

Client Alert

September 2015

Corps Issues Guidance Implementing Protective Measures Established by NMFS' 2014 Biological Opinion on NWP

The United States Army Corps of Engineers ("Corps") recently issued three guidance documents implementing protective measures established by the National Marine Fisheries Service's (NMFS) [2014 biological opinion](#) on the Corps' Nationwide Permit Program.¹ In its 2014 biological opinion, NMFS reached a no-jeopardy and no-adverse-modification determination, but based its determination in part on 12 measures protective of listed species and critical habitat. The recently issued guidance documents are the first in a series of steps that the Corps will be undertaking to implement the 12 measures listed in the biological opinion. The guidance documents: (1) require a determination of whether new or modified regional conditions are appropriate and necessary; (2) provide a template for information packages to be completed by Corps districts and posted on district websites for use by permittees when submitting preconstruction notifications; and (3) require a special condition requiring reporting of any incident in which a listed species is injured or killed as a result of permit activities. All three guidance documents apply to the seven Corps divisions and 19 Corps districts affected by the 2014 biological opinion. In addition to the implementation of the 12 measures listed in the 2014 NMFS biological opinion, the nationwide permits will be undergoing review and public comment as the Corps prepares to reissue the permits in 2017. These new measures, combined with other changes that may result from the pending reissuance of nationwide permits, could have important implications for industry.

Potential New or Modified Regional Conditions

On May 7, 2015, the Corps issued [guidance](#) requiring Corps districts to coordinate with NOAA regional or local offices "to determine whether new or modified regional conditions are appropriate and necessary to further ensure compliance with Section 7 of the ESA and the minimal individual and cumulative adverse effects requirements for NWPs."² This could result in additional requirements for permittees and restrictions on the use of NWPs. New or modified regional conditions will be subject to public notice and comment. A decision not to issue new or modified regional conditions requires a written determination. All regional conditions must be "directly related to the impacts of the [NWP activity], appropriate to the scope and degree of those impacts, and reasonably enforceable."

Template for Information Packages

On August 5, 2015, the Corps issued [guidance](#) providing a template for information packages to be completed by Corps districts and posted on Corps district websites.³ The information packages are

¹ NMFS, Biological Opinion on the Authorization of Discharges of Dredged and Fill Material or Other Structures or Work Into Waters of the United States Under the Corps' Nationwide Permit Program (Nov. 24, 2014).

² U.S. Army Corps of Engineers, Guidance Concerning the Implementation of November 2014 Biological Opinion on the 2012 Nationwide Permits issued by NOAA Fisheries – Coordination to Identify New or Modified Regional Conditions (May 7, 2015).

³ U.S. Army Corps of Engineers, Guidance Concerning the Implementation of November 2014 Biological Opinion on the 2012 Nationwide Permits issued by NOAA Fisheries – Templates for Information Packages to Facilitate Compliance with Nationwide Permit General Condition 18 (Aug. 5, 2015).

intended to help potential permittees determine whether a preconstruction notification is necessary to comply with NWP General Condition 18(c), and the types of information to include (such as listed species and designated critical habitat). The guidance explains that the preconstruction notification will be used to determine whether Endangered Species Act Section 7 consultation is required, but clarifies that the Corps — not the project proponent — will be responsible for determining the action, the action area and the effects of the action. The Corps districts are encouraged to give NMFS regional or field offices 30 days after completion of the template to suggest additional information package content. After this coordination, districts are encouraged to post the information package on their website within 30 days. The template provides a space to document listed species under NMFS jurisdiction that occur in the Corps district, a space to document the species for which critical habitat has been designated within the district, and links to information about the species and critical habitat. The template explains that a preconstruction notification is required if the proposed nationwide permit activity is located in the occupied range of listed species, in designated critical habitat or within the vicinity of the occupied range or designated critical habitat; or if a preconstruction notification is specifically required by the nationwide permit or by a regional condition for the nationwide permit.

Reporting Requirement

On May 5, 2015, the Corps issued [guidance](#) requiring Corps districts to include a special condition to nationwide permit verification letters that requires permittees to report any incident in which a listed species appears to be injured or killed as a result of discharges of dredged or fill materials or structures or work in navigable waters and to preserve evidence of the specimen if asked.⁴ This special condition is not required where there is no potential for a listed species to be injured or killed by the authorized activity such as when a no-effect determination has been made.

Contacts

Deidre G. Duncan
dduncan@hunton.com

Andrew J. Turner
aturner@hunton.com

Karma B. Brown
kbbrown@hunton.com

John Henson*
jhenson@hunton.com

**Admitted only in Tennessee: Work Supervised by Deidre G. Duncan, a member of the District of Columbia Bar.*

Kerry L. McGrath
kmcgrath@hunton.com

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⁴ U.S. Army Corps of Engineers, Guidance Concerning the Implementation of November 2014 Biological Opinion on the 2012 Nationwide Permits issued by NOAA Fisheries – Special Condition to be Added to Nationwide Permit Verification Letters (May 5, 2015).