# Analysis of BAAJA Amendments to CWA Section 404 Nationwide Permit Program

This document is an analysis of the Bipartisan American Affordability and Jobs Act of 2026's (BAAJA) proposed amendments to Section 404 of the Clean Water Act. It provides a background on the Nationwide Permit program and how it currently functions. It then provides an overview of how the BAAJA amendments would alter and expand the program.

## Nationwide Permitting Overview

Section 404(e) of the Clean Water Act authorizes the Army Corps of Engineers (Corps or Army Corps) to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. 1344(e)(1). The regulations governing how the Corps adopts and administers the Nationwide Permit (NWP) program are codified in 33 C.F.R. Part 330. Overall, the Nationwide Permit program was designed to streamline Clean Water Act Section 404 permits and Rivers and Harbors Act Section 10 permits for small projects with minimal impacts.

The latest version of Nationwide Permits was published in January 2026 and took effect in March 2026. Reissuance and Modification of Nationwide Permits, 91 Fed. Reg. 768 (Jan. 8, 2026).[1] As part of the rulemaking for the 2026 Reissuance, the Corps reported that approximately 55,000 projects proceeded under NWPs in the previous year.[2]

There are currently 57 NWPs that authorize specific Section 404 and/or Section 10 activity. The NWPs are accompanied by General Conditions (GCs), which apply to all NWPs unless specifically exempted. In order for a project to obtain coverage under a NWP, it must comply with the terms of the specific NWP and all of the GCs. So the NWP describes the specific Section 404 or Section 10 activity that authorizes, including any limits on the activity to ensure the impacts are minimal, and the GCs are a set of general guardrails to ensure that all NWP projects will have minimal impacts. In some instances, a proponent may need to submit a Pre-construction Notice (PCN) with information about the project for the Corps to verify that the project does qualify for NWP coverage. The thresholds for when a PCN is required are generally listed in the specific NWP and the GCs.

If a potential project meets all the requirements of the NWP and all of the GCs and no PCN is required, the project proponent can simply go forward with the project without notifying or receiving a verification from the Corps. If the NWP or GC requires a PCN, then the project proponent submits a PCN to the Corps. As part of the Corps' review, it evaluates projects on a case-by-case basis and makes a determination that the project either qualifies for NWP coverage,

[1] *Available at* https://www.federalregister.gov/documents/2026/01/08/2026-00121/reissuance-and-modification-of-nationwide-permits

[2] "Nationwide Permit Reissuance," U.S. Army Corps of Eng'rs (Jan. 8, 2026), *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/3210

or that the project will have more than minimal environmental impacts.[3] If the project will have more than minimal environmental impacts, the Corps can either issue conditions along with an NWP verification, or the Corps can require the project to go through the individual permitting process. 33 C.F.R. § 330.1(d); § 330.4(e)(2); § 330.6(a)(3)(i).

For example, if a property owner wants to build a boat ramp in a lake, that project may qualify for coverage under NWP 36 – Boat Ramps. 91 Fed. Reg. at 867. Under the terms of NWP 36, that project would be covered as long as the boat ramp does not exceed 50 cubic yards of fill, it is not more than 20 feet in width, the fill material meets certain criteria, and it would not be placed in a wetland or other special aquatic site. If the project meets all those conditions and all the GCs, it can move forward without notifying the Corps. However, if the project will exceed 50 cubic yards of fill, or will be larger than 20 feet in width, the property owner must submit a PCN to the Corps for verification that the larger footprint will not cause more than minimal adverse effects.

If the proposed boat ramp would meet all the requirements in NWP 36, but is in a location that has known tribal treaty resources, and some of those resources are listed as threatened or endangered under the Endangered Species Act, then the property owner would need to ensure that the project meets the requirements in GC 17 – Tribal Rights and GC 18 – Endangered Species. 91 Fed. Reg. at 877. In the case of GC 18, the property owner must receive a verification from the Corps before it can start any construction at all.

If the Corps receives a PCN for the proposed boat ramp, either because the project is beyond the threshold in the NWP or because it triggers a GC, the Corps evaluates whether the project will have more than minimal individual or cumulative adverse impacts on the environment. As part of the Corps' decision, the District Engineer will consider the direct and indirect effects of the NWP activity and the cumulative adverse effects. In addition,

> "The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity ( *e.g.,* partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region ( *e.g.,* watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination." 91 Fed. Reg. at 883.

[3] "The Corps establishes PCN thresholds for those NWP activities that have the potential to cause more than minimal adverse environmental effects, to provide the opportunity for district engineer to conduct an activity-specific review and to exercise discretionary authority and require individual permits for activities that will have more than minimal adverse environmental effects." 91 Fed. Reg. at 836

If the Corps determines that the boat ramp will have more than minimal adverse environmental impacts it can place conditions on the verification or require the property owner to apply for an individual permit.

Currently, the Nationwide Permit program acknowledges that not all NWPs are suitable for all regions. Some NWP activities may impact regions differently due to the activity itself, or there may be a drastic difference in the number of NWP projects per region causing larger impacts. In order to ensure that projects covered under NWPs only have minimal impacts, the individual Corps Divisions and Districts have some discretion on how NWPs are implemented in their respective regions. The Corps Districts can impose additional Regional General Conditions (RGCs) on the NWPs, or restrict the use of specific NWPs within their respective regions altogether if they have concerns for the aquatic environment or any factor of the public interest. 33 C.F.R. § 330.1(d)

For example, the Seattle District of the Army Corps added a regional condition requiring non-federal permittees to submit a PCN "for all NWPs associated with structures or fills in areas where Tribes have retained, via treaty, the right to fish in their usual and accustomed grounds and stations."[4] The Seattle District also has regional conditions addressing salmon and other fish in the region (RC 5, RC 6).

**Proposed Modifications to the NWP System in the BAAJA**

There are several changes to Section 404 in the BAAJA that would change the Nationwide Permit program. This document only highlights a few of the major changes and the impacts they would have on how the program works.[5]

First, BAAJA would limit the consideration of "environmental effects" to "only the effects on compliance with water quality requirement [in Section 401] of any discharge of dredged or fill material resulting from the activity[.]"

This completely alters what the Corps considers in whether to issue an NWP, and curtails the ability of Corps Divisions and Districts to evaluate environmental impacts of NWPs on a regional level and in individual project verifications. Currently, the Corps considers direct and indirect impacts to the aquatic environment, which is not limited to impacts to water quality requirements. The Corps also considers impacts to endangered and threatened species, historic properties, tribal treaty rights, impacts to migratory birds, as well as other federal laws and regulations that may be required. This means that the current NWP program could be out of compliance with other federal laws, including the requirement in the Clean Water Act that Corps

[4] "Special Public Notice," Seattle District, U.S. Army Corps of Eng'rs (March 10, 2026), *available at* https://puibrary.sec.usace.army.mil/api/download?id=660b1174-bead-471a-9043-217f5093dc23&filename=20260310-SPN-NWS-FinalRegionalConditions.pdf&token=&preview=true

[5] This document does not analyze the amendments codifying a number of NWPs.

permitting decisions must be made in compliance with the Section 404(b)(1) Guidelines[6] and the Rivers and Harbos Act.[7]

As a practical matter, this also means that a project seeking coverage under an NWP could destroy or severely degrade wetlands and waterways, but if the discharge material only minimally impacts water quality, that the project would still get NWP coverage. This also does not account for the different water quality standards between states and tribes, which may not be adequately considered by Corps headquarters as part of the NWP permitting process.

This may also eliminate or restrict the ability of tribes to advocate that projects with impacts to tribal resources must go through an individual permitting process to fully consider impacts to the tribe, its resources, and its members. Currently, the NWP program can consider the environment broadly, which can encompass tribal resources. With this BAAJA amendment, it is possible that tribes may only be able to advocate for permit conditions or for an individual permit process if the project would impact tribal water quality standards.

Second, BAAJA would also mandate that "any effects of a discharge of dredged or fill material into less than 2 acres of navigable waters to be a minimal adverse environmental effect."

This mandate completely ignores that projects of any size can have devastating impacts on the environment and the aquatic ecosystem. For scale, two (2) acres is slightly less in size than two full-sized football fields. Many NWPs currently limit the size of the coverage available before the applicant has to submit a PCN or apply for an individual permit. NWP 18, for Minor Discharges, requires that a project cannot cause a loss of more than 1/10 acre of a water of the United States and the quantity of fill material cannot exceed 25 cubic yards. NWP 18 also requires a PCN if the project is located in a special aquatic site, such as wetlands. 91 Fed. Reg. at 862. Even NWP 39, for commercial and institutional developments, a highly controversial NWP in the last rulemaking, limits impacts to ½ acres for NWP coverage and requires a PCN for all activities for Corps verification that the project does not cause more than minimal adverse environmental effects. 91 Fed. Reg. at 867-68. In both NWP 18 and NWP 39, the PCN process gives the Corps an opportunity to evaluate whether the projects themselves, which only have a small amount of fill, could have a more than minimal adverse impact to the environment. As a result, the Corps could require additional conditions or require an individual permit. This amendment would strip the Corps of that discretion for any project that has less than 2 acres of fill, regardless of the catastrophic impacts the project would have. This also means that projects much larger than 2 acres can qualify for NWP coverage as long as their direct fill is less than 2 acres. For example, a data center that would cover 50 acres but only have 1.5 acres of direct fill

[6] The guidelines state that "From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." 40 C.F.R. § 230.1(d).

[7] The NWP program also administers general permits under Section 10 of the RHA. It is unclear whether these amendments to the BAAJA would allow the Corps to continue to combine RHA general permitting with the NWP program.

into waters of the United States would be considered under the statute as having a minimal adverse effect without any regard for the actual environmental effects of the development.

In conjunction, these two BAAJA amendments would also strip the Corps Divisions of the ability they have to evaluate NWPs and to restrict or limit the use of NWPs within their regions. Currently, Corps Divisions can add regional conditions or revoke the use of NWPs if they will have a more than minimal adverse impact within the region. This has been a safeguard for the NWP program to work effectively and allow for the consideration of regional differences. However, limiting the evaluation of environmental impacts only to compliance with water quality standards and also mandating that all projects with less than 2 acres of fill into waters of the United States limits the Corps' ability to make a determination that certain NWPs may have a more than minimal adverse environmental effect within their specific regions.

These two BAAJA amendments alone would also increase the number of projects that receive NWP coverage by orders of magnitude. Currently, approximately 55,000 projects receive NWP coverage per year. The BAAJA amendments decrease the Corps' ability to evaluate environmental impacts and simultaneously increase the amount of discharge that would qualify for NWP coverage which would inevitably increase the number of projects covered under NWPs and increase the size of projects covered under NWPs.

Third, BAAJA severely limits judicial review of any of the NWPs. The bill places a statute of limitations on judicial review of a general permit (which includes NWPs) of 150 days after the date on which the permit was issued.

In conjunction with the language in BAAJA that extends the life of NWPs from 5 years to 10 years, this would mean that if a NWP was not challenged within 150 days, that the NWP would not be amended for another 10 years.

This poses two problems. First, it would limit legal challenges to NWPs that are brought on an "as applied" basis, which means that the NWP is unlawful as applied to a certain project or within a certain region. So if there is no project or verification under a potentially unlawful NWP within the first 150 days after the NWP is published, then there is no opportunity to file a legal challenge to the NWP.[8] Second, if a potentially unlawful NWP is not challenged within the 150 day time frame window, the public could be stuck challenging each of the individual verifications or individual uses of that NWP for 10 years, or until the NWP is amended.

In 2017, NWP 48 authorized infrastructure to facilitate shellfish aquaculture. Several groups in Washington state challenged the use of NWP within Washington state waters and Puget Sound because projects in the region would have significant environmental impacts and would also impact salmon that were listed as threatened under the ESA, as well as their critical

[8] NWPs are typically published in the Federal Register in January of the year they are reissued and have an effective date of March in that same year. The BAAJA amendment explicitly limits the statute of limitations to 150 days after the permit was issued. This could mean that there is even less time for judicial review in an "as applied" case, as there could be a lag between when the NWP is "issued" and when it becomes effective.

habitat. *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*, 417 F. Supp.3d 1354, 1365-66 (W.D. Wash. 2019). The court found that NWP 48 did not consider any regional data or the varied impacts that aquaculture activities can have within the state. The court then held that NWP 48 was unlawful as applied to the state of Washington. Underlying the decision was an acknowledgement that the Nationwide Permitting program cannot always account for regional impacts or regional considerations and the program might be inappropriate or some areas. As a result of this litigation, the 2026 reissuance of NWPs excludes the use of NWP 48 within the state of Washington.

**Summary**

These three BAAJA amendments to the Nationwide Permit program would drastically increase the number of projects that would qualify for NWP coverage, increase the amount and severity of environmental degradation these projects are allowed to have without any oversight from the Army Corps of Engineers, and severely limit the public's ability to challenge potentially unlawful NWPs.