

## UPDATED: Army Corps Proposes to Reissue Nationwide Permits Two Years Ahead of Schedule

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### Introduction

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) published in the Federal Register its notice of proposed rulemaking (NOPR) to replace the 2017 Nationwide Permits (NWP) by the end of 2020. NWPs provide a streamlined process for the Corps to authorize work in streams, wetlands, lakes, and tidal waters under Section 404 of the federal Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899.

In the NOPR the Corps has proposed modifications to several of the current NWPs and five new NWPs. The NOPR published in the Federal Register is substantially the same as the pre-publication version of the proposal released by the Corps on August 3, 2020. The Corps will accept public comments on the NOPR on or before November 16, 2020. Once the Corps reviews the public comments and finalizes its proposal, additional conditions will be imposed on the 2020 NWPs by Corps district offices, State agencies, and Indian Tribes. That process could delay the effective date of the 2020 NWPs in some districts until 2021.

### Background and Overview

NWPs are general permits issued by the Corps that are designed to streamline the agency's review of certain categories of activities in jurisdictional waters and wetlands that have no more than minimal individual and cumulative adverse environmental impacts. The ultimate goal of the NWP program is to establish standard terms and conditions for protection of jurisdictional waters and wetlands, while also allowing the activities to proceed with minimal delay and paperwork.

NWPs automatically expire every five years. The Corps usually reissues the NWPs on a five-year cycle. The current 2017 NWPs are scheduled to expire on March 18, 2022, but the Corps is now proposing to reissue and revise the NWPs two years early. The Corps is taking this early action in response to several Trump Administration initiatives to ease permitting burdens and promote economic growth, as well as in response to pending litigation over at least one of the 2017 NWPs.

In particular, the Corps states that the proposal is issued in response to Executive Order (E.O.) 13783 ("Promoting Energy Independence and Economic Growth"), which directed federal departments and agencies to identify and suspend, revise, or rescind existing regulations that unduly burden the development or use of domestically produced energy resources. In a report issued pursuant to E.O. 13783, the Corps identified nine NWPs that could be modified to reduce regulatory burdens. The Corps states that it is proposing to modify these nine NWPs and to reissue the remaining NWPs at the same time to keep all of the NWPs on the same 5-year cycle.

The Corps' proposal for early reissuance of the NWPs is made in the context of pending litigation over the 2017 NWPs. In two separate court cases challenging those NWPs, federal courts in 2020 issued rulings that [partially enjoined their use](#). The Corps states that, in response to a court order partially enjoining NWP 48 (covering commercial shellfish activities), "we have made substantial revisions to the draft national decision document for this proposed NWP." The Corps is seeking comment on that draft decision document for NWP 48, which is summarized in the Corps' proposal and available in the agency's docket for the proposal (COE-20200002).

By reissuing all of the NWPs now, the Corps also may have intended to help resolve or strategically delay litigation over particular issues raised in pending court cases involving NWP 12 (covering utility line activities). One of the Corps' goals in reissuing the proposed 2020 NWPs now, with the intention of finalizing them in the near future, may have been to create the basis for the Corps to argue that pending



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litigation over the 2017 NWP is now moot. Any dismissal of pending litigation on mootness grounds would not resolve the underlying substantive legal issues raised in those court proceedings, which could be raised again in similar litigation over the 2020 NWPs. Such a dismissal could, however, delay a ruling on the merits of those cases while the Corps finalizes the 2020 NWPs.

The Corps is now proposing to split NWP 12 into three separate NWPs covering different types of utility lines: (1) oil and gas pipelines, (2) electrical/telecommunication lines, and (3) water/sewer utility lines. This change will segregate issues specifically related to oil and gas pipelines from other utility line issues. This segregation of oil and gas pipeline issues from other utility line issues will affect the scope of potential litigation challenging the 2020 NWPs; and, if the change is not invalidated, it will also affect the scope of future permitting by project proponents seeking coverage under the 2020 NWPs.

The Corps is also proposing new NWPs covering two categories of activities that are not covered by any of the existing NWPs: (1) activities associated with water reclamation facilities; and (2) certain types of mariculture activities not covered by NWP 48.

## Changes Applicable to Existing NWPs

The Corps' proposal for the 2020 NWPs retains all of the 2017 NWPs, with revisions to individual NWPs as well as changes that apply to multiple NWPs.

- **NWP 3 (Maintenance Activities).** The Corps is proposing to modify this NWP to authorize small amounts of riprap to protect those structures and fills, without a preconstruction notification (PCN) requirement.
- **NWP 12 (Utility Line Activities) (now proposed as "Oil or Natural Gas Pipeline Activities").** As noted above, the Corps is proposing to split NWP 12 into three separate NWPs covering different types of utility line activities. The new version of NWP 12 would cover only oil and gas (including petrochemical product) pipeline activities. Two new NWPs (discussed below) would cover (i) electric utility and telecommunication line activities; and (ii) other utility line activities, such as water, sewer, and non-petrochemical industrial product pipelines. According to the Corps, the intent "is to tailor these NWPs to more effectively address potential differences in how the different types of utility lines are constructed, maintained, and removed, and to potentially add industry-specific standards or best management practices that would be appropriate to add as national terms to the applicable NWP to help ensure that the NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects." The Corps is specifically seeking comments and suggestions on such national standards and best management practices for each of the various types of utility lines in response to the proposal.

To help simplify and expedite the NWP process, the Corps is also proposing to reduce the number of triggers for PCN under NWP 12. Under the Corps' proposal, oil and gas pipeline permittees would be required to provide PCN only for utility line activities that: (1) require authorization under section 10 of the Rivers and Harbors Act of 1899; (2) will result in a loss of greater than 1/10-acre of waters of the United States; or (3) are associated with an overall project of more than 250 miles in length, where the project purpose is the installation of new pipeline (rather than repair or maintenance) along the majority of the distance of the overall project length. This third threshold is a new threshold. It would require the permittee to identify in the PCN the locations and proposed losses of waters of the United States for all crossings of waters of the United States that require Corps authorization, including crossings that would not require PCN. The Corps is specifically inviting comment on this threshold, including on whether 250 miles is the appropriate threshold.

The Corps also proposes to remove several of the PCN thresholds in the 2017 version of NWP 12. (This change would apply to the oil and gas activities authorized under NWP 12, as well as the new NWPs "C" and "D" for other linear utility lines.) The PCN thresholds proposed for elimination include: (i) "mechanized land clearing in a forested wetland for the utility line right-of-way"; (ii) non-overhead utility lines exceeding 500 feet; (iii) utility lines placed within a

jurisdictional area that “runs parallel to or along a stream bed that is within that jurisdictional area”; (iv) permanent access roads constructed above grade in jurisdictional waters for a distance of more than 500 feet; and (v) permanent access roads constructed in jurisdictional waters with impervious materials. These changes to PCN thresholds for NWP 12 are likely to draw significant attention in the commenting process.

The Corps proposes to retain a note from the 2017 NWP 12 stating that, “[f]or oil or natural gas pipeline activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization.”

As with the 2017 NWP 12, the 2020 NWP 12 generally prohibits any “change in pre-construction contours and elevation” except for access roads, which are required to minimize such changes and to be properly bridged or culverted to maintain surface flows.

- **NWP 17 (Hydropower Projects).** The Corps is proposing to modify this NWP to raise the generating capacity threshold from 5,000 kW to 10,000 kW. This change is proposed to conform to the revised definition of “small hydroelectric power project” in the Hydropower Regulatory Efficiency Act of 2013.
- **NWP 21 (Surface Coal Mining Activities).** The Corps is proposing to modify NWP 21 to remove the provision requiring the permittee to “receive a written authorization” from the Corps before commencing the activity. The same change is proposed to NWP 49, covering “Coal Remining Activities,” and NWP 50, covering “Underground Coal Mining Activities.” The Corps states that these changes are proposed “to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.” In practice, many Corps districts do not recognize such “default authorizations,” but the 45-day clock is nevertheless an important milestone in the regulatory process.
- **Multiple NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52) (removal of 300-linear-foot limit on loss of stream bed).** One key change that applies to multiple NWPs is the Corps’ proposal to remove the 300-linear-foot limit for losses of stream bed that had been imposed with the 2017 NWPs. The Corps proposes to remove the 300-foot-limit from the following NWPs:
  - NWP 21 (Surface Coal Mining Activities);
  - NWP 29 (Residential Developments);
  - NWP 39 (Commercial and Institutional Developments);
  - NWP 40 (Agricultural Activities);
  - NWP 42 (Recreational Facilities);
  - NWP 43 (Stormwater Management Facilities);
  - NWP 44 (Mining Activities);
  - NWP 50 (Underground Coal Mining Activities);
  - NWP 51 (Land-Based Renewable Energy Generation Facilities); and
  - NWP 52 (Water-Based Renewable Energy Generation Pilot Projects).

Under the Corps’ proposal, these NWPs “would instead rely on the 1/2-acre limit and PCN requirements to ensure that activities authorized by these NWPs result in no more than minimal adverse environmental effects.”

- **NWP 48 (Commercial Shellfish Activities) (now proposed as “Commercial Shellfish Activities Mariculture Activities”).** The Corps is proposing to remove the 1/2-acre limit for impacts to submerged aquatic vegetation in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years. The Corps is also proposing to remove both PCN thresholds for this NWP. As noted above, a federal court recently issued a ruling that partially enjoined the use of NWP 48, and the Corps states that it has made substantial revisions to the official “decision document” that provides the agency’s rationale

for its issuance of NWP 48. Finally, the Corps proposes to change the formal title of this NWP from Commercial Shellfish *Aquaculture* Activities to “Commercial Shellfish Activities *Mariculture* Activities,” which the Corps says will “more accurately reflect where these activities are conducted (i.e., coastal waters).” This terminology is consistent with the two new NWPs the Corps has proposed for other types of mariculture activities.

District Engineers would retain the ability to waive certain limitations in the NWPs, including some of the numeric “threshold” limits (quantified as acres, linear feet, or cubic yards). Such waivers require the District Engineer to determine that any adverse environmental impact would be minimal even with the waiver. In conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed, as described above, the Corps also proposes to remove provisions in the 2017 NWPs authorizing District Engineers to waive the 300-linear-foot limit for losses of “intermittent” and “ephemeral” stream bed. The Corps recently published a final rule re-defining the jurisdictional term “waters of the United States” (WOTUS) that categorically excluded “ephemeral” waters from jurisdiction under the CWA. The Corps reasoned that the new WOTUS rule means “there would be no need to request waivers for losses of ephemeral stream bed (regardless of length) since NWP authorization (or any other form of Corps authorization) will not be needed to authorize discharges of dredge or fill material into ephemeral streams.”

### Newly-Proposed NWPs

The Corps is also proposing to add the following new NWPs:

#### NWPs “A” and “B” (Seaweed Mariculture Activities and Finfish Mariculture Activities).

The Corps issued these new NWPs in response to Executive Order 13921 (“Promoting American Seafood Competitiveness and Economic Growth”). The Corps states that these NWPs would “complement the existing NWP on shellfish mariculture” by authorizing “all three major sectors of mariculture in coastal waters: shellfish, seaweed, and finfish.” The proposed NWP for finfish mariculture activities would apply only to offshore finfish mariculture operations in marine and estuarine waters. The proposed NWP for finfish mariculture activities would not authorize the construction of land-based finfish mariculture facilities such as ponds to produce carp and other finfish.

#### NWP “C” (Electric Utility Line and Telecommunications Activities).

In conjunction with its limitation of NWP 12 to petrochemical pipeline activities, the Corps is proposing to move electric utility and telecommunications line activities, which have been covered by NWP 12 since 1977, to a new, separate NWP. An “electric utility line and telecommunication line” would be defined as “any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.”

NWP C would authorize a range of activities associated with the construction, maintenance, repair, and removal of electric utility lines/telecommunication lines, and associated facilities, including: substation facilities in non-tidal waters; foundations for overhead electric utility line or telecommunication line towers, poles, and anchors; and access roads for the construction and maintenance of these lines. Temporary sidelaying of material during trench excavation is allowed, typically for up to 3 months and no more than 180 days, provided that the location would not allow the material to be dispersed by currents or other forces. A trench excavation may not result in the draining of a water of the United States.

As with NWP 12, for electric utility line or telecommunications activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing would be considered a single and complete project for purposes of authorization under the new NWP.

Retaining the basic structure of the 2017 NWP 12, the Corps proposes the following limitations on the use of NWP C:

- The activity may not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project;

- There must be no change in pre-construction contours, except for access roads, which are required to minimize changes and provide appropriate bridges/culverts for surface flows;
- Access roads and foundations may only be placed in non-tidal waters;
- Discharges into non-tidal wetlands adjacent to tidal waters for substation facilities or access roads are not permitted;
- Access roads must be the minimum width necessary and constructed to minimize adverse effects on waters of the United States and maintain surface flows; and
- Foundations must be the minimum size necessary and separate footings for each tower leg must be used where feasible.

PCN would be required only if: (1) a section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States. As described above, other PCN thresholds under the 2017 NWP 12 that applied to electric utility lines are now proposed for elimination.

The Corps explains that one purpose in separating electric utility and telecommunication lines from other utility lines is to address potential differences in how the various types of utility lines are constructed, maintained, and removed. For example, the Corps recognizes that the footprints of the structures that support overhead electric lines, and the impacts of installing those structures, are fairly small when compared to underground utilities. In addition, the Corps is considering potentially adding industry-specific standards or best management practices tailored to utility and telecommunication line activities. The Corps is seeking comment on such standards or best management practices that could be added to the new NWP.

#### **NWP “D” (Utility Line Activities for Water and Other Substances).**

This NWP would cover utility line activities that convey water and other substances that are not covered by NWP 12 (proposed to be limited to oil or natural gas pipeline activities) or the new proposed NWP C for electric utility line and telecommunications activities. This proposed new NWP would authorize utility lines that carry substances—whether gaseous, liquid, liquescent, or slurry—that are not oil, natural gas, petrochemicals, or electricity. For example, this NWP would cover utility lines that convey: potable water; irrigation water; stormwater; sewage/wastewater; non-petrochemical industrial products; and brine.

This new NWP would retain the basic structure of the 2017 version of NWP 12, and include terms similar to those that would apply to the proposed new NWP C, including the language addressing changes to pre-construction contours and the revised PCN requirements.

While this alert highlights key terms of the proposed new NWP C and NWP D, the Corps’ proposal includes detailed activity-specific requirements and other measures that warrant closer review during the public comment period. In particular, as noted above, the Corps is seeking comment on industry-specific standards or best management practices that could be incorporated into NWP C, NWP D, and NWP 12. Depending on how the Corps finalizes its proposal in response to public comment, those standards and practices could become mandatory within each industry covered by those NWPs.

#### **NWP “E” (Water Reclamation and Reuse Facilities)**

NWP E would authorize discharges of dredged and fill material into non-tidal waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities. NWP E would also authorize temporary fills, including mats, needed to construct the water reuse projects and attendant features. Although some aspects of construction, expansion, and maintenance of water reclamation and reuse facilities were previously authorized under several existing NWPs, those NWPs did not expressly apply to water reclamation and reuse facilities. NWP E would consolidate those authorizations and provide clarity regarding the use of an NWP for water reclamation and reuse facilities. NWP E, as proposed, would not authorize discharges that cause the loss of greater than 1/2-acre of waters of the U.S. or discharges into tidal waters or non-tidal wetlands adjacent to tidal waters.

### **Changes to General Conditions**

The Corps is proposing the following changes to the nationwide “General Conditions” (GCs) that apply to all NWPs, regardless of project location:

- **GC 13 (Temporary Structures and Fills).** The Corps clarifies the scope of GC 13 to include temporary “structures” within the general requirement for timely removal.
- **GC 17 (Tribal Rights).** The Corps is proposing to modify the general condition covering potential adverse effects upon tribal rights to shift from a standard stating that “[n]o NWP activity may cause more than minimal adverse effects on tribal rights, including protected tribal resources, or tribal lands” to a different standard stating that “[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.” This change focuses the Corps’ inquiry more squarely on the legal standard for impairment of reserved tribal rights and the specific types of rights most commonly raised in Corps proceedings: water rights, and treaty hunting and fishing rights.
- **GC 18 (Endangered Species).** The Corps has largely retained the existing GC 18 language addressing compliance with consultation requirements under the Endangered Species Act (ESA), Section 7. However, the Corps proposes changes to the terms of GC 18 to align with its [recent revisions to the ESA consultation regulations](#). As with those revisions, the changes to GC 18 focus on what is considered an “effect” of the proposed action that is reasonably certain to occur and therefore warrants analysis under Section 7.
- **GC 19 (Migratory Birds and Bald and Golden Eagles).** The Corps’ proposal notes that the Department of the Interior recently issued a Solicitor’s Opinion concluding that the Migratory Bird Treaty Act (MBTA) does not prohibit incidental take of migratory birds, and “is limited to affirmative actions that have as their purpose the taking or killing of migratory birds.” The U.S. Fish and Wildlife Service (USFWS) subsequently [proposed a rule](#) that would codify that Solicitor’s Opinion as part of its regulations. Consistent with this more limited reading of the MBTA, the Corps’ proposal for GC 19 would require permittees to contact the USFWS to determine “what measures, if any, are necessary or appropriate to *reduce adverse effects* to migratory birds or eagles,” when the former language had required permittees to contact USFWS to determine “applicable measures to *reduce impacts*” to those birds. The changes to GC 19 will draw significant scrutiny. Notably, the Solicitor’s Opinion that provides the legal basis for these proposed changes was recently [vacated](#) by a federal district court.
- **GC 23 (Mitigation).** The Corps is proposing to add a 1/10-acre threshold for triggering compensatory mitigation for stream impacts, similar to the 1/10-acre threshold for wetland impacts. This change would eliminate compensatory mitigation requirements for certain types of projects—even projects that would not be authorized under the 2017 NWPs and would instead require an Individual Permit from the Corps. For example, a project that impacts 300 linear feet of a 5-foot-wide stream would currently trigger a compensatory mitigation requirement, and an Individual Permit would be required if the impacts exceeded 300 linear feet. Under the Corps’ proposal, that project could impact more than 870 feet of that same stream without triggering the need for an Individual Permit or compensatory mitigation.
- **GC 25 (Water Quality) and GC 26 (Coastal Zone Management).** The Corps proposes minor clarifications to the text of GC 25 and GC 26. The primary change would explain what happens when a permittee cannot comply with all of the conditions of an existing water quality certification or coastal zone management consistency determination for a specific NWP. In such instances, the permittee must obtain a separate, individual water quality certification/coastal zone management consistency concurrence (or a waiver) for the proposed discharge in order to be authorized to proceed under the applicable NWP. This is not a change, but rather a confirmation of the legal framework that governs the use of NWPs as conditioned by applicable water quality certifications and coastal zone management consistency determinations. The process by which such conditions are added to the NWPs is discussed below.
- **GC 28 (Use of Multiple NWPs).** The Corps proposes to modify the general condition for treatment of projects operating under multiple NWPs to address maximum impact limits. In



cases where only one NWP has a maximum acreage limit, that limit will apply for all authorized activities. In cases where each of the NWPs used has a different acreage limit, each acreage limitation must be met. This will prevent permittees from using NWPs with higher acreage limits to increase the acreage loss of waters of the United States for NWPs with lower specified acreage limits.

### District Regional Conditions, 401 Certification Conditions, and Coastal Zone Management Act (CZMA) Conditions

Once finalized, the proposed 2020 NWPs would remain subject to further restrictive terms and conditions from Corps district offices, State agencies, and Indian Tribes. Corps district offices may issue regional conditions that revoke or further condition the use of any of the 2020 NWPs, accommodating regional differences in aquatic resources and their local importance, and helping ensure that activities authorized by the NWPs result in no more than minimal individual and cumulative adverse environmental effects. Corps districts also may adopt additional regional general permits. District offices can be expected to solicit comments on these proposals shortly after the Corps publishes notice of the proposed 2020 NWPs.

States may further condition or deny the use of any of the NWPs through the conditioning or denial of water quality certification under Section 401 of the CWA. The EPA exercises Section 401 authority in Indian Country and may restrict the use of any of the 2020 NWPs within Indian Country, although the EPA has delegated that authority to certain Tribes. Under the CZMA, coastal states may impose additional restrictions on the use of any of the NWPs to ensure consistency with state coastal zone management requirements.

### “Grandfathering” of Rights under the 2017 NWPs

The Corps’ regulations provide a type of “grandfathering” of rights under expired NWPs. The regulations state that, when activities are “under construction” or “under contract to commence in reliance upon an NWP,” then those activities will generally “remain authorized provided the activity is completed within twelve months of the date of an NWP’s expiration, modification, or revocation,” subject to the Corps’ general authority to modify, suspend, or revoke authorizations. See 33 CFR § 330.6(b); 33 CFR § 330.4(e); 33 CFR 330.5 (c), (d).

The Corps issuance of the 2020 NWPs outside of the normal 5-year cycle raises unique issues related to “grandfathering,” which the Corps discusses in its proposal. The Corps states that, “[t]o avoid having two sets of NWPs in effect at the same time and to comply with §330.6(b), [it] may change the expiration date of the 2017 NWPs” at the time it issues the final 2020 NWPs. That would allow the 2017 NWPs to expire the day before the 2020 NWPs go into effect. The Corps is soliciting comment on whether to change the expiration date of the 2017 NWPs to the day before the 2020 NWPs go into effect.

The Corps goes on to state that if it changes the expiration date for the 2017 NWPs, “project proponents will have time to complete those activities under the terms and conditions of the 2017 NWPs” pursuant to 33 CFR § 330.6(b). The amount of time will depend on whether or not the activity qualifies for authorization under the reissued or modified NWP:

- “If the activity *qualifies* for authorization under the reissued or modified NWP, the original NWP verification letter will continue to be valid [until] March 18, 2022, unless the district engineer identified a different expiration date in that verification letter.”
- “If the activity *no longer qualifies* for NWP authorization under the reissued or modified NWP, the project proponent would have 12 months to complete the authorized activity as long as that activity is under construction or under contract to commence construction before the reissued or modified NWP goes into effect. If the project proponent does not have the activity under construction or under contract to commence construction before the reissued or modified NWP goes into effect, he or she will need to seek another form of [Corps] authorization. After that 12 month period, if those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2020 NWPs (including any regional conditions imposed by division engineers), the project proponent will need to

obtain an individual permit, or seek authorization under a regional general permit, if such a general permit is available in the applicable Corps district and can be used to authorize the proposed activity.”

Project proponents with coverage under the 2017 NWP should check any verification letters received from the Corps, which may specify a particular expiration date for the project.

Project proponents with pending requests for verification of coverage under the 2017 NWP should discuss with their Corps project managers whether a new application will be required if the 2020 NWP are finalized before the Corps issues its verification letter for the project. In some cases, if the project continues to meet the terms and conditions of the 2020 NWP, the Corps may not require the proponent to submit a new application.

## Potential Challenges to the 2020 NWP and Other Potential Barriers to their Use

As noted above, the Corps’ early reissuance of the NWP is expressly intended to resolve pending litigation over NWP 48 (covering commercial shellfish activities), and it may have been intended to help resolve or strategically delay pending litigation over NWP 12 (covering utility line activities).

Nevertheless, the Corps proposal is likely to generate new litigation that could lead to an injunction prohibiting the use of the NWP in whole or in part. Some of the same arguments used against the 2017 NWP could be raised again in litigation challenging the 2020 NWP, and the 2020 NWP may provide new grounds for a challenge.

For example, the Corps’ proposal states that “there is no requirement that the Corps undertake programmatic consultation for the NWP program” under the ESA. This statement assumes that no programmatic review is required because any proposed activity covered under an NWP would undergo activity-specific consultation if the District Engineer makes a “may affect” determination in reviewing a particular project. One of the bases for the federal district court’s [invalidation of NWP 12](#) in litigation over the Keystone XL pipeline, however, was its conclusion that “[p]roject-level review does not relieve the Corps of its duty to consult on the issuance of [the 2017] nationwide permits at the programmatic level.” Similar arguments could be raised regarding the Corps’ reliance on project-level review in issuing the 2020 NWP. Projects that rely on the 2020 NWP could, therefore, be susceptible to similar legal challenges and potential court injunctions.

Additionally, litigation over the geographic scope of jurisdictional waters under the [new WOTUS rule](#) could impact the Corps’ implementation of the proposed 2020 NWP. As noted above, the proposed NWP rely in part on the new WOTUS rule for their treatment of “intermittent” and “ephemeral” waters. The Corps’ proposal for the 2020 NWP states that the new WOTUS rule (called the “Navigable Waters Protection Rule”) became effective on June 22, 2020, “in all states and jurisdictions except for the State of Colorado due to a court-issued stay in that state.” The Corps’ proposal recognizes that the Colorado case is under appeal, and the Navigable Waters Protection Rule has been challenged in several other district courts.

## FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on Clean Water Act and other water-related regulatory developments. If you would like more information about the proposed changes to the NWP program or other Clean Water Act issues, please contact [Duncan Greene](#), [Jonathan Simon](#), [Joseph Nelson](#), [Jenna Mandell-Rice](#), [Brent Carson](#), or any member of the firm’s [Water](#) practice in Seattle, WA at (206) 623-9372, or in Washington, D.C. at (202) 298-1800.

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