

Clean Water Act, Section 404 Permits for Flood Recovery Projects

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Clean Water Act, Section 404

General Permits for Flood Recovery

- General Permits applicable to a broad range of Flood Recovery Projects (FRPs)
 - Nationwide (General) Permits (NWP)
 - Regional General Permits (RGPs)
- NWP and RGP must comply with:
 - Specific Permit, General and Regional Conditions
 - **Not authorized for projects involving ESA or NHPA** until compliance established
 - Pre-construction Notification (PCN) Procedures
 - 401 Water Quality Certification - issued for all NWP & RGP in Colorado, except for projects on Native American Lands (Tribal 401 WQC review)
 - Compensatory Mitigation – **FRPs are viewed as self-mitigating**



Nationwide Permits (NWP) for Flood Recovery

- NWP 3 – Maintenance – legally existing , currently serviceable structure or fill
- NWP 12 – Utility Line Activities – including pipelines
- **NWP 13 – Bank Stabilization**
- NWP 14 – Linear Transportation Crossings – roads, bridges
- NWP 18 – Minor Discharges
- **NWP 27 - Aquatic Habitat Restoration, Establishment, and Enhancement Activities**
- NWP 31 – Maintenance of Existing Flood Control Facilities
- **NWP 37 – Emergency Watershed Protection and Rehabilitation**
- **NWP 45 – Repair of Uplands Damaged by Discreet Events**



NWP 37 –Emergency Watershed Protection & Rehabilitation

Authorizes work done by or funded by:

- **NRCS - Emergency Watershed Protection (EWP) Program**
- Also applicable USFS, DOI, OSM and FSA programs

NWP 37 authorizes a broad range of **EWP&R activities** based on Corps discretion

- Corps will apply NWP37 to all EWP, Phase 2 projects in CO
- ***PCN required** – Project-specific review to ensure Corps Minimal Effects Determination
- No specific conditions, but **must follow DOLA/CWCB 30% Design Guidelines**

***PCN required:** Applicant must wait until the Corps issues NWP verification or 45 calendar days before proceeding, unless an unacceptable hazard to life, significant loss of property, or economic hardship will occur.



NWP 37 –Emergency Watershed Protection & Rehabilitation

- **EWP Phase 2 projects receive federal funding**
 - **establishes a federal nexus** (major federal action under NEPA); and
 - **triggers NEPA review** under applicable and relevant federal regulations (ARARs)
- **NRCS is performing programmatic regulatory review of EWP Phase 2 projects (expedites Corps NWP 37 project review and approval):**
 - **EIS under NEPA** - covers the broad view of environmental impacts and benefits of a proposed decision with greater efficiency
 - **Programmatic BA for the North Counties under ESA** – review completed by USFWS and NRCS awaiting concurrence
 - **Programmatic Agreement with SHPO under NHPA** - where Section 106 consultation is not feasible



NWP 13 – Bank Stabilization

Authorizes **bank stabilization activities necessary for erosion prevention**, provided the activity meets all of the following criteria:

- No material is placed in excess of the **minimum needed for erosion protection**;
- Activity is **no more than 500 linear feet** along the bank, unless the Corps waives this criterion;
- Activity **will not exceed an average of one cubic yard per running foot** placed along the bank below the plane of the OHWM, unless the Corps waives this criterion;
- Activity **does not involve discharges of dredged or fill material into special aquatic sites**, unless the Corps waives this criterion;
- No material is placed in a manner that will be **eroded by normal or expected high flows**; and
- The activity is **not a stream channelization activity**.

***PCN required**: The Applicant must wait until the Corps issues an NWP verification or 45 calendar days have passed before proceeding



NWP 27 - Aquatic Habitat Restoration, Establishment, and Enhancement Activities

● Authorizes **restoration, enhancement, establishment and relocation*** of:

- Wetlands*
- Riparian areas
- Streams*
- Open waters*

provided **activities result in net increases in aquatic resource functions & services.**

***PCN required:** The Applicant must wait until the Corps issues an NWP verification or 45 calendar days have passed before proceeding



Nationwide Permit 27 Authorizes

- removal of accumulated sediments;
- installation, removal, and maintenance of small water control structures, dikes, and berms, and discharges of dredged or fill material to restore appropriate stream channel configurations after removal;
- enhancement, restoration, or establishment of riffle and pool stream structure;
- placement of in-stream habitat structures;
- modifications of the stream bed and/or banks to restore or establish stream meanders;
- backfilling of artificial channels;
- removal of existing drainage structures and filling, blocking, or reshaping of drainage ditches to restore wetland hydrology;
- installation of structures or fills necessary to establish or re-establish wetland or stream hydrology;
- construction of small nesting islands;
- construction of open water areas;
- vegetation reestablishment activities , including plowing or discing for seed bed preparation & planting native wetland species;
- re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed;
- mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation;
- **other related activities**; and
- compensatory mitigation projects, including mitigation banks and in-lieu fee projects.



NWP 27 - Aquatic Habitat Restoration, Establishment, and Enhancement Activities

Town of Lyons, St, Vrain Creek Design-Build FRP



NWP 45 - Repair of Uplands Damaged by Discrete Events

- Authorizes activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events; and
- Bank stabilization to protect the restored uplands.

Provided that the activities:

- must not exceed the contours, or OHWM, that existed before the damage occurred;
- minor dredging is limited to the amount necessary to restore the damaged upland area and does not significantly alter the pre-existing bottom contours of the waterbody; and
- work must commence, or be under contract to commence, within two years of the date of damage, unless this criterion is waived by the Corps.



Use of Multiple NWP's for Flood Recovery

- Impact authorized by the NWP's cannot exceed the limit of the NWP with the highest specified acreage limit
- Variability in Corps regional guidance/policy amongst Districts
 - Hold Pre-Application Meeting to confirm
- Example of use of multiple NWP's
 - City of Greeley, Bellvue Filtration Plant, Raw Water Ponds along Poudre River



Use of Multiple NWP's for Flood Recovery

City of Greeley, Bellvue Filtration Plant, Raw Water Ponds along Poudre River

NWP 13 – Bank Stabilization & NWP 45 – Repair of Uplands Damaged by Discreet Events



NWP Review and Renewal in 2016/2017

- NWPs are up for revision and renewal in 2016/2017
- Federal Register notice will be issued
- 90 day Public Notice/Comment period
- Final Notice in December 2016
 - Including 90-day Notification establishing the effective date

(Personal communication with Van Truan, Chief , Southern Colorado Regulatory Branch, Albuquerque District, U.S. Army Corps of Engineers, Pueblo, Colorado)



Regional General Permits (RGPs) for Flood Recovery

- RGP 12 - Aquatic Habitat Improvements for Stream Channels in Colorado (All Districts)
 - Requires coordination with CPW – recommend Applicant obtain a Letter of Support
 - Compensatory Mitigation - viewed as self-mitigating
 - Expires October 11, 2016
- RGP 53 (96-07) - Flood Related Emergencies in Colorado (All Districts)
 - Compensatory Mitigation - viewed as self-mitigating
 - Expires July 31, 2016



RGP 53 (#96-07) – Flood-related Activities in Colorado

Authorizes certain flood-related fill or excavation activities, other work associated with flood protection, and repair work for flood-damaged areas performed in waters of the U.S.

RGP 53 may apply to localized or widespread flood events and including:

- repair and reconstruction of existing roads;
- temporary levee construction and repair;
- bridge embankment repair;
- protection and/or repair of utility structures;
- bank protection/stabilization; and
- protection and restoration of intake structures.

Provided that:

- Applicant applies for RGP within one (1) year following the flood event (subject to Corps extension); and
- Applicant completes work within six (6) months from RGP issuance date; or a written request for a time extension submitted to Corps at least four (4) weeks before RGP expires, including justification.



CONCLUSIONS

Selecting the applicable 404 permit(s) based on Flood Recovery Project-specific circumstances is the key to timely review, approval, and implementation.

***Early coordination with the Corps, State and Watershed Group is the key!**

References

A Citizen's Guide to the Corps of Engineers: <http://www.americanrivers.org/assets/pdfs/reports-and-publications/citizens-guide-to-the-corp.pdf>

USACE Omaha District, Regulatory web page: <http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Colorado.aspx>

USACE Sacramento District, Regulatory web page: <http://www.spk.usace.army.mil/Missions/Regulatory.aspx>





ADDITIONAL THOUGHTS
and
QUESTIONS?

