Corps’ Regulatory Program Update

Presentation for the National Association of Flood and Stormwater Management Agencies

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Topics

- U.S. Supreme Court decision in *Hawkes*
- 2015 definition of “waters of the United States”
- 2017 Nationwide Permits
  - Proposed changes
  - What is proposed to stay the same
- Factors influencing permitting timeframes
Hawkes decision

- U.S. Supreme Court Opinion issued May 31, 2016
- Permit application for peat mining operation (Minnesota)
- Question – Whether an approved jurisdictional determination identifying “waters of the United States” is a final agency action subject to judicial review
  - Approved jurisdictional determination is a document issued by the Corps that definitely states whether there are (or are not) waters of the United States on a parcel
  - Is it immediately reviewable under the Administrative Procedure Act?
- Role of Corps’ administrative appeal process?
Hawkes decision

- The Court’s finding:
  - An approved jurisdictional determination has “direct and appreciable legal consequences” and is a final agency action
- Corps, Army, Department of Justice, and EPA are evaluating whether changes in regulations, guidance, or policy are needed
- In the interim, the Corps will continue to process requests for approved jurisdictional determinations using current practices
2015 rule defining “waters of the United States”

- Final rule issued by EPA and Corps on June 29, 2015
- Lawsuits filed in numerous district courts and circuit courts
- Stayed by 6th Circuit Court of Appeals
  - October 9, 2015
- While stay is in place, Corps will determine Clean Water Act section 404 jurisdiction on case-by-case basis using:
  - November 1986 regulation (33 CFR part 328)
  - 2003 EPA/Army guidance – U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps*
  - 2008 EPA/Army guidance – U.S. Supreme Court decision in *Rapanos et al. v. U.S. Army Corps of Engineers*
2015 rule defining “waters of the United States”

- Corps will continue to coordinate draft approved jurisdictional determinations with EPA under 2007 coordination memo for:
  - Isolated, non-navigable, intrastate waters
  - Waters and wetlands that require a significant nexus to traditional navigable waters under the *Rapanos* decision

- Final approved jurisdictional determinations will continue to be posted on Corps district web sites
Nationwide Permits

- General permits issued by Corps Headquarters to authorize activities across the country
  - Categories of activities with no more than minimal individual and cumulative adverse environmental effects
  - Must be reissued every 5 years (limited by statute)
  - A federal rulemaking activity

- Nationwide permits authorize:
  - Discharges of dredged or fill material into waters of the United States
    - Section 404 of the Clean Water Act
  - Structures or work in navigable waters
    - Section 10 of the Rivers and Harbors Act of 1899
Nationwide Permits

- Congressional intent (Clean Water Act Section 404(e))
  - Streamlined authorization process for small activities with no more than minimal adverse environmental effects
- Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- First issued in 1977
  - 15 nationwide permits
- Current nationwide permits expire on March 18, 2017
  - 50 nationwide permits
  - 31 general conditions
NWP 2017 Rulemaking Timeline

- **Submit draft proposed rule to OMB**
- **OMB Interagency Review for proposed rule**
- **Publish in Federal Register for 60-day comment period**
- **District public notices – 45 days**
- **Review comments and prepare draft final NWPs**
- **OMB Interagency Review 60 – 90 days**
- **Districts finalize regional conditions, issue public notices**
- **State water quality Certifications – 60 day minimum**
- **State coastal zone consistency – 90 day minimum**
- **Submit draft final rule to OMB**
- **Finalize rule**
- **Publish final rule in Federal Register**

- **2015**
- **2016**
- **2017**

- **2012 NWPs expire as 2017 NWPs go in effect 3/18/17**
Grandfathering provision

- 33 CFR 330.6(b)
- Applies to activities covered under 2012 NWPs
- Permittee has one year to complete authorized work if under contract or under construction before March 18, 2017
Summary of June 1, 2016 proposed rule

- Propose to reissue 50 existing NWPs
  - 26 NWPs – no changes proposed
  - 24 NWPs – some changes proposed
- Propose to issue two new NWPs
  - Removal of low-head dams
  - Construction and maintenance of living shorelines
- Propose one new general condition
  - Activities affecting structures or works built by the United States (federal projects)
Comment summary

- Comment period ended August 1\textsuperscript{st}.
- More than 54,000 comments received
  - Many comments opposing reissuance of NWP 12 (utility lines)
  - Many comments supporting, opposing proposed living shoreline NWP
  - ~400 substantive comments with specific recommendations
- Corps is reviewing comments, preparing draft final rule
Proposed changes to NWPs

- NWP 3 – Maintenance
  - Clarify that NWP authorizes removal of previously authorized structures or fills
  - Authorize use of timber mats, if Corps authorization required
Proposed changes to NWPs

- NWP 13 – Bank stabilization activities
  - Clarify that this NWP authorizes a variety of bank stabilization activities, not just bulkheads and revetment
  - Cubic yard limit to be measured along bank, and includes in-stream techniques (e.g., barbs)
  - Authorize maintenance of bank stabilization activities
  - Native plants appropriate for site conditions must be used for bioengineering or vegetative stabilization
Proposed changes to NWPs

- **NWP 33 – Temporary construction, access, and dewatering**
  - Propose to require pre-construction notification only for activities in waters and wetlands subject to Section 10 of the Rivers and Harbors Act of 1899

- **NWP 45 – Repair of uplands damaged by discrete events**
  - Allow district engineer to waive the 12-month notification deadline if permittee can demonstrate funding, contract, or similar delays after major events
Proposed new NWPs

- NWP A – Removal of low-head dams
  - Developed to facilitate river and stream restoration activities, enhance public safety
  - Restore river connectivity, remove hazard for swimmers and small craft users
  - Proposed to define “low-head dam” as a dam constructed across a stream that passes flows over the entire width of dam crest on an uncontrolled basis
  - Notification required for all activities

Photo credit: Cleveland Museum of Natural History
Proposed new NWPs

- **NWP B – Living shorelines**
  - Authorize construction and maintenance of living shorelines for shore erosion control in low- to mid-energy coastal and lake environments
  - A substantial living component (e.g., sand fills planted with vegetation) in combination with hard structures such as reef structures or stone sills
  - Provide some shoreline ecological processes while reducing erosion
Proposed changes to general conditions

- GC 18 – Endangered species
  - Define “direct effects” and “indirect effects” to assist in Endangered Species Act compliance
    - Direct effects are immediate effects on listed species and critical habitat caused by NWP activity
    - Indirect effects are effects on listed species and critical habitat caused by NWP activity that occur later in time, and are reasonably certain to occur
  - Clarify that other federal agencies are responsible for their own compliance with the Endangered Species Act
  - District engineer may add permit conditions for Endangered Species Act compliance
Proposed changes to general conditions

- GC 23 – Mitigation
  - Reorganize text to clarify mitigation requirements for NWPs and their relationship to the Corps’ 2008 mitigation rule
  - Retain 1/10-acre threshold for wetland compensatory mitigation
    - Can be waived by district engineer
  - Preference for use of mitigation bank or in-lieu fee program credits
    - Does not preclude the use of permittee-responsible mitigation, where appropriate
Proposed changes to general conditions

- GC 31 – Activities affecting structures or works built by the United States (new GC based on Engineer Circular 1165-2-216)
  - Any NWP activity that also requires Section 408 permission from the Corps requires pre-construction notification
  - Activity is not authorized by NWP until after the Corps issues the Section 408 permission, and the district issues the NWP verification
Proposed changes to general conditions

- GC 32 – Pre-construction notification
  - No changes to the Corps’ review process
  - Changes to content of notification:
    - Specify the NWP(s) the project proponent wants to use
    - Describe mitigation measures intended to reduce adverse environmental effects
    - For linear projects, clarify that notification must identify other crossings of waters of the United States that require Corps authorization, including those that do not require notification
  - As a separate action, the Corps is also proposing to issue a standard Pre-Construction Notification form
    - Notice and comment through a separate Federal Register notice
Comments sought in proposed rule

- All the nationwide permits, general conditions, and definitions, as well as application (pre-construction notification, or PCN) procedures
- Changes in NWP terms and conditions to address 2015 final rule defining “waters of the United States” to continue authorizing activities with no more than minimal adverse environmental effects, such
  - Acreage limits (no changes, raise, lower?)
  - Pre-construction notification thresholds (no changes, raise, lower?)
Comments sought in proposed rule

- The use of waivers for certain NWP limits (e.g., the 300 linear foot limit for losses of stream bed)
  - Whether to retain waivers
  - Changing numeric value of limits that can be waived
  - Whether to cap waivers for 500 linear foot limit for NWP 13 bank stabilization activities
  - Whether to impose a linear foot cap on waivers of the 300 linear foot limit for losses of stream bed (e.g., NWP 29 (residential developments) and 9 other NWPs)
  - Whether to require compensatory mitigation for all losses of jurisdictional waters and wetlands authorized by waivers
Comments sought in proposed rule

- Ways to improve compensatory mitigation for NWP activities to offset direct, indirect, and cumulative effects caused by those activities
- Suggestions for factors district engineers should consider on when to require compensatory mitigation for NWP activities, and how much should be required
Factors affecting permitting timelines

- Required compliance with other laws:
  - Endangered Species Act Section 7
  - National Historic Preservation Act Section 106
  - Essential Fish Habitat provisions of Magnuson-Stevens Act

- Other factors
  - Corps’ Tribal Trust responsibilities
    - Government-to-government consultation necessary when activities may affect trust resources (natural and cultural resources)
In 2015, section 7 consultations for:
- 987 standard permits (29%)
- 3,607 nationwide permits (10%)

All actions in 2015:
- 3,447 standard permits
- 34,969 nationwide permits
Questions?