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U.S. Army Corps of Engineers Proposal to Reissue/Modify Nationwide Permits: Associated General Contractors of America Comments

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The Associated General Contractors of America ("AGC") submitted August 1st comments on the United States Army Corps of Engineers ("Corps") proposal to reissue and modify Clean Water Act Nationwide Permits ("NWP").

As noted in a previous blog post, the Corps proposed in the June 1st Federal Register to reissue and modify its NWPs general conditions and definitions. See 81 Fed. Reg. 35,186.

An individual Clean Water Act 404 permit authorizes specific activities on a case-by-case basis. In contrast, a NWP is a general permit that provides standing permission for all activities that fit the description in the permit. Such permits provide for preauthorized permission for activities that conform to the standards of the NWP. Certain NWPs do require some type of authorization from or notice to the Corps prior to starting work.

AGC notes that it represents more than 26,000 firms engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. It further states its members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, and multi-family housing units.

AGC has an Arkansas chapter.

AGC explains its interest by stating:

In the Corps' own words, "The purpose of the NWP program is to reduce regulatory delays and burdens on the public, to place greater reliance on state and local controls, and to free our limited resources for more effective regulation of other activities with greater potential to adversely impact the aquatic environment." For nearly four decades the Corps has managed its workload by issuing general permits. Over time, the Corps has revised the nationwide permit program to include more, and increasingly stringent, conditions as prerequisites to authorization of general permits. The Corps argues that these additional restrictions and limitations are necessary to ensure authorization of only activities with "minimal impacts." The Corps makes available individual permits to address those activities with greater impacts. In practice, however, the general permits are now more like individual permits, in terms of the large amount information and data required.

For the construction industry, it is important that the Corps maintain a streamlined permit program that avoids duplication with other federal and state regulatory agencies. To remain competitive, contractors

must adapt quickly to changes due to fluctuating markets, contract revisions, and geological anomalies. The general permit provides the kind of flexibility required for construction jobsites that are temporary and every changing. For these reasons, AGC members have a strong interest in preserving a workable general permit program for construction and development activities. AGC believes that any changes to the Corps' general permitting program should maintain an efficient and streamlined process for authorizing activities that propose minimal impacts.

The issues addressed in AGC's comments include the following topics/issues:

- Acreage Limits and Pre-Construction Notification Thresholds
- Erosion of the General Permit Program Will Result in Project Delays, Higher Costs and Increased Uncertainty for All Activities that Require CWA Section 404 Approvals
- "Waters of the United States" Rule
- Waiver of Certain NWP Limits
- Regional Conditioning
- Overlap of Federal, State and Local Rules
- Specific Comments on NWP Conditions & Provisions
- General Condition 16 – Wild and Scenic Rivers
- General Condition 18 – Endangered Species
- General Condition 23 – Mitigation
- Clarification of How the District Engineer Determines What Constitutes "Minimal Adverse Effects" Is Needed, As Well as a Process for Challenging Such a Finding
- New General Condition 31 – Activities Affecting Structures Built by the United States
- General Condition 32 – Pre-Construction Notification

[A copy of the comments can be downloaded here.](#)