

OVERVIEW OF U.S. ARMY CORPS OF ENGINEERS (USACE) NATIONWIDE PERMIT PROGRAM

Virtual Regulatory Program Workshop
hosted by Colorado Regulatory Offices

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Denver Regulatory Office (RCO)

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"The views, opinions and findings contained in this report are those of the author(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation."



**US Army Corps
of Engineers®**





DISCUSSION TOPICS

- What's new with the NWP's
(lots of changes!)
- Updated General Conditions
and Definitions
- Grandfathering Process



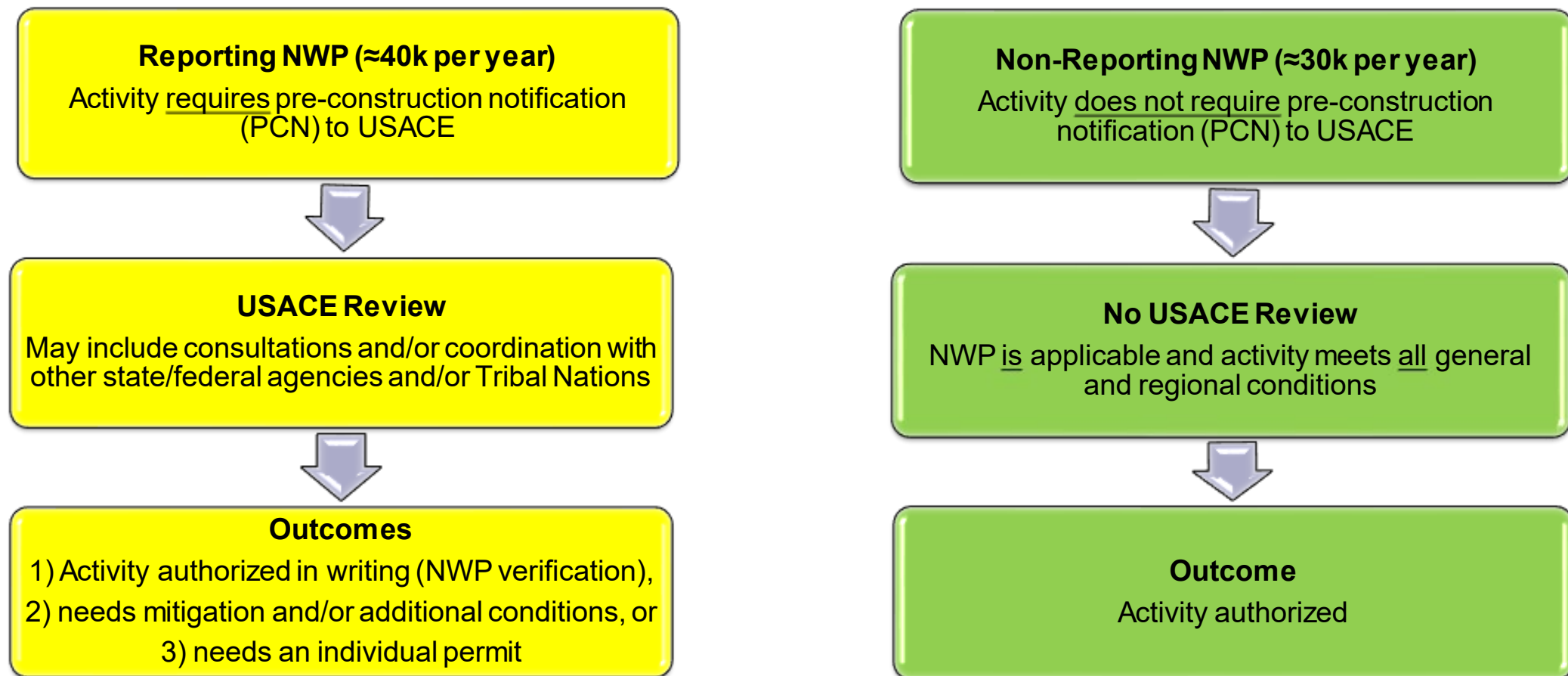
View from the USACE Tri-Lakes Office overlooking the Chatfield Reservoir in Littleton, Colorado



NATIONWIDE PERMIT BACKGROUND



3





PRE-CONSTRUCTION NOTIFICATION (PCN)



What is a PCN?

- Required for certain NWP (and certain activities, thresholds, and/or other considerations)

Consultations can trigger a PCN

- Endangered Species Act Section 7
- National Historic Preservation Act Section 106

Coordination can trigger a PCN

- Wild and Scenic Rivers Act
- Waivers to limits requested



Preble's Meadow Jumping Mouse – photo accessed 12/14/2020 from Rocky Mountain Wild accessed at: <https://rockymountainwild.org/prebles>

Provides the opportunity for the District to review a proposed NWP activity to determine if eligible for authorization



NATIONWIDE PERMIT PROGRAM



Intent is to streamline the review of similar activities with *no more than minimal adverse environmental effects*

- Reissued every 5 years (typically)
- Rulemaking activity, with interagency review under Executive Order (EO) 12866

Decision documentation completed upfront

- NEPA, Public Interest Review, 404(b)(1) Guidelines
- Establish additional review process (ESA, Historic, etc.)

NWPs authorize:

- Discharges of dredged or fill material into WOUS (**Section 404** CWA)
- Structures or work in navigable waters (**Section 10** RHA of 1899)





NATIONWIDE PERMIT PROGRAM EFFECTIVE DATES

2017 NWP's issued on December 21, 2016

- 52 NWP's were scheduled to expire on March 18, 2022 (12 were changed with the January 2021 final rule and the remaining 40 reissued in the December 2021 final rule had their expiration changed to February 24, 2022)

January 2021 NWP's issued on January 13, 2021

- 16 NWP's (12 re-issued/modified and four new)
- 32 general conditions and associated definitions
- In effect March 15, 2021, and expires March 14, 2026

May 20, 2021, Correction to the January 2021 Final Rule

- Language revision NWP 52

December 2021 NWP's issued on December 27, 2021

- Re-issued 40 NWP's and issued one new NWP
- General conditions & definitions from January 2021 apply here
- In effect February 25, 2022, and expires March 14, 2026





JANUARY 2021 REISSUED/ISSUED NATIONWIDE PERMITS

- NWP 12 – Oil or Natural Gas Pipeline Activities
- NWP 21 – Surface Coal Mining Activities
- NWP 29 – Residential Developments
- NWP 39 – Commercial and Institutional Developments
- NWP 40 – Agricultural Activities
- NWP 42 – Recreational Facilities
- NWP 43 – Storm Water Management Facilities
- NWP 44 – Mining Activities
- NWP 48 – Commercial Shellfish Mariculture Activities
- NWP 50 – Underground Coal Mining Activities
- NWP 51 – Land-Based Renewable Energy Generation Facilities
- NWP 52 – Water-Based Renewable Energy Pilot Projects
- NWP 55 – Seaweed Mariculture Activities
- NWP 56 – Finfish Mariculture Activities
- NWP 57 – Electric Utility Line and Telecommunications Activities
- NWP 58 – Utility Line Activities for Water and Other Substances

*In effect March 15,
2021, and expire
March 14, 2026*



DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[Docket Number: COE-2020-0002]

RIN 0710-AB29

Reissuance and Modification of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.
ACTION: Final rule.

SUMMARY: Nationwide Permits (NWP) authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that have no more than minimal individual and cumulative adverse environmental effects. In a proposed rule published in the September 15, 2020, issue of the **Federal Register**, the Corps proposed to reissue 52 existing NWPs and issue five new NWPs, plus the NWP general conditions and definitions. In a final rule published in the January 13, 2021, issue of the **Federal Register**, the Corps reissued 12 of the 52 existing NWPs and four of the five new NWPs, as well as the NWP general conditions and definitions. In this final rule, the Corps is reissuing the remaining 40 existing NWPs and issuing the remaining one new NWP. The NWP general conditions and definitions published in the January 13, 2021, issue of the **Federal Register** apply to the 41 NWPs reissued or issued in this final rule.

DATES: The 41 NWPs in this final rule go into effect on February 25, 2022. The 41 NWPs in this final rule expire on March 14, 2026.

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW-CO-R, 441 G Street NW, Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202-761-4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/>.

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 - A. National Environmental Policy Act Compliance
 - B. Compliance With Section 404(e) of the Clean Water Act
 - C. 2020 Revisions to the Definition of "Waters of the United States" (i.e., the Navigable Waters Protection Rule)
 - D. Compliance With the Endangered Species Act
 - E. Compliance With the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act
 - F. Compliance With Section 106 of the National Historic Preservation Act
 - G. Section 401 of the Clean Water Act
 - H. Section 307 of the Coastal Zone Management Act (CZMA)
- IV. Economic Impact
- V. Administrative Requirements
- VI. References

List of Acronyms

- BMP Best Management Practice
- CEQ Council on Environmental Quality
- CWA Clean Water Act
- DA Department of the Army
- EFH Essential Fish Habitat
- ESA Endangered Species Act
- FWS U.S. Fish and Wildlife Service
- GC General Condition
- NEPA National Environmental Policy Act
- NHPA National Historic Preservation Act
- NMFS National Marine Fisheries Service
- NPDES National Pollutant Discharge Elimination System
- NWP Nationwide Permit
- PCN Pre-construction Notification
- RGL Regulatory Guidance Letter

List of Nationwide Permits Issued in This Final Rule

- 1. Aids to Navigation
- 2. Structures in Artificial Canals
- 3. Maintenance
- 4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
- 5. Scientific Measurement Devices
- 6. Survey Activities
- 7. Outfall Structures and Associated Intake Structures
- 8. Oil and Gas Structures on the Outer Continental Shelf
- 9. Structures in Fleet and Anchorage Areas
- 10. Mooring Buoys
- 11. Temporary Recreational Structures
- 12. Bank Stabilization
- 13. Linear Transportation Projects
- 14. U.S. Coast Guard Approved Bridges
- 15. Return Water From Upland Contained Disposal Areas
- 16. Hydropower Projects
- 17. Minor Discharges
- 18. Minor Dredging
- 19. Response Operations for Oil or Hazardous Substances

- 20. Removal of Vessels
- 21. Approved Categorical Exclusions
- 22. Indian Tribe or State Administered Section 404 Programs
- 23. Structural Discharges
- 24. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- 25. Modifications of Existing Marinas
- 26. Moist Soil Management for Wildlife
- 27. Maintenance of Existing Flood Control Facilities
- 28. Completed Enforcement Actions
- 29. Temporary Construction, Access, and Dewatering
- 30. Cranberry Production Activities
- 31. Maintenance Dredging of Existing Basins
- 32. Boat Ramps
- 33. Emergency Watershed Protection and Rehabilitation
- 34. Cleanup of Hazardous and Toxic Waste
- 35. Reshaping Existing Drainage Ditches
- 36. Repair of Uplands Damaged by Discrete Events
- 37. Discharges in Ditches
- 38. Coal Remining Activities
- 39. Removal of Low-Head Dams
- 40. Living Shorelines
- 41. Water Reclamation and Reuse Facilities

I. Background

A. General

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), where those activities will result in no more than minimal individual and cumulative adverse environmental effects. NWPs were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment with conditions to minimize those adverse effects, without requiring individual permits for those activities. After 1977, NWPs have been issued or reissued in 1982 (47 FR 31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), 2012 (77 FR 10184), 2017 (82 FR 18660), and 2021 (86 FR 2744).

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States that will cause only minimal individual and cumulative adverse environmental effects for a period of no more than five years after the date of issuance (33 U.S.C. 1344(e)). The Secretary's authority to issue permits has been

In effect February 25, 2022, and expire March 14, 2026





DECEMBER 2021 REISSUED/ISSUED NATIONWIDE PERMITS



- NWP 1 – Aids to Navigation
- NWP 2 – Structures in Artificial Canals
- NWP 3 – Maintenance
- NWP 4 – Fish and Wildlife Harvesting, Enhancement, etc.
- NWP 5 – Scientific Measurement Devices
- NWP 6 – Survey Activities
- NWP 7 – Outfall Structures and Assoc. Intake Structures
- NWP 8 – Oil and Gas Structures on the OCS
- NWP 9 – Structures in Fleeting and Anchorage Areas
- NWP 10 – Mooring Buoys
- NWP 11 – Temporary Recreational Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 15 – U.S. Coast Guard Approved Bridges
- NWP 16 – Return Water Upland Contained Disposal Areas
- NWP 17 – Hydropower Projects
- NWP 18 – Minor Discharges
- NWP 19 – Minor Dredging
- NWP 20 – Response Operations for Oil or Haz. Substances
- NWP 22 – Removal of Vessels
- NWP 23 – Approved Categorical Exclusions
- NWP 24 – Indian Tribe or State Admin. S. 404 Programs
- NWP 25 – Structural Discharges

- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 28 – Modifications of Existing Marinas
- NWP 30 – Moist Soil Management for Wildlife
- NWP 31 – Maintenance of Existing Flood Control Facilities
- NWP 32 – Completed Enforcement Actions
- NWP 33 – Temporary Construction, Access, and Dewatering
- NWP 34 – Cranberry Production Activities
- NWP 35 – Maintenance Dredging of Existing Basins
- NWP 36 – Boat Ramps
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 38 – Cleanup of Hazardous and Toxic Waste
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 45 – Repair of Uplands Damaged by Discrete Events
- NWP 46 – Discharges in Ditches
- NWP 49 – Coal Remining Activities
- NWP 53 – Removal of Low-Head Dams
- NWP 54 – Living Shorelines
- NWP 59 – Water Reclamation and Reuse Facilities* NEW



NATIONWIDE PERMIT PROGRAM CHANGES



Five new NWPs

- NWP 55 & NWP 56 – Not applicable in Colorado
- NWP 57 Electric utility line and telecommunications activities
- NWP 58 Utility line activities for water and other substances
- NWP 59 Water reclamation and reuse facilities

23 NWPs had changes from 2017





NEW NATIONWIDE PERMITS FOR 2021 (APPLICABLE IN COLORADO)



Former 2017 NWP 12 (Utility Lines)

Split into three NWPs (12, 57, and 58)

- New NWP 57 – Electric utility line and telecommunications activities
- New NWP 58 – Utility line activities for water and other substances
- Require temporary fills to be removed in entirety and restored to preconstruction elevation
- $\frac{1}{2}$ acre threshold limit for each single and complete project
- NWP 57 and NWP 58 require a PCN (1) if a Section 10 permit is required or (2) if the discharge will result in the loss of greater than 1/10-acre of waters of the United States





NEW NATIONWIDE PERMITS FOR 2021 (APPLICABLE IN COLORADO)



New NWP 59– Water Reclamation and Reuse Facilities



- 1/2 acre threshold limit
- Requires a PCN for all activities
- District engineers will evaluate proposed losses of stream bed to determine whether those losses, plus any other losses of waters of the United States caused by discharges of dredged or fill material, will result in no more than minimal individual and cumulative adverse environmental effects, and thus eligible for authorization under this NWP
- In geographic areas where there are regional concerns about cumulative losses of stream bed, division engineers can add regional conditions to this NWP to impose smaller acreage limits on losses of stream bed



NWP CHANGES (APPLICABLE IN COLORADO)



NWP 12 Oil or natural gas pipeline activities: Limit to oil or natural gas pipeline activities. Remove PCN requirements for a list of activities. Added a PCN requirement for new oil or natural gas pipelines more than 250 miles in length

NWP 14 Linear Transportation Projects: Driveways were added to the list of examples of authorized activities. “Driveways” was defined 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 is not limited to those associated with a single unit or multiple unit residences

NWP 17 Hydropower Projects: Modified to increase total generating capacity from 5,000 kW to 10,000 kW

NWP 21 Surface coal mining activities: Removed the 300 linear foot limit for losses of stream bed. Removed waiver provision. Removed reference to integrated permit processing procedures. Removed requirement for written verification



NWP CHANGES (APPLICABLE IN COLORADO)



NWP 27 Aquatic Habitat Rest. (et al) Activities: Modified to add releases of sediment from reservoirs to restore or sustain downstream habitat to the list of examples of activities authorized by this NWP

NWP 36 Boat ramps: Added “repair” and “replacement” of boat ramps.

NWP 41 Reshaping Existing Drainage and Irrigation Ditches: Modified to include irrigation ditches

NWP 44 Mining Activities: Removed the 300 linear foot limit for losses of stream bed. Removed waiver provision. Limit mining in non-tidal navigable waters of the United States (i.e., S. 10 waters) to 1/2-acre

NWP 49 Coal Remining Activities: Removed text reference (integrated permit processing procedures)

NWP 50 Underground Coal Mining Activities: Removed the 300 linear foot limit for losses of stream bed. Removed waiver provision. Removed requirement for written verification. Removed reference to integrated permit processing procedures. Removed note stating that coal preparation and processing outside the mine site may be authorized by NWP 21

NWP 53 Removal of Low-Head Dams: Modified definition of “low-head dam”



NWP CHANGES (APPLICABLE IN COLORADO)



- NWP 21 – surface coal mining activities
- NWP 29 – residential developments
- NWP 39 – commercial and institutional developments
- NWP 40 – agricultural activities
- NWP 42 – recreational facilities
- NWP 43 – storm water management activities
- NWP 44 – mining activities
- NWP 50 – underground coal mining activities
- NWP 51 – land-based renewable energy generation facilities
- NWP 52 – water-based renewable energy pilot projects



**REMOVAL OF 300 LINEAR FOOT LIMIT FOR LOSSES OF STREAMBED
FOR THOSE LISTED ABOVE**



WHY REMOVE THE 300 LINEAR FOOT LIMIT FOR LOSSES OF STREAM BED?



More accurate quantification of losses of stream bed

- Streams within watersheds vary substantially in size
- More defensible determinations of “no more than minimal impacts”

Consistent limits for all categories of non-tidal waters

Consistency with 404(b)(1) Guidelines, which provide greater protection for special aquatic sites (e.g., wetlands)

Establish compensatory mitigation requirement for losses of greater than 3/100-acre of stream bed





CHANGES TO GENERAL CONDITIONS (APPLICABLE TO COLORADO)



GC 13, Removal of temporary fills - added “structures” to require removal of temporary structures

GC 17, Tribal rights - Restored text of general condition that was in 2012 and prior NWPs

GC 18, Endangered species - Removed definitions of “direct effects” and “indirect effects”. Replaced with references to the 2019 FWS and NMFS regulations defining:

- “effects of the action” [50 CFR 402.02]
- “activities that are reasonably certain to occur” [50 CFR 402.17(a)]
- “consequences caused by the proposed action” [50 CFR 402.17(b)]

GC 25, Water quality - If project proponent cannot comply with all conditions for the WQC issued by certifying authority for issuance of the NWP, then he or she must obtain an individual WQC or waiver for the proposed discharge

GC 28, use of multiple NWPs - Clarified use of NWPs with different numeric limits, with examples



CHANGES TO GENERAL CONDITIONS (APPLICABLE TO COLORADO)



GC 23, Mitigation

- Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre-construction notification, *unless the district engineer provides an activity-specific waiver of this requirement*
 - District engineer may require other forms of mitigation
 - Mitigation requirement may be satisfied through restoration or enhancement of riparian areas next to streams
- Acre-based mitigation requirements will be consistent with wetland mitigation requirement for NWPs



CHANGES TO GENERAL CONDITIONS AND PCN REQUIREMENTS



GC 32, Pre-construction notification:

- Clarification added for linear projects where one or more single and complete crossings require PCN, the quantity of anticipated losses of wetlands and waters included in the PCN will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project and does not change those non-PCN NWP activities into NWP PCNs

The NWP PCN form (Form ENG 6082) or a letter should be used for NWP PCNs

Remove the agency coordination provision for PCNs requesting waivers of the 300 linear foot limit for losses of stream bed

20 NWPs –no PCN required
14 NWPs – some activities require a PCN
23 NWPs- all activities require a PCN

Where no PCN is required- applicant is still responsible for ensuring that the project qualifies for that applicable NWP and that all terms and conditions are met



CHANGES TO NWP DEFINITIONS



Removed definitions of:

- Ephemeral stream
- Intermittent stream
- Protected tribal resources

Modified definition of:

- Modified definitions of “ordinary high-water mark” and “perennial stream”
- Modified definition of “loss of waters of the United States” to remove references to quantifying stream bed losses in linear feet





ROAD AHEAD AND...



2017 NWP's that hadn't already changed with the January 2021 Final Rule expired **February 24, 2022**



1860

Federal Register/Vol. 82, No. 4/Friday, January 6, 2017/Rules and Regulations

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[COE-2015-0017]

RIN 0710-AA73

Issuance and Reissuance of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

effects. The NWP's authorize a variety of activities, such as aids to navigation, utility line crossings, erosion control activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. The two new NWP's authorize the removal of low-head dams and the construction and maintenance of living shorelines. Some NWP activities may proceed without notifying the Corps, as long as those activities comply with all applicable terms and conditions of the

330.1(b)). Activities authorized by NWP's and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.



...THE GRANDFATHERING PROVISION



GRANDFATHERING PROVISION 33 CFR 330.6(B)

12 NWP's that were re-issued March 2021 are grandfathered UNTIL March 18, 2022

40 NWP's that were re-issued from the December 27, 2021, Final Rule, are grandfathered for 12 months after expiration of the 2017 applicable NWP

- For the 40 NWP's previously authorized under the 2017 NWP's with original expiration of March 18, 2022, are grandfathered provided
 - Construction for the authorized impacts has started or is under contract to start by the NWP expiration
 - Work in authorized impacts to WOUS must be completed within the 12 month period

Under 33 CFR 330.6(b), Corps Headquarters may modify, reissue, suspend, or revoke the NWP's at any time.

Activity must be completed within 12 months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised by a division/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)

Twelve-month period is known as the grandfathering period



RECAP

- All 2021 NWPs are now in effect and will expire March 14, 2026
- 2017 NWPs have expired but with the grandfathering clause if you have started construction and/or are under contract the clause may apply to you (refer to previous slide and your specific permit conditions)
- We've included helpful links on the next slide
- When in doubt please contact your local regulatory office





HELPFUL LINKS – HQ NATIONWIDE PERMIT INFORMATION



- Public HQ Nationwide Permit Information Page
- Pre-Construction Notification Form (ENG Form 6082)
- NWP 2021 Summary Table
- NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52
 - Final Nationwide Permits (Federal Register Notice January 13, 2021)
- 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, 54, 59
 - Final Nationwide Permits (Federal Register Notice December 27, 2021)



QUESTIONS?

Project specific questions should be submitted to the appropriate Colorado Regulatory Office - found at the link below:

<https://www.nwo.usace.army.mil/Missions/Regulatory-Program/Colorado/State-Contacts/>



View of the Arkansas River on the Railroad Bridge at the Arkansas Headwaters Recreation Area near Buena Vista, Colorado



THANK YOU

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