



Army Corps of Engineers Releases 2017 Nationwide Permits

JANUARY 19, 2017

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Introduction

On January 6, 2017, the U.S. Army Corps of Engineers (Corps) issued its 2017 Nationwide Permits (NWP) for work in streams and wetlands under Section 404 of the federal Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899. [82 Fed. Reg. 1860](#). The 2017 NWP are effective March 19, 2017 for a period of five years, replacing the 2012 NWP that expire on March 18, 2017. NWP are a type of general permit issued by the Corps that are designed to regulate certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts—with the ultimate goal of establishing standard terms and conditions for protections of jurisdictional waters and wetlands while allowing the activities to proceed with minimal delay and paperwork.

The Corps reissued all fifty-two existing NWP and added two new NWP: NWP 53, authorizing removal of low head dams, and NWP 54, authorizing construction and maintenance of Living Shoreline in coastal waters. Importantly, despite comments urging the Corps to impose tighter limits on the use of certain NWP, the reissued NWP maintain all of the acreage and linear limitations and key streamlining provisions in the 2012 NWP, including the definition of a single and complete linear project, which allows large linear utility or transportation projects to obtain coverage under multiple NWP, one for each separate and distant water body crossing.

While most of the 2012 NWP are reissued without significant modification, substantive changes and clarifications have been made to several NWP, which are highlighted below. In addition, revisions to General Conditions (GCs) address consideration of tribal treaty rights and resources, mitigation, requirements for a complete pre-construction notification (PCN), and the default provisions under which a PCN applicant can proceed if the Corps fails to respond within 45-days. The Corps also issued a [Summary Table](#) which identifies for each NWP the applicable limitations, the major changes, and the requirement for when to file a PCN.

Each Corps District may now issue Regional Conditions that could prohibit or further condition the use of the 2017 NWP by applicants within each District. Under Section 401 of the CWA, the Corps' issuance of the 2017 NWP starts a 60-day period for states (or in Indian Country for the Environmental Protection Agency (EPA) or Tribes delegated CWA section 401 authority water quality certifications) to condition or deny use of any of the 2017 NWP. The 2017 NWP issuance also starts a 90-day period for coastal states to make a consistency determination under the Coastal Zone Management Act (CZMA).

Permittees with coverage under an existing 2012 NWP will be considered "grandfathered" by the Corps if they have entered into a contract by March 18, 2017 to perform the work authorized by the 2012 NWP, or if they have commenced construction by that date. In such case, work must be completed by March 18, 2018. Otherwise, coverage under the 2017 NWP must be sought.

Background

Section 404(e) of the CWA authorizes the Secretary of the Army to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material." 33 U.S.C. §1344(e)(1). Activities that qualify for a general permit must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative environmental effects.

The most common general permits are NWP, which provide streamlined review and authorization for categories of activities that the Corps has determined have minimal impacts on the aquatic environment. NWP automatically expire, unless renewed, every five years.

The Corps has issued [Decision Documents](#) for each of the fifty-four 2017 NWP. In each, the Corps has issued a Finding of No Significant Impact (FONSI) under the National Environmental Policy Act (NEPA). No further NEPA compliance is required for the Corps to authorize work by any project under an applicable 2017 NWP. The Decision Documents also confirm that the issuance of the 2017 NWP will have “no effect” under the Endangered Species Act (ESA). The Corps reached its “no effects” determination based on General Condition 18, which requires every applicant that “might affect” an ESA-listed species or its designed critical habitat to submit a PCN, so that the Corps can determine if the action requires ESA consultation.

Highlights of the 2017 NWP

Thresholds for NWP

The 2017 NWP retain all of the 2012 NWP, largely without major revisions. The acreage and linear limitations for use of many NWP (typically 1/2-acre and 300 linear feet of stream bed) have not been changed, although for NWP 29, 39, 40, 42, 43, and 50, the Corps now requires the acreage loss of stream beds to be calculated and added to determine whether the 1/2-acre threshold has been exceeded. The ability to obtain waivers from certain limitations (such as the 300-foot stream bed limit) has been retained, but a 1,000-foot cap has been placed on waivers from the 500 linear foot limit for bulkheads under NWP 13.

New NWP

The Corps has added two new NWP categories:

- NWP 53 (Removal of Low-Head Dams) authorizes removal of low-head dams, defined 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. Under this new NWP, a qualifying low-head dam provides little storage function and does not have a separate spillway or spillway gates, but may have an uncontrolled spillway. The low-head dam structure removed under this NWP must be deposited and retained in an area that has no jurisdictional waters of the United States unless otherwise specifically approved by the Corps’ district engineer under separate authorization. In general, compensatory mitigation is not required for activities authorized by this NWP because the removal itself improves ecological functions. NWP 53 does not authorize the construction of new dams to replace low-head dams. A separate permit, NWP 27, still authorizes the removal of other small water control structures, dikes, and berms typically found in headwater streams.
- NWP 54 (Living Shorelines) authorizes construction and maintenance of living shorelines (natural and man-made materials to establish and maintain marsh fringes or other living elements to reduce erosion while retaining or enhancing ecological processes) for shore erosion control. NWP 54 is only applicable in coastal areas, which consist of estuarine and marine waters and the Great Lakes. This NWP cannot be used to authorize erosion control activities in other lakes or inland waters, including hydropower reservoirs. A 500-linear-foot limit, which is waivable, has been imposed for this NWP. Additionally, the Corps has recognized that the 500-linear-foot limit does not preclude groups of adjoining landowners from working together to construct living shorelines at the same time, with the living shoreline on each property staying within the 500-foot limit. This NWP is an alternative to seeking authorization under NWP 13 for traditional forms of bank stabilization. Importantly, the Corps notes that NWP 54 does not establish a preference for one approach to bank stabilization over another.

Major Changes to Preexisting NWP

- NWP 3 (Maintenance)
 - The substantive terms of NWP 3 were not changed but important clarifications were added.
 - For repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills, the Corps clarified that no documentation of the prior authorization is required, and that this NWP authorizes removal of previously authorized structures and fills.
 - For discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures, including intake and outfall structures and associated canals, the Corps removed a provision authorizing the placement of new or additional riprap to protect the structure, but noted that riprap may be authorized by NWP 13.
 - For temporary structures, fills, and work necessary to conduct maintenance activity the Corps clarified that NWP 3 authorizes use of temporary mats, if regulated by the district.
- NWP 12 (Utility Line Activities):
 - The Corps has retained the Single and Complete Linear Project approach to allow each separate and distant crossing of waters to be authorized by a separate NWP, dismissing comments urging the Corps to abandon this approach. In order to qualify for coverage under NWP 12, each separate and distant crossing cannot result in the loss of more than 1/2-acre of jurisdictional waters. The determination as to what will constitute a “separate and distant” crossing will be a case-by-case determination. For large linear projects (including utility, cable, telephone, etc. lines as well as pipelines used to move oil, gas, slurry, etc.), there often are hundreds of separate NWP 12 verifications issued by the Corps, one for each crossing.
 - The Corps must still conclude that the cumulative adverse environmental effects of the entire project are no more than minimal. In order for the Corps to evaluate cumulative effects, NWP 12 applicants are now required to submit in their PCN information on all proposed crossings, including those that do not trigger the need for a PCN.
 - If one or more crossings do not qualify under NWP 12, the entire utility line may require coverage under an individual permit. Under the Corps’ regulations, one portion of the utility line may be able to proceed if the applicant can show that those portions that still qualify under NWP 12 have independent utility from those portions triggering the need for an individual permit.
 - Independent utility is defined as a project that would be constructed absent the construction of other projects in the project area. The Corps has recommended that NWP 12 applicants identify in their PCNs those portions of the entire utility line that may have independent utility in case one or more crossings are determined not to meet the NWP 12 thresholds.
 - NWP 12 now also authorizes the use of temporary mats, including timber mats, but notes that District Engineers retain the discretion, on a case by case basis, to determine whether use of temporary timber mats requires Corps authorization.

- Temporary structures, fills and work (such as cofferdams) are now authorized for the remediation of inadvertent returns of drilling fluids through sub-soil fractures during horizontal directional drilling operations. Remediation must occur as soon as practicable. The Corps notes that the fluids used for drilling are not themselves considered “fill material”; but, states can require section 401 water quality certification for any discharge into jurisdictional waters and wetlands, not just discharges of dredged or fill material.
- Now optic cables and other lines that communicate “through the internet” are considered utility lines under NWP 12. However, the Corps rejected comments that asked for NWP 12 authorization for wireless communication facilities.
- NWP 14 (Transportation Projects)
 - The substantive terms of NWP 14 were not changed, but the Corps added two clarifying notes. First, the Corps clarified how linear transportation projects are to comply with the Corps’ regulations related to single and complete crossings and how NWPs may be combined with individual permits. Second, the Corps clarified when PCNs are applicable to NWP 14.
 - In the preamble to the 2017 NWPs, the Corps reiterated that NWP 14 “[d]oes not authorize storage buildings, parking lots, train stations, aircraft hangars, or other non-linear transportation features.” The Corps specifically corrected a statement in the preamble to the 2012 NWPs, in which the Corps had stated that NWP 14 authorizes parking lots, calling that statement “an error.”
- NWP 27 (Habitat Restoration and Enhancement)
 - To address concerns regarding the misuse of NWP 27 to authorize activities such as bank stabilization and wetland or stream conversion, the Corps added language limiting the use of NWP 27 to activities that are based on specific “ecological references,” defined as a model used to plan and design an aquatic habitat and riparian area restoration, enhancement or establishment activity. NWP 27 will no longer be eligible for bank stabilization activities, stormwater management activities, or best management practice facilities constructed to meet TMDLs established under Section 303(d) of the CWA.
- NWP 29 (Residential Developments)
 - The Corps added language to NWP 29 clarifying that any losses of stream bed are applied to the 1/2-acre limit. The Corps rejected other requested modifications to NWP 29, including a proposal to limit it to low-impact development activities.
- NWP 33 (Temporary Construction, Access, and Dewatering)
 - The Corps added a note clarifying that PCNs are required under NWP 33 only for activities in waters that are “navigable” under CWA Section 10.
- NWP 39 (Commercial and Institutional Developments)
 - The Corps revised the text of NWP 39 to add wastewater treatment facilities to the list of examples of attendant features authorized by NWP 39. The Corps also added language clarifying that any losses of stream bed are applied to the 1/2-acre limit.
- NWP 51 (Land-Based Renewable Energy Generation Facilities)

- In the 2012 NWP, the Corps had required PCNs for all activities authorized by NWP 51. In the 2017 NWP, the Corps added a PCN threshold of 1/10 of an acre, allowing smaller projects with smaller impacts to avoid PCN requirements.
- The Corps also clarified that any losses of stream bed are applied to the 1/2-acre limit and made minor revisions to the notes for NWP 51.
- NWP 52 (Water-Based Renewable Energy Generation Pilot Projects)
 - The Corps clarified and expanded the scope of NWP 52, including adding wave energy projects and floating solar panels in Section 10 waters to the list of activities authorized by this NWP.
 - The Corps also clarified that any losses of stream bed are applied to the 1/2-acre limit and added a note stating that hydrokinetic renewable energy generation projects authorized by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization under Section 10 of the Rivers and Harbors Act of 1899.

Important Changes to General Conditions

The Corps also made several significant revisions to the General Conditions (GC) that govern use of all NWPs and has added one new General Condition.

- GC 17 and GC 20 – Addressing Tribal Issues
 - The Corps has altered the threshold of effect and scope for consideration of the effects of a project on tribal rights and resources.
 - Modified GC 17 sets a standard of no more than “minimal adverse effects” on tribal treaty rights. Activities with more than a minimum adverse effect on such rights, resources or lands require an Individual Permit. Note, however, that some Corps Districts have denied permits on the basis that impacts on treaty rights would be more than *de minimis*. See [Memorandum for Record for Gateway Pacific Terminal Project](#).
 - In terms of scope, modified GC 17 continues the inclusion of treaty rights, but extends consideration and safeguards to “protected tribal resources.” The 2017 NWP define “protected tribal resources” broadly as “any natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or served by or for, Indian tribes through treaties, statutes, judicial decisions, or executive order, including tribal trust resources.” Modifications to GC 17 are consistent with the [1998 Department of Defense American Indian and Alaska Native Policy](#), including the inclusion of Tribal Historic Preservation Officers and definitions of tribal lands and tribal rights.
 - In response to comments seeking greater Corps consideration of tribal concerns, the Corps clarified that its responsibilities for protecting tribal rights, protected tribal resources, and tribal lands, “only applies to the activities the Corps has authority to regulate. The Corps does not have the legal authority to regulate or impose conditions on actions or activities outside of its jurisdiction, such as activities in upland areas or operation and maintenance activities that do not require DA authorization.”
 - The 2017 NWP note that “Division engineers can add regional conditions to one or more NWPs to require PCNs for proposed activities in a geographic region that have the potential to cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.”

- Under GC 20 (Historic Properties), the Corps has included “designated tribal representative” among the options for the Corps to seek assistance regarding information on the location of potential historic resources.
- GC 18 ESA.
 - This condition requires PCNs for any activity that “might affect” listed species and designed critical habitat. The “might affect” standard is intended to allow the Corps to evaluate whether the proposed activity reaches a “may affect” threshold thereby triggering consultation requirements under Section 7 of the ESA.
 - The Corps has added definitions for direct and indirect effects to ensure that direct and indirect effects to listed species and designed critical habitat are considered when applicants notify the Corps that activities “might affect” a listed species and when the Corps considers whether the activity “may affect.”
 - The Corps also notes that, while the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services), in their role of administering the ESA, may consider impacts from interrelated and interdependent activities, the Corps does not have legal authority to enforce conditions that the Services might impose on those interrelated and interdependent activities in an incidental take statement in a biological opinion. Further, the Corps reiterates that the Services are solely responsible for enforcing ESA protections that apply, for example, to upland activities, outside of the Corps’ jurisdiction.
 - A new paragraph (f) is added to confirm that ESA consultation has been satisfied when a non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit and an approved Habitat Conservation Plan (HCP) that covers a project included in the proposed NWP activity.
- GC 23 Mitigation
 - The 1/10 acre threshold has been retained for requiring wetland compensatory mitigation with the District Engineer’s discretion to waive such mitigation requirements.
 - The Corps notes that it cannot require mitigation for activities it does not regulate. For example, tree cutting for overhead power lines that does not involve discharge does not require compensatory mitigation.
 - The revised condition provides Corps district engineers with the authority to determine whether mitigation is necessary for impacts to perennial, intermittent, or ephemeral streams, and provides guidance that stream mitigation “should be accomplished through habitation, enhancement and preservation” through such techniques as dam removal and modification, culvert replacement and modification, levee removal or setbacks, road removal, reduced sediment loading to streams, reduced impervious surfaces, fencing of riparian areas to exclude livestock.
 - The condition also notes that upland buffers can be used to provide compensatory mitigation.
 - It clarifies that District Engineers can take into account the type of aquatic resource, and whether it is natural or man-made, when deciding if compensatory mitigation should be required.
- New GC 31 Activities Affecting Structures or Works Built by the U.S.

- This new condition confirms that any NWP activity that also requires permission from the Corps under 33 USC 408 (a Section 408 Permit) because it will alter or temporarily or permanently occupy or use a Corps-authorized civil works project, must submit a PCN and is not authorized until the Corps issues the Section 408 Permit and the written NWP verification. [Note: For those familiar with 2012 GC's, the addition of this new GC 31 has renumbered all subsequent GCs]
- GC 32 Pre-Construction Notification
 - Corps has added requirements and clarification for a complete PCN Application:
 - Applicants must specify which NWP is proposed to be used.
 - Applicant must describe mitigation measures proposed to be used.
 - A delineation of wetlands or other waters is needed, but only for that portion of the land proposed for the NWP activity.
 - Corps has clarified information that is NOT required for a complete PCN Application:
 - An approved or preliminary Jurisdictional Determination (JD) is NOT required. If a JD or a Preliminary Jurisdictional Determination (PJD) is desired, a separate request should be provided to the Corps.
 - A Floodway analysis is NOT required, even if the activity will occur in a floodway.
 - A complete mitigation plan is NOT required. Where mitigation is required, the Corps will inform the applicant that a mitigation plan that satisfies 33 CFR 332.4 is required.
 - This condition also confirms that, except for NWP 21, 29, 50 and NWPs subject to GC 18, 20 and 31, the activity identified in a PCN is authorized after 45-days has passed and the Corps receives a complete PCN; although the Corps may later revoke or suspend that activity under 33 CFR 330.1(3)(1).
 - Notes that the Corps, when responding to a PCN, is to make only one request for additional information.

Corps' Approach to "WOTUS" (Waters of the United States) Issue

In its draft rule for the 2017 NWPs, the Corps sought comments regarding the relationship between the NWP program and the Corps' proposed rule revising the definition of "waters of the United States" ("WOTUS") as published in the June 29, 2015, edition of the Federal Register (80 FR 37054) (the "WOTUS Rule"), which has been stayed pending the outcome of multiple court challenges.

In the final rule for the 2017 NWPs, the Corps appears to have followed the recommendations of many commenters who suggested that the Corps should write the NWPs so that they are "neutral" with respect to any particular regulation defining WOTUS pending the outcome of the litigation. In particular, the Corps stated that it will continue to rely on general terms relating to jurisdiction, such as "adjacent" and "ordinary high water mark," which have been used in the Corps regulatory program and the NWP program for many years, and will continue to process PCNs and voluntary requests for NWP verification in accordance with the current regulations and guidance for identifying waters of the United States. The Corps further stated that if it determines that the 2017 NWPs need to be modified to address changes in the geographic scope of Clean Water Act jurisdiction, it will conduct rulemaking prior to making those changes.

Important Clarifications to District Engineer Decisions for Verifying NWPs

- The Corps has clarified the obligations of the District Engineer when responding to a PCN by requiring a brief written decision document explaining the District Engineer's determination.
- The Corps' decision must evaluate direct and indirect effects and cumulative effects. Factors to be considered include:
 - Site specific factors, such as the environmental setting in the vicinity of the proposed activities
 - Type of resources affected
 - Function of resources that may be affected
 - Degree to which functions may be affected
 - Extent that functions may be lost
 - Duration of effects
 - Importance of the resource to the region
 - Mitigation offered by applicant or imposed by District Engineer
- The Corps is now required to consider "the appropriate geographic area" at the "appropriate geographic scale (e.g. district, watershed, ecoregion)" when assessing the cumulative effects of multiple NWPs for a linear project.

Grandfathering Jurisdictional Determinations

Activities authorized by the 2012 NWPs that have commenced or are under contract to commence by March 18, 2017, will have one year (i.e., until March 18, 2018) to complete those activities under the terms and conditions of the 2012 NWPs. Activities that were previously authorized by the 2012 NWPs that have not commenced or are not under contract to commence by March 18, 2017, will require reauthorization under the 2017 NWPs, provided those activities qualify for authorization under the 2017 NWPs.

Additionally, those projects with approvals under the 2012 NWPs should look for specific language in their verification letters, which, according to 33 C.F.R. §330.6(a)(ii), should include a statement that the verification will remain valid if the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. In such cases, a permittee under an existing NWP might not need to seek reauthorization under the 2017 NWPs.

Regional Conditions, 401 Certification, CZMA Conformance

The federally authorized 2017 NWPs remain subject to further limitations at the District and State level. Each Corps District may issue Regional Conditions that may revoke or limit the use of any of the 2017 NWPs. Corps Districts may also adopt additional Regional General Permits, which may provide broader coverage than the 2017 NWPs. Many Corps Districts have already posted proposed Regional Conditions. These are expected to be finalized before March 19, 2017.

Under Section 401 of the CWA, every state has the authority through its water quality certification process to condition or deny the use of any of the 2017 NWPs. The EPA exercises Section 401 authority in Indian Country and may restrict the use of any of the 2017 NWPs within Indian Country, although EPA has delegated that authority to certain tribes. In the next 60 days, expect to see Section 401 Water Quality Certifications in each state (and by the EPA or delegated tribes in each specified tribal area).

Similarly, under the CZMA, coastal states may impose restrictions on the use of any of the NWP's within coastal communities. Such conditions are expected in the next 90 days.

Potential Challenges to the 2017 NWP's

Although Congress and the incoming Trump administration appear likely to move forward to reverse certain rules issued late in the Obama administration, it is unlikely that this would include the Corps' 2017 NWP's. A court challenge to the 2017 NWP's could occur, most likely from tribal or environmental interests who requested a number of changes to the proposed 2017 NWP's that the Corps did not make. Such challenges could, among other issues, raise questions including the level of review under NEPA required for issuance of the 2017 NWP's as well as whether the NWP's, as issued, are in compliance with the Corps' responsibilities under the ESA. If such a lawsuit were filed, it would be difficult for a court to stay implementation of the 2017 NWP's while also maintaining the "status quo," because the 2012 NWP's will automatically expire on March 18, 2017.

For more information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the proposed changes to the NWP program, please contact [Brent Carson](#), [Duncan Greene](#), [Jonathan Simon](#), [Joseph Nelson](#), [Erin Bartlett](#), or any member of the firm's [Environmental](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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