Holland & Hart



Jennifer Scheller Neumann

Of Counsel
202.654.6903
Washington, DC
jsneumann@hollandhart.com

New Army Corps Guidance Puts Wind and Solar Projects in the Slow Lane

Insight — October 28, 2025

On September 18, 2025, the Assistant Secretary of the Army for Civil Works issued a memorandum directing the U.S. Army Corps of Engineers (the Corps) to consider new factors when deciding whether to grant permit applications under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act (RHA). The Corps is also directed to move high “energy generation per acre” projects to the front of the line for processing. The Corps guidance, which is similar to instructions issued by the Department of the Interior and Department of Agriculture to prioritize energy projects with smaller footprints, seems designed to favor technologies like coal, nuclear, and natural gas, while disadvantaging wind and solar projects, which the memorandum describes as having larger footprints. It is unclear exactly how the Corps will apply the instructions to its permitting process for energy projects, but wind and solar developers can adopt strategies to improve the odds of a positive outcome.

Key Takeaways:

- New permitting priorities: The Army Corps now prioritizes energy projects with high "generation per acre" and considers whether projects displace "more reliable" energy sources.
- Undefined standards create uncertainty: Key terms like "energy generation per acre," "reliability," and "aesthetics" are not defined, making it difficult to know how the new criteria will be applied.
- Strategic planning is essential: Developers should consider jurisdictional determinations, general permits, and early Corps engagement to navigate the new requirements.

What the Corps Will Now Consider

In deciding whether to grant an individual permit, the Corps must now consider:

- The “project's annual potential energy generation per acre,”
- Whether projects “displace other more reliable energy sources,” and
- Whether project-related activities “denigrate the beauty of the Nation's natural landscape under the public interest review's 'aesthetics' factor.”

Districts are also instructed to prioritize processing applications “that would generate the most annual potential energy generation per acre over

projects with low potential generation per acre."

What's Unclear and How it Could Affect Your Project

The memorandum leaves key terms and processes undefined. For example, it does not define "annual potential energy generation per acre," but it does reference sources that describe the "boundary area" for various types of generation projects, including 85,000 acres for 1,000 megawatts of wind energy, 6,000 acres for 1,000 megawatts of solar energy, and 60 acres for more than 2,000 megawatts of nuclear energy. However, it is unknown whether the Corps will apply the boundary area metric, especially because it appears to ignore differences in land use among different types of projects. For example, much of the land within the boundary area of an onshore wind farm remains useful for other purposes, such as farming.

The terms "reliability" and "displacing" are also undefined, making it unclear whether the Corps will prioritize continuous output, dispatchability, or resilience to fuel and supply constraints, and how "displacement" applies when technologies may not be suitable for the same site.

The memorandum also fails to provide criteria for evaluating "aesthetics," which are inherently subjective. The memorandum likewise does not explain how the Corps will assess visual impacts across different technologies.

What Developers Can Do Now

Developers should first determine whether the new Direction applies to their projects: it only affects activities that require Clean Water Act Section 404 or Rivers and Harbors Act Section 10 approvals. Additionally, the following strategies may prove beneficial.

- First, consider seeking a jurisdictional determination ("JD") from the Corps to map jurisdictional waters in a project area and design projects to avoid them where feasible. The memorandum does not apply to JDs, and requesters need not describe the intended site use since JDs focus solely on the presence of jurisdictional waters.
- Second, where possible, use general permits, like Nationwide Permits 51 (land-based renewables) and 57 (electric utility lines), rather than individual permits.
- Third, build schedule buffers into project timelines to accommodate potentially longer processing times for certain permit applications.

When individual permit applications are unavoidable, developers should clearly address the factors contained in the memorandum, including explaining their methodology for calculating "energy generation per acre." It is also critical to articulate the project's purpose in terms of any applicable renewable mandates, grid needs, and offtake commitments, and to document why alternative energy sources or locations are impractical. According to the 404(b)(1) guidelines, permits cannot be granted if there is a practicable alternative to the proposed discharge that would have a less adverse impact on the aquatic ecosystem. The memorandum instructs the Corps to assess whether alternative energy

sources can provide equivalent generation with less impact on aquatic resources, making a thorough alternatives analysis essential.

Finally, engage the Corps district early to discuss how the new policy will be applied in practice. Providing the agency with the information it needs to process a permit application will help to minimize any delays caused by the agency's reprioritization of application processing capacity.

Bottom Line

The Corps' new preferences seem intended to make wind and solar projects harder to build, although how the Corps will apply the direction in the memorandum remains unclear. We will continue to monitor Corps guidance and its implications for project planning, permitting, and litigation risks, and can help develop strategies to reduce delays and increase the likelihood of obtaining necessary permits.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.