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## **Nationwide Permits for Wetlands Projects: Issues and Regulatory Developments**

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# Nationwide Permits for Wetlands Projects: Issues and Regulatory Developments

## Summary

General permits issued by the U.S. Army Corps of Engineers authorize various types of development projects in wetlands and other waters of the United States. These permits authorize activities that are similar in nature and are judged to cause only minimal adverse effect on the environment. The Corps uses general permits to minimize the burden of its regulatory program: they authorize landowners to proceed with a project without having to obtain individual permits in advance.

Nationwide permits are one type of general permit. They authorize a number of categories of activities throughout the nation (such as minor dredging projects and bank stabilization projects) and are valid only if the applicable conditions are met. Nationwide permits, which currently number 43, are issued for five-year periods and thereafter must be renewed. They were most recently reissued in total in January 2002, but actions to issue or modify smaller numbers of them also were taken since the previous full reissuance in 1996. The current program has few strong supporters, for differing reasons. Developers say that it is too complex and burdened with arbitrary restrictions. Environmentalists say that it does not adequately protect aquatic resources. At issue is whether the program has become so complex and expansive that it cannot either protect aquatic resources or provide for a fair regulatory system, which are its dual objectives.

Coordinating implementation of the nationwide permits between federal and state governments raises a number of issues. Of particular concern to states is tension over their authority to certify that the nationwide permits will not violate water quality standards. If a state denies this certification, the Corps does not necessarily consider the state's action sufficient cause to deny issuance of the federal permit. This effectively forces states to accept the federal permit or take steps to condition individual projects, a resource-intensive burden that could be avoided if the Corps treated a state denial as a permit veto, states say.

Recent congressional interest in wetlands permit regulatory programs has been evident in oversight hearings and in connection with specific provisions of appropriations bills to fund the Corps' regulatory program. For the last several Congresses, there has been a stalemate over legislation that would comprehensively reform and streamline wetlands regulatory law and which could, if enacted, modify the nationwide permit program. During this time, no consensus has emerged on whether or how to legislatively reform overall wetlands policy. Congressional involvement in these issues could arise again as a result of reissuance of the nationwide permits in 2002 and federal court rulings that invalidated the Corps regulation of excavation activities and affected the Corps' overall regulatory program. This report will be updated as warranted by developments.

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# Nationwide Permits for Wetlands Projects: Issues and Regulatory Developments

## Introduction

Federal laws require government approval prior to beginning any work in or over navigable waters of the United States which affects the course, location, condition or capacity of such waters, or prior to discharging dredged or fill material into U.S. waters. Regulatory programs which implement these laws are administered through permits issued by the U.S. Army Corps of Engineers (the Corps), which shares responsibility with the Environmental Protection Agency (EPA), under the authority of the Clean Water Act, the Rivers and Harbors Act, and the Marine Protection, Research and Sanctuaries Act.

The Corps' regulatory process involves both general permits for actions by private landowners that are similar in nature and will likely have a minor effect on wetlands, and individual permits for more significant action. A nationwide permit is a form of general permit which authorizes a category of activities throughout the nation and is valid only if the conditions applicable to the permit are met. These permits are issued under authority of section 404(e) of the Clean Water Act. They cover categories of activities that are similar in nature and will cause only minimal adverse effect on the environment, both individually and cumulatively. At issue in this program is the balance of two objectives: providing regulatory protection to ensure minimal impacts on aquatic resources, and providing a fair and efficient regulatory system. For several years, however, interest groups of differing perspectives have criticized the program and increasingly question whether *either* objective is being achieved, much less both objectives.

Nationwide permits, which currently number 43, are issued for five-year periods and thereafter must be renewed. They were most recently reissued in total in January 2002, but actions to issue or modify smaller numbers of them also were taken since the previous full reissuance of the permits in 1996. Controversies about the program are reflected especially in one of the nationwide permits, Permit 26, which authorized discharges in headwaters or isolated waters (but did not cover specific categories of activities, as do other nationwide permits). First issued in 1977, Permit 26 was criticized by environmentalists who contended that it resulted in a significant loss of wetlands acreage. In 1996, the Corps reissued this permit but greatly reduced its scope, leading to criticism by landowner and developer groups who said it would be more burdensome for permit applicants. In 2000, the Corps withdrew Permit 26 and replaced it with five new permits, but criticism of specific nationwide permits, including those that replaced Permit 26, and the program as a whole has not diminished.

The nationwide permit regulatory program has drawn Congress' attention several times in the recent past. In 1997, House and Senate committees held oversight hearings to review several issues and controversies. In 1999 and again in 2000, congressional appropriators directed the Corps to take certain actions concerning its overall regulatory program, and nationwide permits in particular.

This report describes and reviews the recent history of the nationwide permit program and discusses several major issues, including program complexity, coordination with states, assessing cumulative impacts of the program, and effects of federal court decisions concerning regulation of excavation activities.

## Background

General permits, including nationwide permits, are a key means by which the Corps seeks to minimize the burden and delay of its regulatory program: they authorize a landowner or developer to proceed with the covered activity without having to obtain an individual, site-specific permit in advance. They are intended to allow certain activities to proceed with little delay or paperwork. According to Corps data, from FY1996-99, general permits entailed average processing time of 14 days, in contrast with individual permits which, on average, took 107 days of processing and evaluation, once an application was complete. Approximately 63,000 activities per year (representing 84% of the Corps' regulatory workload) were authorized by nationwide and other general permits. While some require advance notification to the Corps or state natural resource agencies, many only require after-the-fact notification. The following are examples of nationwide permits:<sup>1</sup>

- Placement of aids to navigation approved by, and installed according to, U.S. Coast Guard requirements (nationwide permit 1);
- Activities related to construction and maintenance of authorized outfall structures (nationwide permit 7);
- Stream or river bank stabilization activities necessary to prevent erosion (nationwide permit 13);
- Minor dredging, that is, dredging of no more than 25 cubic yards as part of a single and complete project (nationwide permit 19);
- Activities associated with restoration or enhancement of wetlands and creation of wetlands and riparian areas (nationwide permit 27);
- Discharges of dredged or fill material due to construction or expansion of a single-family home (nationwide permit 29); and
- Discharges for construction or expansion of recreational facilities (nationwide permit 42).

Many nationwide permits have specific conditions and terms (such as acreage limitations and requirements for advance notification to the Corps or other agencies). In addition, a number of general conditions apply to some or all nationwide permits.

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<sup>1</sup> The full text of the current nationwide permits and related general conditions, issued in January 2002 and discussed in this report, are available online at [[http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nationwide\\_permits.htm](http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nationwide_permits.htm)].

These include, for example: no activity may cause more than a minimal adverse effect on navigation; no activity may jeopardize a threatened or endangered species; discharges into spawning areas and migratory waterfowl breeding areas must be avoided, to the maximum extent practicable; and discharges of dredged or fill material must be minimized or avoided through mitigation to offset more than minimal impacts on the aquatic environment, to the maximum extent practicable.

## Permit Reissuance in 1996

The Corps first issued regulations for general permits in the mid-1970s, and Congress codified the concept in amendments to the Clean Water Act in 1977 (P.L. 95-217). Nationwide and other general permits<sup>2</sup> are valid only for a period of five years, as is the case with other Clean Water Act permits. They were reissued as a group in November 1991, taking effect in January 1992. In accordance with that renewal schedule, the Corps reissued the existing 37 nationwides and 2 new ones on December 13, 1996, with an effective date of February 11, 1997 (61 *Federal Register* 65873-65922). With the exception of nationwide permit 26 (discussed below), all were scheduled to expire on February 11, 2002, unless otherwise modified, reissued, or revoked. Of the existing permits, the agency reissued 25 with no change and modified 12. It also modified five of the general conditions (out of 22) which apply to all permits and added two new general conditions.

The Corps had several substantive purposes behind modifying the permits. One was the need to better ensure that permits have minimal adverse effects, especially on isolated wetland areas. A second was the need to better regionalize the program, by emphasizing that Corps officials (38 district and 11 division engineers) should condition nationwide permits on a local basis with limitations which reflect differences in aquatic ecosystem functions and values that exist across the nation. A third was the need to conform several existing permits to a broadened definition of “discharge” adopted by the Corps in 1993 related to regulation of excavation activities (see discussion below, “Uncertainty Due to Overturning the Tulloch Rule.”)

Prior to the 1991 reissuance, the nationwide program involved little individualized review of these permits, as the guiding criteria was that covered activities impose so minimal an environmental impact that the full review given

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<sup>2</sup> Section 404(e) of the Act authorizes the Corps to promulgate general permits on a regional, state, or nationwide basis. The Corps’ regulations authorize the issuance of general permits on a regional (sub-state) or statewide basis by district or division engineers, rather than headquarters, which issues the nationwide permits. The Corps uses the general permit authority to authorize statewide general permits covering activities in states that are deemed to have sufficient state regulatory authority. These statewide general permits (programmatic general permits, or PGPs) function as a substitute for full state program authorization to administer the 404 program. Depending on the core state program, state PGPs may encompass all wetlands regulation in a state, certain waters only, or certain types of regulated activities. Once a PGP is approved, the Corps suspends permit activity in lieu of the authorized state or sub-state entity, although the Corps retains the right to override the PGP and issue a federal permit in individual cases. Thus, in addition to 43 nationwide permits, the Corps has authorized approximately 400 regional general permits (RGPs) and 50 PGPs.

individual permits is not warranted. In the 1991 program revisions, however, district engineers were given greater authority to modify, suspend, or revoke nationwide permits for specific activities, and division engineers were authorized to exercise discretionary authority to revoke applicability of specific nationwide permits in high value aquatic areas and to then require individual permits for the activity. Further, preconstruction notification (PCN) was required for several of the nationwide permits, and when such notice is required, the applicant must provide a wetlands delineation, as well. Advance notification is intended to give the Corps time to determine that the adverse effects of the discharge or activity will be minimal. The district engineer generally has 30 days to notify the person of approval to proceed or, instead, of the need to obtain an individual permit; thereafter, the applicant may proceed.

Even with those changes, the nationwide permits did not attract significant controversy when they were reissued in 1991. More attention and more controversy focused on the Corps' process of reissuing the permits in 1996, much of it centering on nationwide permit 26 (NWP 26), which was added to the program in 1977 and expanded in 1982.

**Nationwide Permit 26 - Background and Controversies.** Nationwide permit 26 authorized discharges of pollutants in headwaters or isolated waters, that is, nontidal waters with a flow rate of less than 5 cubic feet per second, or nontidal waters which are neither part of nor adjacent to a surface water system. Prior to reissuance in 1996, the filling authorized by this nationwide could affect no more than 10 acres of waters, including wetlands, and required preconstruction notification (PCN) to the Corps if it would affect from 1 to 10 acres. Discharges affecting less than 1 acre required no advance notification or wetland delineation. Headwaters and isolated waters are areas which many people have difficulty identifying as wetlands, because they may appear dry for much of the year or lack the types of vegetation commonly associated with wetlands. Yet, they meet criteria developed by scientists and wetland delineators of areas that are, in fact, wetlands (criteria concerning characteristic hydrology, soil, and vegetation), and are increasingly recognized as providing important functions within entire aquatic ecosystems.

Permit 26 had been controversial for several reasons. Unlike other nationwide permits, it did not authorize specific activities, such as minor dredging or bank stabilization. Instead, it authorized discharges to certain types of waters, based on acreage and lack of hydrologic connection to navigable waters. Environmental groups had long been concerned that this nationwide permit was overly broad, could be abused by applicants through segmenting of projects, and could result in large amounts of unmonitored wetland losses. Many believed that the permit was illegal, because it violated the Clean Water Act's requirement that activities covered by nationwide permits are "similar in nature."

Industry groups, including developers and landowners, viewed NWP 26 as an important mechanism for minimizing regulatory burdens on small businesses and other permit applicants. According to Corps' statistics, residential development was the major type of activity authorized by NWP 26, comprising about 25% of all NWP 26 authorizations. Transportation activities were the next largest category,

comprising about 20% of all NWP 26 authorizations.<sup>3</sup> Without general permits, including NWP 26, landowners would face delays in project development and increases in costs. From the perspective of these groups, NWP 26 was valuable for much the same reason that the permit was controversial with environmentalists: it authorized discharges to types of waters and was not restricted to specific activities.

According to Corps' statistics, by the mid-1990s, between one-quarter and one-third of all nationwide permits authorized annually were for NWP 26 activities. Corps' data indicated that 75% of all environmental impacts resulting from all of the nationwide permits were authorized under this one permit.<sup>4</sup>

**Reissuance of Nationwide Permit 26: 1996 Modifications and More Controversy.** Prior to reissuance of the nationwide permits in 1996, environmental groups and other protection advocates, including federal and state natural resource agencies, pressed for repeal or modification of NWP 26. They argued that the Corps was unable to fully account for the environmental impact of NWP 26 either individually or cumulatively, because of poor recordkeeping and monitoring, and therefore the Corps could not support a conclusion that the effects of nationwide permits were not significant.

The Corps acknowledged criticism that it lacked data with regard to the use of NWP 26 and its impact, yet said that based on available statistics and considering required on-site mitigation, the Corps had received more wetlands acreage than had been lost by use of the permit.<sup>5</sup> Nevertheless, in response to such long-standing criticisms and to what Corps officials said was increased understanding of the ecological importance of isolated and headwater wetlands, the Corps modified this permit in 1996 in order to ensure that in the future, no more than minimal adverse effects occur, both individually and cumulatively.

The Corps modified NWP 26 in two major respects. First, it reduced the acreage limits to cover discharges to nontidal headwaters and isolated waters no larger than 3 acres and to require advance notification by the applicant if the discharge affects 1/3-acre or more (compared with 10-acre and 1-acre thresholds previously). Discharges affecting more than 3 acres were required to obtain individual project authorization (compared with the previous 10-acre limit). Second, the Corps reissued this permit only for two years, intending to replace NWP 26 with

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<sup>3</sup> Department of the Army, Corps of Engineers. "Proposal to Issue and Modify Nationwide Permits." 63 *Federal Register* 36041. July 1, 1998.

<sup>4</sup> Presentation by Michael Davis, Deputy Assistant Secretary of the Army for Civil Works, at the Environmental Law Institute, Feb. 4, 1997.

<sup>5</sup> In FY1995, 13,837 activities were authorized by NWP 26, impacting 5,020 acres of wetlands. The Corps says it received approximately 5,909 acres of mitigation for these impacts, yielding a mitigation ratio of 1.15:1. (61 *FR* 65892). In addition, however, Corps districts estimate that another 20,000 NWP 26 activities were accomplished without a requirement for reporting to the Corps (i.e., they affected areas of less than 1 acre), and the total acreage impacted, as well as whether any mitigation occurred, is unknown (61 *FR* 65894). Further, these data provide no information about the long-term quality of the mitigation.



activity-based permits similar, perhaps, to those authorized in NWP 29 (construction of single-family residences that impact less than ½-acre of wetlands or waters of the United States).

The Corps itself summarized the responses by groups who opposed modifying NWP 26 and narrowing its scope.

Numerous commenters expressed the view that the NWP has worked well, that there is no evidence to indicate that it is resulting in more than minimal adverse effects and that the loss or further limiting of NWP 26 would result in increased regulatory burdens on the public, less regulatory certainty, unacceptable work load increases for the Corps, increased processing times, project delays, and an overall lessening of the regulatory program's ability to protect waters of the United States. (61 *FR* 65890, December 13, 1996)

Considering these views, the Corps determined that, "for fair, effective, and efficient implementation of the Corps regulatory program" (61 *FR* 65893), it was necessary to have a general permit such as NWP 26, yet because of the ecological importance of isolated and headwater wetlands and the potential for adverse impacts by NWP 26, the agency reissued this permit in a "more restrictive and environmentally sensitive form during the two-year phaseout." (61 *FR* 65891)

On the issue of increased workload, the Corps estimated that the lower acreage limits in the revised permit would require the agency to process approximately 500 additional individual permits per year, a 10% increase over FY1996. Industry sources said that an additional 1,000 individual permit reviews was a more accurate estimate. On the other hand, the Corps further estimated that if NWP 26 were totally eliminated and all such projects were subject to individual project review and verification, the agency's workload would increase seven-fold, an increase that "would render the program ineffective and would be a disservice to the American public and overall environmental protection." (61 *FR* 65894) Industry groups also were concerned that the Corps would not be able to issue replacement permits for NWP 26 within two years. An industry coalition, led by homebuilders, challenged the reissued NWP 26, arguing that it was too restrictive and had not been subject to adequate public review. Complying with a court order in that case, in November 1997, the Corps agreed to reopen the comment period on phasing out NWP 26 (*National Association of Home Builders v. U.S. Army Corps of Engineers*, 97-464 D.D.C.). In the mean time, however, the Corps was working on activity-specific permits to replace NWP 26, as it had indicated intent to do in December 1996.

## **Replacement Permits for NWP 26 in 2000**

As announced in 1996, in March 2000, the Corps issued several new activity-based permits to authorize specific categories of activities, replacing the approach in NWP 26 which was based on acreage and particular geographic types of waters (headwaters and isolated wetlands).<sup>6</sup> The final replacement permits published on

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<sup>6</sup> The Corps went through a lengthy proposal and public comment process before the replacement permits were issued in March 2000. Permits to replace NWP 26 were proposed (continued...)

March 9, 2000,<sup>7</sup> authorized five specific activity-based permits, modified several existing NWP's and general conditions, and added two new general conditions. They became effective June 7, 2000. The five new permits apply to the following activities:

- Residential, commercial, and institutional developments, including construction of building pads, building foundations, and attendant features (NWP 39).
- Reshaping of existing serviceable drainage ditches constructed in non-tidal waters in a manner that benefits the aquatic environment or improves water quality (NWP 41).
- Recreational facilities (facilities with low environmental impact such as playgrounds, campgrounds, biking and hiking trails). It may be used for the construction or expansion of recreational facilities that are integrated into the existing landscape (NWP 42).
- Stormwater management facilities (such as stormwater management ponds or detention basins) involving construction or maintenance of such facilities (NWP 43).
- Aggregate and hard rock mineral/mining activities with minimal adverse effects on the aquatic environment (primarily commercial sand, gravel, stone, and hard rock metals and minerals) (NWP 44).

The replacement permits were limited to work in non-tidal waters of the United States and would not authorize work in tidal waters (those subject to the ebb and flow of the tide) or in non-tidal wetlands contiguous to tidal waters (i.e., wetlands connected by surface waters to tidal waters and located landward of the high tide line). Thus, their geographic reach was potentially broader than NWP 26, which was restricted solely to activities in headwaters and isolated wetlands. The Corps believed that removing the headwaters restriction would help reduce confusion by eliminating the need to determine where the median flow of a waterbody is less than 5 cubic feet per second (i.e., the threshold determining areas where NWP 26 could be used). All but the new permit for reshaping of existing drainage ditches (NWP 41)<sup>8</sup> were limited to activities that do not cause the loss of greater than ½ acre of non-tidal waters (compared with the 3-acre maximum in NWP 26) or more than 300 linear feet of streambed. Even with that size limitation, several of these permits require preconstruction notification to the Corps for impacts of greater than 1/10 acre to ensure that any activity that potentially may have more than minimal adverse effects on the aquatic environment is reviewed on a case — by-case basis.

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<sup>6</sup> (...continued)

July 1, 1998; additional changes were proposed October 14, 1998. Further modifications were proposed July 21, 1999. The Corps received nearly 12,000 public comments on these proposals leading to final action early in 2000. NWP 26 was extended several times in order to remain in effect until final action on the replacement permits occurred.

<sup>7</sup> U.S. Department of the Army, Corps of Engineers. "Proposal to Issue and Modify Nationwide Permits; Final Notice." *65 Federal Register* 12818, Mar. 9, 2000.

<sup>8</sup> "We have not imposed a ½ acre limit on NWP 41 because it only authorizes activities that benefit the aquatic environment." *65 Federal Register* 12825.

Several of the new permits (residential, commercial, and institutional activities; recreational facilities; and stormwater management facilities) required compensatory mitigation to offset unavoidable losses of waters of the United States. Compensatory mitigation may be provided through restoration, enhancement, or creation of aquatic habitats; preservation of adjacent open or green space; land trusts; or mitigation banks.<sup>9</sup> Specific compensatory mitigation requirements are determined by district engineers on a case-by-case basis, but the basic Corps concept was that there should be a minimum requirement of an acre-for-acre (1:1) wetland replacement as compensatory mitigation for all activities requiring preconstruction notification. Greater than a 1:1 ratio can be required to adequately replace aquatic resource functions and values lost as a result of NWP-authorized activities.

The new general conditions adopted in March 2000 limit the use of nationwide permits for projects within critical resource waters, and for permanent above-grade wetland fills within the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). Critical resource waters are those designated as having particular environmental or ecological significance (such as designated marine sanctuaries and state natural heritage sites). Regarding the 100-year floodplain, the Corps said it sought to ensure that the nationwide permit program discourages further development that would reduce the flood storage capacity of the floodplain, but not create undue constraints or costs on the regulated public, unless necessary to improve the aquatic environment.

**Regional Conditioning.** As with the previous nationwide permits, Corps officials retained the authority to apply special conditions to use of any of the proposed new permits or even to revoke use of specific permits in aquatic environments of particularly high value or in specific geographic areas. Indeed, the Corps expected that its district and division engineers would utilize a significant amount of regional conditioning to ensure effective protection at the local level of wetlands and other water resources (regional conditioning cannot be used to make an NWP less restrictive). The purpose of regional conditioning is to consider local differences in aquatic resource functions and values to ensure that nationwide permits do not authorize activities with more than minimal adverse effects on the aquatic environment. Regional conditions might include distinct watersheds or waterbodies where certain nationwide permits should be suspended or revoked, thus requiring landowners to obtain individual project-specific permits; reducing the acreage thresholds in certain types of waters; or adding notification requirements for all permitted work in certain watersheds. The permits issued in March 2000 provided a new and somewhat more formal approach than in the past to developing appropriate conditions in each Corps District, providing explicitly for public input and coordination with federal resource agencies. Regional conditioning occurred prior to the date the nationwide permits became effective (i.e., June 7, 2000).

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<sup>9</sup> “A mitigation bank is a site where wetlands or other aquatic resources are restored, created, enhanced, or preserved to provide compensatory mitigation in advance of the authorized impacts. The entity that developed the mitigation bank provides these aquatic resources in return for payment from the permittee.” 63 *Federal Register* 36045, July 1, 1998.

However, regarding increased use of regional conditioning to strengthen permits, some environmental groups were skeptical that the Corps would be able to attach meaningful conditions, while developers had the opposite concern — that restrictions imposed by Corps regions would be unduly burdensome.<sup>10</sup>

The Corps also modified six existing permits to increase the number of activities authorized by them. For example, NWP 40 was expanded to authorize certain discharges associated with agricultural activities which are necessary for increasing agricultural production and constructing farm buildings. One of the goals of NWP 40 is to reduce duplication between the Corps and the Natural Resources Conservation Service (which implements wetlands programs under federal farm law) and provide some regulatory relief to agricultural producers. However, to ensure that authorized activities will have minimal adverse effects, like other nationwide permits, NWP 40 restricts the types of agricultural activities and sets acreage limits (in terms of discharges into wetlands) allowable under the permit.

Further, the Corps lowered the acreage limit for NWP 29, which authorizes single-family housing activities, from ½ acre to 1/4 acre in non-tidal waters, — i.e., discharges associated with construction or expansion of a single-family home and attendant features may not cause the loss of more than 1/4 acre of non-tidal waters or wetlands. This permit is used by the person who will use the house as a personal residence, not by contractors or developers who offer a house for sale upon completion. The change to this permit was the result of a lawsuit against the Corps which had challenged the issuance of NWP 29 and was intended to assure that NWP 29 authorizes only those single family housing activities with minimal adverse effects on the aquatic environment. (*Alaska Center for the Environment v. West*, No. A96-245 CV (D. Alaska, April 30, 1998))

**Comments and Reactions of Stakeholders.** The Corps received comments both in support and in opposition to the permits to replace NWP 26, with environmental groups and industry groups criticizing many aspects, generally from opposite perspectives. The Corps summarized these differing views in a July 1999 Notice:

Members of environmental groups and development groups were typically in opposition to the proposed new and modified NWPs. The environmental community opposed the proposed NWPs, asserting they would allow too much impact on the aquatic environment. The development community opposed the proposed NWPs, asserting they are too restrictive on the regulated public.<sup>11</sup>

Throughout the development of the replacement permits, the Corps stated that its goal was to improve protection of aquatic resources, while ensuring that those activities with truly minimal adverse impacts on the aquatic environment are authorized in an efficient manner by a general permit:

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<sup>10</sup> “Six New Classes of Activities Covered Under Proposed Corps Replacement Permits.” *Daily Environment Reporter*, June 25, 1998, No. 122, p. AA-1.

<sup>11</sup> 64 *Federal Register* 39257, July 21, 1999.

To achieve this goal [of fair, flexible and effective federal wetlands protection programs], the Corps regulatory program must continue to provide effective protection of wetlands and other aquatic resources and avoid unnecessary impacts to private property, the regulated public, and the environment. These proposed NWP's will more clearly address individual and cumulative impacts to the aquatic environment, ensure that those impacts are minimal, address specific applicant group needs, and provide more predictability and consistency to the regulated public.<sup>12</sup>

However, reactions by interest groups and stakeholders to the new and modified permits issued in 2000 suggested that many believed the Corps was far from achieving its intended goal. Developers indicated that the proposal would do little to help groups such as homebuilders, since much of their activity occurs in isolated or headwater wetlands, which were included in NWP 26 but would not be included in the activity-specific permits. In addition, industry said that, by barring use of the permits in tidal waters, many activities that could benefit from simplified procedures of general permits (such as construction or expansion of residential and commercial developments) would, instead, require individual permits. Environmental groups, on the other hand, criticized the permits because they expanded the types of wetlands that could be filled and expanded the types of authorized activities. In the Notice accompanying the final permits, the Corps acknowledged the widespread criticism. Nevertheless, the Corps believed that, through the ½ acre limit and the limitations on the construction of developments in 100-year floodplains, the new and modified NWP's provided substantial additional protection of the aquatic environment.

An issue of concern to industry since 1996, when the Corps announced that NWP 26 would be eliminated, was how the agency would manage the increased workload, including potentially greater numbers of individual permits to be processed, and what delay applicants would encounter. In industry's view, the greater complexity of the NWP program, resulting from the replacement and modified permits, meant that more applicants would be required to seek individual permits, thus increasing applicants' costs and time delays. The Corps acknowledged that there would be substantial impact on the regulated public and an increase in permit evaluation time. It estimated that the new permits would cost permit applicants about \$32 million per year and would result in a 20% increase in the number of applicants requiring individual permits annually.<sup>13</sup> The Corps also acknowledged that there would be substantial increases in its own workload and estimated that it would need an additional \$6 million in FY2001 to accommodate the added workload.<sup>14</sup> The Corps did receive \$8 million more in funding in FY2001 for its regulatory program and \$2 million more in FY2002, but these increases have mainly been used to maintain services, not meet new programmatic needs.

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<sup>12</sup> 63 *Federal Register* 36041, July 1, 1998.

<sup>13</sup> U.S. Department of the Army, Corps of Engineers. "Final Notice of Issuance and Modification of Nationwide Permits; Correction." 65 *Federal Register* 14255, Mar. 16, 2000.

<sup>14</sup> U.S. Department of the Army, Corps of Engineers. "Questions and Answers, Nationwide Permits, March 6, 2000." Text of this fact sheet is available at [<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/press/qanda.pdf>].

Recognizing that its workload would increase, the final permits increased from 30 to 45 days the period for Corps officials to review those permits for which applicants must submit preconstruction notification (a permit is automatically authorized, if the Corps fails to act within that time period).

**Lawsuits Challenging the Replacement Permits.** On the same day that the final replacement and modified permits were published, an industry group challenged the permits in court (*National Association of Home Builders v. U.S. Army Corps of Engineers*, Civil Action No. 1:00CV00379 TPJ, D.D.C., filed March 9, 2000). The lawsuit contended that the Corps exceeded its authority by imposing broad restrictions through the NWP program and that the program no longer is the streamlined permitting approach intended by Congress when it authorized general permits in 1977.

Lawsuits also were filed by two other groups. A challenge brought by the National Stone Association said the Corps violated the Clean Water Act by asserting jurisdiction over excavation activities (*National Stone Association v. U.S. Army Corps of Engineers*, Civil Action No. 1:00CU00558 TPJ, D.D.C.). Another brought by the National Federation of Independent Business Legal Foundation said the replacement permits did not consider the impact on small businesses (*NFIB v. Corps of Engineers*, No. 1:00CV01404, D.D.C.). These cases are still pending.

## **Reissuance of All Nationwide Permits in 2002**

In August 2001, with the approaching expiration of the 1996 nationwide permits, the Corps proposed to reissue those and others both issued and modified since 1996 (including the 2000 replacement permits for NWP 26) in order to put all 43 nationwide permits in the program on a unified five-year schedule. According to the Corps, the proposal was intended to simplify permits for activities that have no more than minimal effect on the environment, add additional requirements to enhance aquatic protection, increase flexibility for Corps field staff to target resources where most needed, reduce unnecessary burdens on the regulated public, while retaining the key protections that were added in the March 2000 replacement permits.<sup>15</sup>

The proposals raised controversies and criticism from environmental advocates and some other federal agencies, including EPA and the U.S. Fish and Wildlife Service. Environmental groups said that the proposal would substantially weaken protection of the nation's wetlands and streams. On the other hand, industry groups said that the proposal involved only minor changes. These changes offer some benefits, they believe, but any such benefits are more than offset by problems with the 2000 replacement permits, which developers and other groups continue to oppose, saying that the permits impose arbitrary and burdensome restrictions. Following a public comment period, the nationwide permits were reissued in January 2002, essentially as proposed in August, with an effective date of March 18, 2002. The Corps' action modified nine existing permits and six existing general conditions

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<sup>15</sup> U.S. Department of the Army, Corps of Engineers. "Proposal to Reissue and Modify Nationwide Permits." 66 *Federal Register* 42069, August 9, 2001.

and added one general condition.<sup>16</sup> The 2002 permits emphasized that, like the 1996 and 2000 permits, the NWP program will rely greatly on regional conditioning to fit the national program to local watersheds. A district engineer can either add special conditions to the NWP authorization or exercise discretionary authority to require an individual permit. This flexibility continues to cause various concerns among stakeholders, with some environmentalists arguing that more restrictive national standards on the NWPs should be imposed instead of relying upon a discretionary authority process. Some in industry believe that the discretionary authority results in greater complexity and less predictability for regulated entities.

Four specific issues raised the most critical opposition. Controversies over these issues are likely to persist.

**300 Linear-foot Prohibition.** One of the most significant changes in the reissued permits affects development activities along streams. Several of the 2000 permits that had replaced NWP 26 included a prohibition limiting the permits to development activities affecting 300 linear feet or less of a streambed; projects affecting larger areas would not qualify for a nationwide permit. The Corps believed that this restriction had resulted in requiring individual permit review for many projects that involve no more than minimal adverse effects on the aquatic environment. In the January 2002 reissuance, the Corps modified this prohibition for nationwide permits 39 (residential and commercial developments), 40 (agricultural activities), 42 (recreational facilities), and 43 (stormwater management facilities) to allow Corps districts to issue case-by-case waivers to the 300 linear-foot limit for discharges affecting intermittent streams (streams that only have flowing water during certain times of the year, when groundwater provides water for stream flow). As reissued, the prohibition remains in effect for perennial streams which have flowing water year-round. The Corps decided that this limitation on perennial streams was necessary to ensure that losses result only in minimal adverse effects, since significant impacts are more likely to occur in perennial than in intermittent streams.

The modification concerning the 300 linear-foot prohibition was needed, the Corps said, to add flexibility to the permit process, by allowing district engineers to authorize activities that have minimal adverse effect on the aquatic environment. It is not intended to relax aquatic protection, the Corps said, but is intended to allow the Corps to focus limited resources more intensively on areas where impacts are likely to be more than minimal. Opponents of the modification argued that the waiver would lead to severe stream destruction from construction, agricultural and other activities. Some said that the 300 linear-foot limit gives predictability to the regulated community and state agencies and that the waiver authority would result in decisionmaking variations between Corps districts and even within the same district. The Corps disagreed and said that district engineers will use their knowledge of the local aquatic environment to make case-by-case determinations whether a waiver is applicable.

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<sup>16</sup> U.S. Department of the Army, Corps of Engineers. "Issuance of Nationwide Permits." *67 Federal Register* 2020, January 15, 2002.

**Mitigation Requirements.** As the Corps stated in August 2001, although minimal adverse effects are anticipated for the nationwide permit program, the use of NWP's may still affect the aquatic environment. Therefore, general condition 19 describes how district engineers will require compensatory mitigation to offset the authorized impacts. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or preservation of aquatic resources, either by the permittee's individual project, or the use of mitigation banks or other consolidated mitigation efforts. Mitigation requirements incorporated in the nationwide permit program have become more specific over time, especially since 1996, and are viewed by environmental protection advocates as critically important.

Before reissuance in 2002, this general condition required one-for-one mitigation of adverse impacts to wetlands with a stated preference for restoration of wetland impacts over preservation (see discussion on page 8).<sup>17</sup> In January, the Corps revised the mandate to allow a case-by-case waiver of this requirement in cases where the Corps determines that some other form of mitigation, such as establishment of vegetated buffers, is more appropriate. The intention of the change, the Corps said, was to have a more ecologically and watershed-based approach to mitigation. In the agency's view, the one-for-one acreage requirement was too restrictive, in that it focused solely on wetlands but did not allow the Corps to mitigate aquatic impacts to streams and other non-wetland aquatic resources. Because the Corps regulates the entire aquatic environment, not just wetlands, it said, mitigation should consider the entire aquatic environment, as well. The Corps said that it will require mitigation for impacts based on a watershed approach, often involving a mix of vegetated buffers and other mitigation in non-wetland areas. Thus, for example, a district engineer might authorize a project with impacts on a particular wetland and require mitigation within the overall aquatic environment of the particular watershed involved but not wetland-acre-for-wetland-acre mitigation. This approach, the Corps said, allows district engineers to require the mitigation for project impacts that best protects the aquatic environment.<sup>18</sup>

Environmentalists strongly opposed this change, saying that it effectively ignores the principle of "no net loss" of wetlands which has been a goal of national wetlands policy since 1990. In response, Corps officials said that under the revision, project applicants must ensure that wetland functions are replaced and that the "no net loss" goal be met on an acreage basis within a Corps district.<sup>19</sup> Environmental groups also argued that the Corps is too quick to look towards mitigation as the answer for development activities affecting wetlands and should focus on avoiding impacts as a first priority. They point out that numerous recent studies, including a

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<sup>17</sup> The policy preference for restoration derives from the fact that preservation does not provide new acres and thus cannot compensate for wetlands loss on an acreage basis.

<sup>18</sup> U.S. Department of the Army, Corps of Engineers. "Issuance of Nationwide Permits." 67 *Federal Register* 2063-2067, January 15, 2002.

<sup>19</sup> U.S. Department of the Army, Corps of Engineers. "U.S. Army Corps of Engineers clarifies inaccuracies in wetlands permit reporting." Press release, Jan. 16, 2002.



June 2001 report of the National Research Council,<sup>20</sup> show that mitigation is not fully successful and does not compensate for wetlands lost to permitted fills. They assert, and the Corps acknowledges, that the Corps' data collection and assessment of mitigation projects must be improved in order to evaluate impacts. Thus, reducing mitigation requirements that already are recognized as unsuccessful and are poorly tracked is insupportable, according to critics. The Corps has said that it is taking steps to address database and monitoring problems.

**Surface Mining Activities.** Nationwide permit 21 authorizes discharges from surface coal mining activities which result in no more than minimal impacts (site-specifically and cumulatively) to the aquatic environment. There is no acreage limit or threshold for a project to use this permit. The Corps reissued NWP 21 with two changes intended to strengthen environmental protection for projects authorized by the permit. First, the reissued permit requires the Corps to determine appropriate mitigation in accordance with nationwide permit general conditions, rather than relying primarily on less restrictive state-required mitigation established under the Surface Mining Control and Reclamation Act, as had previously been the case. Second, the revised permit requires explicit authorization before the activity can take place, rather than only requiring preconstruction notification, as in the past.

Critics were less focused on these changes than on the basic permit itself, because they have long contended that the permit authorizes disposal of coal mining waste material which buries streams with overburden material, thereby disturbing the natural stream processes and water quality in entire watersheds and resulting in permanent loss of habitat. According to that view, mitigation cannot sufficiently compensate for these impacts, and any use of this permit is inconsistent with ensuring "minimal adverse effects" on the aquatic environment.

Further contributing to controversy over NWP 21 is the fact that in recent years the Corps has allowed the use of this permit to authorize mountaintop mining activities in several Appalachian states (e.g., West Virginia and Kentucky). This practice involves removing the tops of mountains to expose and remove underlying coal seams. Upon completion of the coal removal, some amount of the waste rock is placed back on the top of the mountain, while the majority is disposed in nearby valleys where streams and wetlands are filled with the excess mining waste. Environmentalists have sought to strengthen regulation of mountaintop mining, if not halt it altogether, in part by arguing that the practice should be regulated under more stringent Clean Water Act provisions than section 404, which authorizes the nationwide permit program. So far, protection advocates have been unsuccessful in their efforts. The Corps continues to assert that use of NWP 21 for surface mining and mountaintop mining activities avoids and minimizes impacts to the extent practicable and that adequate mitigation can be used to determine that a project has minimal effects. These activities, the Corps believes, can result in a "substantial improvement in downstream water quality and aquatic habitat within a watershed."<sup>21</sup>

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<sup>20</sup> National Academy of Science, National Research Council. *Compensating for Wetland Losses under the Clean Water Act*. Washington, 2001. 267 p.

<sup>21</sup> U.S. Department of the Army, Corps of Engineers. "Issuance of Nationwide Permits."  
(continued...)

Citizen groups recently have filed lawsuits seeking generally to halt the Corps' use of Nationwide Permit 21 for mountaintop mining operations. In the first such case, a federal district court ruled that NWP 21 violates the Clean Water Act by authorizing activities that have more than minimal adverse environmental effects (*Ohio Valley Environmental Coalition v. Bulen*, S.D. W.Va., Civ. Action No. 3:03-228, 7/8/2004). The court barred the Corps from using NWP 21 to authorize new mountaintop mining in southern West Virginia and ordered the Corps to revoke previous authorization for 11 operations. In January 2005, three Kentucky groups filed a lawsuit to extend the West Virginia decision to Kentucky valley fills.<sup>22</sup>

**Fills within the 100-year Floodplain.** As discussed above, in 2000 the Corps established a general condition for the nationwide permit program limiting activities within the 100-year floodplain as defined by FEMA. In the reissued permits, the Corps modified a portion of this general condition to delete a mandate that permittees document that the project meets FEMA approved requirements and delete a requirement for preconstruction notification to the Corps for certain activities occurring in the 100-year floodplain. Environmental critics argue that the modification now will permit development in ecologically sensitive floodplain areas. The Corps said it believed that requiring applicants to comply with FEMA requirements is just as effective as also requiring applicants to document their compliance and that the changes to this general permit condition would not reduce the floodplain restrictions adopted in 2000.

## State Coordination Issues

Implementation of the Corps' regulatory program, including the nationwide permits, requires considerable coordination between federal and state governments. For one thing, many states (and some localities) administer their own wetlands management and protection programs which vary in the way wetlands are defined and the activities that may or may not take place within or near regulated wetlands, and officials attempt to minimize duplication and overlap.

More important, however, is a coordinating responsibility given to states under section 401 of the Clean Water Act. This provision requires states to certify that a proposed project seeking a federal license or permit, such as a section 404 permit, will not violate a state's water quality standards.<sup>23</sup> In addition, states and territories that operate management programs under the Coastal Zone Management Act are required to provide concurrence that the activity is consistent with the state's coastal zone management (CZM) program. Review under the 401 water quality certification process or CZM concurrence is an important means by which states ensure that their water quality concerns will be considered in federally licensed activities.

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<sup>21</sup> (...continued)

67 *Federal Register* 2043, January 15, 2002.

<sup>22</sup> For additional information, see CRS Report RS21421, *Mountaintop Mining: Background on Current Controversies*, by Claudia Copeland.

<sup>23</sup> States also may waive 401 certification, which is effectively the same as issuing an unqualified certification.

It is Corps practice to allow a period of time following publication of final nationwide permits for states to review them before the permits take effect. This gives states time to determine if they will certify compliance with water quality standards, certify conditional compliance (requiring the applicant to take additional protective steps), or deny certification. Conditions placed as a result of 401 certification or CZM concurrence by a state automatically become part of a nationwide permit in that state. Some of the modifications in the 1996 permits were endorsed by many states (changes to narrow the scope of NWP 26, for example), because they were considered to be more protective than the previous permit. In those cases, states provided 401 certification, and projects authorized by the nationwide permit could proceed without additional state restrictions. However, some states favored modifications to other permits which the Corps did not adopt,<sup>24</sup> and in those instances, states declined to provide 401 certifications.

Following issuance of permits to replace NWP 26 in March 2000, the Corps gave states a longer period than normal (90 days rather than 60 days) for states to carry out their 401 certification and CZM consistency reviews. Sixteen states denied water quality certification for the replacement permits, and several states revoked the ½-acre limit in the new permits in favor of more restrictive requirements. State review of the 2002 permits is underway.

An issue of long-standing concern to states is the fact that, if a state denies 401 certification or CZM concurrence because the project (under either a general or individual permit) would violate water quality standards, the Corps does not necessarily consider the state's action sufficient cause to deny issuance of the federal permit. When this happens in the case of nationwide permits, the state is forced either to accept the permitted activity, as authorized by the Corps, or to expend its resources to review the project separately and issue a 401 certification with conditions specific to that project. States would like the Corps to treat a 401 denial as a veto. The Corps may deny the permit (withdrawing its applicability in a state), but will not always do so. The Corps' position is that denial of state water quality certification for a nationwide permit does not necessarily mean that unacceptable adverse effects will occur on a case-by-case basis, and the Corps prefers that the burden of conditioning or restricting the project at that point be with the state.

This tension over state and federal responsibilities does not exist under other Clean Water Act permits. For example, under the Act's discharge permit program for industrial and municipal sources (the National Pollutant Discharge Elimination System program in section 402 of the Act), if a state denies 401 water quality certification, EPA insists on changes to the project until it gains 401 certification.

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<sup>24</sup> For example, many states have opposed NWP 29, the single-family residence nationwide permit: 17 states denied 401 certification when NWP 29 was issued in 1995, because the permit was inconsistent with state water quality standards or other state wetlands management activities. While the Corps modified this permit in the 1996 revisions (by requiring a "no fill" buffer between the project site and any free-flowing stream), it did retain the permit and did not further modify it in response to requests that the ½-acre limit be reduced or that the permit be withdrawn. Sixteen states denied certification of this permit following its reissuance in 1996.

One option is for states to seek approval of a programmatic general permit (PGP; see discussion in footnote 2), if the state is qualified and has sufficient regulatory authority. The Corps would then suspend federal permitting, and there would be less question over state water quality or other requirements. This is the case in Connecticut, Maine, Massachusetts, New Hampshire, and Rhode Island, states with PGP programs which replace the federal nationwide permits. Another option is for states to seek authorization for full assumption of the 404 program, a more complicated process than PGP approval, and only Michigan and New Jersey have done so. However, not all states are interested or in a position to seek PGP approval or full program authorization. Thus, even though the Corps has stated its intention to work in partnership with states, most states will continue to conduct 401 certification reviews of nationwide and other wetlands permits, and it is likely that conflicts over water quality certification will persist.

## **Other Issues Concerning Nationwide Permits**

The nationwide permits issued since 1996 have raised a number of additional issues. For example, the program is intended to balance a desire for administrative simplicity and reduced regulatory burden, on the one hand, with protecting aquatic resources, including wetlands. Yet, some question whether a number of administrative requirements of the permits, such as advance notification to the Corps and other agencies, written verification of permit compliance, and opportunities for regional conditions, are tilted too much in the direction of protecting aquatic resources and not enough in the direction of regulatory relief, while also making the nationwide permit program unduly complicated.

As one example, industry groups were particularly concerned that the 1996 permits restricted the use of multiple nationwide permits for a single project (a practice referred to as “stacking”). Previously, many applicants could use nationwide permits in combination to speed authorization of their activities. However, the Corps determined that this often results in unintended cumulative impacts because of increased acreage being affected. Thus, the Corps prohibited stacking of some permits and required prior notification to the Corps for most others, to allow officials to determine whether it is appropriate to combine nationwide permits, or whether the activity should be evaluated under an individual permit. In 2000, the Corps modified the general condition which restricts stacking to clarify that more than one NWP can be used to authorize a single and complete project, provided that the acreage loss of waters does not exceed the highest specified acreage limit for the NWPs.

**Defining Minimal Effects and Assessing Cumulative Impacts.** Other observers have been critical that, while the Corps has made environmentally strengthening improvements to many of the nationwide permits since 1996, it has not addressed a number of outstanding concerns. For example, the Corps declined to define what is “minimal effects.” The agency also declined to require mitigation of wetlands losses, as opposed to expressing a preference for it, and declined to require that mitigation be done on-site. On these points, the Corps’ general position is that it is not appropriate to define or dictate these matters on a nationwide basis, because what constitutes minimal adverse environmental effects or adequate compensatory action for wetlands loss can vary widely from state to state and watershed to watershed.

Environmentalists have urged the Corps to conduct a cumulative impact analysis of the nationwide permit program. The agency declined to do so, contending that the permits do not constitute a major federal action having a significant effect on the human environment, since Corps data on the usage of permits suggest that the adverse effects, even cumulatively, are less than minimal. Thus, the agency said it is not required to prepare an Environmental Impact Statement under provisions of the National Environmental Policy Act, nor is a cumulative impact analysis warranted. In February 1998, environmental groups brought suit against the Corps for failure to fully evaluate the effects of the nationwide permit program. The lawsuit contended that the Corps should have examined the effects of the nationwide permits on threatened and endangered species and their habitat before reissuing them in 1996 and should have consulted with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service on the effects on listed species (*Natural Resources Defense Council v. West*, 98-0560 VR, N.D. Calif., filed February 11, 1998). Partly in response to this litigation, the Corps announced in June 1998 that it would prepare a programmatic environmental impact statement (PEIS) on the nationwide permit program and would consult with the other federal resource agencies, although the Corps continues to hold that the program has no significant impact on the environment or on endangered species.<sup>25</sup> The Corps views voluntary preparation of this PEIS as part of its commitment to ensure that the nationwide program authorizes only activities with minimal individual and cumulative environmental effects. A draft PEIS was issued in July 2001,<sup>26</sup> and the Corps said at the time that a final PEIS would be issued early in 2002. This has not yet occurred.

The approach taken by the Corps in preparing the draft PEIS was to consider several possible regulatory alternatives to the nationwide permit program as a whole, such as replacing the general permit program with standard individual permits or regional general permits. It then compares impacts of these regulatory alternatives on aquatic resources, on permit applicants, and on Corps administration. Some groups had urged the Corps to prepare an environmental impact assessment of individual current nationwide permits including impacts on wetlands functions and values, since some permits may have greater environmental impact than others, but the agency did not do so. This concern was raised in connection with permit reissuance. Before the permits were revised in January 2002, the Association of State Wetland Managers and the Coastal States Organization urged the Corps to delay reissuance pending completion of the PEIS, since it may present information supporting modification of the NWP.<sup>27</sup>

**Uncertainty Due to Overturning the Tulloch Rule.** The status of some existing Corps permits and aspects of its wetlands regulations was made uncertain by a federal court ruling in January 1997. In this case (*American Mining Congress v. U.S. Army Corps of Engineers*, No. 93-1754 SSH (D.D.C.)), the U.S. District

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<sup>25</sup> U.S. Department of the Army, Corps of Engineers. "Finding of No Significant Impact for the Nationwide Permit Program." June 23, 1998.

<sup>26</sup> U.S. Department of the Army, Corps of Engineers. "Draft Nationwide Permits Programmatic Environmental Impact Statement," July 31, 2001.

<sup>27</sup> "States Urge Corps to Suspend Plans to Revise Wetlands Permits." *Inside EPA*, July 6, 2001: p. 15.

Court for the District of Columbia overturned regulations issued by the Corps and EPA in 1993 which had extended the scope of the wetlands regulatory program to include certain landclearing and excavation activities. The Corps and EPA issued these regulations as part of the settlement of a lawsuit brought by environmental groups over the agencies' failure to regulate discharges associated with excavation (*North Carolina Wildlife Federation, et al. v. Tulloch*, Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992)). At issue was whether "fallback" from dredging activities constituted pollution, under the Clean Water Act.

The federal district court ruled that, in issuing the rules that resolved the *Tulloch* case, the agencies had exceeded their authority under the Clean Water Act. The 1993 rules revised the definition of "discharge" to clarify that discharges or redeposit associated with mechanized landclearing or excavation are subject to regulation. The federal district court ruled that, in issuing the rules that resolved the *Tulloch* case, the agencies had exceeded the authority of the Act by requiring permits from persons who engage in wetland excavation activities which result in "incidental fallback" of dredged material, because excavation is not defined as a regulated activity under the Act. The court said that

the appropriate remedy for what the agencies now perceive to be an imperfect statute, however, is Congressional action; defendants' authority is limited to adopting regulations that effect the will of Congress as expressed in the statute...The Court finds that the Tulloch Rule exceeds the scope of the agencies' statutory authority and, accordingly, declares it invalid and sets it aside. (slip opinion at 25)

Following the district court's ruling in January 1997, the Corps and EPA issued guidance to field staff regarding the federal government's authority to regulate certain excavation activities in wetlands. Staff were directed not to take administrative or enforcement actions related solely to the "incidental fallback" of dredged or fill material in wetlands. According to the guidance, such activities would include dredged material that falls from a dredge bucket as it is raised up through the water column, but would not include ditching activities where the excavated material is sidecast into U.S. waters; the latter would require a permit. Other activities would require case-by-case examination to determine whether they are affected by the ruling. One example of this type cited in the guidance is channelization and the reconfiguring or straightening of streams.<sup>28</sup>

Corps officials and environmentalists viewed the ruling as a major setback for the regulatory program. The government argued that the case has important implications for the scope and effectiveness of the entire CWA section 404 permit program, since the Tulloch Rule was adopted to close a significant loophole that had allowed developers to degrade waters without obtaining a 404 permit. However, a government appeal of the ruling was rejected by the U.S. Court of Appeals for the D.C. Circuit (*National Mining Association v. U.S. Army Corps of Engineers*, 97-5099, D.C. Cir., June 19, 1998). That court found that the Tulloch Rule's

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<sup>28</sup> Army Corps of Engineers, EPA Guidance Regarding Regulation of Activities in Light of American Mining Case, Issued April 11, 1997. Text available at [<http://www.wetlands.com/fed/tulloch3.htm>].

“overriding purpose appears to be to expand the Corps’ permitting authority to encompass incidental fallback and, as a result, a wide range of activities that cannot remotely be said to ‘add’ to the waters of the United States.” The court said it would give “considerable deference” to an effort by the Corps to draw a line between incidental fallback on the one hand, and re-deposits which are subject to regulation on the other hand, but that the Tulloch Rule drew no such line. The appeals court upheld a nationwide injunction that the district court had issued against enforcement of the Tulloch Rule. Government requests for rehearing of the appeals court’s decision also were rejected, and the government did not seek Supreme Court review.

According to the Corps, some excavation activities do come under section 404 jurisdiction, despite the overturning of the Tulloch Rule. While discharges associated with “incidental fallback” are excluded by these court decisions, other excavation activities that result in redeposits of dredged material into U.S. waters, other than incidental fallback, (such as replacement of an aquatic area with dry land) require a section 404 permit. They may be authorized by nationwide permits if they comply with the terms and limits of those permits. On May 10, 1999, the Corps published a final rule to conform the regulatory definition of “discharge of dredged material” with the judicial decisions.<sup>29</sup>

At the same time, the Corps announced that it would initiate a rulemaking to more clearly delineate the scope of Clean Water Act jurisdiction over redeposits of dredged material into U.S. waters. This occurred in January 2001, when the Corps and EPA issued a rule to clarify the types of activities that are likely to result in a discharge of dredged material subject to CWA section 404.<sup>30</sup> The rule states that ditch digging, dredging, and other excavation using heavy equipment typically create more than incidental fallback and result in a discharge of dredged material. In the view of the agencies, the use of heavy equipment for excavation or landclearing disrupts enough material to assume that the activity will cause a discharge of dredged material that would be deposited on surrounding wetlands or downstream areas. Under the rule, unless project-specific evidence shows that the activity results in only incidental fallback, it will be considered a regulable discharge of dredged material.

In issuing this rule, EPA and Corps officials were concerned that, since June 1998, large-scale developments had caused water quality degradation and at least 20,000 acres of wetlands loss with no permit review. Environmental groups supported the rule, but industry groups said it conflicts with prior court decisions.

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<sup>29</sup> U.S. Department of the Army. Corps of Engineers. “Revisions to the Clean Water Act Regulatory Definition of ‘Discharge of Dredged Material.’” 64 *Federal Register* 25120, May 10, 1999.

<sup>30</sup> U.S. Department of the Army, Corps of Engineers, and Environmental Protection Agency. “Further Revision to the Regulatory Definition of ‘Discharged of Dredged Material;’ Final Rule.” 66 *Federal Register* 4550, Jan. 17, 2001. The rule was issued by the outgoing Clinton Administration. After reviewing the new rule, the Bush Administration announced in April 2002 that it would allow the regulation to take effect without modification. Regulated industries are displeased with the new rule, and two groups filed lawsuits challenging it.

Several nationwide permits can be used to authorize certain activities associated with excavation. These include, for example, NWP 31, dealing with maintenance of existing flood control projects; NWP 18, concerning minor discharges of dredged or fill material; and NWP 7, authoring maintenance excavation of outfall structures. In addition, 1996 modifications to several nationwide permits were made to conform to the 1993 regulations (for example, NWP 12, concerning discharges in connection with utility line construction, was modified to authorize mechanized landclearing necessary for installation of utility lines). Under the federal court rulings about the Tulloch Rule, no permit is required if there is only “incidental fallback” from such activities, but if not, these general permits may be used, so long as the activities have minimal adverse environmental effects. Corps officials believed that the rulings which overturned the Tulloch Rule had no direct effect on the nationwide permit program, but they drew more attention to the Corps’ overall regulatory program and debate over the scope of its authority to regulate. One uncertainty concerns which excavation activities remain subject to section 404, based on case-by-case evaluations that are now required, and what role nationwide permits will play in authorizing those activities.

## Congressional Interest

Congressional interest in legislation to revise the wetlands regulatory program has been apparent for several years, as groups have pursued proposals intended to simplify and streamline permitting and revise federal and state roles in permitting. (For additional information, see CRS Issue Brief IB97014, *Wetlands Issues*.) None has focused specifically on nationwide permits. During the mid-1990s, overall wetlands policy was a major component of debates on the Clean Water Act and was partly the reason that no comprehensive clean water legislation was enacted. Interest groups were unable to reach consensus on whether legislative reform is needed and, if so, how far it should extend. In May 1995, the House passed legislation to reauthorize the Clean Water Act (H.R. 961) that, in part, would have significantly amended the wetlands permit program in section 404, but not the general permit provisions of the law. It would have required that landowners be compensated if a federal agency action under section 404 diminishes the fair market value of property by 20% or more. It also would have established a wetlands classification system nationwide, allowing for differential regulatory procedures; in areas deemed least ecologically valuable, no permit would be required. The changes contained in H.R. 961 were opposed by environmentalists and the Clinton Administration. The Senate did not take up Clean Water Act legislation during the 104<sup>th</sup> Congress, and no comprehensive legislative activity has occurred since then.

The controversies that surrounded debate on H.R. 961 led many observers to believe that future wetlands reform efforts might focus on narrower, strategic revisions, rather than comprehensive proposals. For example, proposals might include exempting categories of activities below a certain threshold (less than 1 or 2 acres, for example) from regulation or clarifying the scope of authorized state general permit programs. Revision of the nationwide permits and the 1997-98 federal court decisions concerning regulation of excavation activities could be impetus for congressional action. So far, no such proposals have been offered.



Congress has shown interest in these issues, however. In April 1997, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment held an oversight hearing on the developments concerning nationwide permits and the federal district court ruling concerning the Tulloch Rule. In June 1997, the Senate Environment and Public Works Subcommittee on Clean Air, Wetlands, and Private Property held a similar hearing. At both hearings, witnesses representing developers and other groups subject to wetlands regulation expressed concern about impacts of the overall wetlands regulatory program, and a number were critical of the 1996 changes to the nationwide permit program, saying that the changes would be costly and could result in project delays. Administration witnesses supported the modifications, saying that the changes will allow the Corps to implement a more fair, flexible, and effective program which is appropriately responsive to environmental protection needs. At the Senate hearing, other public witnesses supported the 1996 changes to NWP 26, discussed the need to regulate excavation activities, and criticized the federal district court's ruling concerning the Tulloch Rule.

Interest in these topics recurred in the 106<sup>th</sup> Congress, focusing on changes to nationwide permit 26. Regulatory issues first were addressed in P.L. 106-60, the FY2000 Energy and Water Development Appropriations bill. As approved by the House in July 1999, this bill (H.R. 2605) included a provision to require the Corps to submit a study on the workload impact and compliance costs of replacement permits for NWP 26 by December 30, 1999. Landowner and developer groups supported the provision, contending that the costs and impacts should be better identified before revised permits were issued, but the Clinton Administration opposed it, saying that the study was unnecessary and, even with a December 30 deadline, would increase wetlands loss in the nation by delaying issuance of replacement permits. The final bill modified the House language by directing the Corps to study the workload impacts and costs of compliance of the proposed replacement permits, but dropped language that would have required submission of a report to Congress before publication of final permits.

Congress addressed the issue of the activity-specific permits issued in 2000 in connection with the FY2001 funding bill for the Corps, but it did not attempt to modify or rescind the permits themselves. Congress included legislative language in P.L. 106-377, the FY2001 Energy and Water Development Appropriations Act, directing the Corps to improve the analysis and increase information available to the public regarding the costs of the nationwide permit program and permit processing times. This bill was enacted in October 2000 (after the effective date of the replacement permits that were issued in March 2000). It directed the Corps to revise its cost estimate of the nationwide permits program, based on the final replacement permits; prepare a plan to manage the additional workload of these permits; provide quarterly program performance reports and annual reports on two specific Corps divisions; and provide improved information on permit applications and the functioning of the administrative appeals process.

There were no similar provisions in the FY2002 funding bill for the Corps or subsequent appropriations acts.

In the future, renewed attention to these issues could occur as part of reauthorization of the Clean Water Act, should it be a legislative priority, or separately, as it did in the FY2000 and FY2001 appropriations process. Congressional interest also could arise as a result of lingering concerns about regulation of excavation activities (specifically, the 2001 revision of the Tulloch Rule) or issues related to the package of nationwide permits revised in 2002.