

REVIEW OF 12 NATIONWIDE PERMITS PURSUANT TO EXECUTIVE ORDER 13783**Executive Summary**

The US. Army Corps of Engineers (Corps) issues nationwide permits (NWP) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the River and Harbor Act of 1899. Section 404(e) of the Clean Water Act states that NWP and other general permits may only authorize activities that “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment”. Under section 404(e), nationwide permits can only be issued for a 5-year period, and must be renewed before they expire. The Corps issues and reissues the NWP through the Administrative Procedure Act rulemaking process, and are considered significant regulatory actions under Executive Order 12866, Regulatory Planning and Review. There are currently 52 NWP, and the NWP were last reissued on December 21, 2016, and published in the *Federal Register* on January 6, 2017.

Executive Order 13783, Promoting Energy Independence and Economic Growth, was promulgated on March 28, 2017. The EO states that *“it is in the national interest to promote clean and safe development of our Nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation”*. Section 2(a) of EO 13783 requires the review of agency existing regulations, of which the NWP are one, that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources. This report reviews 12 NWP that authorize activities associated with the development or use of domestically produced energy resources, and makes recommendations for changes that could be made to support the objectives of E.O. 13783.



Summary of Draft Recommendations

1/2-Acre Limit: The 1/2-acre limit should be retained for those NWP's covered in this report where that limit currently applies (i.e., NWP's 12, 21, 39, 50, 51, and 52). Since it was first adopted in 2000, the 1/2-acre limit has allowed thousands of activities to be authorized by NWP. It has also been effective in ensuring that the NWP's with that acreage limit only authorize those activities requiring Department of the Army authorization that result in no more than minimal individual and cumulative adverse environmental effects. Where feasible, project proponents will design their projects to avoid and minimize losses of jurisdictional waters and wetlands on the project site to comply with the 1/2-acre limit and qualify for NWP authorization.

300 Linear Foot Limit: Several of the NWP's have, in addition to the 1/2-acre limit for losses of waters of the United States, a 300 linear foot limit for filling and excavating stream bed. This 300 linear foot limit can be waived by a district engineer if the affected stream is an intermittent or ephemeral stream, and the district engineer makes a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects and the loss of stream bed (plus any other losses of jurisdictional waters and wetlands) does not exceed the 1/2-acre limit. The Corps recommends removing the 300 linear foot limit from those NWP's included in this review where it currently applies (i.e., NWP's 21, 39, 50, 51, and 52) because of the challenges and associated costs in determining whether a particular stream segment is a perennial, intermittent, or ephemeral and potentially eligible for a waiver of the 300 linear foot limit. Removal of the 300 linear foot limit would streamline the NWP authorization process and reduce processing times. All proposed activities authorized by these NWP's require pre-construction notification (PCN), which allows the Corps to review each proposed activity. The 1/2-acre limit and PCN requirements are sufficient to ensure that activities authorized by these NWP's will result in no more than minimal adverse environmental effects. Although under the current NWP's the 300 linear foot limit can be waived for losses of intermittent and ephemeral stream beds, distinguishing between perennial, intermittent, and ephemeral stream segments requires additional analysis and increases review times. Removal of the 300 linear foot limit would reduce costs to the regulated public and the Corps, resulting in more equivalency between these NWP's and the other NWP's.

Nationwide Permit (NWP) 3 – Maintenance. This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. It also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). After NWP 3 was reissued on December 21, 2016, the Corps has been asked whether this NWP authorizes small amounts of riprap to protect the structure or fill that repaired, rehabilitated, or replaced, without the need to submit a PCN. The structures and fills repaired,

rehabilitated, or replaced under this NWP often are related to energy production, distribution, and use. The Corps recommends modifying this NWP to authorize small amounts of riprap to protect those structures and fills, without a PCN requirement.

NWP 7 – Outfall Structures and Associated Intake Structures. This NWP authorizes activities related to the construction or modification of outfall structures and associated intake structures. Outfall and intake structures may be associated with energy generation facilities, such as power plants. The Corps recommends making no changes to this NWP because it already provides a streamlined authorization process for these activities.

NWP 8 – Oil and Gas Structures on the Outer Continental Shelf. This NWP authorizes structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Bureau of Ocean Energy Management. Most of the compliance with applicable laws is done by the Bureau of Ocean Energy Management when it approves leases on the outer continental shelf for these activities. Therefore, the Corps recommends not making any changes to this NWP.

NWP 12 – Utility Line Activities. This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines, including outfall and intake structures. It also authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, foundations for overhead utility lines, and the construction and maintenance of utility line access roads. The Corps recommends modifying this NWP to simplify the pre-construction notification thresholds, by reducing the number of PCN thresholds from 7 to 2. Pre-construction notification would be required for utility lines crossing navigable waters subject to section 10 of the Rivers and Harbors Act of 1899 and for utility line activities resulting in the loss of greater than 1/10-acre of waters of the United States.

NWP 17 – Hydropower Projects. This NWP authorizes hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project is licensed by the Federal Energy Regulatory Commission; or (b) a licensing exemption granted by the Federal Energy Regulatory Commission. The Hydropower Regulatory Efficiency Act of 2013 changed the definition of “small hydroelectric power project” by raising the generating capacity limit from 5,000 kW to 10,000 kW. The Corps recommends modifying this NWP to change the generating capacity threshold in (a) from 5,000 kW to 10,000 kW to be consistent with the definition of “small hydroelectric power project” in 16 U.S.C. 2705(d).

NWP 21 – Surface Coal Mining Activities. This NWP authorizes discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations. It has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. Prior to 2012, this NWP did not have an acreage limit, and it relied in part on

the review conducted under Title V of the Surface Mining Control and Reclamation Act of 1977 or an integrated permit processing procedure by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, to ensure that activities authorized by NWP 21 result in no more than minimal individual and cumulative adverse environmental effects. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed. In addition, the Corps recommends removing the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, 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.

NWP 33 – Temporary Construction, Access, and Dewatering. This NWP authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. For the 2017 NWPs, the Corps modified this NWP to reduce the number of activities requiring pre-construction notification. Prior to 2017 all NWP 33 activities required PCNs. For the 2017 NWP 33, the Corps modified the PCN requirements for this NWP, from requiring PCNs for all authorized activities to requiring PCNs only for activities occurring in waters subject to section 10 of the Rivers and Harbors Act of 1899. The Corps recommends making no additional changes to this NWP.

NWP 39 – Commercial and Institutional Developments. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction of commercial and institutional developments and attendant features. This NWP can be used to authorize power plants, refineries, oil wells and drilling pads, and other types of energy projects. Pre-construction notification is required for all activities authorized by this NWP. The Corps recommends modifying this NWP to remove the 300 linear foot limit for losses of stream bed and the associated waiver provision for intermittent and ephemeral streams. The Corps would rely on the 1/2-acre limit and the PCN review process to ensure that this NWP only authorizes activities that will result in no more than minimal individual and cumulative adverse environmental effects.

NWP 49 – Coal Remining Activities. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. This NWP has no acreage limit because it requires the overall mining plan (including any coal mining in areas that were not previously mined) to will result in a net increase in aquatic resource functions. The Corps recommends removing the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, 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.

NWP 50 – Underground Coal Mining Activities. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations. It has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed. The Corps also recommends removing the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, 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.

NWP 51 – Land-Based Renewable Energy Generation Projects. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. It has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed.

NWP 52 – Water-Based Renewable Energy Generation Pilot Projects. This NWP authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind, water-based solar, wave energy, or hydrokinetic renewable energy generation pilot projects and their attendant features. For land-based attendant features, it has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed.

Appendix C to 33 CFR part 325 – Procedures for the Protection of Historic Properties. Consistent with the direction and goals of both EO 13777 and EO 13783, the Corps recommends that the Administration issue an official statement declaring that 33 CFR part 325, Appendix C, *Procedures for the Protection of Historic Properties*, a longstanding regulation promulgated by the U.S. Army Corps of Engineers for use specifically in its Regulatory Program for compliance with the National Historic Preservation Act, is an acceptable “Federal Agency Program Alternative” under 36 CFR 800.14, and shall substitute for all of Subpart B of said regulation, and is fully consistent with the ACHP’s regulations. Rulemaking to amend Appendix C is not necessary because the Corps issued guidance in 2005 and 2007 to make the Corps’ procedures in Appendix C fully consistent with the ACHP’s regulations.