

# Client Alert

August 2012

## **Center for Biological Diversity Notifies U.S. Army Corps of Engineers of Intent to File Lawsuit Challenging Nationwide Permit Program and Seeking Suspension of the Program**

On August 16, 2012, the Center for Biological Diversity (CBD) notified the U.S. Army Corps of Engineers (Corps) of its intent to file a lawsuit in 60 days to challenge the Corps's nationwide permit (NWP) program, alleging that the authorization of the NWP program pursuant to Section 404 of the Clean Water Act (CWA) violated the Endangered Species Act (ESA). Unless the Corps acts to correct the alleged ESA violations, CBD will pursue litigation seeking to force the Corps to immediately suspend its NWP program and/or require the Corps to revise its NWPs. NWPs cover a broad array of activities throughout various industries, including, for example, maintenance activities, pipeline and utility line activities, residential and commercial development, mining activities and agricultural activities. This prospective litigation could result in suspension or revocation of not only all NWPs, but also all other general permits, including regional general permits and state program general permits, and could have significant implications for all entities regulated under the CWA that rely on NWPs and general permits to conduct their activities.

The NWP program is aimed at streamlining CWA permitting for projects deemed by the Corps to have minimal adverse environmental impacts. CBD alleges that the Corps's most recent reissuance of its 50 active NWPs on February 21, 2012, violated the ESA because the Corps failed to complete formal ESA consultation with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) and failed to implement the reasonable and prudent alternative identified in a "jeopardy" biological opinion issued by NMFS. As a result, CBD contends that the Corps failed to ensure that the NWP program will not jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat.

Under ESA Section 7(a)(2), a federal agency proposing to take an action must undergo consultation with NMFS and FWS (jointly, the Services) to ensure that the action "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat." Informal consultation concludes with a written concurrence from the FWS or NMFS that the agency action is "not likely to adversely affect" the listed species or its designated habitat. Formal consultation concludes with the Services' issuance of a "biological opinion," which states the opinion of the Services concerning whether the action is likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of designated critical habitat. If so, the Services must suggest reasonable and prudent alternatives that can be taken by the agency in implementing the agency action. During the pendency of consultation, Section 7(d) of the ESA prohibits a federal agency from making any "irreversible or irretrievable commitment of resources" that would foreclose the implementation of any reasonable and prudent alternative measures suggested by the Services.

The Corps initiated formal Section 7(a)(2) consultation with FWS regarding the effects of NWPs on listed species under FWS's jurisdiction, but it was never completed and FWS never produced a written concurrence or biological opinion for the 2012 NWP reauthorization. As the result of formal Section 7(a)(2) consultation between the Corps and NMFS, just days prior to the Federal Register publication of the Corps's 2012 NWP reauthorization, NMFS issued a programmatic "jeopardy" biological opinion and a reasonable and prudent alternative, which included a long list of actions that the Corps should take to

ensure that the NWP's are not likely to jeopardize the continued existence of endangered and threatened species or result in destruction or adverse modification of critical habitat. (NMFS, *Biological Opinion on U.S. Army Corps of Engineers' Nationwide Permit Program* [Feb. 15, 2012]). Among these actions, the reasonable and prudent alternative would not only impose on the Corps numerous inspection, monitoring and reporting obligations but, in the meantime, would also require suspension or revocation of regional general permits, state program general permits and NWP's in at least 19 Corps Districts, including, for example, NWP's 3 (Maintenance), 7 (Outfall Structures and Associated Intake Structures), 12 (Utility Line Activities), 17 (Hydropower Projects), 29 (Residential Developments), 31 (Maintenance of Existing Flood Control Facilities), 33 (Temporary Construction, Access and Dewatering), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 43 (Stormwater Management Facilities) and 52 (Water-Based Renewable Energy Generation Pilot Projects). CBD claims that the Corps ignored NMFS's findings and failed to implement the reasonable and prudent alternative outlined by NMFS, putting listed species at risk.

CBD contends that the Corps must suspend its entire NWP program until its formal ESA consultation with FWS and NMFS is complete. If the Corps does not take corrective action, CBD will seek an injunction in federal district court, seeking to halt the NWP program. As a result, parties that rely on NWP's or are considering use of NWP's to conduct their activities should calculate for this uncertainty surrounding the NWP program.

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