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## ABOUT B&D

Beveridge & Diamond's 100 lawyers in seven U.S. offices focus on environmental and natural resource law, litigation and dispute resolution. We help clients around the world resolve critical environmental and sustainability issues, relating to their products and facilities.

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## Corps of Engineers Nationwide Permits – Some New, Some Modified – Take Effect

On March 19, 2017, the latest iterations of the U.S. Army Corps of Engineers' nationwide permits (NWP) will take effect. As set forth in the Corps' [final rule](#) announcing these NWP, the 2017 package contains 52 permits, many of which are being reissued from the permits currently in place, along with General Conditions, Definitions, and decision-making directions for Corps district engineers. The NWP Program is a streamlined permitting process that authorizes certain categories of activities that have minimal individual and cumulative impact to wetlands and other waters of the United States subject to a pre-determined set of General Conditions. Any parties that operate under such NWP should review the modifications to determine whether their future permitting options might be affected, and seek legal counsel as needed. The new set of NWP will be valid for five years, expiring on March 18, 2022.

The following summarizes modifications in the 2017 package that affect multiple NWP, the two new NWP (NWP 53 and 54<sup>1</sup>), and significant updates to General Conditions (including an altogether new Condition), significant directions to Corps district engineers for implementing the NWP program, and notable changes to the NWP Definitions. Of particular relevance to stakeholders in all industries are:

- the modifications to notice requirements for certain NWP;
- the modifications to General Conditions regarding endangered species, migratory birds, mitigation, and pre-construction notification; and
- the modifications to decision-making directions to Corps district engineers.

A summary of all significant modifications to NWP, General Conditions, District Engineer directions, and Definitions is available in the Beveridge & Diamond summary chart (B&D table), [linked here](#).

<sup>1</sup> While the NWP are numbered to 54, there are 52 NWP currently; NWP 26 and NWP 47 previously were discontinued and therefore are labeled as "reserved."

and appended below. In addition, for further information, the Corps' summary chart of the 2017 NWP is available [here](#), and the 2017 NWP Final Decision Documents are available on the Corps [website](#).

## Significant Updates to NWPs

### *New NWPs*

NWP 53 Removal of Low-Head Dams authorizes discharges associated with removal of low-head dams. The Corps defines a low-head dam as "a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis." The Corps notes that this type of dam provides little storage function (i.e., they are shorter in height) and that streamlining the removal process will help restore rivers and streams to their natural state.

NWP 54 Living Shorelines authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into the waters of the United States for the construction and maintenance of living shorelines used for shore erosion control. Living shorelines consist of natural and man-made materials and must have a substantial biological component. Many living shorelines contain rock or reef structures to assist in protecting the shoreline. The Corps clarifies that this NWP does not authorize beach nourishment or land reclamation activities.

### *Revised pre-construction notification requirements*

Numerous NWPs require notification (pre-construction notification or PCN) to the Corps before beginning an authorized action when specified conditions are met. The 2017 NWPs modify the current PCN requirements for the following NWPs.

- NWP 3: Maintenance
  - PCN requirement eliminated for removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill.
- NWP 33: Temporary Construction, Access, and Dewatering
  - PCN only required for activities in navigable waters.
- NWP 41: Reshaping Existing Drainage Ditches
  - PCN requirement eliminated.
- NWP 44: Mining Activities
  - Requires final reclamation plan for PCN if reclamation required.
- NWP 45: Repair of Uplands Damaged by Discrete Events
  - Authorizes waiver of 12-month limit for submitting PCN if cause for delay shown.
- NWP 48: Commercial Shellfish Aquaculture Activities
  - Allows submittal of single PCN for contiguous project areas or a PCN for each project area.
- NWP 51: Land-Based Renewable Energy Generation Facilities
  - PCN only required for discharges that result in the loss of greater than 1/10 of an acre.

### *References to "single and complete project" and 33 C.F.R. § 330.6(d)*

The Corps reiterated and clarified that for Utility Line Activities (NWP 12) and Linear Transportation Projects (NWP 14), each crossing of a single waterbody at separate and distant locations, or multiple waterbodies at separate and distant locations, is considered a "single and complete project." The Corps also clarified that portions of a larger project may proceed under these NWPs while the district engineer evaluates an individual permit application for other portions of the same project—as is consistent with 33 C.F.R. § 330.6(d).

*Clarification that losses of stream bed apply to the ½ acre limit*

Certain NWP include a limitation that the authorized discharge must not cause the loss of more than 300 linear feet of stream bed. The Corps retained this limitation and clarified that such stream bed losses are included in the limitation that the aggregate total loss of jurisdictional wetlands and waters cannot exceed 1/2-acre. This 2017 NWP modification affects the following NWPs.

- NWP 21: Surface Coal Mining Activities.
- NWP 29: Residential Developments.
- NWP 39: Commercial and Institutional Developments.
- NWP 40: Agricultural Activities.
- NWP 42: Recreational Facilities.
- NWP 43: Stormwater Management Facilities.
- NWP 44: Mining Activities.
- NWP 50: Underground Coal Mining Activities.
- NWP 51: Land-Based Renewable Energy Generation Facilities.
- NWP 52: Water-Based Renewable Energy Generation Pilot Projects.

*Other NWP Updates*

In addition to the overarching modifications, the Corps made significant modifications to the following NWPs. Additional information is available in the B&D table, [linked here](#) and appended below.

- NWP 12: Utility Line Activities.
- NWP 13: Bank Stabilization.
- NWP 21: Surface Coal Mining Activities.
- NWP 43: Stormwater Management Facilities.
- NWP 48: Commercial Shellfish Aquaculture Activities.

**Significant Updates to General Conditions**

Significant updates to General Conditions (GCs) and a summary of the new General Condition 31 are listed and described below.

*GC 17: Tribal Rights*

GC 17 has been modified to include the requirement that NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

*GC 18: Endangered Species*

GC 18 has been modified in four ways. First and foremost, the Corps has added a paragraph (f) that provides that if a proposed NWP activity falls within a project or group of projects that already have a valid ESA section 10(a)(1)(B) incidental take permit and approved Habitat Conservation Plan, the Endangered Species Act (ESA) § 7 consultation requirement will be satisfied for purposes of the PCN review for that activity.

Second, the Corps has defined the terms “direct effects” and “indirect effects” consistent with ESA implementing regulations to mean, respectively, “the immediate effects on listed species and critical habitat caused by the proposed

NWP activity” and “those effects on listed species and critical habitat that are caused by the proposed NWP activity and are later in time, but still are reasonably certain to occur.”

Third, the Corps has clarified that a district engineer may add activity-specific conditions to an NWP authorization after conducting formal or informal ESA § 7 consultation.

Fourth, the Corps has clarified that federal agencies only need to submit documentation of compliance with ESA § 7 when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN.

*GC 19: Migratory Birds and Bald Eagles*

GC 19 has been modified to state that a permittee is responsible for ensuring its actions comply with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. A permittee is no longer responsible for obtaining “take” permits from FWS.

*GC 23: Mitigation*

GC 23 contains two significant clarifications. First, the Corps has clarified that district engineers may require mitigation to ensure that activities authorized by NWPs will result in no more than minimal individual and *cumulative* adverse environmental effects. Second, the Corps has clarified that the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu fee credits. Other notable changes are identified in the B&D table, [linked here](#) and appended below.

*GC 31: Activities Affecting Structures or Works Built by the United States (NEW)*

Under this new GC, a proposed NWP activity that also needs permission under section 408 of the River and Harbors Act requires submission of a PCN and is not authorized by the NWP until the district engineer issues a written NWP verification. The district engineer cannot issue a written NWP verification until after the section 408 permission has been granted or the Corps determines that section 408 permission is not required for a particular activity.

*GC 32: Pre-Construction Notification*

GC 32 contains two new significant requirements. First, if a party intends to use mitigation measures to reduce adverse environmental effects caused by the proposed activity, the PCN must contain a description of those measures. Second, PCNs for linear projects must identify all crossings of wetlands, other special aquatic sites, and other waters that require Department of Army authorization and include the quantity of proposed losses for each single and complete crossing. Other changes can be found in the B&D table, [linked here](#) and appended below.

**Significant Updates to Section D. District Engineer’s Decision (i.e., Directions to District Engineers)**

The most significant modification to these directions is that they now expressly require district engineers to consider cumulative effects, in addition to direct and indirect effects, when determining whether activity will have more than minimal adverse environmental effects. This analysis need not be exhaustive since cumulative effects have already been considered in the National Environmental Policy Act cumulative effects analysis for the NWPs. Other changes can be found in the B&D table, [linked here](#) and appended below.

**Significant Updates to Definitions**

Significant updates to Definitions are listed and described below.

- “Discharge” has been modified to clarify that the term refers to “discharges of dredged or fill material” and not to discharges of other types of pollutants.

- *"Ecological reference"* is a new defined term meaning "a model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27." The full definition is available in the [B&D table](#).
- *"Loss of waters of the United States"* has been modified to clarify that stream bed can be measured by area or by linear feet and that loss calculations are limited to losses caused by activities that require Department of the Army authorization.
- *"Navigable waters"* is a new defined term; it is defined by reference to 33 C.F.R. part 329.
- *"Protected tribal resources"* is a new defined term meaning "those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources."
- *"Tidal wetland"* has been modified so that first sentence now reads "A tidal wetland is a jurisdictional wetland that is inundated by tidal waters."
- *"Tribal land"* is a new defined term. [See the B&D table](#) for the full definition.
- *"Tribal rights"* is a new defined term. [See the B&D table](#) for the full definition.

*Beveridge & Diamond's [Natural Resources](#) and [Clean Water Act](#) teams develop creative, strategically tailored solutions to challenges posed by the nation's clean water laws. To discuss these issues further, please contact [Parker Moore](#), [Marc Goldstein](#), [Benjamin Apple](#), or [Megan Morgan](#).*

**SUMMARY OF CHANGES TO NATIONWIDE PERMITS, GENERAL CONDITIONS,  
DISTRICT ENGINEER’S DECISION, AND DEFINITIONS<sup>1</sup>**

**Proposed Rule, 81 Fed. Reg. 35186 (June 1, 2016)**

**Final Rule, 82 Fed. Reg. 1860 (Jan. 6, 2017)**

Nationwide Permit	Changes
NWP 3: Maintenance	
(a) Repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills	<ul style="list-style-type: none"> <li>• Clarify that NWP authorizes removal of previously authorized structures or fills.</li> <li>• New authorization for removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill – without requiring PCN</li> </ul>
(b) Discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures, including intake and outfall structures and associated canals	<ul style="list-style-type: none"> <li>• Remove provision authorizing the placement of new or additional riprap to protect the structure (riprap may be authorized by NWP 13).</li> </ul>
(c) Temporary structures, fills, and work necessary to conduct maintenance activity	<ul style="list-style-type: none"> <li>• Clarify that NWP authorizes use of temporary mats, if regulated by the district.</li> </ul>
NWP 9: Structures in Fleeting and Anchorage Areas	<ul style="list-style-type: none"> <li>• Remove reference to U.S. Coast Guard. Provides authorization under section 10 of the Rivers and Harbors Act of 1899 for barge fleeting activities that have not been covered because of the wording of NWP 9 that has been in place since 1982.</li> </ul>
NWP 12: Utility Line Activities	<ul style="list-style-type: none"> <li>• Authorizes the use of temporary mats.</li> <li>• Add notes referencing concepts from definition of “single and complete linear project” and 33 CFR 330.6(d).</li> <li>• Add note with reference to Corps regulations for required minimum clearances of overhead electric power transmission lines over navigable waters.</li> </ul>

<sup>1</sup> The summaries of NWP changes are taken directly from the U.S. Army Corps of Engineers summary table in the final rule. All other summaries of changes to General Conditions, District Engineer’s Decision, and Definitions are compiled from the proposed and final rules and paraphrased where appropriate.

Nationwide Permit	Changes
Utility lines (NWP 12 continued)	<ul style="list-style-type: none"> <li>• Clarify that NWP only authorizes crossings of waters of the US associated with the construction, maintenance, and repair of utility lines.</li> <li>• Add internet as form of communication carried by utility lines.</li> <li>• Authorize regulated activities associated with remediation for inadvertent returns of drilling fluids that may occur during horizontal directional drilling operations to install utility lines.</li> <li>• Add note stating that NWP authorizes utility line maintenance and repair activities that do not qualify for the CWA Section 404(f) exemption for maintenance.</li> </ul>
NWP 13: Bank Stabilization	<ul style="list-style-type: none"> <li>• Clarify that NWP 13 authorizes a variety of bank stabilization techniques, not just bulkheads and revetments.</li> <li>• Cubic yard limit to be measured along the bank, to cover applicability to in-stream fills to control erosion.</li> <li>• Add provision requiring proper maintenance and state that NWP also authorizes maintenance activities.</li> <li>• State that native plants instead of invasive plants must be used for bioengineering or vegetative stabilization.</li> </ul>
NWP 14: Linear Transportation Projects	<ul style="list-style-type: none"> <li>• Add notes referencing concepts from definition of “single and complete linear project” and 33 CFR 330.6(d).</li> </ul>
NWP 19: Minor Dredging	<ul style="list-style-type: none"> <li>• Add requirement that all dredged material must be deposited and retained in an area that has no waters of the US unless otherwise specifically approved by the district engineer under separate authorization.</li> </ul>
NWP 20: Response Operations for Oil or Hazardous Substances	<ul style="list-style-type: none"> <li>• Changed “and” to “or” in title of NWP.</li> </ul>
NWP 21: Surface Coal Mining Activities	<ul style="list-style-type: none"> <li>• Remove paragraph that authorized surface coal mining activities that were previously authorized by the 2007 NWP 21.</li> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> </ul>
NWP 22: Removal of Vessels	<ul style="list-style-type: none"> <li>• Change Note 2 to refer to the possibility of shipwrecks being historic properties.</li> </ul>
NWP 23: Approved Categorical Exclusions	<ul style="list-style-type: none"> <li>• Change “environmental documentation” to refer to an environmental impact statement or environmental assessment.</li> </ul>
NWP 27: Aquatic Habitat Restoration, Enhancement, and Establishment Activities	<ul style="list-style-type: none"> <li>• Add requirement to use an ecological reference to plan, design, and implement the NWP activity.</li> <li>• Add the removal of stream barriers, such as undersized culverts, fords, and grade control structures, to list of examples of authorized activities.</li> </ul>
NWP 29: Residential Developments	<ul style="list-style-type: none"> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> </ul>

Nationwide Permit	Changes
NWP 31: Maintenance of Existing Flood Control Facilities	<ul style="list-style-type: none"> <li>• Add provision stating that a flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.</li> <li>• Add Note clarifying that the one-time compensatory mitigation requirement applies to the time since the maintenance baseline was established for this NWP, not every 5 years.</li> </ul>
NWP 32: Completed Enforcement Actions	<ul style="list-style-type: none"> <li>• Modify paragraph (i)(a) to clarify that activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters.</li> <li>• Add provision stating that non-compliance with the terms and conditions of an NWP 32 authorization may result in an additional enforcement action, such as a Class I civil administrative penalty.</li> </ul>
NWP 33: Temporary Construction, Access, and Dewatering	<ul style="list-style-type: none"> <li>• Require PCNs only for activities in navigable (i.e., section 10) waters.</li> </ul>
NWP 35: Maintenance Dredging of Existing Basins	<ul style="list-style-type: none"> <li>• Require that dredged material be deposited in area with no waters of the US, unless authorized by the Corps by a separate permit.</li> </ul>
NWP 39: Commercial and Institutional Developments	<ul style="list-style-type: none"> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> <li>• Add wastewater treatment facilities to the list of examples of attendant features.</li> </ul>
NWP 40: Agricultural Activities	<ul style="list-style-type: none"> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> </ul>
NWP 41: Reshaping existing drainage ditches	<ul style="list-style-type: none"> <li>• Remove PCN requirement.</li> </ul>
NWP 42: Recreational Facilities	<ul style="list-style-type: none"> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> </ul>
NWP 43: Stormwater Management Facilities	<ul style="list-style-type: none"> <li>• Maintenance of stormwater management facilities, low impact developed integrated management features, and pollutant reduction green infrastructure features that are not waters of the US, and maintenance does not require a section 404 permit.</li> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> <li>• Authorizes the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters to meet reduction targets established under TMDLs set under the CWA.</li> </ul>
NWP 44: Mining Activities	<ul style="list-style-type: none"> <li>• For mining activities in non-tidal open waters, the ½-acre limit applies to the mining area.</li> <li>• The loss of non-tidal wetlands plus the mining area in non-tidal open waters cannot exceed ½-acre.</li> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> <li>• Final reclamation plan required for PCN, if reclamation is required.</li> </ul>

Nationwide Permit	Changes
NWP 45: Repair of Uplands Damaged by Discrete Events	<ul style="list-style-type: none"> <li>• Provide district engineer with authority to waive 12-month limit for submitting PCN if permittee can demonstrate funding, contract, or similar delays.</li> </ul>
NWP 48: Existing Commercial Shellfish Aquaculture Activities	<ul style="list-style-type: none"> <li>• Project areas also include lands where other legally binding agreements establish enforceable property interests.</li> <li>• Define “new commercial shellfish aquaculture operation” as operating in an area where such activities have not occurred during the past 100 years.</li> <li>• Operator can submit one PCN for a group of contiguous project areas or one PCN per project area.</li> <li>• Remove the PCN threshold for dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation.</li> <li>• Does not authorize activities that directly affect more than ½-acre of submerged aquatic vegetation beds in an area that has not been used for commercial shellfish aquaculture during the past 100 years.</li> <li>• PCN should describe all species and culture activities the operator expects to undertake in the project area or group of contiguous project areas during the effective period of this NWP.</li> <li>• PCN must include all species that are planned to be cultivated during the period the NWP is in effect.</li> <li>• PCN must specify whether suspended cultivate techniques will be used and indicate the general water depths in the project area.</li> </ul>
NWP: 50: Underground Coal Mining Activities	<ul style="list-style-type: none"> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> </ul>
NWP 51: Land-Based Renewable Energy Generation Facilities	<ul style="list-style-type: none"> <li>• Change the PCN threshold to 1/10-acre.</li> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> <li>• Revise Note 2 to include NWP 14 activities.</li> </ul>
NWP 52: Water-Based Renewable Energy Generation Pilot Projects	<ul style="list-style-type: none"> <li>• Add floating solar panels in navigable (i.e., section 10) waters to the list of activities authorized by this NWP, with a ½-acre limit.</li> <li>• Add wave energy devices.</li> <li>• Clarify that any losses of stream bed are applied to the ½-acre limit.</li> <li>• Add note stating that hydrokinetic renewable energy generation projects authorized by the FERC under the Federal Power Act of 1920 do not require separate authorization under Section 10 of the Rivers and Harbors Act of 1899.</li> </ul>

Nationwide Permit	Changes
<p><b>NWP 53: Removal of Low-Head Dams</b></p> <p><b>**NEW**</b></p>	<p><b>Summary:</b></p> <ul style="list-style-type: none"> <li>• Authorizes the removal of low-head dams for stream restoration and public safety.</li> <li>• “Low-head dam” defined as dam built to pass upstream flows over the entire width of the dam crest on a continual and uncontrolled basis.</li> <li>• As a general rule, compensatory mitigation is not required for these activities because they result in net increases in stream ecological functions and services.</li> <li>• NWP does not authorize regulated activities for restoration of stream in vicinity of former impoundment (these activities may be authorized by NWP 27), or bank stabilization activities (these activities may be authorized by NWP 13).</li> </ul>
<p><b>NWP 54: Living Shorelines</b></p> <p><b>**NEW**</b></p>	<p><b>Summary:</b></p> <ul style="list-style-type: none"> <li>• Authorizes construction and maintenance of living shorelines for shore erosion control.</li> <li>• Living shorelines consist of natural and man-made materials.</li> <li>• May include stone or reef structures to protect the shorelines from low to moderate energy waves.</li> <li>• Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures.</li> <li>• Does not authorize beach nourishment or land reclamation activities.</li> <li>• Discharges of dredged or fill material into the waters of the US, including the construction of fill structures such as sills or breakwaters, must be the minimum necessary for the establishment and maintenance of the living shoreline.</li> </ul>

General Condition	Changes
<p>GC 9: Management of Water Flows</p>	<ul style="list-style-type: none"> <li>• Modify the first sentence by removing the word “and” before “stormwater” and adding the phrase “and temporary and permanent road crossings” after “stormwater management activities: to add road crossings to the examples of activities where the pre-construction course, condition, capacity, and location of open waters must be maintained to the maximum extent practicable.</li> </ul>
<p>GC12: Soil Erosion and Sediment Controls</p>	<ul style="list-style-type: none"> <li>• Modify last sentence to encourage permittees to conduct work during low tides to reduce soil erosion and sediment transport during construction in tidal waters.</li> </ul>
<p>GC 16: Wild and Scenic Rivers</p>	<ul style="list-style-type: none"> <li>• Require PCN for any NWP activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in System while river is in official study status.</li> </ul>

General Condition	Changes
GC 17: Tribal Rights	<ul style="list-style-type: none"> <li>Require that NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.</li> <li>Remove the phrase "or its operation" after "activities" because the Corps may not have the legal authority to regulate the operation of a facility or structure after the authorized activity is completed.</li> </ul>
GC 18: Endangered Species	<ul style="list-style-type: none"> <li>Define "direct effects" as "the immediate effects on listed species and critical habitat caused by the proposed NWP activity."</li> <li>Define "indirect effects" as "those effects on listed species and critical habitat that are caused by the proposed NWP activity and are later in time, but still are reasonably certain to occur."</li> <li>Clarify that Federal agencies only need to submit documentation of compliance with section 7 of the Endangered Species Act ("ESA") when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN.</li> <li>Clarify that Corps district engineer may add activity-specific conditions to an NWP authorization after conducting formal or informal ESA § 7 consultation.</li> <li>Add subsection providing that Section 7 consultation requirement is satisfied if proposed NWP activity falls within a project or group of projects that has a valid ESA section 10(a)(1)(B) incidental take permit and approved Habitat Conservation Plan.</li> </ul>
GC 19: Migratory Birds and Bald Eagles	<ul style="list-style-type: none"> <li>State that permittee is responsible for ensuring its actions comply with Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act.</li> <li>Removes statement that permittee is responsible for obtaining "take" permits from FWS.</li> </ul>
GC 20: Historic Properties	<ul style="list-style-type: none"> <li>Clarify that federal permittees only need to submit documentation of their compliance with section 106 of the National Historic Preservation Act (NHPA) if the proposed NWP activity requires pre-construction notification because of other terms and conditions, including regional conditions imposed by division engineers.</li> <li>Clarify that it is the Corps district engineer's responsibility to make section 106 effects determinations.</li> <li>Include "designated tribal representative" as an option for assistance regarding information on the location of potential historic resources.</li> <li>Clarify that 45-day deadline for Corps to provide notice of whether section 106 consultation is required applies to non-federal permittees only.</li> </ul>
GC 22: Designated Critical Resource Waters	<ul style="list-style-type: none"> <li>Add reference to new NWP 54: Living Shorelines.</li> </ul>

General Condition	Changes
GC 23: Mitigation	<ul style="list-style-type: none"> <li>• Clarify that mitigation can be required by Corps district engineers to ensure that activities authorized by NWP's will result in no more than minimal individual and cumulative adverse environmental effects.</li> <li>• State that compensatory mitigation for stream losses "should" be provided through rehabilitation, enhancement, or preservation.</li> <li>• State that compensatory mitigation provided through riparian areas can be accomplished by restoration, enhancement, or maintenance/protection of those areas and that restored riparian areas should consist of native species.</li> <li>• State that if the Corps district engineer determines compensatory mitigation is required for the proposed NWP activity, the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu credits.</li> <li>• Clarify that the amount of compensatory mitigation required by the Corps district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.</li> <li>• Clarify that compensatory mitigation to offset losses of specific functions of jurisdictional waters and wetlands should only be required by Corps district engineers when those losses are caused by regulated activities.</li> </ul>
GC 30: Compliance Certification	<ul style="list-style-type: none"> <li>• Add timeframe for certification; completed certification should be sent to the district engineer within 30 days of completing the authorized activity or the completion of the implementation of any required compensatory mitigation, whichever occurs later.</li> </ul>
<p><b>GC 31: Activities Affecting Structures or Works Built by the United States</b></p> <p><b>**NEW**</b></p>	<p><b>Summary:</b></p> <ul style="list-style-type: none"> <li>• A proposed NWP activity that also needs permission under section 408 of the River and Harbors Act requires submission of a PCN and is not authorized by NWP until the district engineer issues a written NWP verification.</li> <li>• The district engineer will not issue a written NWP verification until after the 408 permission has been granted, or the Corps determines that section 408 permission is not required for a particular activity.</li> </ul>

General Condition	Changes
GC 32: Pre-Construction Notification	<ul style="list-style-type: none"> <li>• Require PCN to identify the specific NWP(s) the project proponent wants to use to authorize the proposed activity.</li> <li>• Require actual description of mitigation measures the applicant intends to use to reduce adverse environmental effects caused by the proposed activity.</li> <li>• Require that PCN for linear projects identify all crossings of wetlands, other special aquatic sites, and other waters that require Department of Army authorization and include quantity of proposed losses of those waters for each single and complete crossing.</li> <li>• Clarify that requirement to submit PCNs for proposed NWP activities that might affect listed species or critical habitat under the ESA or have the potential to cause effects to historic properties applies to non-federal permittees.</li> <li>• Require the PCN to include a statement from the project proponent confirming that he or she has submitted a written request for section 408 permission under River and Harbors Act, if the proposed NWP activity will alter or occupy structures or works built by the United States.</li> <li>• Allow applicants to submit PCNs and supporting information as electronic files when district engineer has established means and protocols to do so.</li> <li>• Clarify when agency coordination is required and the procedures for agency coordination.</li> <li>• Require agency coordination for PCNs for proposed NWP 13 activities where the applicants request waivers for one or more of limits of NWP 13 that can be waived with a written activity-specific determination of no more than minimal adverse environmental effects.</li> <li>• Remove the agency coordination requirement for all NWP 48 activities that require PCN.</li> </ul>

District Engineer's Decision (Section D)	Changes
	<ul style="list-style-type: none"> <li>• State that if an applicant requests authorization under one or more specific NWP's, the district engineer should issue the verification letter for those NWP's, unless he or she exercises discretionary authority to require an individual permit.</li> <li>• Clarify that for those NWP's that have a 1/2-acre limit with a waivable 300 linear foot limit for losses of intermittent or ephemeral stream bed, the loss of stream bed plus any other losses of jurisdictional waters and wetlands cannot exceed 1/2-acre.</li> <li>• Allow use of a condition assessment to help determine whether a proposed activity will result in no more than minimal adverse environmental effects.</li> <li>• Require district engineer to consider cumulative effects, in addition to direct and indirect effects, when determining whether activity will have more than minimal adverse environmental effects.</li> <li>• Clarify that mitigation measures, including compensatory mitigation, may be used to ensure that a proposed NWP activity results in no more than minimal adverse environmental effects.</li> <li>• Allow applicants to propose compensatory mitigation to offset impacts to other types of waters, such as streams.</li> <li>• Clarify that the 45-day PCN review period may be extended if general conditions 18, 20, and/or 31 apply and additional time is needed to complete ESA section 7 consultation, NHPA section 106 consultation, or for the Corps to make a decision on a request for section 408 permission. (The proposed change to this sentence also includes NWP's 21, 49, and 50, because regulated activities are not authorized by these NWP's until written verifications are issued by district engineers.)</li> </ul>

Definition	Changes
"Discharge"	Clarify that the use of the term "discharge" in the NWP refers to "discharges of dredged or fill material" and not to discharges of other types of pollutants.
<b>"Ecological reference"</b> <b>**NEW**</b>	"A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region."
"Loss of waters of the United States"	<ul style="list-style-type: none"> <li>Clarify that loss of stream bed can be measured by area (e.g., acres, square feet) or by linear feet.</li> <li>Clarify that losses of waters of the United States calculated for purposes of determining NWP eligibility are limited to losses caused by activities that require Department of the Army authorization.</li> </ul>
<b>"Navigable waters"</b> <b>**NEW**</b>	<b>Defined same as</b> "navigable waters" in 33 CFR part 329.
"Non-tidal wetland"	<ul style="list-style-type: none"> <li>Remove reference to definition of "wetland" promulgated in 2015 final rule defining "waters of the United States."</li> <li>Add reference to 33 CFR 328.3(c)(4).</li> </ul>
<b>"Protected tribal resources"</b> <b>**NEW**</b>	<b>Defined as:</b> "Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources."
"Riparian areas"	Change the word "adjacent" to "next" in the first sentence of this definition because riparian areas border rivers, streams, and other bodies of water.
"Tidal wetland"	<ul style="list-style-type: none"> <li>Change first sentence to read "A tidal wetland is a jurisdictional wetland that is inundated by tidal waters."</li> <li>Remove references to regulatory definitions in CFR.</li> </ul>
<b>"Tribal land"</b> <b>**NEW**</b>	<b>Defined as:</b> "Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation."
<b>"Tribal rights"</b> <b>**NEW**</b>	<b>Defined as:</b> "Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies."
"Waterbody"	Remove reference to 33 CFR 328.3(a)(1)–(5).