

# 2017 NATIONWIDE PERMITS: THE FINAL RULE

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# TOPICS

- What are the Nationwide Permits?
- Regional conditions
- Summary of changes in the 2017 Nationwide Permits
- Alternatives to the Nationwide Permits



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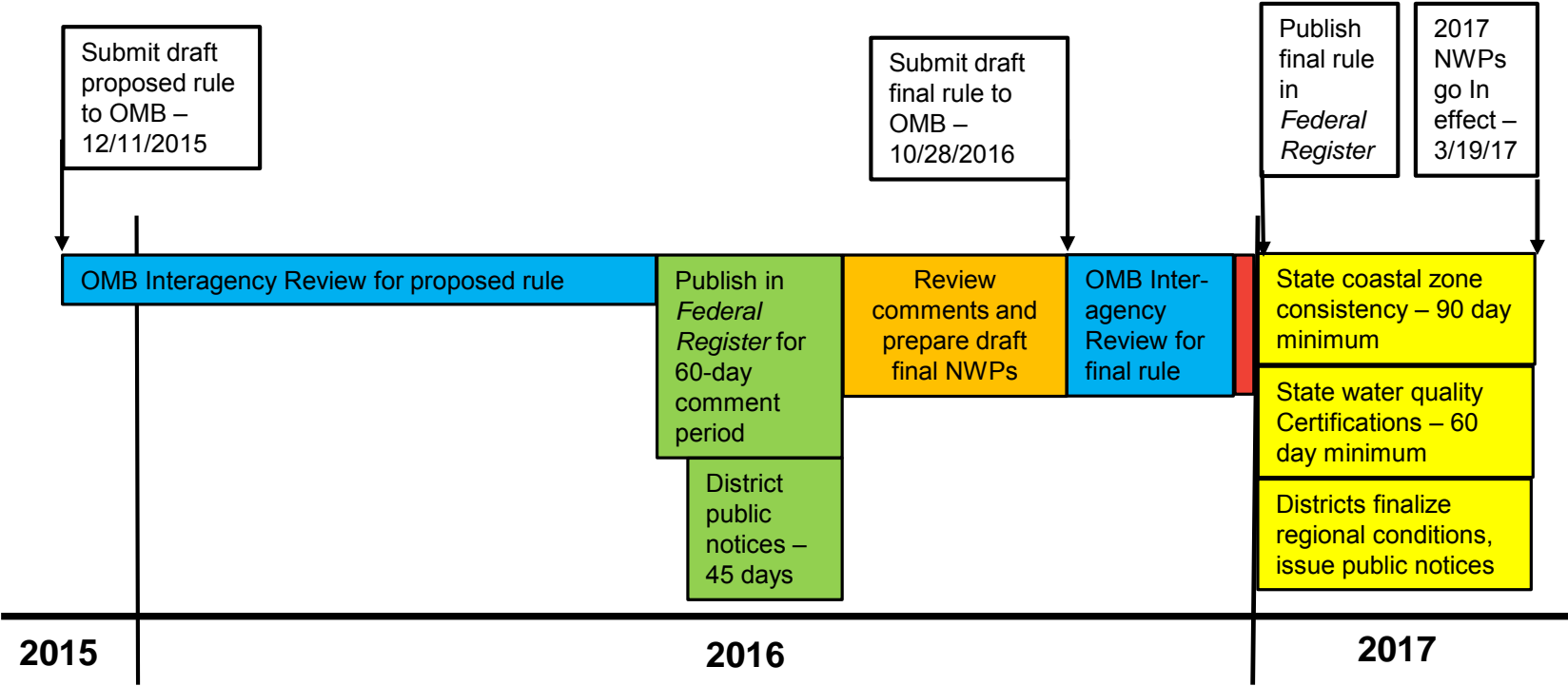


# NATIONWIDE PERMITS

- 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 subject to Administrative Procedure Act
  - Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- Nationwide permits (NWP) 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)



# NWP 2017 RULEMAKING PROCESS



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# COMMENT SUMMARY – JUNE 1, 2016 PROPOSED RULE

- Over 54,000 comments received
- Individual comments posted on [www.regulations.gov](http://www.regulations.gov) in docket number COE-2015-0017
- 53,200 comments opposed reissuance of NWP 12, utility line activities
- 700 comments opposed reissuance of NWP 21, surface coal mining activities
- Many comments supported or opposed issuance of new NWP to authorize construction and maintenance of living shorelines
- Other comments discussed certain NWPs, general conditions, or other aspects of the proposed rule and recommended specific changes



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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

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23 CFR (Reg.)  
Division and Headquarters of Engineers, Part III, Sec. 101.104



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# SUMMARY OF 2017 FINAL RULE

- **Nationwide permits**
  - 26 NWPs reissued with changes
  - 24 NWPs reissued with no changes
  - 2 new NWPs issued
- **General conditions**
  - Reissued 12 general conditions with changes
  - Reissued 19 general conditions without changes
  - Issued 1 new general condition
- **Definitions**
  - Added 5 new definitions



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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
  - Activities that also require §408 permissions
  - Activities in Wild and Scenic Rivers



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## DISCRETIONARY AUTHORITY

- Tailoring NWP's on regional or activity-specific basis to satisfy statutory requirement for general permits
- **Division Engineers** can modify, suspend, or revoke Nationwide Permits in a region
  - Add pre-construction notification requirements
  - Reduce acreage or other limits
  - Restrict or prohibit use in certain areas or waters
- **District Engineers** can modify, suspend, or revoke Nationwide Permits for specific activities
  - Add activity-specific conditions to Nationwide Permit to ensure no more than minimal adverse effects, such as mitigation requirements to reduce adverse effects

# 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 water quality certification or Coastal Zone Management Act consistency concurrence
  - Require another agency decision or approval



# CORPS REGIONAL CONDITIONING PROCESS

- Districts issue public notices on proposed regional conditions (shortly after proposed rule)
- Corps districts develop final regional conditions after final rule signed by Corps Headquarters
- Districts evaluate information gained from:
  - Consultation with tribes
  - Coordination with other agencies
  - Public comments
- Corps districts prepare supplemental documents
- Submit draft supplemental documents to Corps division for review and approval
- Corps districts issue public notice announcing final Corps regional 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
- Changes:
  - 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))
  - Removed provision in paragraph (b) authorizing riprap to protect the structure



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## NWP 12 – UTILITY LINE ACTIVITIES

- Authorizes crossings of jurisdictional waters and wetlands for utility lines and associated features for operation and maintenance of utility line
- 1/2-acre limit for utility line crossings, substations, foundations for overhead utility lines, and access roads
- Changes:
  - Clarified 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



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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:
  - Clarified that this NWP authorizes a variety of bank stabilization activities, including bulkheads, revetments, riprap, bioengineering, vegetative stabilization, and stream barbs
  - 1,000 linear foot cap for bulkheads
  - Authorize maintenance activities



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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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# 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
- Changes:
  - Pre-construction notification required only for those activities in waters subject to section 10 of the Rivers and Harbors Act of 1899





# 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 of 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 51 – LAND-BASED RENEWABLE ENERGY GENERATION FACILITIES

- Authorizes the construction, expansion, or modification of these facilities in non-tidal waters
- Limits:
  - 1/2-acre of non-tidal waters; 300 linear feet of stream bed
- Changes:
  - PCN threshold increased to 1/10-acre



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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



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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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# 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:
  - ▶ Added 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

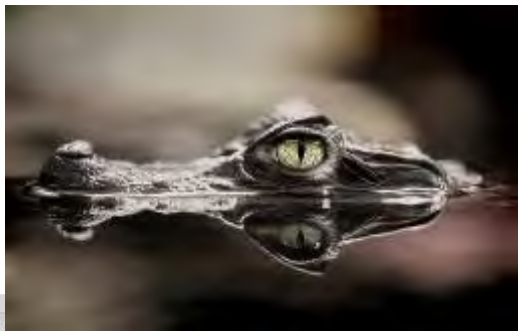


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## GC 18 – ENDANGERED SPECIES

- 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
- Clarified that other federal agencies are responsible for their own compliance with the Endangered Species Act
- May use ESA section 10(a)(1)(B) incidental take permit to fulfill requirements of this general condition and the ESA



## 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 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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# ALTERNATIVES TO THE NATIONWIDE PERMITS



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# TYPES OF GENERAL PERMITS

- Nationwide permit – issued by Corps Headquarters
- Regional general permit – issued by Corps districts
  - Authorizes specific category of activities
  - No more than minimal individual and cumulative adverse environmental effects
  - Issued to authorize:
    - Activities not covered by NWP
    - Similar activities with different terms and conditions (e.g., lower or higher acreage limits)
- Programmatic general permit – issued by Corps districts
  - Reduce duplication with other federal, state, or local regulatory program(s)



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# USE OF REGIONAL AND PROGRAMMATIC GENERAL PERMITS

- Wholesale replacement of NWP Program:
  - New England District revokes all the NWPs and uses state-based regional or programmatic general permits to authorize categories of activities similar to the NWPs
- Partial replacement of NWP Program:
  - Corps districts suspend or revoke certain NWPs and use regional or programmatic general permits in place of one or more NWPs
    - Maryland State Programmatic General Permit (most NWPs)
    - Louisville District's RGP-1 replaces 11 NWPs in Indiana
- Divisions cannot revoke NWPs on regional basis to require individual permits without documenting that more than minimal individual and cumulative adverse effects are occurring



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# QUESTIONS?



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