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**Proposed Changes to U.S. Army Corps’ Nationwide (General) Permits for Work in ‘Water of the U.S.’**

**AGC NWP DISCUSSION DOCUMENT**

The U.S. Army Corps of Engineers (Corps) recently published a proposal to reissue and modify the nationwide (general) permits (NWPs). The Corps issues NWPs to authorize a variety of construction operations in “Waters of the U.S.” (WOTUS) that have minimal individual and cumulative adverse environmental effects. Based on recent data, the Corps has authorized roughly 30,000 projects through the NWP program each year. AGC invites members to share their feedback to the Association by Friday, July 8, 2016, using this NWP DISCUSSION DOCUMENT. [**Click here**](http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx) **for the Corps’ Complete Summary Table of Proposed 2017 NWPs. Public comments are due to the Corps by August 1. You may submit your own/company comments directly to the Corps via e-mail at:**[**NWP2017@usace.army.mil**](javascript:void(0)) **or through the Federal eRulemaking portal at** [**www.regulations.gov**](http://www.regulations.gov) **(Docket ID No. COE-2015-0017).**

| **- NOTABLE CHANGES THAT MAY IMPACT COMMERCIAL CONSTRUCTION -** | | | | | |
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| **NWP #** | **Proposed Changes** | | **Notes** | | **AGC Member Feedback** |
| **NWP 3 – Maintenance**   1. Repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills 2. Discharges assoc. with removal of accumulated sediments and debris in the vicinity of existing structures, incl. intake & outfall structures and assoc. canals 3. Temp structures, fills, & work necessary to conduct maintenance activity | * Clarify that NWP authorizes removal of previously authorized structures and fills. * Clarify that NWP authorizes use of temporary mats in jurisdictional “Waters of the U.S.” (WOTUS) if used to minimize impacts during regulated activities. | | * Does not authorize: maintenance dredging for the primary purpose of navigation; beach restoration; or new stream channelization or stream relocation projects. Limit stream channel modification to the minimum necessary for the maintenance activity. * Temporary fills must be removed and the impacted areas returned to pre-construction condition. | |  |
| **NWP 12 – Utility Line Activities** | * Authorize use of temporary mats in jurisdictional WOTUS if used to minimize impacts during regulated activities. * Add note referencing def. of “single and complete linear proj” – 33 CFR 330.6(d), and note w/ reference to Corps regs for req’d min clearances of overhead electic power transmission lines over nav waters. * Clarify that NWP only authorizes crossings of WOTUS assoc. w/ the construction, maintenance, and repair of utility lines. Authorizes inadvertent returns of drilling muds through frac-outs that may occur during directional drilling operations to install utility lines. * Add note that NWP authorizes utility line maintenance/repair activities that don’t qualify for CWA Section 404(f) exemption for maintenance. | | * Temporary fills must be removed and the impacted areas returned to pre-construction condition. * Separate footings for each tower leg should be used where feasible. * The following definition of “single and complete project” was added during the 2012 NWP process: *“That portion of the total linear project proposed or accomplished by one owner/ developer or partnership or other association of owners/developers that includes all crossings of a single WOTUS at a specific location. For linear proj crossings a single or multiple waterbodies several times at separate and distinct locations, each crossing is considered a single and complete project for purposes of NWP authorization.”* | |  |
| **NWP 13 – Bank Stabilization** | * Clarify that NWP authorizes a wide variety of bank stabilization measures, not just bulkheads and revetments. * Clarify hat not all fill material must be placed on the bank. Some can extend into stream channel. However, limits haven’t changed. * Add provisions requiring proper maintenance and state that NWP also authorizes repair/maint of bank stabilz activities. * State that native plants approp for site must be used for bioengineering or veg stab. | | * Activity cannot impair surface water flow into or out of WOTUS. * Temp fills must be removed in their entirely and affected areas returned to pre-constr elevations. Can’t use invasive species. | |  |
| **NWP 14 – Linear Transportation Projects** | Add note referencing def. of “single and complete linear proj” – 33 CFR 330.6(d). | | Does not authorize storage bldgs, parking lots, train stations, aircraft hangars, or other non-linear features. | |  |
| **NWP 19 – Minor Dredging** | Add reqm’t that dredged material must be deposited in an area that has no jurisdictional WOTUS, unless authorized by a separate Corps permit. | | Does not authorize dredging or degradation through siltation of coral reefs, submerged aquatic beds, ana-dromous fish spawning areas or wetlands. | |  |
| **NWP 21, 29, 39, 42, 43, 44, 50, 51, 52** | **Clarify that any losses of stream bed count towards the ½ acre loss limit.** | |  | |  |
| **NWP 23 – Approved Categorical Exclusions** | Change “environmental documentation” to refer to an enviro impact statement or enviro assessment. | | Categorical exclusions must be approved by Office of Chief of Engineers - see RGL 05-07. | |  |
| **NWP 33 – Temporary Construction, Access, and Dewatering** | Change the pre-construction notification (PCN) threshold to only require notification for work in navigable waters (Section 10 waters). | |  | |  |
| **NWP 35 – Maintenance Dredging of Existing Basins** | Require that dredged material be deposited in an area w/ no jurisdictional WOTUS, unless authorized by a separate Corps permit. | |  | |  |
| **NWP 41 – Reshaping Existing Drainage Ditches** | Remove PCN requirement. | | Reshaping drainage ditch cannot increase capacity of ditch or drain addt’l WOTUS. Does not authorize relocation of drainage ditches constructed in WOTUS. | |  |
| **NWP 43 – Stormwater Management Facilities** | * Clarify that stormwater or wastewater mgmt facilities that meet the criteria at 33 CFR 328.3(b)(6) are not WOTUS, and maintenance does not require a Section 404 permit. * Clarify that any losses of stream bed count towards the ½ acre loss limit. | | * Does not authorize construction of new stormwater mgmt facilities in perennial streams. * Maintenance does not require PCN if limited to restoring orig design capacities. Also authorizes low-impact dev integrated mgmt features. | |  |
| **NWP 44 – Mining Activities** | * Clarify that for mining activities in non-tidal open waters, the ½ acre loss limit applies to the mining area. The loss of non-tidal wetlands plus the mining area in non-tidal open waters cannot exceed ½ acre. * Clarify that any losses of stream bed are applied to the ½ acre loss limit. | | PCN must include reclamation plan if reclamation is required by other statutes. | |  |
| **NWP 45 – Repair of Uplands Damaged by Discrete Events** | Provide district engineer with authority to waive 12-month limit for submitting PCN if permittee can demonstrate funding, contract, or similar delays. | | PCN must be submitted to district engineer w/in one yr of date of damage; work must start or be under contract w/in two yrs of date of damage, unless waived in writing. | |  |
| **NEW!**  **NWP A – Removal of Low Head Dams** | This new NWP is proposed to authorize the removal of low-head dams for river restoration and public safety. | | A low-head dam is defined as a dam built to pass upstream flows over the width of the dam crest on an uncontrolled basis. | |  |
| **NEW!**  **NWP B – Living Shorelines** | This new NWP is proposed to authorize fills to within 30 feet of the mean high water mark and 500 feet along the bank of navigable waters for construction and maintenance of living shorelines for shore erosion control. Living shorelines consist of natural and man-made materials to establish and maintain marsh fringes or other living elements to reduce erosion while retaining or enhancing ecological processes. May include stone or reef structures to protect the shoreline from low to moderate waves. | |  | |  |
| **NEW!**  **General Condition  (GC) 31 – Activities Affecting Structures or Works Built by the US** | This new GC is proposed to ensure no activity potentially authorized by a NWP can proceed until the project proponent received permission under 33 USC 408 to alter or occupy structures or works built by the U.S. | |  | |  |
| **GC 23 – Mitigation**  **(See also below for more on mitigation topic.)** | The Corps proposes to clarify that if the district engineer determines the adverse environmental effects of the proposed activity will be more than minimal, the applicant may 1) apply for an individual permit or 2) prepare a mitigation proposal to reduce effects to no more than min.  In addition, modify language to state:   * That compensatory mitigation for stream losses *should* be provided through rehabilitation, enhancement, or preservation (to be consistent with 33 CFR 332.3(e)(3)); * That compensatory mitigation provided through riparian areas can be accomplished by restoration, enhancement, or preservation of those areas; * That restored riparian areas should consist of native species; * That if the district engineer determines compensatory mitigation is required for the proposed NWP activity, the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu credits (consistent with the 2008 Mitigation Rule, 33 CFR 332.3(b)); and * That compensatory mitigation to offset losses of specific functions of WOTUS should only be required by district engineers when those losses are caused by regulated activities. | |  | |  |
| **GC 32 – Pre-construction Notification (PCN)**  **(See also below for more on PCN topic.)** | * Add statement that PCN should identify specific NWP(s) project proponent wants to use to authorize the proposed activity. * Require a description of mitigation measures applicant intends to use to reduce adverse enviro effects of proposed activity. * For linear projects, clarify that PCN should identify all WOTUS crossings that require DA authorization. * Add reqm’t that PCN include statement confirming that proj proponent has submitted written request for section 408 permission, if the proposed activity will alter or occupy structures or works built by U.S. (see NEW GC 31). * Modify language to allow applicants to submit PCNs as electronic files. * Clarify when agency coordination is required and the procedures for agency coordination (e.g., NWP 13, NWP 48). | |  | |  |
| **\*\* The Corps has requested comment on several other important issues, as highlighted below. \*\*** | | | | | |
| **Acreage and Linear Foot Limitations** | The Corps is seeking comment on whether to retain the ½ –acre limit that is imposed on certain NWPs [NWP 12, 14, 21, 29, 39, 42, 43, 44, 50, 51 and 52] or to impose different acreage limits on these NWPs. | Comments should explain how your recommended changes to acreage limits would help the NWP program continue to comply with Congressional intent for a streamlined process for authorizing regulated activities that result in no more than minimal individual and cumulative adverse environmental effects. | |  | |
| **“Waters of the United States” (WOTUS) Definition** | The Corps is seeking comment on how the 2015 revisions to the definition of WOTUS might affect the applicability & efficiency of the proposed NWPs. |  | |  | |
| **Pre-construction Notifications (PCN)**  **(See also above “GC 32 – Pre-construction Notification.”)** | The Corps is seeking comment on:   * Changing the PCN “thresholds” for certain NWPs (see above e.g., NWP 33 & NWP 45), or perhaps all those NWPs that require PCN; * Eliminating the PCN requirement for certain NWPs (see above e.g., NWP 41); and * Developing a standard PCN form for use with the 2017 NWPs. *There will be a separate* Federal Register *notice seeking comment on this form.* | The purpose of a PCN is to give  the district engineer an opportunity to  review a proposed NWP activity  (generally 45 days after receipt of a  complete PCN) to ensure that the  proposed activity (*i.e.,* discharges of  dredged or fill material into WOTUS and/or structures or work in navigable waters) is authorized by an NWP. | |  | |
| **Waivers** | The Corps is seeking comment on five aspects of waivers: (1) making changes to the numeric limits that can be waived; (2) whether to retain the authority of the district engineers to issue activity-specific waivers on certain NWP limits; (3) whether to impose a linear foot cap on certain waivers; (4) whether to impose a linear foot cap on losses of intermittent and ephemeral stream bed potentially eligible for certain waivers; and (5) whether to require compensatory mitigation to offset all losses of stream bed. | Certain NWPs have a 300-linear foot limit for losses of stream bed. In the proposal, the following NWPs have certain limits that can be waived with a written determination of a district engineer after review of a PCN: NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, and 52. (For most of these NWPs, the total loss of WOTUS cannot exceed 1⁄2 -acre. | |  | |
| **Mitigation**  **(See also above “GC 23 – Mitigation.”)** | The Corps is seeking comment on ways to improve how compensatory mitigation conducted under the NWP program is implemented to offset direct, indirect, and cumulative effects. The Corps is particularly interested in factors which district engineers would consider for deciding when and how much mitigation may be necessary and what additional information could be considered to help inform their mitigation decisions. |  | |  | |

**\*\*\*Please feel free to flag additional issues in the space below.\*\*\***

**QUESTIONS?**

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