), if the state is qualified and has sufficient regulatory authority. The Corps would then suspend federal permitting, and there would be less question over state water quality or other requirements. This is the case in a number of states with PGP programs, which replace some or all of the federal nationwide permits. State PGPs are duplicative of some nationwide permits and offer a more streamlined regulatory process for applicants. Another option is for states to seek authorization for full assumption of the 404 program, a more complicated process than PGP approval, and only Michigan and New Jersey have done so. However, not all states are interested or able to seek either PGP approval or full program authorization. Thus, even though the Corps has stated its intention to work in partnership with states, most states will continue to conduct 401 certification reviews of nationwide and other wetlands permits, and it is likely that conflicts over water quality certification will persist.

Endangered Species Act Consultation

The Endangered Species Act (ESA) is intended to protect and conserve endangered and threatened species and their habitats.[33] Among the act's provisions, ESA Section 7 prescribes the steps that federal agencies must take to ensure that their actions do not jeopardize endangered or threatened wildlife and flora. Section 7(a) requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS, for terrestrial or freshwater species and habitat) or National Marine Fisheries Service (NMFS, for marine species and habitat) if a planned action, such as permit issuance, may jeopardize the continued existence of a threatened or endangered species or

[33] 16 U.S.C. §1531 et seq.

adversely modify habitat designated as critical. After this consultation process has been completed, FWS or NMFS is required to provide a written biological opinion (BiOp) detailing how the proposed action would affect a species or its critical habitat. If the agency action would place the listed species in jeopardy or adversely modify its critical habitat, FWS or NMFS is required to suggest reasonable and prudent alternatives (RPAs). The RPAs must be measures that the action agency has authority to enforce. Following the issuance of a "jeopardy" opinion, the action agency must (a) terminate the action, (b) implement the proposed alternative(s), or (c) seek an exemption from a Cabinet-level Endangered Species Committee.[34]

The Corps' regulatory programs—standard individual permits and general permits—are subject to ESA compliance and consultation requirements. Through ESA consultations and coordination with FWS and/or NMFS, the Corps establishes procedures to ensure that NWPs are not likely to jeopardize any threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in development of regional conditions added to the NWP by the division engineer, or in conditions added to a specific NWP authorization by the district engineer.

Each activity authorized by an NWP is subject to general condition 18, which states that no activity that "may affect" listed species or critical habitat is authorized by the NWP unless ESA Section 7 consultation with FWS and/or NMFS has been completed. General condition 18 also requires a non-federal permit applicant to submit a preconstruction notification (PCN) to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, making it the responsibility of the project proponent to determine if a listed species or critical habitat is or might be present.[35]

General condition 18 and similar language in Corps regulations (33 C.F.R. §330.4(f)) allow the Corps to conclude that activities authorized by the NWPs will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. That is, the Corps' legal position, described in the June 2016 reissuance proposal, is that the action of issuing or reissuing the NWPs *per se* has no effect on listed species or their critical habitat and thus requires no ESA Section 7 consultation, because general condition 18 and the Corps' rules ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, FWS, and NMFS.[36]

Controversy about the Corps' compliance with ESA requirements has been evident for some time, but especially since the NWPs were reissued in 2012. At that time, NMFS for the first time issued a BiOp that found that several of the 2012 NWPs could create jeopardy for as many as 55 threatened or endangered marine species, such as Cook Inlet beluga whale and several sea turtle species. "Reasonable and prudent alternatives" identified in the BiOp were not implemented. Instead, the Corps agreed to open ESA consultation with NMFS, with an expectation that a new BiOp would be issued. In 2014 NMFS did issue a new BiOp that reversed its 2012 finding that the NWPs could result in jeopardy to listed species, noting that NMFS's determination was based in part on Corps plans to ensure that species are protected, including by improved tracking of the

[34] For background, see CRS Report RL31654, *The Endangered Species Act: A Primer*, by (name redacted)

[35] General condition 20 imposes a similar requirement concerning historic properties; that is, in cases where an activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, non-federal permittees must submit a PCN to the district engineer, and the activity is not authorized until the requirements of the National Historic Preservation Act (54 U.S.C. 300101 et seq.) have been satisfied.

[36] 81 *Federal Register* 35193.

permits' authorized activities.[37] The Corps subsequently issued guidance on coordination with NMFS local offices, and on information required of applicants that submit a PCN pursuant to general condition 18.

The 2012 NMFS concerns also reflect long-standing concerns of some environmental advocates that the Corps fails to ensure that the NWP program will not jeopardize endangered or threatened species. In August 2012, the Center for Biological Diversity notified the Corps of its intent to file a lawsuit over ESA compliance, seeking to force the Corps to cease the program until it can ensure that authorized discharges will not violate ESA. Although the organization did not ultimately file such a lawsuit, environmentalists remain interested in the Corps' compliance with ESA.

Congressional Interest

Congress has shown some interest in CWA permitting issues and the NWP program specifically, but not for some time. In 1997, a House Transportation and Infrastructure subcommittee held an oversight hearing on developments concerning nationwide permits and other issues.[38] A Senate Environment and Public Works subcommittee held a similar hearing that year.[39] At both hearings, a number of witnesses were critical of the 1996 proposed changes to the nationwide permit program, saying that the changes would be costly and could result in project delays. Administration witnesses supported the modifications, responding that the changes would allow the Corps to implement a more fair, flexible, and effective program that is appropriately responsive to environmental protection needs.

Subsequently, on two occasions Congress addressed aspects of the NWP program in the context of appropriations legislation. Both reflected congressional interest in the costs of the program and permit processing times and concerns that the increasing activity restrictions and general conditions in NWPs were also increasing permit processing time. First, in the FY2000 Energy and Water Development Appropriations Act (P.L. 106-60), Congress directed the Corps to study the workload impacts and costs of compliance with the 2000 nationwide permits. Second, the FY2001 Energy and Water Development Appropriations Act (P.L. 106-377) directed the Corps to prepare another cost estimate of the NWP program, along with providing the public with additional information on permit applications. The Corps responded to these mandates with reports in March 2000 and August 2001 that acknowledged some increases in processing time and individual permit applications.

It has been more than 15 years since Congress examined the nationwide permit program through oversight hearings or legislation (in connection with appropriations bills). As this report has described, the program has continued to evolve and to generate wide-ranging concerns among stakeholder and interest groups. While the Obama Administration's initiatives concerning some

[37] National Marine Fisheries Service, "Endangered Species Act Section 7 Consultation, Biological Opinion, Authorization of Discharges of Dredged and Fill Material or Other Structure or Work into Waters of the United States under the Corps' Nationwide Permit Program," November 24, 2014, http://www.nmfs.noaa.gov/pr/consultation/opinions/usace-nwp404-reinitiated11242014.pdf.

[38] U.S. Congress, House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, "Recent Regulatory and Judicial Developments on Wetlands," Hearing, 105th Cong., 1st sess., April 29, 1997 (105-36), 230 pp.

[39] U.S. Congress, Senate, Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety, "Wetlands: Review of Regulatory Changes," Hearing, 105th Cong., 1st sess., June 26, 1997 (S.Hrg. 105-328), 230 pp.

activities that are authorized by nationwide permits have drawn congressional attention and criticism—such as surface coal mining activities in Appalachia[40]—that attention has not extended to oversight of the Corps' regulatory program generally. Whether recent controversies about NWP 12 and its use in siting of pipeline and utility line projects, or other issues, will lead to greater congressional interest in the program is unknown for now.

[40] For information, see CRS Report RS21421, *Mountaintop Removal Mining: Background on Recent Controversies*, by (name redacted) .

Appendix. Current Nationwide Permits

The following is a list of the nationwide permits as issued in January 2017. These permits will be effective from March 19, 2017, through March 18, 2022. The full text of these permits and related general conditions is available at http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx.

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Utility Line Activities
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water from Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Response Operations for Oil and Hazardous Substances
21. Surface Coal Mining Operations
22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
25. Structural Discharges
26. [Reserved]
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28. Modifications of Existing Marinas
29. Residential Developments

30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
33. Temporary Construction, Access and Dewatering
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
39. Commercial and Institutional Developments
40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
45. Repair of Uplands Damaged by Discrete Events
46. Discharges in Ditches
47. [Reserved]
48. Existing Commercial Shellfish Aquaculture Activities
49. Coal Remining Activities
50. Underground Coal Mining Activities
51. Land-Based Renewable Energy Generation Facilities
52. Water-Based Renewable Energy Generation Pilot Projects
53. Removal of Low-Head Dams
54. Living Shorelines

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