

# Client Alert

February 2012

## Corps Reauthorizes General Permits With New Limitations for Coal Mining

The U.S. Army Corps of Engineers reissued its Clean Water Act nationwide general permits (NWP). The new five-year NWP take effect on March 19, 2012, and expire on March 19, 2017. A copy of the *Federal Register* notice issuing the new NWP is available [here](#).

Nationwide permits are issued under Section 404 of the Clean Water Act. Section 404(e) authorizes the Corps to issue general permits for categories of activities involving discharges of dredged or fill material into waters of the United States, provided that the Corps determines that the discharges will cause only minimal adverse environmental effects. The Corps reissued 48 existing NWP and issued two new NWP. Highlights of changes to the NWP relevant to coal mining operations include the following:

**NWP 21** is reauthorized, including for the six-state eastern coal region consisting of Ohio, Kentucky, Pennsylvania, Tennessee, Virginia and West Virginia, where the Corps had suspended its use on June 18, 2010, with new threshold limitations imposed on activities authorized after March 19, 2012. For activities authorized under the existing NWP 21, the Corps provides an additional 12-month grandfather period for completion of projects that have been commenced or will commence prior to expiration of the existing permit on March 18, 2012. For those authorized activities that will not be completed upon expiration of the grandfather period, the Corps will consider reauthorizing without imposing the new limitations upon a written request for reauthorization to the district engineer by February 1, 2013.

Availability of the newly issued NWP 21 is limited to discharges with impacts not greater than a half acre of waters, including no more than 300 linear feet of streambed. The district engineer may waive the 300-linear-foot limit by making a written determination that the discharge will result in minimal individual and cumulative adverse effects. The permit is not available for discharges associated with construction of valley fills. The term "valley fill" is broadly defined as a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

**NWP 44** is reauthorized for non-coal mining with threshold limits and waiver provisions consistent with NWP 21. Applications require inclusion of a reclamation plan with the preconstruction notice if such a plan is a requirement of other statutes.

**NWP 49** is reauthorized for remining and reclamation of previously mined areas, provided the total area disturbed by the new mining does not exceed 40 percent of the total acreage impacted. In making this determination, the Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The permittee must include a document describing how the overall mining plan will result in a net increase in aquatic resource functions.

**NWP 50** is reauthorized for discharges associated with underground coal mining and reclamation activities with the same threshold and waiver provisions.

The Corps has provided states with a 60-day period to allow them time to make their decisions on 401 certification and 90 days for Coastal Zone Management Act (CZMA) consistency determinations. Until a

state issues its programmatic 401 and CZMA determinations with respect to the new NWP's, the Corps will consider use of any issued permits contingent on obtaining the 401 certification or CZMA concurrence, as appropriate.

Corps Districts have also proposed regional conditions. Since the regional conditions proposed by each District may have been based on the proposed NWP's, it may be important to promptly check regional conditions proposed by a District to determine whether the conditions need to be revised to conform to the final NWP's.

### **Hunton & Williams Natural Resource Practice**

Hunton & Williams regularly counsels and represents industry and government clients who rely upon Clean Water Act permits, including NWP's. Our attorneys have experience with virtually every aspect of the Clean Water Act, including the NPDES permit program, and other natural resources laws often associated with Clean Water Act permits, including the National Environmental Policy Act and the Endangered Species Act. We routinely represent regulated businesses in legislative, regulatory, litigation and enforcement matters arising under the Clean Water Act, National Environmental Policy Act, Endangered Species Act and related laws.

If you have questions about the developments discussed in this client alert, or other natural resource or environmental issues, please contact us.

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