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Contact:

Becki Dobyns 202-761-1809
Becki.j.dobyns@usace.army.mil

Homer Perkins 202-761-1807
Homer.h.perkins@usace.army.mil

World Wide Web: www.usace.army.mil
News Release: www.hq.usace.army.mil/cepa/newsrel.htm

U.S. Army Corps of Engineers reissues Nationwide Permits, strengthens commitment to wetlands protection, “no net loss”

WASHINGTON, D.C., (Jan. 14, 2002) – The U.S. Army Corps of Engineers (USACE) will issue nationwide permits (NWP) in the Jan. 15, 2002, *Federal Register*. Nationwide permits ensure appropriate environmental protections when authorizing discharges of small amounts of dredge and fill material into waters of the U.S.

“Overall, the permits are undergoing several small but important changes,” said John Studt, Chief of the U.S. Army Corps of Engineers Regulatory Branch. “The revised permits will do a better job of protecting aquatic ecosystems while simplifying some administrative burdens for the regulated public. The changes also reinforce and clarify the Corps’ commitment to the ‘no net loss’ of wetlands goal.”

USACE sought public comment for proposed changes to the permits in August 2001. The permits are being reissued with several changes from the August proposal based on numerous public and federal agency comments.

The reissued NWP maintain the protective acreage thresholds established in 2000, which reduced permissible acreage impacts under a nationwide permit from 3 acres to acre, to help ensure minimal impacts to the aquatic environment.

The three significant modifications from the August proposal to the reissued NWP are:

- 1) **A greater emphasis on protecting the “no net loss”** of wetlands standard, responding to public concerns. The reissued nationwide permits require USACE regulatory offices to meet and measure their success regarding the “no net loss” goal programmatically. While Corps districts are not required to provide a one-for-one replacement for impacted acreage for each individual project, they must meet or exceed that goal for their entire program. This allows districts to make more flexible decisions to issue timely permits while ensuring protection of the aquatic ecosystem on a watershed basis. For Nationwide Permits in calendar year 2000, the Corps authorized impacts to 4,374 acres of waters (which include wetlands and open waters) and required 4,261 acres of mitigation. Nationally, the latest USACE statistics show that in fiscal year 2001, 25,000 acres of wetlands were filled, while 43,000 acres of wetlands were required to be created, restored or enhanced to compensate for those impacted.
- 2) **Strengthens protections for streams.** The August proposal would have waived a previous prohibition of no more than 300-linear-foot impacts for perennial and intermittent streams. The

reissued permits make a distinction between intermittent and perennial (more established, permanent) streams, and allow the waiver for intermittent streams only. To receive a nationwide permit for work that impacts a perennial stream, the applicant can not fill more than 300 linear feet of that stream. Anything above that would be considered more than a minimal impact and could not be authorized with a nationwide permit.

- 3) **Strengthens protections for mining-related permits.** The reissued permits call for re-evaluating NWP 21, which permits activity associated with surface coal mining, once a regional environmental impact statement jointly prepared by the Corps, the State of West Virginia, the U.S. Environmental Protection Agency (EPA), and other federal agencies is complete. In the meantime, the reissued permits will maintain the additional environmental protections in the proposal. These protections enhance the mitigation and case-by-case review requirements for using NWP 21. Corps districts will require full mitigation to offset any impacts of discharges to waters of the United States, even though this may include mitigation beyond what is required by a state under the project's coal mining permit. The Corps will also require case-by-case review of all projects seeking to use this permit to ensure that any adverse effects of the permitted activity are no more than minimal, both individually and cumulatively.

The revised permits are the result of extensive coordination with the EPA and other federal agencies. The full text of the nationwide permits will be posted in the Jan. 15, 2002, *Federal Register* at http://www.access.gpo.gov/su_docs/aces/aces140.html. To compare the revised permits to the August 2001 document, look under the August 9 entry in the *Federal Register*.

“Nationwide permits are general permits that authorize categories of activities which the Corps has determined will have minimal impacts on the aquatic environment, individually and cumulatively, when conducted in accordance with the permit conditions,” Studt explained. “However, the Corps will continue to require an individual permit for any project, whether covered by a general permit or not, which it determines would have more than minimal environmental impact.”

The replacement nationwide permits will take effect March 16, 2002, 60 days after being published in the *Federal Register*.

For more information on the U.S. Army Corps of Engineers Regulatory Program, visit the program's Web page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

Questions and Answers – Nationwide Permits reissue – January, 2002

Why are you issuing Nationwide Permits now?

A. By law (the Clean Water Act of 1977), the Corps must reissue nationwide permits every five years.

Q. How many comments did you get on the proposed Nationwide Permits and what was the nature of those comments?

A. We received approximately 2,100 comments total. Of these, about 1,700 were identical postcards as part of a mail campaign. We received about 400 letters, of which about 70 were form letters. The three major concerns centered on support for maintaining the “no net loss” goal, on the importance of protecting streams, and surface coal mining, all of which were addressed in the final changes.

Q. What happens between the time when the old permits expire and the new ones become effective?

A. First, 60 days are needed between the announcement in the *Federal Register* and when the permits become effective to give state governments time to take their final positions on Section 401 water quality certification and coastal zone management consistency. Since the nationwide permits from 1996 expire Feb. 11, 2002, 32 nationwide permits will not be available between Feb. 11 and March 16, 2002. Any impact on the regulated public will be minimal since permit applicants can still apply during this time, and Corps districts can still evaluate permit applications. The Corps cannot make decisions until March 16, 2002, but the districts can evaluate the applications received.

Q. How do the Nationwide Permits impact mitigation?

A. Some of the nationwide permits, particularly NWP 21, Surface Coal Mining, will require more stringent mitigation. In addition, the Corps has directed each district to ensure that it meets the “no net loss” of wetlands on an acreage basis.

Q. How do the new NWPs protect endangered species?

A. General Condition 11 relates directly to endangered species. The standard to protect endangered and threatened species applies across the regulatory program and is unchanged since 1991.

Q. What is the role of vegetated buffers in mitigating for impacts to the aquatic environment?

A. Like wetlands, vegetated buffers are a critical need for the overall aquatic environment, and in fact, many vegetated buffers are also wetlands. The ultimate purpose of creating vegetated buffers (and wetlands) is to protect the aquatic ecosystem. Sometimes the best protection is provided by a wetland, sometimes a vegetated buffer, and sometimes a combination of the two. The Corps’ regulatory intent is to make the best mitigation choice for aquatic environment based on the needs of the watershed. Finally, it’s important to note that Corps districts must meet the “no net loss” of wetlands goals programmatically. So, if the best answer in a given situation is to create a vegetated buffer as mitigation for a wetland, the district must still achieve enough acreage in wetlands mitigation elsewhere to meet the no net loss goal. Ultimately, the big winner in such a decision is the aquatic ecosystem.

Q. How do the NWPs relate to the Regulatory Guidance Letter (RGL)?

A. The RGL establishes general guidelines which relate to mitigation for all permitted actions, whether they are minimal impacts as permitted with a nationwide or other general permit, or more substantial impacts covered with an individual permit. General Condition 19 contains more specific requirements applying to NWPs in particular. The RGL is currently undergoing interagency review.

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

A. The Corps’ district engineers have been given the authority to evaluate cumulative adverse effects under NEPA and the Clean Water Act, Section 404 program. For NWPs, it is also important to note that each NWP authorization can only impact _ acre. The Corps districts evaluate cumulative adverse effects based on a watershed perspective. In some watersheds, a small incremental increase in impacts will be of concern, while in others the impacts can be mitigated.

Q. How do the Nationwide Permits improve compliance by clarifying and streamlining the permit process while still ensuring protections to the aquatic ecosystem?

A. There are several changes intended to improve compliance by clarifying and streamlining the process. First, Corps districts may waive the prohibition that no more than 300-linear-feet of intermittent streams can be impacted with a nationwide permit, when environmental impacts are minimal. This will allow some minimal activities that currently would require an individual permit to use a NWP instead. The Corps is retaining the prohibition for perennial streams. We believe that in general, impacts to more than 300 linear feet of a perennial stream will be more than minimal, so we are requiring an individual permit for such projects. The Corps also simplified General Condition 26. While requiring all permittees to meet FEMA-approved state and local floodplain standards, it no longer requires applicants to document that they have met them with additional paperwork because the Corps has found this additional documentation unnecessary to ensure compliance. For

NWP 31, the Corps has clarified that impacts from routine maintenance relating to flood control projects only need to be mitigated once, at the time the maintenance baseline is established. Finally, there is also a new General Condition 27, which allows the Corps to identify the construction period's length, exceeding the grandfathering provision of current NWPs. This means that projects that must receive other permits and/or will take a long time to construct will have an adequate construction period.

Q. How do you measure mitigation?

A. The Corps believes that mitigation should compensate lost functions and values resulting from permitted activities, and determines mitigation requirements accordingly. However, the Corps has also directed district offices to ensure that wetlands impacts are mitigated at least one for one, on an acreage basis, across the district as a whole. The Corps inspects and enforces those mitigation requirements on as many projects as we can. For wetland impacts, we determine whether the permittee has completed the mitigation required and if not, require additional work by the permittee to ensure the adverse effects are mitigated. The Corps is currently upgrading its internal databases to better track impacts and mitigation in the future.

Q. What changes did you propose in August and leave intact?

A. Please see separate chart.

Q. How does the recent Supreme Court ruling regarding isolated wetlands affect these proposed changes (SWANCC case)?

A. It does not. The SWANCC decision related to the jurisdiction of the Clean Water Act over non-navigable, isolated, intrastate waters. Permits under Section 404 of the Clean Water Act, including Nationwide Permits, are only required for discharges into jurisdictional waters.

Q. Will the changes impact the workload of USACE regulators?

A. Not significantly. These permits constitute little change in the permits since March, 2000, and thus should have a negligible impact on regulators' workload. The only significant increase in work relates to greater oversight regarding NWP 21 – surface coal mining – but most of this work occurs in only a few Corps districts. The Corps does not anticipate that these NWPs will increase turn-around times for permits.

Q. What is the difference between intermittent and perennial streams and why is it important?

A. Perennial streams flow 365 days a year in a normal year. Intermittent streams have short or lengthy periods of time when there is no flow in a normal year. Both are important ecologically, however, because many intermittent streams have lengthy periods of no flow, impacts to more than 300 linear-feet of an intermittent stream may still be minimal in some cases.

Q. Has the Corps coordinated these changes with other federal agencies?

A. Yes. USACE coordinated with the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Federal Emergency Management Agency, Office of Management and Budget, the President's Council on Environmental Quality, and others.