



Nationwide Permit Reissuance

January 2022

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 district or division commander revokes the NWP in a state or other geographic region. The NWPs authorize approximately 40,000 reported activities per year, as well as approximately 30,000 activities that do not require reporting to USACE districts. In 2017 the USACE issued 52 NWPs, and they authorized 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. To continue the NWP Program, the NWPs must be reissued before the 2017 NWPs expire in March 2022.

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, USACE 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 23,700 comments were received in response to the *Federal Register* notice. The comments were evaluated, and two draft final NWP rules were prepared to issue those NWPs. The first draft final rule for 16 NWPs was submitted to OMB on December 11, 2020, and the second final rule for 41 NWPs was submitted to OMB on June 11, 2021. Five agencies provided comments on the first draft final rule, and three agencies provided comments on the second draft final rule. The agency comments were reviewed, and modifications were made to the draft final NWPs to address agency comments.

The first final rule was published in the *Federal Register* on January 13, 2021 (86 FR 2744) and it reissued 12 existing NWPs and issued four new NWPs. The second final rule was published in the *Federal Register* on December 27, 2021 (86 FR 73522) and it reissued 40 existing NWPs and issued one new NWP.

2021 Nationwide Permits: In the January 2021 final rule, USACE reissued and modified 12 existing NWPs and issued four new NWPs. In the January 2021 final rule, USACE also reissued the NWP general conditions and definitions, with some modifications to respond to public and agency comments. The January 2021 final rule went into effect on March 15, 2021. In the December 2021 final rule, USACE reissued 40 existing NWPs and issued one new NWP. The NWP general conditions and definitions published in the January 2021 final rule apply to the 41 NWPs issued in the December 2021 final rule. The December 2021 final rule goes into effect on February 25, 2022. The reissued NWPs have no major changes from 2017, the last time the NWPs were authorized in accordance with the law. The revised NWPs will streamline the requirements of the Clean Water Act and the Rivers and Harbors Act of 1899 and their revisions were informed by extensive feedback from the public and various stakeholders. These permits provide effective review of projects that have minimal impact on the aquatic environment.

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Two of the five new NWP's provide an effective process to authorize structures in navigable waters for finfish and seaweed mariculture activities. Another two of the five new NWP's 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. The fifth new NWP authorizes discharges of dredged or fill material into regulated waters for the construction, expansion, and maintenance of water reclamation and reuse facilities. Notification requirements have been revised for some NWP's to provide greater national consistency and foster making timely decisions for the regulated community for minimal impact activities. All improvements, additions, and revisions to the suite of NWP's are consistent with USACE's commitment to effectively evaluate minor activities, while ensuring appropriate environmental protection of the nation's aquatic resources. The 2021 NWP's support implementation of the Infrastructure Investment and Jobs Act by providing USACE authorization for regulated activities associated with infrastructure.

USACE division engineers may add, after public review and consultation, regional conditions to NWP's 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 ecologically critical waters. Division and district 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's 21, 29, 39, 40, 42, 43, 44, 50, 51, 52: All of these NWP's have been revised to remove the 300-linear-foot limit for losses of stream bed; the aggregate limit for loss of waters of the United States for these NWP's is 1/2-acre. All 10 NWP's have pre-construction notification requirements that will ensure that authorized activities will have no more than minimal adverse environmental effects. Removing the 300-linear-foot limit does not reduce environmental protection, but it does make these 10 NWP's 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 losses equivalent to the compensatory mitigation requirement for wetland losses in the NWP program.

NWP 27: This NWP authorizes aquatic habitat restoration, enhancement, and establishment activities. It was modified to authorize releases of sediment from reservoirs to maintain sediment transport continuity in rivers to restore downstream habitats. It was also modified to authorize coral restoration or relocation activities.

NWP 41: This NWP authorizes the reshaping of existing drainage ditches to improve water quality. It was modified to include the reshaping of existing irrigation ditches to improve water quality.

NWP 48: This NWP authorizes commercial shellfish mariculture activities. It was revised to provide greater flexibility in its use. NWP 48 is available to authorize new operations as well as existing operations that are seeking authorization to continue on-going activities. A preconstruction notification requirement has been added to this NWP for all impacts to submerged aquatic vegetation that are greater than 1/2-acre, to require case-by-case review by USACE districts to ensure that the impacts of those activities are no more than minimal.

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New NWP 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 conducted 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 conducted 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 1/2-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 United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

NWP 59: This new NWP 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. This NWP has a 1/2-acre limit for losses of waters of the United States and pre-construction notification to USACE district engineers is required for all activities.

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 USACE district engineers in terms of enforcement and compliance efforts.

USACE modified the expiration date for the 12 existing NWPs (i.e., NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52) that were reissued in the January 2021 final rule. The expiration date for the 2017 versions of those NWPs was changed to March 14, 2021. USACE 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) that were reissued in the December 2021 final rule. The expiration date for the 2017 versions of those NWPs was changed to February 24, 2022. The expiration date for the 52 reissued NWPs and the five new NWPs issued in the January 2021 and December 2021 final rules is March 14, 2026.

For permittees holding verified authorizations for activities for any of the 52 existing NWPs replaced by the January 2021 and December 2021 final rules, if the previously verified activity continues to qualify for NWP authorization under any of the 52 NWPs reissued in those two final rules, that verification letter

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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 52 existing NWPs reissued in these two final rules, 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 verifications for activities that were authorized by the 2017 NWPs, but no longer qualify for authorization under the 52 existing NWPs that were reissued in the January 2021 and December 2021 final rules (i.e., a reissued NWP has been modified so that the activity that was previously authorized by that NWP is no longer covered by that NWP), those activities continue to be authorized by the 2017 NWP for 12 months after the expiration date of those NWPs (i.e., March 14, 2021, for the 12 NWPs reissued in January 2021; February 24, 2022, for the 40 NWPs reissued in December 2021) 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 NWP 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, 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. Information on the final nationwide permits is available on the following USACE's web site: <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx>.