

## **Final Rule: Issue, Reissue, and Modify Nationwide Permits Talking Points, Key Messages, and Questions and Answers 13 January 2021**

**Coordinating Instructions:** This document in its entirety is considered FOR OFFICIAL USE ONLY and may not be released as a complete document.

The information contained within this document may be used to verbally and in writing inform the public, media and other stakeholders about the final rule and the Nationwide Permit program.

### **Talking Points**

- Issuance of these NWP is culmination of years of effort at all levels of the USACE organization, across the interagency, and with the public, to increase the efficiency and effectiveness of the nationwide permit program while ensuring that all environmental protections remain strong.
- The proposed rule solicited input on the reissuance, modification, and issuance of a package of a total of 57 nationwide permits, including five new permits. This final rule issues 12 existing nationwide permits with modifications and issues four new nationwide permits.
- USACE prioritized the finalization of these 16 nationwide permits at this time to ensure that the most efficient and effective permitting tools were available to the public and our regulators as the nation emerges from the pandemic that has touched so many lives over the past year.
  - The permits that this rule finalizes authorize minimally impacting activities associated with the construction of, for example, housing and commercial development, renewable energy, food production, electric and telecommunications lines, and water utility lines.
  - USACE identified these activities, and the efficiencies that are finalized in the permits, as a priority to accomplish in advance of the normal 5-year cycle of nationwide permit renewal.
- USACE has the authority to issue, reissue, revoke, or suspend nationwide permits at any time; we have taken this action in the past and have issued new nationwide permits out of cycle and have also suspended nationwide permits at various times and for varied reasons.
- The remaining 40 NWPs that have not been finalized by this rule are expected to be finalized in the coming months to also provide meaningful and streamlined authorizations.

### **Key Messages**

**MESSAGE 1:** The U.S. Army Corps of Engineers announced January 13, 2021, the publication of the 2021 Nationwide Permits (NWPs) in the Federal Register.

- The 2021 NWPs include 12 reissued and four new nationwide permits for work in wetlands and other waters that are regulated by Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899.

- The 12 reissued and four new NWP's are the culmination of a notice of proposed rulemaking published in the Federal Register on September 15, 2020, for a 60-day public comment period, and interagency review and comment.
- The 12 reissued and four new NWP's enable activities such as renewable energy, residential and commercial development, and food production if those activities are done in a manner that has no more than minimal adverse effects to the environment.
- The 12 reissued NWP's will provide greater regulatory efficiency and clarity, and reduce burdens on the regulated public while ensuring appropriate environmental protection for the nation's aquatic resources.
- Two of the four new NWP's are related to finfish and seaweed mariculture activities. The other two new NWP's are related to the construction and maintenance of electric utility lines and telecommunication activities or the construction and maintenance of utility lines for water or other substances in regulated waters.

**MESSAGE 2:** The 12 reissued and four new nationwide permits take effect March 15, 2021.

- All 2017 NWP's remain in effect until the NWP's issued by this rule take effect March 15, 2021. The twelve 2017 NWP's being replaced will expire March 14, 2021, the day before the reissued NWP's will take effect.
- The reissued NWP's will replace 12 of the 52 NWP's published in 2017. The 12 reissued and four new NWP's will be subject to a new set of general conditions included in the 2021 final rule.
- The remaining 40 NWP's published in 2017 remain in effect with the same definitions and general conditions in the 2017 final rule through their scheduled March 18, 2022, expiration date, unless the USACE replaces those NWP's with reissued NWP's before that expiration date.

**MESSAGE 3:** Nationwide permits authorize activities that are similar in nature and cause only minimal adverse environmental impacts to aquatic resources separately or on a cumulative basis. Activities range from work associated with aids to navigation and utility lines to residential developments and maintenance activities.

- USACE has the authority to issue, reissue, modify, revoke, or suspend NWP's at any time.
- USACE generally updates the nationwide permits every five years. This is the fourth time that USACE has issued or modified NWP's outside of the normal 5-year cycle since they were first issued in 1977. The other three times occurred in 1984, 1995 and 2000.
- USACE is committed to ensuring its regulations, policies, and guidance are efficient and that the regulated public bears the minimum regulatory burden as necessary.
- As part of its ongoing process of continual improvement and the usual renewal process, USACE began its review of the NWP's shortly after their reissuance in 2017 that has led to the 12 reissued and four new NWP's. As part of the review, USACE solicited input from the public; state, local and tribal governments; non-governmental organizations; businesses and other interested parties.
- The 12 reissued and four new NWP's are the result of USACE efforts to improve the efficiency and effectiveness of its Regulatory Program while preserving environmental protection.

## Questions and Answers

### **Q1. Why has USACE decided to issue only a portion of the NWP's at this time and not the entire suite?**

A1. The 12 reissued and four new NWP's are the culmination of a notice of proposed rulemaking published in the Federal Register September 15, 2020, a 60-day public comment period, and interagency review and comment.

The 12 reissued and four new NWP's are permits that enable renewable energy activities, residential and commercial development, and food production if those activities are done in a manner that has no more than minimal adverse effects on the environment. They provide greater consistency and clarity and reduce burdens on the regulated public while ensuring appropriate environmental protection for the nation's aquatic resources.

The reissued NWP's are not significantly changed from 2017 but increase the efficiency of the permitting process.

### **Q2. Why is USACE releasing the reissued and new NWP's now outside the normal cycle? Are you making the changes now to beat the change in administrations?**

A2. USACE has the authority to issue, reissue, modify, revoke, or suspend NWP's at any time. USACE generally updates the nationwide permits every five years. This is the fourth time that USACE has issued or modified NWP's outside of the normal five-year cycle since they were first issued in 1977. The other three times occurred in 1984, 1995 and 2000.

The USACE Regulatory Program is dedicated to improving consistency, efficiency and effectiveness of the delivery of its mission. This includes insuring that all of its regulations, policies, guidance, and permitting instruments, such as the NWP's, are crafted in a manner that enables the public to receive decisions from USACE with as little regulatory burden as necessary, while still ensuring compliance with all applicable laws. After publication of the 2017 NWP's, USACE initiated a review of those NWP's, in part due to Executive Order (E.O.) 13783, but also because of the USACE longstanding commitment to bettering its processes. Subsequently, USACE solicited input from the public; federal, state, local, and tribal governments; non-governmental organizations; businesses and other interested parties on its NWP's that may be appropriate for repeal, replacement, or modification.

The development of this final rule and these NWP's has followed all applicable processes. USACE has been open and transparent about the review and has provided multiple opportunities for stakeholder and public comment. The effort has culminated with the 12 reissued and four new NWP's that, for example, enable renewable energy activities, residential and commercial development, and food production if those activities are done in a manner that has no more than minimal adverse effects to the environment.

### **Q3. What activities do the four new NWP's cover?**

A3. Two of the four new NWP's provide appropriate mechanisms for an efficient process to authorize structures in navigable waters for finfish and seaweed mariculture activities. The other two new NWP's provide appropriate processes to enable project proponents to obtain authorization to discharge dredged or fill material or to construct structures or do work in

regulated waters associated with the construction of electric utility lines and telecommunication activities or with the construction of utility lines for water or other substances.

**Q4. Are there any 2017 NWP USACE is not proposing to reissue or is proposing to eliminate?**

A4. No. USACE is reissuing 12 of the 52 existing 2017 NWPs. The remaining 40 NWPs from 2017 remain in effect with the same definitions and general conditions through their scheduled March 18, 2022, expiration date.

**Q5. Has USACE made any changes to NWP 12?**

A5. Yes, NWP 12 is modified to cover only oil and gas pipeline activities, leaving the ½-acre threshold as the limit for losses of waters of the United States.

**Q6. Has USACE removed the 300-linear-foot limit for stream impacts?**

A6. Yes. Removal of this limit provides equivalent quantitative limits (i.e., ½ acre) for all types of non-tidal waters subject to discharges of dredged or fill material authorized by these NWPs.

- Removal of the limit increases the availability of these 10 NWPs for use to authorize small impacts to stream beds that have no more than minimal adverse environmental effects.
- A Pre-Construction Notice including project specific plans is required for all these NWPs.
- The ½ acre limit for loss of non-tidal waters is retained.
- Division engineers may impose regional conditions to restrict the use of NWPs to address regional aquatic resource concerns.
- A district engineer retains authority to impose project specific verification conditions to address project specific resource concerns.
- The final rule reiterates multiple criteria in the district engineer's decision to inform the determination of "not more than minimal adverse environmental effects" or the need to assert discretionary authority and to process an individual permit.

USACE has also modified general condition 23 - Mitigation, to establish a compensatory mitigation requirement for losses of greater than 3/100-acre of streambed. This modification would make the compensatory mitigation requirement for stream bed loss equivalent to the requirement for compensatory mitigation requirements for wetlands in the NWP Program.

**Q7. Are permittees required to provide compensatory mitigation to offset losses of wetlands and waters caused by NWP activities?**

A7. In general, USACE may require compensatory mitigation for wetland losses in excess of 1/10-acre to ensure minimal impacts. USACE may also require compensatory mitigation for stream losses over 3/100-acre. Compensatory mitigation requirements added to NWP authorizations help maintain aquatic resource functions and services in watersheds.

**Q8. How do Nationwide Permits address cumulative effects to the aquatic environment?**

A8. USACE district engineers are required to evaluate cumulative adverse effects that occur as a result of activities authorized by the NWPs. To comply with the requirements of the National Environmental Policy Act and Section 404(e) of the Clean Water Act, HQUSACE evaluates potential cumulative impacts when it issues the NWPs. Division engineers can suspend or

revoke an NWP if the cumulative impacts of that NWP in a district or other geographic area (such as a watershed) would be more than minimal.

**Q9. What is a primary goal of the NWPs?**

A9. Nationwide permits authorize – with limited delay and paperwork – activities that are similar in nature and cause no more than minimal adverse environmental impacts to aquatic resources separately or on a cumulative basis. Activities range from work associated with aids to navigation and utility lines to residential developments and maintenance activities.

**Q10. What is the difference between an NWP and a Standard Individual Permit?**

A10. A standard individual permit is a type of USACE permit decision that is issued for a specific activity, after a public notice and comment period. A USACE district considers comments submitted in response to the proposed work described in the public notice, before issuing, or denying, the individual permit. In contrast, an NWP is issued by USACE Headquarters to authorize a category of activities. Although a public notice and comment period is required for the issuance of an NWP, specific activities are authorized by that NWP at the district level without a public notice. Some NWPs require submission of a pre-construction notification, which is reviewed by the USACE district to determine whether the proposed activity qualifies for the NWP. Certain NWPs also require USACE to coordinate proposals with other federal and state regulatory and resource agencies. Other NWPs do not require this review and can proceed as long as the proposed activity meets all of the terms and conditions of the NWP.

**Q11. Can USACE districts choose not to use the NWPs, and if so, what happens then?**

A11. USACE districts may choose to use other types of general permits instead of the NWPs, especially in cases where it could reduce duplication between USACE and state government, where the state government has implemented a regulatory program like the USACE program. In those cases, regional general permits are used in place of the NWPs to authorize activities with minimal adverse environmental effects. The regional general permits authorize minor activities like those authorized by the state regulatory program, which helps to reduce duplication.

**Q12. Has USACE coordinated these changes with other federal agencies?**

A12. Yes. These permits are issued following the rulemaking process, led by the Office of Management and Budget and following the Administrative Procedure Act and Executive Order 12866. Interagency review and comment followed the 60-day public comment period announced in the notice of proposed rulemaking published in the Federal Register on September 15, 2020, and also following the development of a draft final rule in December 2020.

**Q13. What is NWP E and why have you chosen not to address it at this time?**

A13. Proposed NWP E is proposed to authorize discharges of dredged or fill material and/or structures or work in related to construction of Water Reclamation and Reuse Facilities. This proposed NWP may be finalized in the future.