



Nationwide Permit Reissuance

January 2021

U.S. ARMY CORPS OF ENGINEERS

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Background: Under Section 404(e) of the Clean Water Act, the U.S. Army Corps of Engineers (USACE) can issue general permits to authorize activities that have only minimal individual and cumulative adverse environmental effects. General permits can be issued for a period of no more than five years. A nationwide permit (NWP) is a general permit that authorizes activities across the country, unless a division commander or district engineer revokes the nationwide permit in a state or other geographic region or for a specific activity. The NWPs authorize approximately 35,000 reported activities per year, as well as approximately 30,000 activities that do not require reporting to USACE districts. Under the 2017 NWPs, there are 52 NWPs, and they authorize a wide variety of activities such as mooring buoys, residential developments, utility lines, road crossings, mining activities, wetland and stream restoration activities, and commercial shellfish aquaculture activities.

The process for issuing NWPs is a rulemaking activity. The proposal to reissue the NWPs was published in the *Federal Register* on September 15, 2020, for a 60-day public comment period ending on November 16, 2020. USACE proposed to reissue all 52 of its existing 2017 NWPs. USACE also proposed to issue five new NWPs that pertain to authorizing seaweed mariculture activities, finfish mariculture activities, electric utility line and telecommunications activities, utility line activities for water and other substances, and water reclamation and reuse facilities. Concurrent with the *Federal Register* notice, districts issued local public notices to solicit comment on proposed regional conditions to further restrict the use of the NWPs to protect local aquatic resources.

Approximately 22,700 comments were received in response to the *Federal Register* notice. The comments were evaluated, and the draft final NWP rule was prepared. The draft final rule was submitted to OMB December 11, 2020, for interagency review. Five agencies provided comments on the draft final rule. The agency comments were reviewed, and modifications were made to the draft final NWPs to address the agency comments.

2021 Nationwide Permits: In this final rule, USACE is reissuing and modifying 12 existing NWPs and issuing four new NWPs. For these 16 NWPs, USACE is also reissuing and modifying the NWP general conditions and definitions. At this time, USACE is not reissuing or modifying the remaining 40 existing NWPs or finalizing proposed new NWP E for discharges of dredged or fill material for water reclamation and reuse facilities. The 40 remaining NWPs continue to be in effect under the January 6, 2017, final rule and the existing general conditions and definitions in the 2017 final rule continue to apply to those permits. The reissued NWPs have no major changes from 2017, the last time the NWPs were authorized in accordance with the law. The revised permits will further streamline the authorization process under the Clean Water Act and Rivers and Harbors Act of 1899 and were informed by extensive feedback from the public and key stakeholders. These permits provide expedited review of projects that have minimal impact on the aquatic environment. The 16 revised and new NWPs will go into effect on March 15, 2021.

Two of the four new NWPs provide appropriate mechanisms for an efficient process to authorize structures in navigable waters for finfish and seaweed mariculture activities. The other two new NWPs provide appropriate processes to enable project proponents to obtain authorization to discharge dredged or fill material or to construct structures or do work in regulated waters associated with the construction and maintenance of electric utility lines and telecommunication activities or with the construction and maintenance of utility lines for water or other substances. Notification requirements have been revised for some permits to provide greater national consistency and foster making timely decisions for the regulated community.

All improvements, additions, and revisions to the package are consistent with USACE's commitment to authorizing minor activities efficiently, while ensuring appropriate environmental protection of the nation's aquatic resources.

USACE division engineers may add, after public review and consultation, regional conditions to NWPs in order to protect local aquatic ecosystems such as fens or bottomland hardwoods, or to minimize adverse effects on fish or shellfish spawning, wildlife nesting, or other ecologically critical processes or areas. Division and district

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commanders are also charged with ensuring appropriate coordination and consultation occurs with federally recognized American Indian and Alaska Native governments.

Revisions to the 2017 Nationwide Permits: NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, 52: All of these NWPs have been revised to remove the 300-linear-foot limit for losses of stream bed; the limit for losses of waters of the United States for each of these NWPs remains at ½ acre. All 10 NWPs have pre-construction notification requirements that will ensure that authorized losses of waters and wetlands are not more than minimal. Removing this limit does not reduce environmental protection, and it makes these 10 NWPs available for use to authorize minimally impacting activities with little paperwork and delay.

Mitigation General Condition: General Condition 23, Mitigation, was modified to include a requirement for compensatory mitigation for stream bed losses exceeding 3/100-acre. This modification makes the compensatory mitigation requirement for stream bed loss equivalent to the compensatory mitigation requirement for wetlands in the NWP program.

NWP 48: The NWP for Commercial Shellfish Mariculture Activities was revised to provide greater flexibility in its use. NWP 48 authorizes new operations as well as existing operations where operators are seeking permission to continue on-going shellfish cultivation activities. A preconstruction notification requirement has been added to the final NWP for all direct impacts to submerged aquatic vegetation greater than ½ acre, to insure appropriate individual review by USACE districts.

New NWPs for 2021: NWP 55: This new NWP authorizes structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of seaweed mariculture activities. Also, this NWP allows project proponents to integrate shellfish production activities if those actions are integrated with the seaweed production on the same structure or a structure that is part of the same project.

NWP 56: This new NWP authorizes structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of finfish mariculture activities. Also, this NWP allows project proponents to integrate shellfish and seaweed production activities if those actions are integrated with the finfish production on the same structure or a structure that is part of the same project.

NWP 57: This new NWP provides authorization for activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States. There are reporting requirements for certain activities authorized by this NWP and it has a ½-acre limit for losses of waters of the United States for each single and complete project.

NWP 58: This new NWP authorizes activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. This NWP also authorizes associated utility line facilities, such as substations, access roads, and foundations for above-ground utility lines, in waters of the U.S., provided the activity does not result in the loss of greater than ½-acre of waters of the U.S. for each single and complete project.

Grandfathering: When USACE modifies existing NWPs, the modified NWPs replace the prior versions of those NWPs so that there are not two sets of NWPs in effect at the same time. Having two sets of NWPs in effect at the same time creates regulatory uncertainty if each set of those NWPs has different limits, requirements, and conditions because permittees may be unclear as to which limits, requirements, and conditions apply to their authorized activities. In addition, differences in NWP limits, requirements, and conditions between two sets of NWPs can create challenges for district engineers in terms of enforcement and compliance efforts.

USACE is modifying the expiration date for the 12 existing NWPs (i.e., NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52) that are issued in this final rule. The expiration date for the 2017 versions of these NWPs is March 14, 2021. The expiration date for the 12 existing NWPs and the four new NWPs issued by this final rule is five years after the date those NWPs go into effect: March 14, 2026.

Activities authorized by the 2017 NWPs remain authorized by those NWPs until March 18, 2022. For permittees holding authorizations for activities for any of the 12 NWPs replaced by this final rule, if the previously verified

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activity continues to qualify for NWP authorization under any of the 12 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. As long as the verified NWP activities continue to comply with the terms and conditions of the 12 existing NWPs issued 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.

For permittees with authorizations for activities that were authorized by the 2017 NWPs, but no longer qualify for authorization under the 12 existing NWPs that are reissued in this final rule (i.e., the reissued NWP has been modified so that the activity that was authorized is no longer covered), those activities continue to be authorized by the 2017 NWP(s) for 12 months of the date 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.

Public Interest: The reissuance of NWPs is of interest to various entities involved in the development of our nation's economy and the employment and well-being of our citizens, such as agricultural producers, other food producers, housing developers, industrial and commercial development companies, utility companies, mining industries, transportation departments, and commercial and recreational users of navigable waterways. The NWP reissuance is also of interest to government agencies and non-governmental organizations that seek protection of natural resources and other environmental qualities. The NWP provide incentives to avoid and minimize impacts to jurisdictional wetlands, streams, and other aquatic resources because of the limits and other conditions imposed on these authorizations. The NWP final rule was published in the *Federal Register* on January 13, 2021.

The final nationwide permits have been posted on USACE's Website
<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx>.