



## Army Corps Finalizes 41 Nationwide Permits for Activities in Jurisdictional Waters and Wetlands

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### Introduction

On December 27, 2021, the U.S. Army Corps of Engineers (Corps) published a [final rule](#) modifying the Corps' Nationwide Permit (NWP) program (December 2021 Final Rule). The December 2021 Final Rule reissued 40 existing NWPs and issued one new NWP.

As explained in our prior [alert](#), in January 2021, the Corps published a final rule reissuing a subset of the existing NWPs (16 NWPs) and issuing four new NWPs (January 2021 Final Rule). The December 2021 Final Rule reissued the 40 remaining NWPs not covered by the January 2021 Final Rule as well as one new NWP. The December 2021 Final Rule relied on the same proposed rule as the January 2021 Final Rule, eliminating the need for a separate step in the rulemaking process.

### Background and Overview

NWPs are general permits issued by the Corps that streamline the agency's review of certain categories of activities in federally jurisdictional waters and wetlands that have no more than minimal individual and cumulative adverse environmental impacts. The permits provide authorizations for those activities under Section 404 of the Clean Water Act (CWA), which covers discharges of dredge and fill material into jurisdictional waters and wetlands, and/or Section 10 of the Rivers and Harbors Act, which covers the construction of structures in or over navigable waters. The purpose of the NWP program is to establish standard terms and conditions for protection of jurisdictional waters and wetlands, while also authorizing the activities to proceed with minimal delay and paperwork.

### Changes to the NWP Program

The Final Rule changes several existing NWPs, including NWP 13 (Bank Stabilization); NWP 14 (Linear Transportation Projects); NWP 17 – Hydropower Projects; NWP 17 – Hydropower Projects; NWP 24 (Indian Tribe or State Administered Section 404 Programs); NWP 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities); NWP 36 (Boat Ramps); NWP 41 (Reshaping Existing Drainage and Irrigation Ditches); NWP 49 (Coal Remining Activities); and NWP 53 (Removal of Low-Head Dams); NWP 54 (Living Shorelines).

- **NWP 13 – Bank Stabilization.** The Corps modified this NWP by adding a note about so-called "living shorelines." The note states that in coastal waters and the Great Lakes, living shorelines may be an appropriate option for bank stabilization, and may be authorized by NWP 54 (discussed below). Because the increased use of nature-based approaches such as living shorelines is a priority in the Biden Administration's climate resiliency efforts, the Corps provided that such soft bank stabilization techniques should generally be considered first when project proponents consider the use of NWP 13. But the Corps noted there are many factors that should be taken into account in the proposed and verified bank stabilization project.
- **NWP 14 – Linear Transportation Projects.** NWP 14 covers activities associated with the construction, expansion, modification, or improvement of linear transportation projects in waters of the United States, and it previously provided examples of such projects including roads, highways, railways, trails, airport runways, and taxiways. The Corps modified this NWP by adding "driveways" to the list of examples of authorized activities. The Corps defined "driveways" to apply broadly to include features that are used by vehicles to move to and from buildings and other facilities, and noted that the term "driveways" is not limited to driveways associated with single unit or multiple unit residences, or driveways used to go to and from commercial buildings, institutional buildings, or other types of buildings. The Corps stated that adding "driveways" to the list of examples of the types of projects covered by NWP 14 will provide clarity to the regulated public because the construction of a driveway may be the only

activity that requires authorization from the Department of the Army if a residential development or a commercial or institutional development is constructed in uplands, and the driveway is needed to cross waters of the United States to provide vehicular access to the upland development. The Corps also noted that discharges of dredged or fill material into waters of the United States for the construction or expansion of driveways may also be authorized by NWPs 29 and 39 as attendant features to residential developments and commercial and institutional developments.

- **NWP 17 – Hydropower Projects.** NWP 17 authorizes discharges of dredged or fill material associated with hydropower projects having less than 5,000 kilowatts (kW) of total generating capacity at existing reservoirs if the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended. The Corps modified this NWP to authorize discharges associated with hydropower projects with a generating capacity of less than 10,000 kW, to be consistent with the current FERC definition of “small hydroelectric power project” and reduce duplication of agency reviews for these projects.
- **NWP 24 – Indian Tribe or State Administered Section 404 Programs.** NWP 24 authorizes any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l). Note 1 to NWP 24 states that only New Jersey and Michigan administer their own Section 404 permit programs.

The Corps did not propose any changes to this NWP, and no comments were received on the proposed reissuance of this NWP. But after the comment period for the proposed rule expired, the State of Florida was granted approval by the US Environmental Protection Agency to assume the CWA Section 404 permit program in Florida. The Corps modified Note 1 of NWP 24 to include Florida to the list of states with approved CWA Section 404 permit programs.

- **NWP 27 – Aquatic Habitat Restoration, Enhancement, and Establishment Activities.** NWP 27 authorizes activities in waters of the United States associated with (i) the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, (ii) the restoration and enhancement of non-tidal streams and other non-tidal open waters, and (iii) the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services. To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so it results in aquatic habitat “that resembles an ecological reference.”

The Corps made three changes to NWP 27: First, the Corps modified NWP 27 to state that an ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas. Second, the Corps added coral restoration or relocation activities to the list of examples of activities authorized by this NWP, stating that PCNs are not required for permittees that propose to conduct coral restoration or relocation activities in accordance with a binding agreement with the NMFS or any of its designated state cooperating agencies. Finally, the Corps added “releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats” to the list of examples of activities authorized by NWP 27.

- **NWP 36 – Boat Ramps.** NWP 36 authorizes activities required for the construction of boat ramps if the construction meets five criteria. The Corps did not propose any changes to NWP 36. But after public comment period, the Corps modified the first paragraph of NWP 36 to clarify that in addition to the construction of new boat ramps, NWP 36 also authorizes the repair or replacement of existing boat ramps.
- **NWP 41 – Reshaping Existing Drainage and Irrigation Ditches.** NWP 41 allows discharges of dredged or fill material into non-tidal waters of the United States to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States for the purpose of improving water quality by re-grading the drainage or irrigation ditch with gentler slopes. NWP 41 does not allow the ditch to increase its drainage capacity, expand the area as originally constructed, or allow relocation of the drainage. The Corps modified this NWP by adding irrigation ditches to the existing authorization for drainage ditches.

- **NWP 49 – Coal Remining Activities.** NWP 49 authorizes discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. In the December 2021 Final Rule, the Corps had proposed one modification to NWP 49 related to PCN, but the Corps ultimately decided not to make that modification. Instead, the Corps only made one change: it removed text referring to “integrated permit processing procedures” because, according to the Corps, “those procedures were not developed for past versions of NWP 49.”
- **NWP 53 – Removal of Low-Head Dams.** NWP 53 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low-head dams. The Corps did not initially propose any changes to NWP 53, but in the December 2021 Final Rule, the Corps modified the definition of “low head dam.” NWP 53 now defines “low-head dam” as “a dam or weir built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest and does not have a separate spillway or spillway gates, but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment. A low-head dam may have been built for a range of purposes (e.g., check dam, mill dam, irrigation, water supply, recreation, hydroelectric, or cooling pond), but in all cases it provides little or no storage function.” The Corps noted that district engineers have discretion in determining whether proposed dam removal involves a low-head dam and thus qualifies for NWP 53 authorization. The Corps acknowledged that the revised definition of low-head dam may broaden the utility of NWP 53 to facilitate the removal of low-head dams that may not have been covered by the 2017 version of this NWP.
- **NWP 54 – Living Shorelines.** NWP 54 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters if eight conditions are met.

Paragraph (d) of NWP 54 states, “For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used if the site is planted by the permittee.” The Corps did not initially propose any changes to this NWP, but it received a public comment stating that this condition should be modified to add elevation as a factor for determining which native plants are appropriate for current site conditions if the permittee is planting the living shoreline. In the December 2021 Final Rule, the Corps added “elevation” as suggested by this comment, explaining that elevation is another factor to consider when deciding which native species to plant in a living shoreline if the biological component of the living shoreline consists of plants.

The December 2021 Final Rule also added one new NWP:

- **NWP 59 – Water Reclamation and Reuse Facilities.** The Corps issued this new NWP, which authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities, as initially proposed. The December 2021 Final Rule states that such facilities may include “vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality.” NWP 59 limits the potential loss of waters of the United States due to the discharge of dredged or fill material to 1/2 acre, and does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

### **Status of NWP 12 (Oil and Gas Activities)**

As explained in our 2021 [alert](#), the January 2021 Final Rule included a new approach to NWP 12, which formerly covered activities associated with not only oil and gas lines but also other utility lines like water/sewer lines and electrical/telecommunication lines. Under the January 2021 Final Rule, NWP 12 now covers only oil and gas activities, and other utility lines are covered under other NWPs. The new version of NWP 12 is currently being challenged in court by [plaintiffs](#) alleging violations of the Endangered Species Act.

## The December 2021 Final Rule Does Not Change Any General Conditions

The December 2021 Final Rule did not change any general conditions or definitions. The Corps stated that the same NWP general conditions and definitions published in the January 2021 Final Rule apply to the 41 NWPs reissued or issued in the December 2021 Final Rule.

## Impact on Existing Coverage Verification under the 2017 NWPs

When the Corps modifies existing NWPs, the modified NWPs replace the prior versions of those NWPs, so that there are never two sets of NWPs in effect at the same time. To accomplish this replacement, the Corps modified the expiration date for the 40 existing NWPs.

The 2017 NWPs were originally set to expire on **March 18, 2022**. In the December 2021 Final Rule, the Corps modified the expiration date for the 40 existing NWPs (i.e., NWPs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 45, 46, 49, 53, and 54) to **February 24, 2022**. In other words, the NWPs are now set to expire *more than three weeks early*.

As explained below, the December 2021 Final Rule includes language suggesting that, despite this change, many current NWP permittees will likely continue to have coverage through March 18, 2022. However, each permittee should be careful to compare these expiration dates with planned construction dates; coordinate with the Corps' Project Manager; and, if possible, get the planned construction activities *commenced or under contract to commence* before the NWP expires.

The December 2021 Final Rule explains the Corps' position on expiration dates as follows:

The expiration date for the 40 existing NWPs and the new NWP issued in this final rule is March 14, 2026. Under 33 CFR 330.6(a)(3)(ii), if the NWP is reissued without modification or the activity complies with any subsequent modification of the NWP authorization, the NWP verification letter (i.e., the written confirmation from the district engineer that the proposed activity is authorized by an NWP) should include a statement that the verification will remain valid for a period of time specified in the verification letter. The specified period of time is usually the expiration date of the NWP. In other words, if the previously verified activity continues to qualify for NWP authorization under any of the 40 existing NWPs reissued in this final rule, that verification letter continues to be in effect until March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter. For most activities authorized by the 2017 NWPs, where the district engineer issued an NWP verification letter, the verification letter identified March 18, 2022, as the expiration date. As long as the verified NWP activities continue to comply with the terms and conditions of the 40 existing NWPs reissued in this final rule, those activities continue to be authorized by the applicable NWP(s) until March 18, 2022, unless a district engineer modifies, suspends, or revokes a specific NWP authorization. Under 33 CFR 330.6(b), Corps Headquarters may modify, reissue, suspend, or revoke the NWPs at any time.

The December 2021 Final Rule also explains that, if construction activities planned in reliance on an NWP have commenced, or are "under contract" to commence prior to the expiration date, then those activities will remain authorized for 12 months after the expiration date:

Activities that were authorized by the 2017 NWPs, but no longer qualify for authorization under any of the 40 existing NWPs that are reissued in this final rule, continue to be authorized by the 2017 NWP(s) for 12 months as long as those activities have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP prior to the date on which the NWP expires. That authorization is contingent on the activity being completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised by a division or district engineer on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). This provision applies to activities that were previously verified by the district

engineer as qualifying for NWP authorization, but no longer qualify for NWP authorization under the modified or reissued NWP.

### Next Steps

The 41 NWPs in the December 2021 Final Rule go into effect February 25, 2022. Once effective, any modified or new NWPs will remain subject to further restrictive terms and conditions imposed by Corps district offices, State agencies, and Indian Tribes to ensure that activities authorized by the NWPs result in no more than minimal individual and cumulative adverse environmental effects. The 41 NWPs will not be available for use until that review process by district offices, State agencies, and Indian Tribes is completed.

### For More Information

Van Ness Feldman closely monitors and counsels clients on Clean Water Act and other water-related regulatory developments. If you would like more information about the proposed changes to the NWP program or other Clean Water Act issues, please contact [Duncan Greene](#), [Jonathan Simon](#), [Joseph Nelson](#), [Michael Pincus](#), [Jenna Mandell-Rice](#), or any member of the firm's Water practice in Seattle, WA at (206) 623-9372, or in Washington D.C. at (202) 298-1800.

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