

## DEPARTMENT OF DEFENSE

## Department of the Army, Corps of Engineers

## Proposal To Issue and Modify Nationwide Permits; Notice

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

**SUMMARY:** To improve protection of the aquatic environment, the Corps of Engineers is proposing to issue 5 new Nationwide Permits (NWP) and modify 6 existing NWPs to replace NWP 26 when it expires. The Corps is also proposing to modify 9 NWP general conditions and add three new general conditions. These general conditions will apply to the proposed new and modified NWPs, as well as the NWPs issued on December 13, 1996, when the new and modified NWPs become effective. The proposed new NWPs are activity-specific and authorize activities in all non-tidal waters of the United States, except for non-tidal wetlands adjacent to tidal waters. These proposed new and modified NWPs will allow Corps districts to enhance protection of the aquatic environment, by utilizing the Corps limited resources to review proposed projects, based on the degree of adverse effects on the aquatic environment. The Corps will spend more time on projects with the potential for more environmental damage and less time on projects with minimal adverse effects on the aquatic environment. The Corps has developed, with public and Federal, Tribal, and State agency comments, terms and conditions to ensure that the adverse effects of authorized activities are minimal. A key element of this process by the Corps to develop NWPs with minimal adverse effects on the aquatic environment is regional conditioning developed by district and division engineers. Regional conditioning of NWPs is critical to ensure that the NWPs help the Corps achieve these goals. Regional conditioning of NWPs is necessary to account for differences in aquatic resource functions and values across the country. Regional conditions will be added to the proposed new and modified NWPs by division engineers to ensure that the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. Concurrent with this **Federal Register** notice, each Corps district will issue a public notice to solicit comments on their final draft

regional conditions for the proposed new and modified NWPs.

The purpose of this **Federal Register** notice is to solicit comments on the final draft of the proposed new and modified NWPs that will replace NWP 26, as well as the NWP general conditions and definitions. Concurrent with this **Federal Register** notice, each Corps district will publish a public notice to solicit comments on their final draft regional conditions for the new and modified NWPs. The comment period for these district public notices will be 45 days. After reviewing the comments received in response to this **Federal Register** notice, the Corps will issue another **Federal Register** notice announcing the issuance of the new and modified NWPs to start the final 60 days for the State and Tribal Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination decisions. After this 60-day period, the new and modified NWPs will become effective as NWP 26 expires.

To improve the implementation of the NWP program, the Corps has combined the NWP general conditions and Section 404 Only conditions into one set of general conditions. The Corps will issue a set of definitions for use with all of the NWPs to provide more consistency in the application of terms commonly used in the NWP program.

Although NWP 26 was scheduled to expire on September 15, 1999, the Corps has extended the expiration date of NWP 26 to December 30, 1999, or until the effective date of the new and modified NWPs, whichever comes first. **DATES:** Comments on the proposed new and modified NWPs must be received by September 7, 1999.

**ADDRESSES:** HQUSACE, ATTN: CECW-OR, 20 Massachusetts Avenue, NW, Washington, DC 20314-1000. Submit electronic comments to [cecwor@hq02.usace.army.mil](mailto:cecwor@hq02.usace.army.mil). See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing of comments.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson or Mr. Sam Collinson at (202) 761-0199 or access the Corps of Engineers Regulatory Home Page at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

**SUPPLEMENTARY INFORMATION:****Background**

On December 13, 1996, the Corps of Engineers (Corps) reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWPs prior to the expiration date of NWP 26. In the July

1, 1998, issue of the **Federal Register** (63 FR 36040-36078), the Corps published its proposal to replace NWP 26 by issuing 6 new NWPs, modifying 6 existing NWPs, modifying 6 NWP general conditions, and adding one new NWP general condition. NWP 26 authorizes discharges of dredged or fill material into headwaters and isolated waters, provided the discharge does not result in the loss of greater than 3 acres of waters of the United States or 500 linear feet of stream bed. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters of the United States and are not adjacent to interstate or navigable waters. Headwaters are non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second.

The new and modified NWPs proposed in the July 1, 1998, **Federal Register** notice could authorize many of the same activities with minimal adverse effects on the aquatic environment that are currently authorized by NWP 26. Most of the proposed new and modified NWPs authorize activities in all non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. These proposed NWPs will ensure that the NWP program is based on the types of authorized activities. Regional conditioning of these proposed NWPs will limit or prohibit their use in high quality waters.

The terms and limits of the proposed new and modified NWPs are intended to authorize activities that typically result in minimal adverse effects on the aquatic environment. For these proposed NWPs, the Corps has also established preconstruction notification (PCN) thresholds to ensure that any activity that may potentially have more than minimal adverse effects will be reviewed by district engineers on a case-by-case basis. Most of the proposed NWPs require submission of a PCN for losses of greater than 1/4 acre of waters of the United States. Most of the proposed NWPs require PCNs for filling open waters, including streams, and for certain proposed NWPs a PCN may be required for filling more than 500 linear feet of stream bed. The PCN requirements for filling stream beds may differ, depending on whether a perennial, intermittent, or ephemeral stream bed is filled. For most of these NWPs, there is no PCN requirement for filling ephemeral stream beds. Excavation of stream beds may require a PCN if the excavation activity results

in a discharge of dredged material, including redeposit other than incidental fallback, into waters of the United States. Regional conditions may be added to NWP's by district or division engineers to lower notification thresholds or require notification for all activities authorized by an NWP in order to ensure no more than minimal adverse effects on the aquatic environment.

The 5 new NWP's proposed in this **Federal Register** notice will expire 5 years from their effective date. The proposed 6 modified NWP's (i.e., NWP's 3, 7, 12, 14, 27, and 40) will expire on February 11, 2002, with the other NWP's that were issued, reissued, or modified in the December 13, 1996, **Federal Register** notice (61 FR 65874-65922). The proposed new and modified NWP's are scheduled to become effective on December 21, 1999, and we have extended the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWP's, whichever occurs first. The extension of the expiration date for NWP 26 is discussed in more detail below.

Compensatory mitigation will be required when the District Engineer determines such mitigation is necessary to ensure that the activities authorized by NWP's will result only in minimal adverse effects on the aquatic environment. For a particular project, the District Engineer may determine that compensatory mitigation is not necessary, because the activity will result in no more than minimal adverse effects on the aquatic environment without compensatory mitigation. Some of the NWP's contain requirements for compensatory mitigation for certain activities, particularly for activities that require notification to the District Engineer. Compensatory mitigation will be used to support the goal of no net loss of aquatic resource functions and values by offsetting impacts to the aquatic environment. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or in exceptional circumstances, preservation of aquatic resources either by individual projects constructed by the permittee or the use of mitigation banks, in lieu fee programs, or other consolidated mitigation efforts. For the new and modified NWP's, an important component of compensatory mitigation is the establishment and maintenance of vegetated buffers adjacent to open and flowing waters. Vegetated buffers adjacent to open waters or streams may consist of either uplands or wetlands and help protect and enhance local water quality and aquatic habitat features in the waterbody. Vegetated

buffers can be established by maintaining an existing vegetated area adjacent to open or flowing waters or by planting native trees, shrubs, and herbaceous perennials in areas with little existing perennial native vegetation. The benefits and requirements for vegetated buffers are discussed in further detail below.

During the review of PCN's, district and division engineers can exercise discretionary authority and require an individual permit for those activities that result in more than minimal adverse effects on the aquatic environment. District engineers can also place conditions, including compensatory mitigation requirements, on NWP authorizations on a case-by-case basis to ensure that the activity authorized by the NWP results only in minimal adverse effects on the aquatic environment.

For these NWP's, we are placing greater emphasis on regional conditioning to ensure that the NWP's authorize only activities with minimal adverse effects on the aquatic environment. Regional conditions allow the NWP program to take into account regional differences in aquatic resource functions and values across the country. Each district will identify areas of high value waters that require lower PCN thresholds or notification for all activities in those waterbodies to ensure that the NWP's authorize only activities with minimal adverse effects on the aquatic environment. Division engineers can also suspend or revoke certain NWP's in high value waters if the use of those NWP's would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. The regional conditioning process is discussed in more detail below.

The Corps believes that the new and modified NWP's, with regional conditions, will increase the overall protection of the aquatic environment when compared to the existing NWP program. However, the scope of applicable waters for the proposed NWP's and the proposed NWP General Condition 27, which prohibits the use of certain NWP's to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain, will substantially increase the Corps individual permit workload. The proposed new and modified NWP's, in addition to the existing NWP's, will allow the Corps to efficiently authorize activities with minimal adverse effects on the aquatic environment and focus its efforts on protecting high value aquatic resources. NWP's will be used to authorize most activities in low value

waters. Higher value waters, including wetlands, will receive additional protection through regional conditioning of the NWP's, special conditions on specific NWP authorizations, and case-specific discretionary authority to require an individual permit when necessary. Regional conditions will be required by each district to restrict or prohibit the use of NWP's in high value waters. The Corps will require compensatory mitigation, where appropriate, to ensure that the individual or cumulative adverse effects on the aquatic environment authorized by these NWP's are no more than minimal. NWP's may also be suspended or revoked in some high value waters if the use of those NWP's would result in more than minimal adverse effects on the aquatic environment.

The proposed new and modified NWP's also reflect the Corps increased focus on open or flowing waters. One of the goals of the proposed new and modified NWP's is to improve protection of open waters and streams, especially water quality and aquatic habitat, while continuing to fully protect wetlands. District engineers will not place less consideration on adverse effects to other types of waters for the sake of wetlands, especially low value wetlands. The establishment and maintenance of vegetated buffers adjacent to open waters and streams will protect, restore, and enhance water quality and aquatic habitat. Vegetated buffers can be used to provide out-of-kind compensatory mitigation for wetland impacts where the District Engineer determines that such mitigation for wetland impacts is the best, ecologically, for the aquatic environment.

In addition to regional conditioning of the proposed new and modified NWP's, additional substantial protection of the aquatic environment will result from the modification of two NWP general conditions. We are proposing to modify General Condition 9, Water Quality, to require that postconstruction conditions do not result in more than minimal degradation of downstream water quality. An important component of this general condition is the requirement that, for certain NWP's, the permittee implement a water quality management plan to protect water quality. The water quality management plan may consist of stormwater management facilities or vegetated buffers adjacent to open or flowing waters or wetlands. It is not our intent to replace existing State or local water quality safeguards if those current safeguards are adequate. However, where the State or local program does not ensure that an authorized activity

results in no more than minimal impacts on downstream water quality, the Corps will condition its NWP authorization to contain a water quality management plan. We are also proposing to modify former Section 404 Only condition 6 (now designated as General Condition 21) to require that neither upstream nor downstream areas are subject to more than minimal flooding or dewatering after the project has been constructed and while the authorized activity is operated. General Condition 21 will help ensure that postconstruction effects on local surface water flows are minimal.

On October 14, 1998, the Corps published a supplemental notice in the **Federal Register** (63 FR 55095-55098) requesting comments on additional proposed limitations for the NWP program, including the proposed new and modified NWPs. This **Federal Register** notice also announced the withdrawal of NWP B for master planned development activities from the July 1, 1998, proposal. The additional NWP limitations proposed in the October 14, 1998, **Federal Register** notice, include prohibiting the use of NWPs in certain designated critical resource waters, limiting the use of NWPs in impaired waters, and prohibiting the use of the new NWPs to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain as mapped by the Federal Emergency Management Agency.

As a result of the proposal published on October 14, 1998, we are proposing to add 3 new NWP general conditions. General Condition 25, Designated Critical Resource Waters, prohibits the use of certain NWPs to authorize discharges of dredged or fill material into designated critical resource waters, including wetlands adjacent to those waters. General Condition 25 also requires notification to the District Engineer for activities authorized by certain other NWPs in Designated Critical Resource Waters. General Condition 26, Impaired Waters, restricts the use of NWPs to authorize discharges of dredged or fill material into waters of the United States designated through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. General Condition 26 prohibits the use of NWPs to authorize discharges of dredged material resulting in the loss of greater than 1 acre of impaired waters of the United States,

including wetlands adjacent to those impaired waters. For discharges of dredged material resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, General Condition 26 requires the prospective permittee to notify the District Engineer and clearly demonstrate that the project will not result in further impairment of the listed water. General Condition 27, Fills Within the 100-year Floodplain, prohibits or restricts the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

The October 14, 1998, **Federal Register** notice also announced the extension of the expiration date for NWP 26 to September 15, 1999. As a result of the additional time needed to finalize the proposed new and modified NWPs, the Corps has decided to extend the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever comes first, to ensure that there is no gap between the effective date of the new and modified NWPs and the expiration date of NWP 26. Extending the expiration date of NWP 26 is necessary to ensure fairness to the regulated public by continuing to provide an NWP for activities in headwaters and isolated waters that have minimal adverse effects on the aquatic environment until the new and modified NWPs proposed in this **Federal Register** notice become effective. In response to the July 1, 1998, **Federal Register** notice, many commenters recommended that the Corps extend the expiration date of NWP 26 until the proposed new and modified NWPs are issued and become effective. NWP 26 can continue to be used to authorize activities in headwaters and isolated waters until its expiration date. A permittee who receives an NWP 26 authorization prior to the expiration date will have up to 12 months to complete the authorized activity, provided the permittee commences construction, or is under contract to commence construction, prior to the date NWP 26 expires (see 33 CFR Part 330.6(b)). This provision applies to all NWP authorizations unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the NWP authorization in accordance with 33 CFR Part 330.4(e) and 33 CFR Part 330.5 (c) or (d).

The existing NWPs, with the exception of NWP 26, will remain in effect until they expire on February 11, 2002, unless otherwise modified, reissued, or revoked. Some of the

proposed new and modified NWPs can be used with existing NWPs to authorize activities with minimal adverse effects on the aquatic environment. The use of more than one NWP to authorize a single and complete project is addressed in the proposed modification of General Condition 15, Use of Multiple Nationwide Permits.

The October 14, 1998, **Federal Register** notice also discussed the need for additional opportunities for public comment on the new and modified NWPs and regional conditions. We have modified the process for additional opportunities for public comment to allow for more effective implementation of the proposed new and modified NWPs.

The revised process for issuing the proposed new and modified NWPs is illustrated in Figure 1. Figure 1 does not contain the previous steps in the development of the proposed new and modified NWPs. The revised process starts with today's publication of the draft new and modified NWPs in the **Federal Register** for a 45-day comment period, with concurrent public notices issued by Corps district offices to solicit comments on draft Corps regional conditions for these NWPs. Comments addressing the draft new and modified NWPs, general conditions, and definitions should be sent to HQUSACE, at the address cited in the **ADDRESSES** section of this **Federal Register** notice. Comments addressing draft Corps regional conditions should be sent to the appropriate Corps district office. After this 45-day comment period, we will review the comments concerning the proposed NWPs that were received in response to this **Federal Register** notice, each district will review the comments concerning their final draft regional conditions that were received in response to their public notices, and Corps divisions will complete the supplemental decision documents for the Corps regional conditions. On October 22, 1999, the Corps will announce the issuance of the final new and modified NWPs in the **Federal Register** to begin the final 60-day State and Tribal Section 401 water quality certification and Coastal Zone Management Act (CZMA) consistency determination processes. Concurrent with the publication of the final new and modified NWPs in the **Federal Register**, each Corps district will publish a public notice announcing their final Corps regional conditions for the new and modified NWPs, so that the 401 and CZMA agencies can make their decisions based on the new and modified NWPs and the Corps regional conditions. After this 60-day 401/CZMA

period, the new and modified NWPs and Corps regional conditions will become effective.

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