

The proposed 2017 Nationwide Permits

**Presentation for the
Association of State Wetland Managers**

David Olson
Headquarters, U.S. Army Corps of Engineers
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Topics

- What are Nationwide Permits (NWP)?
- What is in the proposed rule
 - ▶ What is new
 - ▶ What has stayed the same
- Implications to the States
- Subjects on which the Corps is seeking comments

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 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

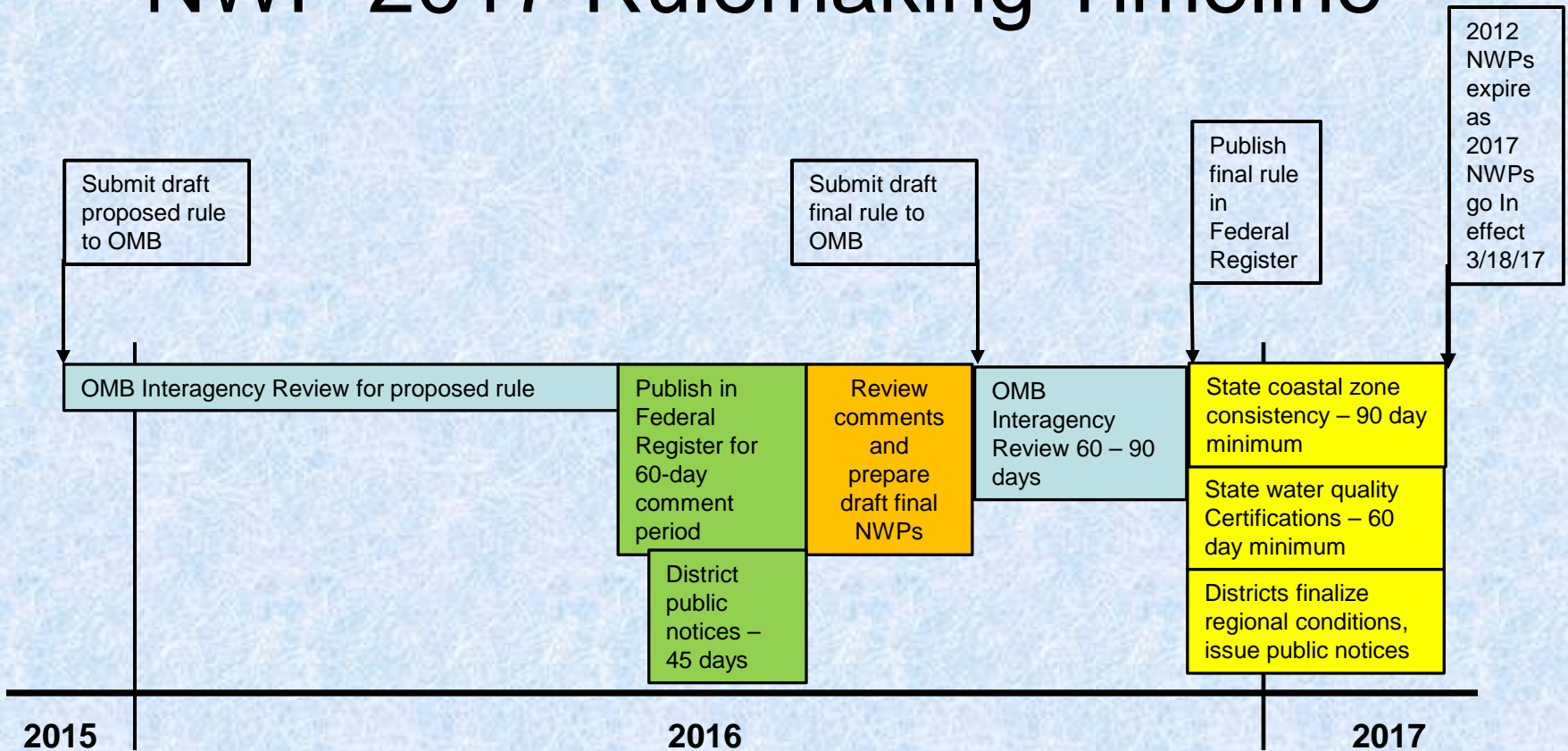
- Congressional intent (Clean Water Act Section 404(e))
 - ▶ Streamlined authorization process for small activities with no more than minimal adverse environmental effects
- Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- First issued in 1977
 - ▶ 15 nationwide permits
- Current nationwide permits expire on March 18, 2017
 - ▶ 50 nationwide permits
 - ▶ 31 general conditions

Summary of June 1, 2016 proposed rule

- Propose to reissue 50 existing NWP's
 - ▶ 26 NWP's – no changes proposed
 - ▶ 24 NWP's – some changes proposed
- Propose to issue two new NWP's
 - ▶ Removal of low-head dams
 - ▶ Construction and maintenance of living shorelines
- Propose one new general condition
 - ▶ Activities affecting structures or works built by the United States (federal projects)



NWP 2017 Rulemaking Timeline



Content of June 1, 2016 Proposed Rule

Proposed changes to NWP

- NWP 3 – Maintenance
 - ▶ Clarify that NWP authorizes removal of previously authorized structures or fills
 - ▶ Authorize use of timber mats, if Corps authorization required



Proposed changes to NWP's

- NWP 12 – Utility line activities
 - ▶ Clarify that for utility lines, the Corps is only authorizing crossings of waters of the United States
 - ▶ Authorize use of timber mats, if Corps authorization required
 - ▶ Authorize activities to address inadvertent returns of drilling muds during sub-soil fractures (frac-outs), if Corps authorization required



Proposed changes to NWP

- NWP 13 – Bank stabilization activities
 - ▶ Clarify that this NWP authorizes a variety of bank stabilization activities, not just bulkheads and revetment
 - ▶ 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



Proposed changes to NWP's

- NWP 21 – Surface coal mining activities
 - ▶ Remove grandfather provision for activities authorized under 2007 NWP 21
 - ▶ All authorized activities subject to 1/2-acre limit, as well as 300 linear foot limit for loss of stream bed
- NWP 29 – Residential developments
 - ▶ Clarify that any losses of stream bed subject to the 300 linear foot limit count towards the 1/2-acre limit
 - ▶ Similar changes to 9 other NWP's that have these 1/2-acre and 300 linear foot limits

Proposed changes to NWP's

- NWP 33 – Temporary construction, access, and dewatering
 - ▶ Propose to require pre-construction notification only for activities in waters and wetlands subject to Section 10 of the Rivers and Harbors Act of 1899
- NWP 39 – Commercial and institutional developments
 - ▶ Add wastewater treatment facilities to list of examples of attendant features

Proposed changes to NWP's

- NWP 44 – Mining activities
 - ▶ Clarify application of 1/2-acre limit to activities in non-tidal open waters (e.g., rivers) and to activities in non-tidal wetlands
 - ▶ The mined area in open waters plus the loss of non-tidal wetlands cannot exceed 1/2-acre
- NWP 45 – Repair of uplands damaged by discrete events
 - ▶ Allow district engineer to waive the 12-month notification deadline if permittee can demonstrate funding, contract, or similar delays after major events

Proposed changes to NWP's

- NWP 48 – Commercial shellfish aquaculture activities
 - ▶ Define “new” activities as activities occurring in areas where no shellfish aquaculture occurred during the past 100 years
 - ▶ Remove notification requirement for dredge harvesting, tilling, and harrowing in areas inhabited by submerged aquatic vegetation
 - ▶ Notification must specify all species planned to be cultivated during the 5-year period the NWP is in effect



Proposed changes to NWP's

- NWP 52 – Water-based renewable energy generation pilot projects
 - ▶ Add floating solar panels in navigable waters, with 1/2-acre size limit
 - ▶ Clarify that hydrokinetic renewable energy generation projects authorized by the Federal Energy Regulatory Commission do not require Corps authorization under the Rivers and Harbors Act of 1899

Proposed new NWP

- NWP A – Removal of low-head dams
 - ▶ Developed to facilitate river and stream restoration activities, enhance public safety
 - ▶ Restore river connectivity, remove hazard for swimmers and small craft users
 - ▶ Propose to define “low-head dam” as a dam constructed across a stream that passes flows over the entire width of dam crest on an uncontrolled basis
 - ▶ Notification required for all activities



Photo credit:
Cleveland Museum of
Natural History

Proposed new NWP

- NWP B – Living shorelines
 - ▶ Authorize construction and maintenance of living shorelines for shore erosion control in low- to mid-energy coastal and lake environments
 - ▶ A substantial living component (e.g., sand fills planted with vegetation) in combination with hard structures such as reef structures or stone sills
 - ▶ Provide some shoreline ecological processes while reducing erosion



Proposed new NWP

- NWP B – Living shorelines
 - ▶ Structures and fills can extend no more than 30 feet from mean high water or ordinary high water mark (limit can be waived)
 - ▶ Maximum extent of 500 linear feet along the shore (limit can be waived)
 - ▶ Fills and structures in jurisdictional waters and wetlands must be the minimum necessary
 - ▶ Notification required for all activities
 - ▶ Does not authorize beach nourishment or land reclamation activities

Proposed changes to general conditions

- 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 managing federal agency determines the proposed NWP activity will not adversely affect the Wild and Scenic River designation or its study status



Proposed changes to general conditions

- 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

Proposed changes to general conditions

- 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

Photo credit:
David Webster



Proposed changes to general conditions

- GC 23 – Mitigation
 - ▶ Reorganize 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



Proposed changes to general conditions

- GC 31 – Activities affecting structures or works built by the United States (new GC)
 - ▶ Any NWP activity that also requires 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



Proposed changes to general conditions

- GC 32 – Pre-construction notification
 - ▶ No changes to the Corps' review process
 - ▶ Changes to content of 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 that do not require notification
 - ▶ As a separate action, the Corps is also proposing to develop a standard Pre-Construction Notification form
 - Notice and comment through a separate Federal Register notice

Proposed changes to general conditions

- GC 32 – Pre-construction notification
 - ▶ Proposed changes to agency coordination
 - Remove agency coordination for NWP 48 activities (commercial shellfish aquaculture activities)
 - Add 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
 - Add agency coordination for proposed NWP B activities (living shorelines) in excess of 500 linear feet, more than 30 feet from mean high water, or discharges into special aquatic sites

What's stayed the same?

- With the exception of the two new proposed NWPs and one new general condition, vast majority of the changes are clarifications
- Little or no proposed changes to processes



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

Pre-construction notification (GC 32)

- 45-day review period begins on date complete PCN is received by district
 - ▶ 30-day completeness review period when a PCN is received
 - If incomplete, notify the applicant and specify the additional information needed for a complete PCN
 - Corps district staff should only send one request for additional information
 - If applicant does not provide requested information, PCN is still incomplete
 - ▶ When complete PCN received, 45-day review period
 - ▶ Applicant cannot begin proposed NWP activity until:
 - Notified by district that activity may proceed under the NWP, or
 - 45 days pass after Corps district receives complete PCN (exceptions on next slide)

Pre-construction notification (GC 32)

- If no response from district after 45-day PCN review period, activity is authorized by the NWP
 - ▶ If applicant requested waiver, that limit is not waived (and activity is not authorized) without written verification by Corps district
- Exceptions:
 - ▶ Proposed activity might affect ESA-listed species or critical habitat (GC 18)
 - ▶ Proposed activity might affect historic properties (GC 20)
 - ▶ Applicant proposes to use NWP 21, NWP 49, or NWP 50
 - NWPs that authorize various surface coal mining activities
 - ▶ Discretionary authority is asserted by district

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 B 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



District engineer's decision

- Section D of the proposed NWP
- 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

District engineer's decision

- 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

Regional and activity-specific conditions for NWP's

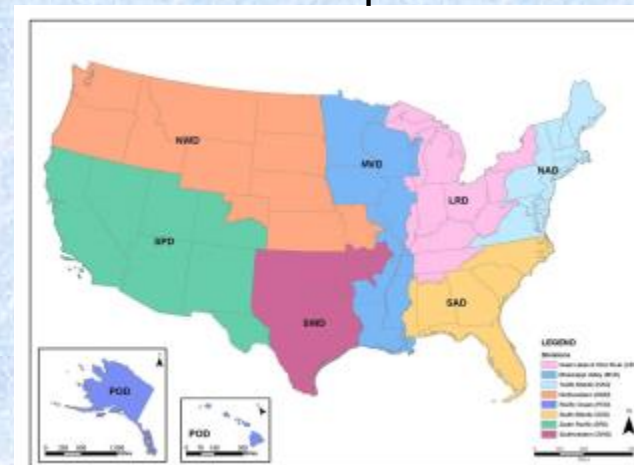
- Permit conditions must be:
 - ▶ Directly related to the impacts of the proposal
 - ▶ Appropriate to the scope and degree of those impacts, and
 - ▶ Reasonably enforceable
- Conditions necessary to satisfy legal requirements, such as:
 - ▶ Water Quality Certification
 - ▶ Coastal Zone Management Act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

Source: 33 CFR 325.4

Regional conditions for NWP

- 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 approval

Corps Divisions



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

What might the changes mean to States?

- Most changes are clarifications expected to have little impact on the number of activities authorized by NWP
- Proposed new NWP for living shorelines would assist states that have established preferences for living shorelines
- Proposed new NWP for low-head dam removal will help support state initiatives for restoring streams, fisheries, and public safety



Comments sought on:

- All the nationwide permits, general conditions, and definitions, as well as application (pre-construction notification, or PCN) procedures
- Changes in NWP terms and conditions to address 2015 final rule defining “waters of the United States” to continue authorizing activities with no more than minimal adverse environmental effects, such
 - ▶ Acreage limits (no changes, raise, lower?)
 - ▶ Pre-construction notification thresholds (no changes, raise, lower?)

Comments sought on:

- The use of waivers for certain NWP limits (e.g., the 300 linear foot limit for losses of stream bed)
 - ▶ Whether to retain waivers
 - ▶ Changing numeric value of limits that can be waived
 - ▶ Whether to cap waivers for 500 linear foot limit for NWP 13 bank stabilization activities, or the 20 foot width for boat ramps authorized by NWP 36
 - ▶ Whether to impose a linear foot cap on waivers of the 300 linear foot limit for losses of stream bed (e.g., NWP 29, residential developments and 9 other NWPs)
 - ▶ Whether to require compensatory mitigation for all losses of jurisdictional waters and wetlands authorized by waivers

Comments sought on:

- How to make NWP 13 (bank stabilization) and proposed new NWP B (living shorelines) as equitable as possible
- Are clarifications needed for NWP 40 (agricultural activities), such as its applicability to blueberry production?
- Clarifications or changes to NWP 41 (reshaping drainage ditches) that would encourage more landowners to reshape their ditches to improve water quality



Comments sought on:

- For NWP 52 (water-based renewable energy generation pilot projects):
 - ▶ Removing the limitation to pilot projects, and how many generation units should be authorized for permanent projects
 - ▶ The proposed 1/2-acre limit for floating solar panels
- Alternative approaches for defining “low-head dams” for proposed new NWP A (removal of low-head dams)
- For proposed new NWP B (living shorelines), the 30 foot limit for structures and fills channelward from mean high water, and the ability for district engineers to waive that limit

Comments sought on:

- Ways to improve compensatory mitigation for NWP activities to offset direct, indirect, and cumulative effects caused by those activities
- Suggestions for factors district engineers should consider on when to require compensatory mitigation for NWP activities, and how much should be required



Submitting comments

- There are several ways to submit comments:
 - ▶ Federal eRulemaking Portal:
<http://www.regulations.gov> (docket number COE-2015-0017)
 - ▶ E-mail: NWP2017@usace.army.mil
 - ▶ Mail: U.S. Army Corps of Engineers, Attn: CECW-CO-R, 441 G Street NW, Washington, DC 20314-1000
- Draft decision documents and regulatory impact analysis are also available for review and comment in docket number COE-2015-0017

Questions?

