

## A Blow To Wind Energy

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Law360, New York (March 9, 2011) -- Over the past decade, wind energy production has entered the mainstream. Commercial wind energy projects have been constructed in 36 states, supplying 1.8 percent of domestic power in 2009. And wind energy generation only will continue to increase in the coming years.

But as wind energy production has gained momentum, the state and federal agencies responsible for regulating generation facilities have struggled to keep pace. Nowhere has this been more apparent than with the Clean Water Act (CWA) Section 404 permitting process administered by the U.S. Army Corps of Engineers.<sup>1</sup>

The Corps now has a plan to correct this. On Feb. 16, 2011, the Corps proposed a new CWA nationwide permit (NWP) to streamline the permitting process for land-based renewable energy generation facilities.<sup>2</sup>

This NWP proposal marks a significant step forward for renewable energy interests, particularly the wind energy industry, which has labored for years under ill-fitting NWPs designed for other activities, causing the industry to push for a permit specifically tailored to wind energy projects.

But the victory may be bittersweet. The proposal leaves far too many questions unanswered, which may make it impracticable to rely on the new NWP when permitting future wind energy projects.

### **Past Practices and Future Possibilities — NWPs and Wind Energy Projects**

The CWA prohibits any discharge of dredged or fill material into navigable waters unless the discharge is authorized by a section 404 permit. Because obtaining a section 404 permit is a time- and resource-intensive process, both for permittees and the Corps, Congress authorized the Corps to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material when such activities are similar in nature and cause only minimal individual and cumulative adverse effects on the environment.<sup>3</sup>

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Under this authority, the Corps has developed 49 NWP's to streamline the permitting process for a range of economic and industrial sectors. These NWP's generally address categories of activities that historically required section 404 permits. But since renewable energy development is relatively new — compared to activities such as agriculture and mining — until recently the Corps has not focused on establishing NWP's for renewable energy projects.

The lack of industry-specific NWP's has not stopped wind energy developers from obtaining general permits for their projects. And rightfully so. Land-based wind turbine facilities typically are located at relatively high elevations or in remote, flat locations that best take advantage of favorable wind flow patterns. The topography of these locations often is not conducive to the presence of wetlands or other surface water features. As a result, the siting of wind turbines usually does not impact jurisdictional waters.

But these remote and elevated locations also generally require developers to construct access roads to their new facilities and install electrical transmission lines to tie in the turbines to substations and the electric grid. And because streams and wetlands frequently pepper the landscape between existing utilities and roads and a new turbine facility's location, construction of supporting infrastructure for wind energy projects is far more likely to cause impacts to jurisdictional waters than construction of the turbine facilities themselves.

Fortunately for the wind energy industry, the Corps long ago developed two NWP's that can be used to authorize construction of access roads and transmission lines. Over the years, the industry has relied on NWP 12 (Utility Line Activities) for permitting its transmission lines and/or NWP 14 (Linear Transportation Projects) for permitting its facility access roads. Yet, even as wind energy interests used these NWP's to streamline project permitting, they pushed the Corps to create a new NWP to accommodate the specific needs of their growing industry.

The Corps responded on Feb. 16, 2011, when it issued Proposed NWP A — Land-Based Renewable Energy Generation Facilities. If adopted, NWP A would authorize discharges of dredged or fill material into nontidal waters of the U.S. for construction, expansion, or modification of land-based renewable energy production facilities, including infrastructure for generating wind, solar, biomass, or geothermal energy.

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As proposed, the NWP would authorize up to 1/2 acre of impacts, including the loss of no more than 300 linear feet of stream bed — unless for ephemeral and intermittent stream beds the Corps waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects.

This acreage/linear foot limit applies to each project's energy generation facilities, collection systems and attendant features, such as roads, utility lines, parking lots and stormwater management facilities. The Corps would require permittees to submit pre-construction notification before any discharge occurs under the NWP.

### **Problems With the Proposed NWP**

Although the proposal of a renewable energy project NWP potentially offers significant benefits to wind energy interests, there remain several important issues that must be resolved for those benefits to be realized. In fact, as proposed, it is uncertain whether project proponents could rely on the NWP to authorize the majority of wind energy projects.

Accordingly, wind energy interests should request that the Corps clarify these issues to ensure that NWP A is a workable general permit that accomplishes the agency's goals and satisfies industry needs. Two of the most pressing concerns are the scope of the proposed NWP for wind energy projects and the categories of waters the Corps plans to cover under the NWP.

### **Defining the Permit's Scope**

The first major concern with NWP A is the scope of the proposed permit. The Corps plans for the NWP to authorize up to 1/2 acre of impacts to nontidal waters of the U.S. related to developing a renewable energy facility, collection system and attendant features, such as access roads and utility lines.

On its face, the inclusion of such attendant features within the scope of the proposed NWP might appear to be an efficient way to consolidate the permitting of the facility with the permitting of those features. In practice, however, the inclusion of roads and utility lines within the permit's scope could prevent many wind energy projects from qualifying for the permit.

Most wind energy generation projects to date have relied on NWPs 12 and 14 to authorize impacts associated with constructing roads and

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transmission lines for the projects. Like Proposed NWP A, NWPs 12 and 14 allow a permittee to impact up to 1/2 acre of waters of the U.S., including wetlands.

Nevertheless, there appears to be a significant difference between the manner for calculating those impacts under NWPs 12 and 14 and the manner for calculating them under Proposed NWP A. This difference arises from the disparate treatment of “linear” projects in applying the “single and complete project” standard for nationwide permits.

To qualify for NWP authorization, an activity must be a “single and complete project.”<sup>4</sup> A “single and complete project” is “the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers.”<sup>5</sup>

But the Corps interprets the scope of “single and complete project” differently for linear projects, such as roads and utility lines, than it does for nonlinear projects, such as a wind farm. In particular, “[f]or linear projects, the ‘single and complete project’ (i.e., single and complete crossing) will apply to each crossing of a separate water of the United States (i.e., single waterbody) at that location.”<sup>6</sup>

As a result, under NWPs 12 and 14, each road or utility line crossing of a distinct waterbody constitutes a separate single and complete project and qualifies for a separate permit with its own 1/2 acre impact limit.

Under Proposed NWP A, the Corps plans to include both the construction of an energy generation facility itself and construction of all roads and utility lines associated with the facility within the permit’s scope. However, the proposal does not answer whether those attendant road and transmission line features could continue to be treated as “linear,” as they are under NWPs 12 and 14, with each waterbody crossing qualifying as a separate project with authorization for up to 1/2 acre of impacts.

The Corps’ silence on this crucial issue suggests not. Instead, it appears the Corps will require permittees to aggregate the impacts from the full length of roads and transmission lines, including the impacts of each separate waterbody crossing, with the impacts of the generation facility to determine whether a project will cause more than 1/2 acre of impacts and, thus, be ineligible for the NWP.

Such aggregation, in many cases, would produce the absurd result of

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rendering wind energy projects ineligible for coverage under the new NWP designed for such projects, while those same projects would be eligible for coverage under permits that were designed for other development activities. This effect will only be compounded by the fact that Proposed NWP A additionally would limit project impacts to 1/2 acre including the loss of no more than 300 linear feet of stream bed, but NWPs 12 and 14 do not impose this secondary linear foot limit on streambed impacts.

In light of these potential problems, the Corps should clarify several points before finalizing NWP A. Most importantly, the Corps must clarify how it will apply the single and complete project standard under NWP A given that the proposal includes both facilities and associated linear infrastructure under its coverage.

In other words, can the roads and utility lines associated with renewable energy projects still be considered “linear” for purposes of defining their separate waterbody crossings as single and complete projects, or must the entire project be considered a single nonlinear installation for which all impacts must be aggregated?

Finally, if only the linear attendant features (roads and utility lines) of a wind energy project impact jurisdictional waters, must a permittee use NWP A to authorize those impacts since the Corps specifically designed the permit for such projects, or could the permittee continue to use NWP 12 and/or NWP 14?

### **CWA Jurisdiction Under the Proposed NWP**

A second concern with Proposed NWP A for wind energy interests is the breadth of waters that the Corps plans to regulate under the permit. The proposal imposes a 1/2-acre impact limit, which includes “the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives this 300 linear foot limit.”<sup>7</sup>

Thus, the proposal apparently considers all ephemeral streams to be covered by the permit and would require permittees to account for impacts to such streams when determining eligibility for the new NWP. If true, such a position would mark an unlawful expansion of CWA jurisdiction.

The CWA prohibits discharges of pollutants into “navigable waters” without a permit. For many years, it has generally been accepted that

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federal jurisdiction over “navigable waters” extends to certain hydrologic features that are not navigable in their own right.<sup>8</sup> And the precise scope of CWA jurisdiction over such features has continued to evolve over the years.

Nevertheless, the Corps’ jurisdiction to regulate navigable waters, or “waters of the United States,” does not extend categorically to ephemeral streams, which typically have “flowing water only during and for a short duration after precipitation events” and are located above the water table year-round.<sup>9</sup>

The Corps admits as much by defining “waters of the United States” to include “waters such as intrastate lakes, rivers, [and] streams (including intermittent streams)” without ever mentioning ephemeral streams.<sup>10</sup> Accordingly, before finalizing the permit, the Corps should either omit ephemeral streams from categorical coverage under the NWP or identify a legal basis for categorically including such waters without unlawfully expanding CWA jurisdiction.

### Correcting the Problems

Proposed NWP A presents a number of problematic issues that will affect the wind energy industry in general, and the need for streamlined permitting in particular. Fortunately, the proposal of a new NWP, as opposed to the reissuance or modification of an existing permit, provides a unique opportunity to shape the requirements and policies underlying the permit before it takes effect.

It is important for stakeholders to use this opportunity to help the Corps understand — and hopefully incorporate — the permitting approaches and requirements that are most workable for industry while still accomplishing the Corps’ statutory mandate under the CWA.

The deadline for commenting on Proposed NWP A is April 18.

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<sup>2</sup> Proposal To Reissue and Modify Nationwide Permits, 76 Fed. Reg. 9174 (Feb. 16, 2011). The Corps also proposed a separate new permit, Proposed NWP B, for “Water-Based Renewable Energy Generation Pilot Projects.” While the authors also have serious concerns about Proposed NWP B, this article focuses on the problems with Proposed NWP A.

<sup>3</sup> 33 U.S.C. § 1344(e).

<sup>4</sup> Nationwide Permit General Condition 16.

<sup>5</sup> 33 CFR § 330.2(i).

<sup>6</sup> *Id.*

<sup>7</sup> 76 Fed. Reg. at 9184 (emphasis added).

<sup>8</sup> See *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

<sup>9</sup> 76 Fed. Reg. at 9205.

<sup>10</sup> See 33 C.F.R. § 328.3. The EPA/Corps guidance for evaluating CWA jurisdiction likewise eschews the notion of categorically federalizing ephemeral waters under the statute. See Clean Water Act Jurisdiction Following the Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States* (2008) (requiring case-by-case analysis).