

2017 NATIONWIDE PERMITS*

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*Reference David Olson's, 7 March 2017 Presentation For the Corps' Regulatory Community of Practice

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TOPICS

- What are the Nationwide Permits?
- What's in the 2017 Nationwide Permit final rule?
- 2017 Nationwide Permits Changes

For more information:

<http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>

<http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Nationwide-Permits/>



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NATIONWIDE PERMITS

- Congressional intent (Clean Water Act Section 404(e))
 - Streamlined authorization process for small activities with no more than minimal adverse environmental effects
 - Issued for no more than 5 years
- Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- First issued in 1977
 - 15 nationwide permits
 - 14 general conditions
- The 2012 Nationwide Permits expired on March 18, 2017
 - 50 nationwide permits
 - 31 general conditions



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SUMMARY OF JANUARY 6, 2017 FINAL RULE

- Reissued all 50 existing NWP
- Issued two new NWPs
 - Removal of low-head dams
 - Construction and maintenance of living shorelines
- Issued one new general condition
 - Activities affecting structures or works built by the United States (federal water resources projects)
- Effective date: March 19, 2017
- Expiration date: March 18, 2022



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SUMMARY OF 2017 FINAL RULE

- **Nationwide permits**
 - 26 NWP's reissued with changes
 - 24 NWP's reissued with no changes
 - 2 new NWP's issued
- **General conditions**
 - Reissued 12 general conditions with changes
 - Reissued 19 general conditions without changes
 - Issued 1 new general condition
- **Definitions**
 - Added 5 new definitions



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SUMMARY OF 2017 FINAL RULE

- What's stayed the same:
 - Acreage limits
 - Linear foot limits
 - Cubic yard limits
 - Most pre-construction notification (PCN) thresholds
- Vast majority of the changes are clarifications
- Little or no change to processes



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PRE-CONSTRUCTION NOTIFICATION REQUIREMENTS

- 19 NWPs – no pre-construction notification (PCN) required
- 14 NWPs – some activities require PCN
- 19 NWPs – all activities require PCN
- For any NWP, PCN is required for:
 - Activities that might affect ESA-listed species or designated critical habitat
 - Activities that might have the potential to cause effects to historic properties
 - Activities that also require 408 permissions
 - Activities in Wild and Scenic Rivers



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PRE-CONSTRUCTION NOTIFICATIONS

- Opportunity for district to review proposed NWP activity to determine eligibility for authorization
 - Will the proposed activity result in only minimal adverse environmental effects?
 - Does proposed activity comply with all applicable general and regional conditions?
 - Is compensatory mitigation or other mitigation required to ensure no more than minimal adverse environmental effects?
 - Are any consultations required?
 - Endangered Species Act Section 7
 - National Historic Preservation Act Section 106



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REQUIRED CERTIFICATIONS

- Water quality certification
 - Required for all discharges into waters of the United States
 - Certified by the State of Colorado Statute; except for Tribal lands
 - Tribal Lands: USEPA conditionally certified 11 NWP's and denied the rest.



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ENDANGERED SPECIES ACT COMPLIANCE

- Corps Headquarters “no effect” determination for the issuance or reissuance of NWP
- Based on requirements of:
 - General condition 18, endangered species
 - For non-federal permittees, PCNs are required for proposed activities that might affect listed species or designated critical habitat



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NATIONAL HISTORIC PRESERVATION ACT COMPLIANCE

- “No potential to cause effects” determination for the issuance or reissuance of NWP by Corps Headquarters
- Based on requirements of:
 - General condition 20, historic properties
 - For non-federal permittees, PCNs are required for proposed activities that might have the potential to cause effects to historic properties



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NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE

- Corps Headquarters fulfills requirements of NEPA when it issues/reissues an NWP and prepares the national decision document
 - Environmental assessment
 - Public interest review
- No NEPA compliance necessary for NWP verification decisions by district engineers



CHANGES IN 2017 NATIONWIDE PERMITS AND GENERAL CONDITIONS



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NWP 3 – MAINTENANCE

- (a) Authorizes the repair, rehabilitation, or replacement of previously authorized structures or fills
- (b) Authorizes the removal of accumulated sediments in vicinity of existing structures and associated canals
- **Limits:**
 - Minor changes to conform to current construction practices, materials, current construction codes, and regulatory requirements (paragraph (a))
 - Removal of accumulated sediment within 200 feet of existing structures (paragraph (b))



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NWP 3 – MAINTENANCE

- Changes:
 - Clarified that NWP authorizes removal of **previously authorized** structures or fills
 - Removal of accumulated sediment within or in immediate vicinity of structure or fill – No PCN required (paragraph (a))
 - Removal of accumulated sediment not in immediate vicinity of structure or fill – PCN required (paragraph (b))
 - Authorize use of timber mats, if Corps authorization required
 - **Removed provision in paragraph (b) authorizing riprap to protect the structure**
 - Riprap can be authorized by NWP 13, with or without PCN

NWP 12 – UTILITY LINE ACTIVITIES

- Authorizes crossings of jurisdictional waters and wetlands for utility lines
- Also authorizes utility line substations, foundations for overhead utility lines, and access roads
- Limits:
 - 1/2-acre limit for each separate and distant waterbody crossing
 - 1/2-acre of non-tidal waters for utility line substations
 - 1/2-acre of non-tidal waters for access road crossings



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NWP 12 – UTILITY LINE ACTIVITIES

- Changes:
 - Clarified that for utility lines, **the Corps is only authorizing regulated crossings of waters of the United States**
 - Authorize regulated activities associated with remediation of inadvertent returns of drilling fluids if subsurface fracture during horizontal directional drilling activities
 - Authorize use of timber mats, if Corps authorization required
 - Added reference to Corps regulations for minimum clearance for overhead electric power lines over navigable waters



NWP 13 – BANK STABILIZATION

- Authorizes bank stabilization activities
- Limits:
 - 500 linear feet along bank
 - 1 cubic yard per running foot
 - No fills in special aquatic sites (e.g., wetlands)
- Above limits can be waived by district engineer
- Changes:
 - Clarified that this NWP authorizes a variety of bank stabilization activities, including bulkheads, revetments, riprap, bioengineering, vegetative stabilization, and stream barbs



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NWP 13 – BANK STABILIZATION

- Changes:
 - Cubic yard limit to be measured along bank, and includes in-stream techniques (e.g., barbs)
 - Authorize maintenance of bank stabilization activities
 - Native plants appropriate for site conditions must be used for bioengineering or vegetative stabilization
 - Limited waivers for bulkheads to 1,000 linear feet
 - Authorize use of timber mats, if Corps authorization required



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NWP 27 – AQUATIC HABITAT RESTORATION, ENHANCEMENT, AND ESTABLISHMENT ACTIVITIES

- Authorizes restoration, enhancement, and establishment of aquatic habitat
 - Must be net gain in aquatic resource functions and services
- Changes:
 - List of examples of authorized activities, add removal of stream barriers (e.g., undersized culverts, fords, and grade control structures)
 - Require use of ecological reference to plan, design, and implement the NWP 27 activity



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ECOLOGICAL REFERENCE

- Intent is to limit the NWP 27 activities to those that will result in aquatic habitats that resemble natural ecosystems in the region
- Two approaches:
 - Use existing examples of target aquatic resource type in the region
 - Use a conceptual model for the target aquatic resource type in the region
- Take into account range of variability in the region



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NWP 33 – TEMPORARY CONSTRUCTION, ACCESS, AND DEWATERING

- Authorizes temporary structures or work and discharges of dredged or fill material, including cofferdams, for construction activities or access fills
- Changes:
 - Pre-construction notification required only for those activities in waters subject to section 10 of the Rivers and Harbors Act of 1899



GENERAL CONDITION (GC) 2 – AQUATIC LIFE MOVEMENTS

- NWP activity must not substantially disrupt the necessary life cycle movements of aquatic species indigenous to the waterbody unless the activity's primary purpose is to impound water
- **Change:**
 - ▶ Added provision stating that if a bottomless culvert cannot be used, then the **crossing should be designed and constructed to minimize adverse effects to aquatic life movements**



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GC 16 – WILD AND SCENIC RIVERS

- Activities in National Wild and Scenic River, or study river designated by Congress, require PCNs to district engineers
- District engineer will coordinate with federal agency with direct management responsibility for that river
- **Activity is not authorized by the NWP unless the federal agency with direct management responsibility determines the proposed NWP activity will not adversely affect the Wild and Scenic River designation or its study status**



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GC 17 – TRIBAL RIGHTS

- Revise general condition to be consistent with 1998 Department of Defense American Indian and Alaska Native Policy
<http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/DoDPolicy.pdf>
- Explicitly covers the suite of tribal rights addressed in 1998 policy: treaty rights, protected tribal resources, and tribal lands
 - **“No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.”**
- Changes:
 - Removed “operation”
 - Changed “No activity...may impair” to the “no more than minimal adverse effects” threshold for general permits

GC 18 – ENDANGERED SPECIES

- Defines “direct effects” and “indirect effects” to assist in Endangered Species Act compliance
 - **Direct effects are immediate effects on listed species and critical habitat caused by NWP activity**
 - **Indirect effects are effects on listed species and critical habitat caused by NWP activity that occur later in time, and are reasonably certain to occur**
- Clarified that other federal agencies are responsible for their own compliance with the Endangered Species Act
- District engineer may add permit conditions for Endangered Species Act compliance
- May use ESA section 10(a)(1)(B) incidental take permit to fulfill requirements of this general condition and the ESA



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GC 19 – MIGRATORY BIRDS AND BALD AND GOLDEN EAGLES

- Clarified that the **permittee is responsible for ensuring his/her activity complies with Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act**
- Permittee is responsible for contacting local office of U.S. Fish and Wildlife Service to determine if “take” permits are needed



GC 20 – HISTORIC PROPERTIES

- Revised text of general condition to be more consistent with threshold for National Historic Preservation Act section 106 consultation:
 - **“May have the potential to cause effects to historic properties”**
- Added designated tribal representative to the list of sources for assistance regarding the potential presence of historic properties
- Clarified when Section 106 consultation is conducted:
 - **NWP activities where there are “no historic properties affected,” or that have “no adverse effects” or “adverse effects” on historic properties**



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GC 23 – MITIGATION

- Reorganized text to clarify mitigation requirements for NWP's and their relationship to the Corps' 2008 mitigation rule
- **Preference for use of mitigation bank or in-lieu fee program credits to fulfill compensatory mitigation requirements imposed by district engineers**
 - Does not preclude the use of permittee-responsible mitigation, where appropriate (or where credits are not available)



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GC 23 – MITIGATION

- Added provision stating that if compensatory mitigation is required, **then the amount must be sufficient to ensure the NWP activity causes no more than minimal individual and cumulative adverse environmental effects**
- Clarified that compensatory mitigation may be required to ensure no more than minimal adverse environmental effects if **a regulated activity results in the loss of certain aquatic resource functions and services (e.g., the conversion of forested wetlands to emergent wetlands)**



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GC 31 – ACTIVITIES AFFECTING STRUCTURES OR WORKS BUILT BY THE UNITED STATES

- New general condition
- Any NWP activity that also requires a Section 408 permission from the Corps requires notification to the Corps district
- Activity is not authorized by NWP until after the Corps issues the 408 permission, and the district issues the NWP verification



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GC 32 – PRE-CONSTRUCTION NOTIFICATION

- No changes to the Corps' review process
 - Retained 30-day completeness review period
 - Retained 45-day verification decision period
- **Changes to content of pre-construction notification:**
 - Specify the NWP(s) the project proponent wants to use
 - Describe mitigation measures intended to reduce adverse environmental effects
 - For linear projects, clarify that notification must identify other crossings of waters of the United States that require Corps authorization, including those authorized by general permits that do not require pre-construction notification
 - For linear projects, the notification must also include the quantity of losses of aquatic resources for each single and complete crossing of those waters and wetlands



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GC 32, PARAGRAPH (b)(3)

- (b)(3) – “Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;”
- There is some redundancy among the 52 NWPs
- 2009 Regulatory SOP:
 - **“Use most efficient permit process (general permits/letters of permission) whenever possible”** (page 9)
- If more than one NWP could authorize the proposed activity, a project proponent may prefer to use a specific NWP
 - e.g., one NWP where the state has issued WQC and the other NWP requires an individual WQC
- But if the proposed activity does not fit within the terms of the applicant’s choice of NWP, use the appropriate NWP
 - e.g., applicant wants to use NWP 27 for bank stabilization (use NWP 13 or 54 instead)

GC 32, PARAGRAPH (b)(3)

- Paragraph 1 of Section D, District Engineer's Decision:
 - “If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, **unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity.**”

[82 FR 2004]



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THANK YOU



“I haven’t found anything wrong yet, but its OK for you to go ahead and worry a bit longer”



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