

SUPPLEMENTAL INFORMATION ON PROPOSED REVISIONS TO NATIONWIDE PERMITS

Summary Prepared by AGC of America

The public comment period for the proposed revisions to the Nationwide Permits (NWP) will be open for 60 days once it is published in the *Federal Register*. As of this writing, the proposal has not been published. Once the comment period opens, the public can submit feedback on www.regulations.gov (docket number COE-2020-0002). [Click here](#) for the pre-publication version of the proposal.

AGC seeks member input to better inform the association's response to the proposal. What, if any, of the changes do you support? Do you have recommendations to how the NWP can be improved? Please send feedback to AGC's Melinda Tomaino at melinda.tomaino@agc.org by September 30, 2020.

The Process Ahead

In addition to the U.S. Army Corps of Engineers' (Corps) proposed changes to the federal Nationwide Permits (NWP), the Corps districts may also propose further restrictive terms and regional conditions on each NWP. The federal NWP proposal will be available for public comment within 60 days of its publication in the *Federal Register* (not published as of this writing). The Corps districts will have separate public notices and will solicit public comment at a district-wide level for regional conditions. Furthermore, the Corps district offices will coordinate with states and tribes to request water quality certifications and with state agencies responsible for coastal zone management to fulfill obligations within those programs. This process may result in additional conditions placed on a federal NWP's use (regional conditions cannot be less restrictive than the federal NWP). Corps regional conditions may add time of year restrictions, add pre-construction notification requirements, and even revoke the use of certain NWP in a particular watershed, for example.

If a construction firm regularly works in a specific Corps district, it may prove beneficial to participate in the district process as those additional conditions will apply to projects in those areas seeking to use an NWP. The Corps will post copies of the district public notices in the www.regulations.gov docket for the federal NWP rulemaking (docket number COE-2020-0002). However, comments on proposed Corps regional conditions must be sent to the Corps district identified in the public notice. Only comments on the federal proposal should be submitted through the federal NWP rulemaking docket.

Within the proposal, the Corps addresses the status of existing permits and seeks comment on a possible change to the expiration dates. The Corps proposal states that currently authorized activities (under the 2017 NWP) would remain authorized until March 18, 2022, and that verification letters continue to be in effect until that time, unless a different expiration date is specified in the letter. However, the Corps requests comment on changing the expiration date of the 2017 NWP to the day before the 2020 NWP go into effect in order to avoid having two sets of NWP in effect at the same time.

Broad Changes

Before looking at proposed changes to specific NWP, the Corps is proposing changes that would impact multiple NWP. AGC would like to highlight four of those proposed changes here for member feedback: 1) use of an acreage limit instead of a linear-foot limit for losses of stream bed; 2) use of a 1/10-acre threshold for requiring compensatory mitigation for losses of stream bed; 3) modifications to the pre-

construction notification process; and 4) notification to non-federal applicants on need for historic properties consultation.

First, the Corps is proposing to remove the 300-linear-foot limit for losses of stream bed and use instead a 1/2-acre limit and pre-construction notification (PCN) requirements.¹ This change would apply to NWP 21, 29, 39, 40, 42, 43, 43, 44, 50, 51, and 52. The Corps requests comment on switching to the 1/2 -acre limit combined with reliance on the PCN process and changes to the mitigation general condition (see below) to continue to ensure the program results in no more than minimal individual and cumulative adverse environmental effects. The Corps also requests comment on situations where linear feet would more accurately represent stream bed loss. If stream bed loss should continue to be calculated in linear feet, the Corps requests legal, regulatory, policy or scientific bases for doing so. The Corps also requests comment on an alternative hybrid approach that would continue to quantify losses of stream bed in linear feet if the authorized activities would only result in the loss of stream bed.

Second, the Corps is proposing to modify the General Condition for Mitigation (GC 23) to add a 1/10-acre threshold for requiring compensatory mitigation for losses of stream beds that require pre-construction notification (unless an activity-specific waiver is issued). The Corps justifies this change to strengthen mitigation requirements for the NWP 21 affected by the change from 300-linear-foot limit to the proposed 1/2-acre limit. The Corps asserts that the 1/10-acre threshold has been effective for mitigating wetland losses. The Corps is proposing other changes to this general condition, such as changing paragraph (e) to read “only native species should be planted” instead of “restored riparian areas should consist of native species” as is currently required. The Corps asserts that this would allow for the normal plant community development process to occur, which will likely include some non-native species.

Third, the Corps is proposing to modify the pre-construction notification process. Some of the changes are highlighted below.

- The proposal would enable work under NWP 21, 49, and 50 proceed if the district engineer does not respond to the PCN within 45 days—consistent with other NWP 21 that require PCNs.
- The proposal also modifies the different requirements of a complete PCN. One of the changes would clarify that the PCN must identify non-PCN NWP 21 that are used to authorize any part of the proposed project or related activity, including separate and distant crossings of waters and wetlands for linear projects. The district engineer will use this information to evaluate cumulative impacts of the linear project.
- Another proposed change would replace “perennial, intermittent, and ephemeral streams” with “streams” and require a delineation of those streams in the PCN. This delineation of streams would be used to calculate the area of stream bed that would be filled or excavated and would contribute to the total loss of stream bed count (plus the losses of any other non-tidal waters and wetlands). The Corps would rely on the proposed 1/2 -acre limit for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 (as discussed above).

¹ The Corps presents its rationale for this change: 1) the number of tools available (such as the PCN process, mitigation, regional conditions) to ensure NWP activities result only in no more than minimal individual and cumulative adverse environmental impacts; 2) acreage more accurately quantifies the losses authorized by NWP 21 (vs. linear feet which does not account for impacts to wider streams); 3) provide consistency in the numeric limits for these NWP 21 for all non-tidal waters of the United States; 4) further streamline the NWP authorization process and advance the objective of the NWP Program (authorize with little delay or paperwork certain activities having minimal impacts).

Fourth, the proposal would require the Corps to notify a non-federal applicant if National Historic Preservation Act consultation (under Section 106) is necessary within 45 days of the determination of a complete application.

Changes to Selected NWP

In this section, AGC highlights some proposed changes to a selection of NWPs that the construction industry uses, based on prior feedback from AGC members. Note: This is not a comprehensive list of all the changes to the NWPs. Furthermore, some NWPs that contractors use, such as NWP 33 – Temporary Construction, Access and Dewatering, may have no proposed changes to the text. Please refer to the proposal for more details on these and all proposed changes to NWPs.

- NWP 3 - Maintenance – propose to modify paragraph (a) to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require DA authorization at the time it was constructed. Also proposing to restore, with minor change, the provision that authorizes the placement of new or additional riprap to protect the structure (if it is the minimal necessary to stabilize the structure) that was in the 2007 NWP 3.
- NWP 12 – Oil and Natural Gas Pipeline Activities – propose modifying this NWP to limit it to oil and natural gas pipeline activities (see the following section below for two new NWPs “C” and “D”). Would require PCNs for activities that meet one of three thresholds (streamlined): if a section 10 permit is required; if the discharge would result in the loss of greater than 1/10-acre of waters of the United States; or if the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline along the majority of the distance of the overall project length.
- NWP 13 – Bank Stabilization Activities - propose to add a note to this NWP to make prospective permittees aware of the of the availability of NWP 54 (Living shorelines) to encourage them to consider living shorelines as an alternative to other approaches to bank stabilization in coastal waters. Not intended to convey a preference for a particular approach.
- NWP 14 – Linear Transportation Projects – propose to add “driveways” to the list of examples of the types of linear transportation projects authorized. The list of examples was not intended to be an exhaustive list.
- NWP 19 – Minor Dredging – propose increasing the limit for the amount of material dredged from navigable waters of the United States from 25 cubic yards to 50 cubic yards. Is 30 or 100 cubic yards more appropriate?
- NWP 39 – Commercial and Institutional Developments - propose to remove the 300-linear-foot limit for losses of stream bed. Adding “by the Corps” to clarify that the Corps, not the permittee, will send a copy of the PCN and verification to the Department of Defense Siting Clearinghouse.
- NWP 41- Reshaping of Existing Drainage and Irrigation Ditches – propose adding “irrigation ditches” to this NWP.
- NWP 43 – Stormwater Management Facilities – propose removing the 300-linear-foot limit for losses of stream bed from this NWP. Will rely on the 1/2-acre limit, PCN review process, and regional conditions. Propose to add the phrase “such as features needed” after “into waters,” because green infrastructure may be constructed for purposes other than meeting targets established under TMDLs.
- NWP 44 – Mining Activities – Propose to modify paragraph (b) to address work in non-tidal navigable waters of the United States subject to section 10 of the RHA. Work regulated under section 10 would be subject to the ½-acre limit.

Proposed New NWPs

The Corps is proposing to add five new NWPs. The first two, A and B, relate to mariculture activities. The following two, C and D, reflect changes to NWP 12 to split that permit into three separate permits. NWP 12 would authorize oil or natural gas pipeline activities. NWP “C” would cover electric utility line and telecommunications and NWP “D” would authorize other utility lines that convey substances not covered by the proposed NWP 12 and NWP C, such as potable water, sewage, wastewater, stormwater, etc. The final new proposed NWP, “E”, relates to the construction, expansion, and maintenance of water reclamation and reuse facilities.

- a. *Seaweed Mariculture Activities – see proposal if applicable*
- b. *Finfish Mariculture Activities – see proposal if applicable*
- c. Electric Utility Line and Telecommunications Activities – New NWP proposed due to the splitting of NWP 12. Propose to retain the basic structure of NWP 12. Seeking comment on national standards or best management practices for electric utility line and telecommunications activities that would be appropriate to add to this NWP. Would define the term “electric utility line and telecommunications line” as “any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.” Would authorize substations constructed in non-tidal waters of the US. Authorizes foundations for associated towers, poles, and anchors. As well as access roads. It would authorize certain temporary structures and fills related to installing or replacing these lines. Would require PCNs for activities that require a section 10 permit (Rivers and Harbors Act) or that would result in the loss of greater than 1/10-acre of waters of the United States.
- d. Utility Line Activities for Water and Other Substances - New NWP proposed due to the splitting of NWP 12. Propose to retain the basic structure of NWP 12. Seeking comment on national standards or best management practices for utility lines that convey water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals that would be appropriate to add to this NWP. The Corps is proposing to include text from the 2017 NWP 12 related to trench excavation, temporary sidelaying, backfilling, substations (including pump and lift stations), foundations for above-ground utility lines, certain temporary structures and fills, etc. It would require PCNs for activities that require a section 10 permit (Rivers and Harbors Act) or that would result in the loss of greater than 1/10-acre of waters of the United States.
- e. *Water Reclamation and Reuse Facilities – see proposal if applicable*

Providing Feedback

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To AGC of America: AGC welcomes feedback from members to better inform our response to the proposal. Please send feedback to AGC’s Melinda Tomaino at melinda.tomaino@agc.org by September 30, 2020.