

# 2017 NATIONWIDE PERMITS: THE FINAL RULE

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For the Association of State Wetland Managers

19 January 2017

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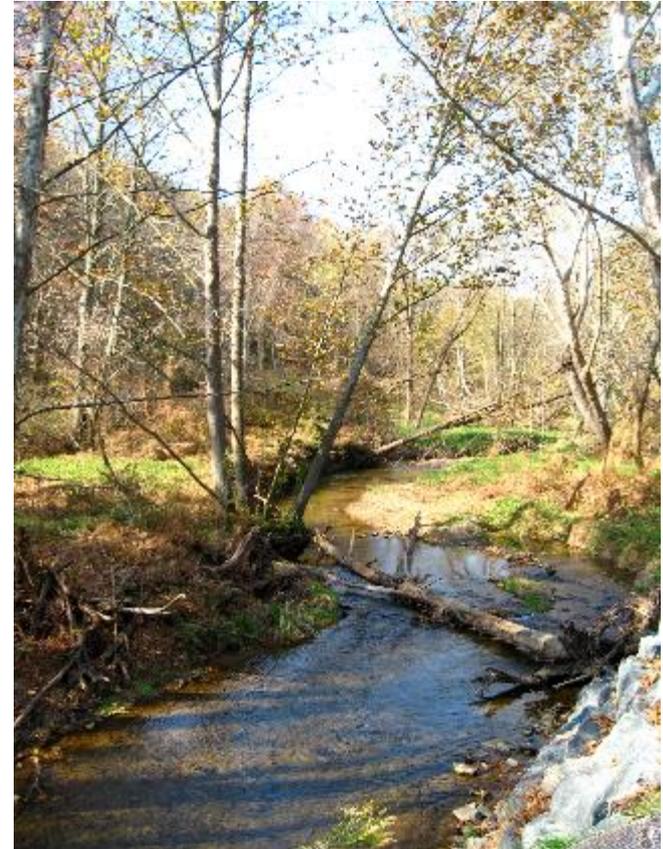


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# TOPICS

- What are the Nationwide Permits?
- Summary of the final rule published on January 6, 2017
- Next steps
- What's in the 2017 Nationwide Permit final rule?
  - What changes were made?
- Conditions for the 2017 Nationwide Permits



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# NATIONWIDE PERMITS

- General permits issued by Corps Headquarters to authorize activities across the country
  - Categories of activities with no more than minimal individual and cumulative adverse environmental effects
  - Reissuance process occurs every 5 years (cannot be extended)
  - A federal rulemaking activity
- Nationwide permits authorize:
  - Discharges of dredged or fill material into waters of the United States
    - Section 404 of the Clean Water Act
  - Structures or work in navigable waters
    - Section 10 of the Rivers and Harbors Act of 1899

# NATIONWIDE PERMITS

- Congressional intent (Clean Water Act Section 404(e))
  - Streamlined authorization process for small activities with no more than minimal adverse environmental effects
- Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- First issued in 1977
  - 15 nationwide permits
- Current nationwide permits expire 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



## FEDERAL REGISTER

Vol. 82      Title  
No. 1      January 6, 2017

Part III

Department of Defense  
Engineers of the Army, Corps of Engineers  
2017-01-06  
Notice and Release of Construction Permit (NCP) Rule



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# SUMMARY OF 2017 FINAL RULE

- **Nationwide permits**
  - 28 NWP's reissued with changes
  - 24 NWP's reissued with no changes
  - 2 new NWP's issued
- **General conditions**
  - Reissue 12 general conditions with changes
  - Reissue 19 general conditions without changes
  - Issue 1 new general condition
- **Definitions**
  - Add 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 NWP's – no pre-construction notification (PCN) required
- 14 NWP's – some activities require PCN
- 19 NWP's – 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



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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
    - Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act



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# NEXT STEPS



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## REQUIRED CERTIFICATIONS



- Water quality certification
  - For an NWP that authorizes a discharge into waters of the United States
  - 60-day review period for states/tribes ends on March 7, 2017
- Coastal Zone Management Act consistency concurrence
  - For an NWP that authorizes an activity in, or affecting, the coastal zone
  - 90-day review period for coastal states ends on April 6, 2017



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# CORPS REGIONAL CONDITIONS

- Corps districts use final rule to develop recommendations for regional conditions
- Evaluate information gained from :
  - Consultation with tribes
  - Coordination with other agencies
  - Public comment
- Corps districts prepare supplemental documents
- Submit draft supplemental documents to Corps division for review and approval
- Corps regional conditions should be finalized prior to effective date (March 19, 2017)
- Corps districts issue public notice announcing final Corps regional conditions



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# 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))



## NWP 3 – MAINTENANCE

- Changes:
  - Clarify 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
  - Remove provision in paragraph (b) authorizing riprap to protect structure (can be authorized by NWP 13)



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## 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:
  - Clarify 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
  - Add reference to Corps regulations for minimum clearance for overhead electric power lines over navigable waters



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# 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:
  - Clarify 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 (con't):
  - 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
  - Limit waivers for bulkheads to 1,000 linear feet
  - Authorize use of timber mats, if Corps authorization required



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## NWP 21 – SURFACE COAL MINING ACTIVITIES

- Authorizes discharges of dredged or fill material into waters of the United States for surface coal mining activities
- Limits:
  - ½-acre of non-tidal waters; 300 linear feet of stream bed
- Changes:
  - Remove provision allowing re-authorization of activities authorized by 2007 NWP 21
  - All activities will be subject to ½-acre limit and 300 linear foot limit for losses of stream bed, and to the prohibition against construction of valley fills



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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:
  - To 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 to 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 29 – RESIDENTIAL DEVELOPMENTS

- Authorizes fills in non-tidal waters to construct or expand residential developments and attendant features
- Limits:
  - ½-acre of non-tidal waters; 300 linear feet of stream bed
- Changes:
  - Clarify that any losses of stream bed are applied to the ½-acre limit
  - [Similar change for NWPs 21, 39, 40, 42, 43, 44, 50, 51, and 52]



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# NWP 31 – MAINTENANCE OF EXISTING FLOOD CONTROL FACILITIES

- Authorizes maintenance for existing flood control facilities to a maintenance baseline approved by Corps district
- Limits: maintenance baseline approved by district engineer
- Changes:
  - Add provision stating that the facility will not be considered abandoned if permittee is experiencing delays in obtaining other required approvals or authorizations
  - Clarify that the one-time mitigation requirement applies since maintenance baseline was established by Corps district under this NWP, not every five years

## NWP 32 – COMPLETED ENFORCEMENT ACTIONS

- Authorizes Corps-regulated activities to close out enforcement actions
  - Non-judicial settlement agreements, federal court decisions, consent decrees, settlement agreements
- Changes:
  - Clarify that acreage limits for Corps non-judicial settlement agreements (5 acres for non-tidal waters and 1 acre for tidal waters) based on area adversely affected by activity
  - Clarify that non-compliance with terms and conditions of NWP 32 may result in additional enforcement action (e.g., a Class I administrative penalty)



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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
- Primary activity must be authorized by U.S. Coast Guard or Corps
- Changes:
  - Pre-construction notification required only for those activities in waters subject to section 10 of the Rivers and Harbors Act of 1899



# NWP 39 – COMMERCIAL AND INSTITUTIONAL DEVELOPMENTS

- Authorizes the construction and expansion of commercial and institutional developments (and attendant features) in non-tidal waters of the United States
- Limits:
  - ½-acre of non-tidal waters; 300 linear feet of stream bed
- Changes:
  - Add wastewater treatment facilities to list of examples of authorized attendant features



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# NWP 41 – RESHAPING EXISTING DRAINAGE DITCHES

- Authorizes the reshaping of cross sections of existing drainage ditches to improve water quality
- Limit:
  - ▶ Activity cannot increase area drained by ditch
- Changes:
  - ▶ Remove 500-linear foot PCN threshold (no PCN required)



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# NWP 43 – STORMWATER MANAGEMENT FACILITIES

- Authorizes the construction and maintenance of stormwater management facilities and low-impact development integrated management features
- Limits:
  - 1/2-acre of non-tidal waters; 300 linear feet of stream bed
- Changes:
  - Authorize the construction pollutant-reduction green infrastructure features to reduce inputs of sediments, nutrients, and other pollutants to meet Total Daily Maximum Loads



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## NWP 44 – MINING ACTIVITIES

- Authorizes mining activities other than coal mining activities (e.g., aggregate and hard rock/mineral mining)
- Limits:
  - ½-acre of non-tidal waters; 300 linear feet of stream bed
- Changes:
  - Clarify application of ½-acre limit
    - Area of non-tidal open waters mined (which includes any stream bed that is mined) plus area of non-tidal wetlands mined cannot exceed ½-acre



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# NWP 45 – REPAIR OF UPLANDS DAMAGED BY DISCRETE EVENTS

- Authorizes discharges of dredged or fill material, including dredging, to restore upland areas damaged by storms, floods, or other discrete events
- Limit:
  - Restore uplands to pre-event ordinary high water mark
- Changes:
  - Allow district engineer to waive 12-month limit for submitting PCN if permittee can demonstrate funding, contracting, or similar delays



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# NWP 48 – COMMERCIAL SHELLFISH AQUACULTURE ACTIVITIES

- Authorizes structures or work, or discharges of dredged or fill material, for commercial shellfish aquaculture activities
- Limits:
  - Project area is area where legally binding agreements establish enforceable property interest, or area covered by permit or license, where the operator is authorized to conduct these activities



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# NWP 48 – COMMERCIAL SHELLFISH AQUACULTURE ACTIVITIES

- Changes:
  - Define “new project area” as area where no commercial shellfish aquaculture activities have been conducted in past 100 years
  - Clarify that operator can submit one PCN for contiguous project areas, instead of one PCN per project area
  - Remove PCN threshold for dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation
  - Remove PCN threshold for changing from bottom culture to floating or suspended culture
  - PCN should describe all activities the operator intends to undertake during 5-year period the NWP is in effect



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# NWP 51 – LAND-BASED RENEWABLE ENERGY GENERATION FACILITIES

- Authorizes the construction, expansion, or modification of these facilities in non-tidal waters
- Limits:
  - ½-acre of non-tidal waters; 300 linear feet of stream bed
- Changes:
  - PCN threshold increased to 1/10-acre



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# NWP 52 – WATER-BASED RENEWABLE ENERGY GENERATION PILOT PROJECTS

- Authorizes the construction, expansion, modification, or removal of these facilities in all waters, except in coral reefs
- Also authorizes land-based components
- Limits:
  - ½-acre; 300 linear feet of stream bed
  - 10 units
- Changes:
  - Add floating solar panels in navigable waters
  - Add wave energy devices



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# NWP 53 – REMOVAL OF LOW-HEAD DAMS

- New NWP
- Authorizes the removal of low-head dam for stream restoration and public safety
- Limits:
  - Low-head dams, which are defined as: “dams 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”
  - PCN for all activities



## NWP 53 – REMOVAL OF LOW-HEAD DAMS

- Removed dam structure must be deposited in area that has no waters of the United States unless another Corps permit authorizes placement of material in waters
- As a general rule, compensatory mitigation is not required for these activities because low-head dam removal restores stream ecological functions and services
- Associated stream restoration activities may be authorized by NWP 27
- Associated bank stabilization activities may be authorized by NWP 13



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# NWP 54 – LIVING SHORELINES

- New NWP
- Authorizes structures or work in navigable waters, and discharges of dredged or fill material, for the construction and maintenance of living shorelines to control erosion in coastal areas (including the Great Lakes)
- Limits:
  - 30 feet from mean low water line in tidal waters or ordinary high water mark in the Great Lakes
  - 500 linear feet along the length of the bank
- Both limits can be waived by the district engineer



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## NWP 54 – LIVING SHORELINES

- Coastal waters with small fetch and gentle slopes subject to low- to mid-energy waves
- Uses vegetation and other living elements (e.g., oysters), and where necessary, fill structures (e.g., sills or breakwaters) to protect those living elements
- Fills, including fill structures, must be the minimum necessary for the establishment and maintenance of the living shoreline
- Activity must be designed to have no more than minimal adverse effects on water and organism movement to and from shore
- PCNs required for all activities (except maintenance)



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# 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:
  - ▶ Add 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 notification to the district engineer
- District engineer will coordinate with federal agency with direct management responsibility for that river
- Activity not authorized by 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
- Explicitly cover 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.”



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## GC 18 – ENDANGERED SPECIES

- Define “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
- Clarify 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

- Clarify 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



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## 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 list of sources for assistance for obtaining information on 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

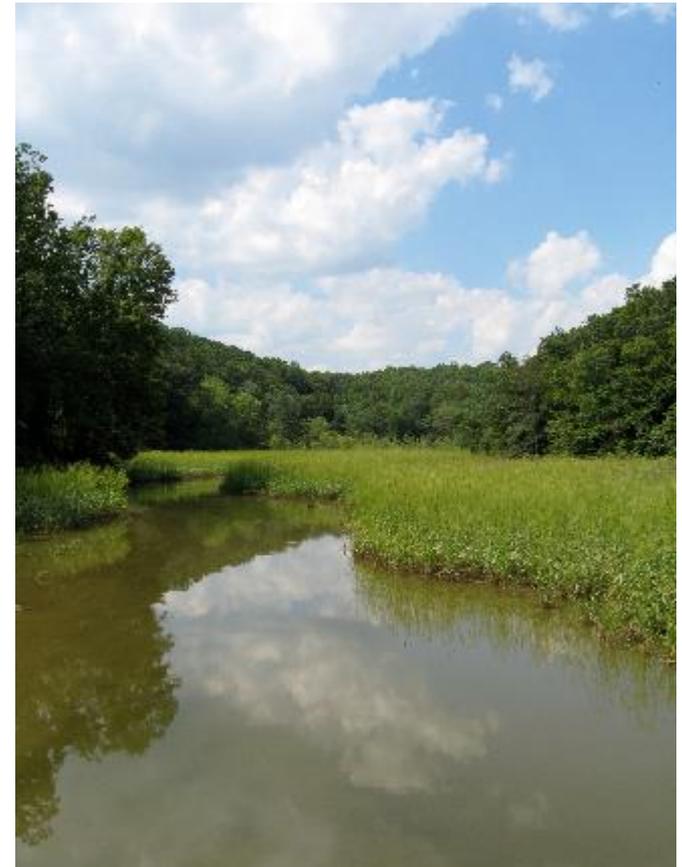


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## GC 23 – MITIGATION

- 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 permit 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 – PRE-CONSTRUCTION NOTIFICATION

- Changes to agency coordination
  - Removed agency coordination for NWP 48 activities (commercial shellfish aquaculture activities)
  - Added agency coordination for proposed NWP 13 activities (bank stabilization) in excess of 500 linear feet, discharging more than one cubic yard per running foot, or discharges into special aquatic sites
  - Added agency coordination for NWP 54 activities (living shorelines) in excess of 500 linear feet or more than 30 feet from mean low water line in tidal waters or ordinary high water mark in Great Lakes



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# AGENCY COORDINATION

- Required for the following NWP activities:
  - Activities that will result in the loss of greater than 1/2-acre
  - Activities authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 that require PCNs and will result in loss of greater than 300 linear feet of intermittent and ephemeral stream bed
  - NWP 13 and 54 activities, where waivers are requested
- Copies of PCN to federal and state resource agencies
- 10 calendar day review period, may be extended by 15 days
- Agency comments on compliance with NWP terms and conditions and the need for mitigation to ensure no more than minimal adverse environmental effects



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## DISTRICT ENGINEER'S DECISION (SECTION D)

- Criteria for determining whether a proposed NWP activity will result in no more than minimal individual or cumulative adverse environmental effects or any public interest review factor
  - For waiver requests, written determination of no more than minimal adverse environmental effects
  - Consider the direct and indirect effects caused by the NWP activity
  - Consider cumulative effects of NWP use on a regional basis
    - Regions may be watersheds, ecoregions, county, or other types of geographic areas
    - Non-linear projects – single watershed or region
    - Linear projects that cross multiple watersheds or regions – consider cumulative effects in each watershed or region



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## DISTRICT ENGINEER'S DECISION (SECTION D)

- Is mitigation, including compensatory mitigation, required to ensure no more than minimal effects?
  - ▶ Add activity-specific conditions requiring avoidance and minimization measures, such as:
    - Construction or management practices that reduce effects on aquatic environment
    - Time-of-year restrictions
  - ▶ If compensatory mitigation required, add activity-specific conditions
    - Use of mitigation bank or in-lieu fee program credits
    - Permittee-responsible mitigation, including approval of mitigation plan
      - ▷ Conceptual or detailed plan to issue NWP verification



# MINIMAL EFFECTS DETERMINATIONS

- Factors considered by district engineers:
  - Environmental setting in the vicinity of the NWP activity
  - Type of resource that will be affected
  - Functions provided by the affected aquatic resources
  - Degree or magnitude to which the aquatic resources perform those functions
  - Extent that aquatic resource functions will be lost (e.g., partial or complete loss)
  - Duration of the adverse effects (temporary or permanent)
  - Importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and
  - Mitigation required by the district engineer



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## NEW DEFINITIONS

- Ecological reference
- Navigable waters
- Protected tribal resources\*
- Tribal lands\*
- Tribal rights\*



\* From 1998 Department of Defense American Indian and Alaska Native Policy



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# CONDITIONS FOR THE NATIONWIDE PERMITS



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# REGIONAL AND ACTIVITY-SPECIFIC CONDITIONS FOR NWPS

- Permit conditions must be:
  - Directly related to the impacts of the proposal
  - Appropriate to the scope and degree of those impacts, and
  - Reasonably enforceable
- Conditions necessary to satisfy legal requirements, such as:
  - Water Quality Certification
  - Coastal Zone Management Act consistency concurrence
  - Endangered Species Act section 7
  - National Historic Preservation Act section 106



*Source: 33 CFR 325.4*



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# REGIONAL CONDITIONS FOR NWPS

- Conditions added to NWPs by division engineers on regional basis may not:
  - Increase terms or limits of NWPs
  - Delete or modify NWP conditions
  - Be inconsistent with the Corps' regulations
  - Be unenforceable
  - Require an individual WQC or CZMA consistency concurrence
  - Require another agency decision or approval



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# WQC/CZMA CONDITIONS

- Regulatory Guidance Letter 92-04
- <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl92-04.pdf>
- Unacceptable conditions
  - Illegal conditions
    - Result in violation of a law or regulation, or would require an illegal action
    - Conflict with the Corps' regulations
  - Conditions that require the Corps or other federal agency to take an action it would not take
    - e.g., requiring notification when it is not required by Corps
  - Conditions that increase the acreage or other limits for an NWP
  - Conditions that delete or modify NWP conditions
- Discretionary enforcement of WQC/CZMA conditions

# QUESTIONS?



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