2012 Nationwide Permits

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Outline

- Nationwide Permit Reauthorization Schedule
- Background on Nationwide Permits
- Nationwide Permit process
- ASWM Contract
- Regional Conditions
- Substantial changes in the February 2011 proposal
  - NWP 21 – Surface Coal Mining Activities
  - NWP 48 – Existing Commercial Shellfish Aquaculture Activities
  - NWP A – Land-based Renewable Energy Generation Facilities
  - NWP B – Water-based Renewable Energy Generation Pilot Projects
  - Criteria for making minimal effects determinations
  - Use of waivers for certain NWP limits
Schedule

- February 16, 2011 – Proposal published in Federal Register for 60-day comment period
  - Districts propose regional conditions
- April 18, 2011 – Federal Register comment period ends
- Spring 2011 – Review comments received, prepare final draft NWPs
- August 2011 - Submit draft final NWPs to OMB for interagency review under Executive Order 12866
- December 2011
  - Publish final NWPs in Federal Register
  - ~90 days for States, Tribes, and EPA to make WQC/CZMA decisions
  - Corps districts begin finalizing regional conditions
- March 2012
  - NWPs go into effect on or before March 18, 2012
Background

- **What are nationwide permits?**
  - One type of general permit
  - Issued by the Chief of Engineers
  - Authorize activities across the country, unless suspended or revoked on a regional basis
  - Valid for no more than 5 years
    - Current NWPs expire on March 18, 2012

- **Activities authorized by an NWP must:**
  - Be “similar in nature”
  - Have no more than minimal impacts, individually and cumulatively
  - Not contrary to the public interest
Background

- Nationwide permits first issued in 1977
- Authorize activities under:
  - Section 10 of the Rivers and Harbors Act of 1899
  - Section 404 of the Clean Water Act
- Each has terms and conditions, which may include:
  - Description of category of authorized activities
  - Acreage limits
  - Linear foot limits
  - Cubic yard limits
  - Requirement to notify Corps district before beginning activity in regulated waters
  - Use limited to certain categories of waters (e.g., non-tidal wetlands)
Background

- There are currently:
  - 49 Nationwide Permits
  - 28 general conditions
    - Apply to all Nationwide Permits
  - 33 definitions

- Authorize approximately 30,000 activities per year
Nationwide Permit process

- Office of Chief of Engineers develops nationwide permit proposal
- Rulemaking
- Submit to Office of Management and Budget (OMB) for interagency review
- After interagency review, publish proposal in Federal Register for 60-day comment period
- Districts publish local public notices
  - Solicit comments on proposed regional conditions
  - Request water quality certification/CZMA consistency concurrence
Nationwide Permit process

- Review comments received, develop final nationwide permits
- Submit final nationwide permits to OMB for interagency review
- Publish final nationwide permits in *Federal Register*
  - Specify a date the final NWPs go into effect
- Final decisions on water quality certification, CZMA consistency
- Corps districts announce final regional conditions
Authorization by Nationwide Permit

- Some activities can proceed without notifying Corps
- Other activities require notifying Corps before beginning the activity (a pre-construction notification or PCN)
  - If ≤ ½ acre, Corps-only review of PCN
  - If > ½ acre, Corps does agency coordination
- District reviews PCN to determine if proposed activity will result in minimal adverse effects
Pre-construction notification

- Case-by-case review
- 45-day review period
- Common triggers for notification:
  - All activities
  - Acreage threshold
  - Linear foot threshold
  - Effects on endangered or threatened species
  - Effects on historic properties
ASWM Contract

- Corps contracts with ASWM to improve delivery of State 401 WQCs for 2012 NWPs
  - ASWM will
    - Identify practices where districts and states have successful processes that led to the Corps incorporating state WQC conditions as regional conditions.
    - Establish workgroup of at least 15 states that revoke, condition or waive WQCs to share:
      - 2012 NWP schedule
      - Successful procedures
      - Content of state WQC conditions adopted as regional conditions
      - Content of state WQC conditions not adopted as regional conditions
    - Final report will be provided to state 401 WQ Programs
  - Corps participated in two ASWM teleconferences on the 2012 NWPs
Regional conditions

- Two types of regional conditions:
  - Corps regional conditions
  - Water quality certification/Coastal Zone Management Act consistency regional conditions

- Ensure use of NWPs will result in minimal adverse effects
- Developed by the District and approved by the Division Engineer
- Address aquatic resource concerns in a specific geographic region (e.g., district, watershed, county)
- Can only place further restrictions on the use of nationwide permits
  - Cannot increase acreage limits or expand applicable waters
- Districts are currently soliciting public comments on their proposed regional conditions
- May also suspend or revoke specific NWPs
WQC/CZMA Regional Conditions

- Special Conditions on a 401 WQC will become regional conditions if they are consistent with the Corps permit conditioning policy.
- Examples of 401 WQC conditions that are not enforceable:
  - Conditions that would result in a violation of law or regulation.
  - Require the Corps or another Federal agency to take an action which it would not otherwise take and do not choose to take.
  - Change the limits (e.g., quantities, dimensions) from those imposed by the NWP:
    - Lower limits would be viewed as requiring individual WQC or CZMA concurrence.
  - Conditions that delete, modify, or reduce NWP conditions.
Substantial Changes in the 2011 Proposal

- Reissue 48 existing NWPs
- Issue 2 new NWPs
- Issue 2 new general conditions
  - Discovery of previously unknown remains and artifacts
  - Safety of impoundment structures
- Issue 1 new definition
  - High tide line
- Require agency coordination for proposed losses of more than 1,000 linear feet of intermittent and ephemeral stream beds
The Corps is seeking public comment on three options:

- **Option 1** – Do not reissue NWP 21.
- **Option 2** – This is the Corps preferred option:
  - Reissue NWP 21 with 1/2 acre limit and 300 linear foot limit to streams, unless waived for intermittent and ephemeral streams (consistent with other NWPs).
  - Require agency coordination of PCN when proposed intermittent and ephemeral stream impacts are over 1,000 linear feet.
  - Prohibit valley fills.
- **Option 3**:
  - Reissue NWP 21 with 1/2 acre limit and 300 linear foot limit to streams, unless waived for intermittent and ephemeral streams.
  - Require agency coordination of PCN when proposed stream impacts are over 1,000 linear feet.
NWP 48 – Existing Commercial Shellfish Aquaculture Activities

- Propose to modify this NWP by:
  - Allowing for the expansion of existing operations and require a PCN
  - Removing the reporting requirement
- Soliciting comment regarding modifying NWP to authorize commercial new shellfish aquaculture activities or develop a new NWP for this activity
NWP A – Land-based Renewable Energy Generation Facilities

- New nationwide permit
- Authorize discharges of fill material into non-tidal waters of the U.S. for the construction, expansion or modification of land-based renewable energy production facilities
  - Examples include solar, wind, biomass, or geothermal energy and utility lines to transfer the energy to land-based distribution facilities
  - Attendant features may include, but are not limited to roads, parking lots, utility lines and storm water management facilities
- Proposed limits
  - Excludes activities in non-tidal wetlands adjacent to tidal waters
  - Limit the loss of waters to 1/2 acre of non-tidal waters of the U.S. with no more than 300 linear feet of stream unless waived for intermittent and ephemeral streams
- All activities require pre-construction notification
NWP B – Water-based Renewable Energy Generation Pilot Projects

- New nationwide permit
- Would authorize structures and work in navigable waters of the U.S. and discharges of fill material into waters of the U.S. for the construction, expansion or modification of water-based renewable energy production facilities
  - Examples include water-based wind or hydrokinetic renewable energy generation pilot projects
  - Attendant features may include, but are not limited to land-based distribution facilities, roads, parking lots, storm water management facilities and utility lines, including utility lines to transfer the energy to land-based distribution facilities

- Limits:
  - Limit the loss of waters to 1/2 acre waters of the U.S. with no more than 300 linear feet of stream unless waived for intermittent and ephemeral streams
  - No more than 10 generation units allowed for each single and complete project
- All activities require pre-construction notification
Minimal Adverse Effects Determinations

- Propose to modify the Notification general condition (GC 30) to explain factors for the district engineer to consider.
  - The environmental setting in the vicinity of the NWP activity
  - Functions provided by the aquatic resources that will be affected by the NWP activity
  - Importance of the aquatic resource functions to the region (e.g., watershed or ecoregion)
  - Any required mitigation
- If practicable, an appropriate functional assessment method may be used
- Case-specific special conditions to the NWP authorization to address site-specific environmental concerns may be used
Waivers of certain NWP limits

- **A waiver:**
  - An existing tool that allows the district to authorize a specific activity that exceeds an NWP limit, after he or she determines that the activity will result in minimal adverse effects
  - Only for losses of intermittent and ephemeral streams; bank stabilization activities
  - Provides flexibility to the regulated public and Districts

- **Proposed changes for the use of waivers**
  - Clarify how the district engineer makes a decision on a waiver request
  - Agency coordination for NWP activities proposing to impact greater than 1,000 linear feet of intermittent and ephemeral stream bed