Nationwide Permits/Clean Water Act: U.S. Army Corps of Engineers Announces Final Action (Including Addressing Data Centers/Pharmaceutical Facilities)



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Army Corps of Engineers ("Corps") published in the January 8th Federal Register a notice of its final action reissuing 56 existing Clean Water Act Nationwide Permits ("NWPs"). See 91 Fed. Reg. 768.

One NWP was added and another deleted.

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, an 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 existing permits, the Corps also sometimes takes the opportunity to revise or add certain NWPs.

The Corps has the authority to issue NWPs to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors act if they will result in no more than minimal individual and cumulative adverse environmental effects. Note that under Section 404 of the Clean Water Act the Corps authorization is required for discharges of dredged or fill materials into Waters of the United States.

Section 10 of the Rivers and Harbors Act requires authorization for:

- Construction of any structure in, over, or under any navigable Water of the United States.
- The excavating from or depositing of material in navigable waters of the United States.
- The accomplishment of any other work affecting the course, location, condition, or capacity of navigable Waters of the United States.

The new NWP added is "59". It is titled:

Water Reclamation and Reuse Activities – Activities to Improve Passage of Fish and Other Aquatic Organisms.

The NWP that is not reissued is “56”. It was titled:

Finfish Mariculture Activities.

The Corps also undertook an interpretive discussion of the following NWP:

39: Commercial and Institutional Developments.

The Corps stated that:

… a few commenters recommended revising this NWP to include data centers, and Artificial Intelligence and Machine Learning facilities as examples of commercial developments. One commenter stated that this NWP should list pharmaceutical storage and pharmaceutical manufacturing facilities as an example of commercial development.

The Corps in the Federal Register preamble states that it agrees that “data centers, artificial intelligence and machine learning facilities, pharmaceutical storage facilities, and pharmaceutical manufacturing facilities are types of commercial developments.”

As a result, the NWP was modified to include:

... "data centers (to include for example, artificial intelligence and machine learning facilities),’’ ‘‘pharmaceutical manufacturing facilities,’’ and the broader term ‘‘storage facilities’’ in the list of examples of commercial developments.

A copy of the Federal Register notice can be found here.