

## 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), 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.

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A summary of all significant modifications to NWP, General Conditions, District Engineer directions, and Definitions is available in the [summary chart \(B&D table\)](#). In addition, for further information, the Corps' summary chart of the 2017 NWPs 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; and
- 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; and
- 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](#).

- NWP 12: Utility Line Activities;
- NWP 13: Bank Stabilization;
- NWP 21: Surface Coal Mining Activities;
- NWP 43: Stormwater Management Facilities; and
- 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](#).

### **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](#).

### **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](#).

### **Significant Updates to Definitions**

"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.