

# 404 Nationwide Permits/Clean Water Act: Association of Clean Water Administrators Comments on Proposed Revisions/Renewal



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The Association of Clean Water Administrators (“ACWA”) submitted November 16th comments on the United States Corps of Engineers (“Corps”) proposed revision and renewal of its nationwide permits (“NWP”) under Section 404 of the Clean Water Act.

The NWP proposal is found at Docket No.: COE-2020-0002.

The Corps issues two types of Clean Water Act Section 404 permits.

An individual 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 of 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.

The Corps is required to periodically renew expiring NWPs. However, besides renewing the existing permits, the Corps also typically takes this opportunity to revise or add certain NWPs.

The Corps proposal renews and revises its current 52 NWPs and adds five new ones. The new NWPs pertain to:

- Authorizing seaweed mariculture activities
- Finfish mariculture activities
- Utility line and telecommunication activities
- Utility line activities for water and other substances
- Water reclamation and reuse facilities

The new utility line NWPs represent the Corps splitting the existing NWP 12 into three categories. The idea is stated to be the benefits in structuring each of the NWPs to fit the different utilities that are constructed, maintained and removed.

NWP 12 has been the subject of litigation in which environmental groups have challenged the validity of the permit. For example, a United States District Court in Montana addressed a challenge to the Corps’ issuance of an NWP 12. See Northern Plains Resource Council, et al. v. U.S. Army Corps of Engineers 2020 WL 1875455. That issue arose in the context of the Northern Plains Resource Council and other organizations’ lawsuit opposing Keystone XL Pipeline. The plaintiffs had argued that the Corps’ reissuance

of NWP 12 in 2017 did not consider relevant impacts under the Endangered Species Act, National Environmental Policy Act, or Clean Water Act.

The ACWA November 16th comments note by way of introduction that the NWPs are:

. . . an important part of the regulatory system and enable efficient and effective regulatory review of construction and development activities that have a minimal individual and cumulative adverse environmental impacts.

Thus, the organization states that it has certain concerns which include:

- Water quality certification process
- Removal of the 300 linear foot limit for loss of stream bed
- Pre-construction notice requirements

As to the water quality certification process, ACWA states its concern with the requirement that states certify the proposed NWPs rather than what it describes as the “traditional approach” of certifying the final NWPs after the final rule has been published in the Federal Register as required by the Administrative Procedure Act. The organization notes in part:

. . . Asking states to concurrently review the proposed NWPS and asking them to certify the proposed NWPs, will pose a significant challenge for states and makes it difficult for some to fully evaluate the proposed permits and undertake an efficient and thorough water quality certification review.

The organization also notes that:

. . . this truncated schedule limits the states’ ability to evaluate the proposed NWPS in the context of several recent CWA rule changes, including the new Navigable Waters Protection Rule/WOTUS.

The concern regarding the removal of the 300 linear foot limit for loss of stream bed is premised on the belief that even such narrow streams provide essential functions in a watershed. ACWA states in part:

. . . A reliance on a ½ acre, especially for smaller streams, could equate to thousands of linear feet of fill or wetland loss. This change may lead to large impacts to small streams that provide important baseline flows even during periods of drought or winter freeze.

The proposed change to the preconstruction notification requirements is a focus because of their role in ensuring their proper utilization. ACWA further notes:

. . . Exempting federal agencies or their agents because they may employ environmental experts does not provide enough certainty for states to ensure that projects will not adversely impact the water quality standards of the state.

ACWA describes itself as the:

. . . independent, nonpartisan, national organization of state, interstate and territorial water program managers, who on a daily basis implement the water quality programs of the CWA.

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