

# CRS Report for Congress

## The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments

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# The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments

## Summary

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. The Corps' regulatory process involves two types of permits: 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 actions. The Corps uses general permits to minimize the burden of its regulatory program: they authorize landowners to proceed with a project without the time-consuming need to obtain standard individual permits in advance. About 90% of the Corps' regulatory workload is processed in the form of general permits.

Nationwide permits are one type of general permit. 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. In September 2006, the Corps proposed to reissue these permits, which are due to expire in March 2007. The current nationwide permit program has few strong supporters, for differing reasons. Developers and other industry groups say that it is too complex and burdened with arbitrary restrictions that limit opportunities for an efficient permitting process and have little environmental benefit. Environmentalists say that it does not adequately protect aquatic resources, because the review procedures and permit requirements are less rigorous than those for individual or standard permits. 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.

In addition to general objections, interest groups have a number of specific criticisms of the permits, such as requirements that there must be compensatory mitigation for impacts of some authorized activities, impacts of regional conditioning through which local aquatic considerations are addressed, concern that coal mining activities authorized by these permits have significant adverse environmental impacts, and the need to define "minimal adverse effects" for purposes of implementing the nationwide permit program. Coordinating implementation of the nationwide permits between federal and state governments also raises a number of issues. Of particular concern to states is tension over whether their authority to certify the nationwide permits is sufficient to assure that water quality standards or coastal zone management plans will not be violated.

Congressional interest in wetlands permit regulatory programs has been evident in the past in oversight hearings and in connection with specific provisions of bills to fund the Corps' regulatory programs. For some time, there has been a stalemate over legislation that would revise wetlands regulatory law and that could, if enacted, modify the nationwide permit program. During this time, no consensus has emerged on whether or how to reform overall wetlands policy legislatively. Congressional involvement in these issues could arise again as a result of reissuance of the nationwide permits in 2007.

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# The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments

## Introduction

Federal laws require government approval prior to beginning any work in or over waters of the United States that affects the course, location, condition, or capacity of such waters, or prior to discharging dredged or fill material into U.S. waters. Regulatory programs that 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 two types of permits: 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 that 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.

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. At issue in the nationwide permit 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. Stakeholders involved in this debate include, on the one hand, industry groups (members of building — especially homebuilding — design, realtor, and petroleum and mining organizations) and, on the other, environmental advocacy groups, along with many state water quality, water resources, and environmental agencies.

The Corps' regulatory authority under the Clean Water Act is broadly defined. It covers waters of the United States, including the territorial seas, and includes traditionally navigable waterways capable of supporting interstate and foreign commerce, plus their tributaries, and adjacent wetlands and isolated waters where the use, degradation, or destruction of such waters could affect interstate or foreign

commerce.<sup>1</sup> In fact, much of the public concern about the program — with regard to impacts of authorized activities, and terms and conditions intended to limit impacts — often focuses on permits for projects that affect the nation’s wetlands. Controversies about the program are compounded by disputes about the data on which the Corps bases its conclusions that adverse environmental impacts of authorized activities are minimal. Critics of the permit program, especially environmental advocates, argue that the Corps’ data are dated (the most recent available statistics are from 2003) and inaccurate, because the Corps lacks an effective tracking and monitoring system for evaluating impacts.

The nationwide permit regulatory program has drawn Congress’s attention several times in the 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 nationwide permit program and discusses several major issues that have drawn the attention of stakeholder interest groups, including program complexity, coordination with states, and assessing cumulative impacts of the program.

## 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. Individual permits are subject to public notice, public hearing, and case-by-case evaluation which typically involve longer time before the activity is authorized. General permits are intended to allow certain activities to proceed with little delay or paperwork. According to Corps data, in 2003, general permits entailed average processing time of 24 days, in contrast with individual permits, which, on average, took 187 days of processing and evaluation, once an application was completed. Approximately 74,000 activities per year (representing 92% of the Corps’ regulatory workload) were authorized by nationwide and other general permits. The Corps acknowledges that it does not have resources to evaluate all of these activities as individual permits. General permits, including nationwide permits, authorize activities that usually would be authorized through the individual permit process with little or no change in the scope of the work.<sup>2</sup> While more than half require advance notification to the Corps for some or all covered activities, others only require after-the-fact notification. The following are examples of nationwide permits:<sup>3</sup>

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<sup>1</sup> Debate about the jurisdictional reach of the Corps’ regulatory program has been a controversial policy and judicial issue for some time. It is beyond the scope of this report, but for additional information see CRS Report RL33483, *Wetlands: An Overview of Issues*, by Jeffrey Zinn and Claudia Copeland.

<sup>2</sup> 64 *Federal Register* 32268, July 21, 1999.

<sup>3</sup> The full text of the current nationwide permits and related general conditions, issued in (continued...)

- 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 and associated intake 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 such as ski areas and golf courses (nationwide permit 42).

Many nationwide permits have specific conditions and terms (such as maximum acreage limitations). In addition, a number of general conditions apply to some or all nationwide permits; 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.

The statutory authority for these permits is Section 404(e) of the Clean Water Act.

In carrying out the functions relating to the discharge of dredged or fill material under this section, the Secretary [of the Army] may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

## **Nationwide Permits: 1977-2002**

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>4</sup> are valid only for a period of five

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<sup>3</sup> (...continued)

January 2002 is available 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)].

<sup>4</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 (continued...)

years, as is the case with other Clean Water Act permits. Thus, they were reissued in 1982 and 1987. They were reissued as a group in November 1991, taking effect in January 1992. Prior to 1991, the nationwide program involved little individualized review of these permits, as the guiding criterion was that covered activities impose so minimal an environmental impact that the full review given individual permits was not warranted. In the 1991 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) to the Corps 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 45 days to notify the person of approval to proceed or, instead, of the need to obtain an individual permit before 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). The Corps had several substantive purposes behind modifying the permits at that time. 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 that reflect differences in aquatic ecosystem functions and values that exist across the nation.

**Nationwide Permit 26: Background and Controversies.** Controversies about the program are reflected especially in one of the nationwide permits, nationwide permit 26, which authorized discharges in headwaters or isolated waters. It had been added to the program in 1977 and expanded in 1982. Headwaters and isolated waters are areas that many people have difficulty identifying as wetlands, because they may appear dry for much of the year or lack the types of vegetation

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<sup>4</sup> (...continued)

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) are derived from an existing state, local, or other federal agency program and are designed to avoid duplication with that program. They 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 its 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 several hundred regional general permits (RGPs) and more than 50 PGPs. Also, some activities qualify for abbreviated permit processing with authorization by district engineers in the form of Letters of Permission.

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." Environmental groups and other protection advocates, including federal and state natural resource agencies, pressed for repeal or modification of NWP 26.

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 and transportation activities were the major types of activities authorized by NWP 26.<sup>5</sup> 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. Corps data also indicated that 75% of all environmental impacts resulting from all of the nationwide permits were authorized under this one permit.<sup>6</sup>

In 1996 the Corps re-issued NWP 26 but with modifications 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 would affect 1/3 acre or more (compared with 10-acre and 1-acre thresholds previously). Second, the Corps reissued this permit only for two years, intending to replace NWP 26 with activity-based permits. The Corps proposed permits to replace NWP 26 in July 1998, but it took until March 2000 for these permits to be finalized. NWP 26 remained in effect during that time.

**Replacement Permits for NWP 26 in 2000.** 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). The final permits<sup>7</sup> repealed NWP 26 entirely, authorized five specific activity-based permits as replacements, modified several existing NWPs and general conditions, and added

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<sup>5</sup> Department of the Army, Corps of Engineers, "Proposal to Issue and Modify Nationwide Permits," 63 *Federal Register* 36041, July 1, 1998.

<sup>6</sup> Presentation by Michael Davis, Deputy Assistant Secretary of the Army for Civil Works, at the Environmental Law Institute, Feb. 4, 1997.

<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.

two new general conditions. They became effective June 7, 2000. The five new permits cover 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). This permit 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).

All but the new permit for reshaping of existing drainage ditches (NWP 41) were limited to activities that do not cause the loss of greater than ½ acre of non-tidal waters<sup>8</sup> (compared with the previous 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 one-tenth of an 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.

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. A mitigation bank is a site where wetlands or other aquatic resources have been 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.<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 in some cases to adequately replace aquatic resource functions and values lost as a result of NWP-authorized activities.

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<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.

<sup>9</sup> 63 *Federal Register* 36045, July 1, 1998.

The Corps also modified six existing permits in 2000 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 on agricultural lands 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  $\frac{1}{2}$  acre to  $\frac{1}{4}$  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  $\frac{1}{4}$  acre of non-tidal waters or wetlands. This permit must be obtained 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 new general conditions adopted in 2000 put limits on 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.

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, because aquatic resource functions and values vary considerably across the country and cannot be imposed through more stringent national limitations (regional conditioning cannot be used to make an NWP less restrictive).<sup>10</sup>

**Lawsuits Challenging the Replacement Permits.** Soon after the final replacement and modified permits were published in 2000, several industry groups challenged the permits in court. The lawsuits 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. They also said that the Corps had not considered impacts on small businesses. Industry petitioners wanted the Corps to re-

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<sup>10</sup> 65 *Federal Register* 12838.

instate NWP 26. However, the Corps has repeatedly said that, since NWP 26 expired in 2000, this permit will not be reinstated.

The consolidated cases were initially dismissed by a federal district court in 2003. The court said it lacked jurisdiction, saying that a final agency action does not take place until a project seeking to be covered by a nationwide permit has exhausted all of its permitting options. However, in 2005, a federal appeals court partly reversed the ruling and remanded the case to the district court. (*National Association of Home Builders v. Army Corps of Engineers* (417 F.3d 1272 (DC Cir 2005)). The appeals court said that the challenged permits constituted final action subject to judicial review. This court also determined that nationwide permits are regulations for purposes of the Administrative Procedure Act and, thus, are subject to the Regulatory Flexibility Act and other administrative requirements to assess impacts on small businesses and unfunded mandates, as well as to prepare environmental documentation and comply with the Congressional Review Act. Previously, the Corps had taken the position that the nationwide permits do not constitute regulations.

Upon remand of the case, the federal district court rejected the lawsuit for a second time in 2006 (*National Association of Home Builders v. Army Corps of Engineers*, 453 F.Supp. 2d 116 (DDC 2006)). The court ruled that the Corps had not acted arbitrarily, capriciously, or contrary to the law in its issuance and reissuance of nationwide permits, as the Corps had adequately explained its reasoning and had acted within its authority.

## **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 that had been 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.<sup>11</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 offered some benefits, they said, but any such benefits are more than offset by problems with the 2000 replacement permits, which developers and other groups continued to oppose, saying that the permits impose arbitrary and burdensome restrictions. Following a public comment period that generated more than 2,100 comments, the nationwide permits were reissued in January 2002, essentially as proposed, with an effective date of March 18, 2002. The Corps' action modified nine existing permits and six existing general conditions and added one general condition.<sup>12</sup>

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<sup>11</sup> U.S. Department of the Army, Corps of Engineers, "Proposal to Reissue and Modify Nationwide Permits," 66 *Federal Register* 42069, August 9, 2001.

<sup>12</sup> U.S. Department of the Army, Corps of Engineers, "Issuance of Nationwide Permits," 67 (continued...)

## 2006 Proposal to Reissue the 2002 Permits

Authorization for the 2002 NWP's will expire March 18, 2007. In preparation for that expiration, on September 26, 2006, the Corps published a proposal to reissue the 43 existing NWP's, with some modification, and to issue six new permits.<sup>13</sup> The proposal also would modify some of the general conditions and definitions that apply to all NWP's. The six proposed new permits are:

- NWP A, Emergency Repair Activities. This general permit is intended to apply to activities for repair, rehabilitation, or replacement of structures or fills that have been destroyed or damaged by storms, floods, fire, or other discrete events. The permit would allow for emergency repairs. The proposal also would modify existing NWP 3 (Maintenance) to limit its coverage to routine maintenance activities.
- NWP B, Discharges into Ditches and Canals that are Waters of the United States. This permit would apply to discharges of dredged or fill material into ditches and canals that are constructed in upland areas, that receive water from another water of the United States, and that divert water to another water of the United States. The Corps argues that, with these limitations, the types of ditches and canals covered by the permit are likely to affect few aquatic resources, thus ensuring that the environmental impact of the discharge is minimal. The permit would be limited to discharges that cause the loss of no more than one acre of waters of the United States.
- NWP C, Pipeline Safety Program Designated Time Sensitive Inspections and Repairs. This permit would authorize inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that are time-sensitive, for example, following a pipeline rupture. The Corps explains that many of these activities could be authorized by existing NWP 3 or NWP 12 (Utility Line Activities), but the new permit would allow rapid response when needed to reduce environmental impacts. No PCN would be required.
- NWP D, Commercial Shellfish Aquaculture Activities. This permit would authorize structures or works in navigable waters, as well as discharges into all waters of the United States for the continued operation of existing commercial oyster, clam, geoduck, mussel or

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<sup>12</sup> (...continued)

*Federal Register* 2020, January 15, 2002.

<sup>13</sup> U.S. Department of the Army, Corps of Engineers, "Proposal to Reissue and Modify Nationwide Permits; Notice," 71 *Federal Register* 56257, September 26, 2006. A summary table of the proposed permits, identifying changes from the 2002 permits, is available at [[http://www.saw.usace.army.mil/wetlands/Notices/NWP/NWP%Table\\_2006proposal.pdf](http://www.saw.usace.army.mil/wetlands/Notices/NWP/NWP%Table_2006proposal.pdf)].

scallop aquaculture operations. It would not include operations that raise crustaceans or finfish.

- NWP E, Coal Remining. This permit is intended to authorize activities for the restoration of coal mine sites that are causing physical and/or chemical impacts to water; many are likely to be abandoned or closed sites. The permit would allow new mining, either at the site or as part of a reclamation project, or together with adjacent unmined areas, and would authorize related discharges of dredged or fill material into non-tidal waters of the United States. There is no proposed acreage limit for this permit, which would apply only to activities already authorized under the Surface Mining Control and Reclamation Act by the federal Office of Surface Mining or qualified states. The applicant must demonstrate to the Corps that the overall project, including the reclamation activity and any new mining, will result in a net increase in aquatic resource functions.
- NWP F, Underground Coal Mining Activities. This permit would authorize a number of different activities associated with underground coal mining, such as excavating rock and soil on the surface in order to expose coal seams; providing road access for people and equipment to a site; and constructing acid mine drainage impoundments or sedimentation ponds. It could be used to authorize permanent structures or fills that would remain after reclamation of the site. The permit would authorize discharges to non-tidal waters only and would have a ½-acre limit on discharges. It would not authorize coal preparation and processing activities outside the mine site.

The proposal included modification of a number of the existing nationwide permits. For example, currently two NWPs apply to construction of residential developments: NWP 29, which authorizes single unit residences (i.e., single family homes; see page 7), and NWP 39, which authorizes multiple unit residential developments, as well as commercial and institutional developments. The Corps proposed to modify these permits so that NWP 39 would authorize commercial and institutional developments, and NWP 29 would authorize all types of residential developments. The proposal would, in effect, eliminate the current NWP 29. The existing NWP 29 has a ¼-acre limit on authorized discharges (see page 7), while as proposed, the revised NWP 29 would have the same conditions as NWP 39: authorized discharges would be limited to impacts affecting ½ acre of non-tidal waters and a 300-foot linear foot limit on the loss of a stream bed. The Corps' rationale for the changes to these two permits was that it is inappropriate to establish different permits for single and multiple unit residential developments, because impacts to the aquatic environment are determined by permit conditions (such as the ½-acre limit), not the type of residential development. Regarding the changes to NWP 39, the Corps argued that commercial (e.g., retail stores, industrial facilities, and shopping centers) and institutional developments (e.g., schools, fire stations, hospitals, and places of worship) are different from residential developments in a number of ways, such as different state and local requirements concerning planning,

zoning, and stormwater management; therefore, it is appropriate to group them in one permit (NWP 39) and to group residential structures in a separate permit (NWP 29).

Both industry groups and environmental advocates criticized the modifications to NWP 29. Industry groups, particularly homebuilders, objected to the fact that new NWP 29 would require preconstruction notification (PCN) for all applications (the current NWP 29 requires PCN for projects with certain impacts over one-tenth of an acre), arguing that it is unclear why a PCN should be required for all activities, regardless of size. Many single-unit projects that previously were not required to submit a PCN would have to do so under the revised permit, they said. Further, they objected to the 300-foot linear limit and the ½ acre threshold under this permit, saying these limits are too stringent (presumably for multiple unit developments) and will exclude many projects with minimal impact from seeking a nationwide permit. Environmental groups, on the other hand, argued that the current ¼-acre threshold should be retained, not increased.

## Critiques by Stakeholder Groups

As noted previously, as the nationwide permit program has become more complex over time, major interest groups are increasingly united in arguing that the program as it has developed fails to meet its overall objectives, although their reasons for this criticism are very different. One view was expressed in comments on the 2006 draft NWPs by an environmental advocacy group.

The nationwide permit system was presumably developed in order to balance two somewhat contrary objectives: to ensure that the permits issued result in only minimal impacts on aquatic resources, and to provide a predictable, fair, and simply regulatory system for citizens applying for permits. Given the complexity and confusion surrounding the nationwide permit program, together with the clearly more than minimal environmental impacts, we question whether either of these objectives is being achieved.<sup>14</sup>

Similar views were expressed by a group representing one set of land developers.

Over time, however, the NWPs have become increasingly restrictive and complex to the point that they faintly resemble the streamlined permitting process Congress envisioned when it enacted Section 404(e)... [T]he program waives between providing administrative relief and imposing red tape, between a truly streamlined process and one that is so severely limited that few projects can qualify.... The history of the NWP has been a consistent tightening of the eligibility for the program.... Each time the Corps has drawn the line between NWP eligibility and ineligibility, eligibility has been restricted, never relaxed.<sup>15</sup>

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<sup>14</sup> Gulf Restoration Network, et al., Comments Submitted on Docket number COE-2006-0005, pp. 1-2.

<sup>15</sup> National Association of Home Builders, "Advice and Recommendations of the National Association of Home Builders on the Department of the Army, Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits," pp. 3, 21, 44.

Beyond apparent broad agreement that the program fails to meet its objectives, the views of industry and environmental advocacy groups diverge greatly. Major industry groups support the NWP program, or the type of streamlined program that they believe was originally intended, and agree with the Corps that the use of nationwide permits will result in minimal adverse environmental impacts. Nevertheless, they are highly critical of many aspects of the Corps' 2006 proposal.

The Corps' attempt to illegally expand its jurisdiction, the stringent and largely inflexible acreage and PCN [preconstruction notification] thresholds, the lack of a proper administrative process and record to support the proposal, the problematic regional conditions and the overall trend toward the elimination of NWPs all contribute to a permit package that is hardly even a semblance of the streamlined process directed by Congress.<sup>16</sup>

Major environmental groups argue that permitted activities will have more than minimal impacts on the environment and that the Corps has no substantial or scientific evidence to conclude otherwise. They argue that the permits are unlawful because they violate the requirements of Section 404(e) that there may be no more than minimal adverse environmental effects on aquatic resources, both individually and cumulatively, and therefore, the permits must be substantially modified or not re-issued. Environmental groups are highly critical of many aspects of the proposal, such as inconsistent and inadequate PCN requirements, overly vague requirements which will result in weakened regulatory protection, the granting of excessive authority to Corps district engineers to waive permit limits in individual cases, and what they describe as "irrational reliance" on compensatory mitigation to offset the harmful effects of permitted activities.<sup>17</sup>

## Specific Critiques

In addition to general objections, comments on aspects of the 2006 proposal that drew most attention address a number of specific concerns, many of which have persisted since issuance of the 2002 permits.

**300 Linear-Foot Prohibition.** One of the most significant changes in the permits that were issued in 2002 affected 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 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

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<sup>16</sup> Ibid., pp. 3-4.

<sup>17</sup> See generally, Comments of the Gulf Restoration Network, et al.; Natural Resources Defense Council, et al., Comments Submitted on Docket # COE-2006-0005; and Ohio Valley Environmental Council, "Re: Proposal to Reissue and Modify Nationwide Permits, Docket No. COE-2006-0005."

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 only 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 was not intended to relax aquatic protection, the Corps said, but was 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.

This topic was addressed again in the Corps' September 2006 proposal. The Corps proposed to extend the 300 linear-foot limit under NWPs 39, 40, 42, 43, and revised 29 to include ephemeral streams (streams that have flowing water only during, and for a short time after, a precipitation event), as well as permanent and intermittent streams. However, the Corps also proposed to allow district engineers to waive the 300 linear-foot limit for discharges to ephemeral streams on a case-by-case basis, in addition to case-by-case waivers of discharges to intermittent streams that have been allowed since 2002.

Commenters on the 2006 proposal viewed this issue from two very different perspectives. Environmental advocates endorsed extending the 300-linear foot limit to ephemeral streams, so as to protect them as well as permanent and intermittent streams, but they criticized the proposal to allow district engineers to waive the limit. Linear foot limits should be firm, they said, and proposed actions that exceed these limits should be subject to individual permit requirements. The Corps has provided no justification for proposing to allow district engineers to waive the limit, they said, nor criteria for how waiver decisions will be made.

On the other hand, regulated industry groups said that extending the 300-linear foot limit to ephemeral streams would greatly increase the regulatory burden of the overall program and reduce the utility of permits like NWPs 29 and 39, while serving no environmental purpose. They observed that the only apparent rationale for treating ephemeral streams in the same fashion as other streams is Corps administrative convenience, since the Corps stated that it may be hard to distinguish between intermittent and ephemeral streams in the field (71 *Federal Register* 56261). Several industry commenters noted that the legal basis for the Corps to assert regulatory jurisdiction over waters that are dry nearly all the time is uncertain, in light of recent

court rulings — including the Supreme Court’s June 2006 ruling in *Rapanos v. United States* — that have narrowed rather than expanded Corps jurisdiction. While the Court’s plurality ruling in that case was split (there was no majority opinion) and left open to many jurisdictional questions,<sup>18</sup> these groups argue that ephemeral waters are for the most part not legally jurisdictional or subject to a requirement for a Section 404 permit. In the proposal, the Corps stated that it will assert jurisdiction over ephemeral streams on a case-by-case basis, in accordance with case law as it evolves and with any future agency guidance on recent court cases.

**Mitigation Requirements.** The Corps acknowledges that, although minimal adverse effects are anticipated from the nationwide permit program, the use of NWRPs may still affect the aquatic environment. Therefore, the permits include a general condition detailing how district engineers may require compensatory mitigation to offset the authorized impacts. Mitigation is intended to compensate for lost functions and values resulting from permitted activities. 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 6).<sup>19</sup> In 2002, 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>20</sup>

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<sup>18</sup> For additional information, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act Is Revisited by the Supreme Court: Rapanos v. United States*, by Robert Meltz and Claudia Copeland.

<sup>19</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>20</sup> U.S. Department of the Army, Corps of Engineers, “Issuance of Nationwide Permits,” 67 (continued...)

Environmentalists strongly opposed this change in 2002, 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>21</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.

In 2006 the Corps proposed certain modifications to the general condition for mitigation. Currently, compensatory mitigation is required for all wetlands impacts of activities requiring a PCN, at a minimum one-for-one ratio, unless the district engineer decides that another form of mitigation would be more appropriate. The Corps proposed to modify this requirement by adding a one-tenth of an acre threshold — that is, if a PCN is required, and if the proposed activity is expected to result in the loss of more than one-tenth of an acre of wetlands, the permittee must comply with mitigation requirements. The Corps also proposed to add language stating that district engineers may require mitigation when certain functions and services of waters of the United States would be permanently changed by the permitted activity (such as conversion of a forested wetland to a herbaceous wetland in a permanently maintained utility line right-of-way).

In the decision documents accompanying the NWP proposal, the Corps estimated that in total the permits (including the six new permits) will be used 52,434 times per year and are expected to impact 6,366 acres of wetlands and other waters per year. The Corps also estimated that 19,501 acres will be mitigated to offset the impacts of authorized activities. The data in these estimates is based on reported use of the NWPs during FY2003 and the period of July 1, 2005, to June 30, 2006, as well as a survey of Corps district offices.

Environmental groups were skeptical of these data, asserting that it is unclear how the numbers were obtained, due to inconsistencies in the Corps’ permit database.

Even more troubling is the notion that the Corps uses these flawed permit numbers to arrive at the acres of wetlands and waters impacted, and for the presumed use and impact of the proposed NWPs. Again, we can only assume that the Corps has averaged the impacts associated with some subset of known nationwide permit applications. This type of statistical mean does not provide us with the actual impact to waters of the United States, nor can it be used as a basis for predicting the future cumulative impacts of the proposed NWPs.<sup>22</sup>

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<sup>20</sup> (...continued)

*Federal Register* 2063-2067, January 15, 2002.

<sup>21</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.

<sup>22</sup> Gulf Restoration Network, et al., Comments Submitted on Docket number COE-2006-0005, p. 4.

In their comments on the 2006 proposal, environmentalists continued to be critical of the Corps' reliance on mitigation as the basis for concluding that impacts of the nationwide permits will be minimal. They pointed to the incomplete track record of mitigation projects described in a number of reports, including a June 2001 report of the National Research Council<sup>23</sup> and a 2005 GAO report, showing that mitigation is not fully successful and does not compensate for wetlands lost to permitted fills.<sup>24</sup> In light of the lack of data that mitigation is performed or that it would successfully replace lost functions and values, they asserted that the Corps lacks sufficient evidence to conclude that mitigation will render the impacts of authorized activities minimal. If an activity requires mitigation, these critics said, by definition it has more than minimal adverse effects to begin with, and under the Clean Water Act, activities with more than minimal adverse effects can only be authorized by an individual permit. They noted that the Council on Environmental Quality has said that relying on mitigation to assume impacts are reduced below the threshold of significance violates the National Environmental Policy Act.<sup>25</sup>

Under the Corps' proposal, compensatory mitigation would be required for all wetland losses that exceed one-tenth of an acre, unless the district engineer issues a project-specific waiver. Industry was critical that under this proposal, the Corps appears to elevate one form of mitigation (compensation) above all others<sup>26</sup> and does not give district engineers flexibility to determine the extent to which mitigation is needed, on a case-by-case basis. Environmental groups, on the other hand, strongly objected to allowing waivers from mitigation requirements and giving discretion to district engineers, particularly because the proposal contains no criteria or performance standards that would govern mitigation.

**Coal Mining Activities.** The use of nationwide permits to authorize coal mining activities has been and continues to be controversial. It has focused on NWP 21, which concerns surface coal mining activities. Critics say that the environmental impacts of coal mining are typically far greater than the standard set forth in CWA Section 404(e): that authorized activities will cause only minimal adverse environmental effects, individually and cumulatively. Industry argues that nationwide permit procedures are necessary to minimize regulatory burdens that

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<sup>23</sup> National Academy of Science, National Research Council, *Compensating for Wetland Losses under the Clean Water Act*, Washington, 2001, 267 p.

<sup>24</sup> U.S. Government Accountability Office, "Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring," GAO-05-898, Sept. 2005.

<sup>25</sup> Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Mar. 23, 1981.

<sup>26</sup> Under its regulations and policy, when the Corps evaluates standard permit applications, it first determines that potential impacts to wetlands and other aquatic resources have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable, in a sequence beginning with avoidance of impacts, followed by minimization of adverse impacts, and then compensatory mitigation for unavoidable impacts which remain. Compensatory mitigation might include restoration of a former wetland, or enhancement for specified purposes such as water quality improvement.

would threaten the economics of coal mining and to provide the kind of flexibility needed by industry to respond to quickly changing operating requirements. The Corps responds that the terms and conditions of NWP 21 are sufficient to ensure that environmental impacts are minimal.

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 in 2002 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 2002 changes than on the basic permit itself, because environmentalists 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.

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).<sup>27</sup> 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>28</sup>

Citizen groups also have filed lawsuits seeking generally to halt the Corps’ use of nationwide permit 21 for mountaintop mining operations. In the first such case,

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<sup>27</sup> For information, see CRS Report RS21421, *Mountaintop Mining: Background on Current Controversies*, by Claudia Copeland.

<sup>28</sup> U.S. Department of the Army, Corps of Engineers, “Issuance of Nationwide Permits,” 67 *Federal Register* 2043, January 15, 2002.

a federal district court ruled that NWP 21 violates the Clean Water Act by authorizing activities that have more than minimal adverse environmental effects. In 2004, the court enjoined 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. On appeal, the judgment of the district court and the injunction against NWP 21 were vacated when the court of appeals found that the Corps had complied with the Clean Water Act when it promulgated NWP21 (*Ohio Valley Environmental Coalition v. Bulen*, 429 F.3d 493 (CA4 2005)). The case was remanded to the district court to address remaining issues that were never decided: fact-based issues such as when a general permit is appropriate. In January 2005, three groups filed a lawsuit to extend the 2004 West Virginia federal district court decision to Kentucky valley fills (*Kentucky RiverKeeper v. Rowlette*, Civil No. 05-181, E.D.Ky.). Both of these cases are pending.

In the September 2006 proposal to reissue the current permits, the Corps noted a number of administrative steps that have been taken to address public concerns about NWP 21, such as adopting a standard operating procedure for review of permit applications. In the proposal, the Corps requested public comment on the need for an acreage limit for this permit, as it currently includes none. The Corps proposal retained the current requirement in this NWP that applicants submit a PCN and that they may not proceed with the activity, even if 45 days have elapsed, without written authorization from the district engineer. The Corps proposed to simplify the permit by eliminating current language concerning specification of the contents of the PCN and mitigation requirements, arguing that those conditions are covered by general conditions that apply to all nationwide permits.

The mining industry generally supported NWP 21 and two related proposed new permits, E and F. However, they opposed any acreage limit on NWP 21, saying that the permit would be useless to them if it included an acreage limit. Most coal companies would not be able to comply with such a limit and would, therefore, be required to obtain an individual permit. Getting an individual permit imposes costs of time and money to applicants and to government, industry contended, without additional environmental benefits.

Environmental critics cited data on the degrading impacts of current NWP 21 to aquatic life in Appalachian streams, as well as terrestrial resources and wildlife, including data from a programmatic environmental impact statement on mountaintop mining prepared by the Corps which acknowledged that fills authorized by this permit have eliminated more than 1,200 miles of streams in the past.<sup>29</sup> In the 2006 decision document for NWP 21, the Corps estimated that in total this permit will be used 204 times per year and is expected to impact 81 acres of wetlands and other waters per year. The Corps also estimated that 71 acres will be mitigated to offset the permit's impacts. Environmental groups argued that there is no support for the Corps' claim that mitigation will reduce impacts of this permit to a minimal level, and that individual permits should be required. In their view, nationwide permits

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<sup>29</sup> U.S. Environmental Protection Agency, "Mountaintop Mining/Valley Fills Final Programmatic Environmental Impact Statement," October 2005. Available at [<http://www.epa.gov/region3/mtntop/index.htm>].

should only be used for mining-related activities with lesser impacts than valley fills, such as road crossings, temporary sediment ponds, or stream diversions.

Two of the proposed new permits, E and F, also address coal mining activities. The Corps' intention with the proposed new permits was to provide incentives to coal remining and underground mining activities, arguing that for those permittees that meet specified terms and conditions such as acreage impact limits, it will be faster to gain authorization under an NWP than it would be to obtain an individual permit. It is the Corps' judgment that the environment will benefit from encouraging coal remining in this manner: by allowing such activities to proceed under a nationwide permit, rather than requiring an individual permit, the environmental benefits of remining (such as removing existing sources of water pollution that harm downstream waters) are more likely to occur. Further, while the Corps acknowledged that permits 21, E, and F will have adverse effects on water quality, the agency contended that compensatory mitigation will ensure that adverse environmental effects are minimal. In the decision documents accompanying the NWP proposal, the Corps estimated that permits E and F will be used 204 times per year and are expected to impact 475 acres of wetlands and other waters per year. The Corps also estimated that 404 acres will be mitigated to offset the impacts of authorized activities.

Environmental critics said that the Corps has no factual basis for determining that impacts of the new coal mining permits will be minimal, since there are no documented data for estimating future impacts of permits that do not now exist. They point out that coal mining waste contains chemicals that are toxic to aquatic life; there have been cases of spills of impounded wastes, with impacts that are more than minimal. Underground mining is a destructive practice, they said, that results in loss of stream and wetland functions through subsidence and waste disposal.

**Fills Within the 100-Year Floodplain.** As discussed above (see page 7), 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 2002, 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 argued that the modification allows 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.

Currently, this general condition prohibits the use of certain NWPs (39, 40, 42, and 44) to authorize discharges of dredged or fill material in waters of the U.S. resulting in permanent above-grade fills within mapped 100-year floodplains located above or below headwaters of streams. It also prohibits the use of NWP 43 (stormwater management) discharges within mapped 100-year floodplains located below headwaters. Activities covered by these permits are subject to PCN requirements, meaning that the permittee must notify the district engineer before beginning the work and cannot proceed sooner than 45 days after filing a complete

PCN without written notice from the Corps. In 2006, the Corps proposed to modify the general condition related to mitigation to simply require permittees to comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency (FEMA). Thus, potential impacts to 100-year floodplains will be addressed through case-by-case review resulting from preconstruction notification by the permittee. The Corps argued that modifying this general condition will increase government efficiency by promoting conformity with state and local planning and zoning efforts, and federal programs, since FEMA is the lead federal agency for floodplain management.

While industry groups supported this proposal, environmental groups and others criticized the proposal to lift restrictions on activities in the 100-year floodplain, saying that allowing fills in the 100-year floodplain could lead to catastrophic consequences during significant flood events. Current restrictions should be retained or even strengthened, some said, so as to prevent cumulative losses of valuable resources which are allowable under FEMA requirements. Without regulatory limits, development can occur in the floodplain, inducing citizens to occupy areas that are at risk of severe flooding. Environmental groups argued that the job of reducing U.S. flood losses by controlling new development should not be left just to state and local governments and that the Corps' regulatory responsibility under the CWA is not lessened by the involvement of other agencies.

## **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, many industry stakeholders 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.

**Regional Conditioning.** 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. One type of regional conditioning is done by district and division engineers who propose specific conditions if there are concerns for the aquatic environment in a particular district, watershed, or other geographic region. Corps officials also may propose revocation of NWP authorization for all, some, or portions of the nationwide permits. A second type of regional conditions is imposed by state Section 401 water quality certification or for state coastal zone consistency (see discussion below). Regional conditions might include identifying 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 2000 provided a new and somewhat more formal approach than in the past to

developing appropriate conditional requirements in each Corps District, providing explicitly for public input and coordination with federal resource agencies.

The 2002 permits emphasized that, like the 1996 and 2000 permits, the NWP program will rely greatly on regional conditioning to adjust 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.

However, regarding increased use of regional conditioning to strengthen permits, some environmental groups have been skeptical that the Corps would be able to attach meaningful conditions, while developers have had the opposite concern — that restrictions imposed by Corps regions would be unduly burdensome.<sup>30</sup>

The 2006 proposal continues the Corps' reliance on regional conditioning as a way for regulators to ensure that impacts of activities are minimal. Echoing their concerns about the Corps' reliance on compensatory mitigation, environmental groups criticized the Corps' expectation that regional conditioning can assure that impacts are minimal. Industry groups contend that regional conditions make the NWPs more complex and burdensome for both the Corps and permit applicants. "As more conditions are placed on the use of NWPs, fewer permit applicants fall outside of the many restrictions and exclusions, thus fewer will qualify for the efficient NWP process."<sup>31</sup>

**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 certification by states 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>32</sup> In addition, the 34 states and territories that operate management programs under the Coastal Zone

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<sup>30</sup> "Six New Classes of Activities Covered Under Proposed Corps Replacement Permits," *Daily Environment Reporter*, June 25, 1998, No. 122, p. AA-1.

<sup>31</sup> National Association of Home Builders, "Advice and Recommendations of the National Association of Home Builders on the Department of the Army, Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits", p. 19.

<sup>32</sup> States also may waive 401 certification, which is effectively the same as issuing an unqualified certification.

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, because a state can use this authority to place its own conditions on the federal permit, or to deny the permit's use in that state.<sup>33</sup> Coordination begins at the time the Corps proposes to issue or reissue the nationwide permit package. However, coordination evidences a number of tensions between the Corps and states, especially when states deny certification or CZM concurrence.

***NWP Reissuance: Public Review and Coordination; State Responses.*** Issuance or reissuance of NWPs begins approximately six months in advance of expiration of existing nationwide permits. The process involves publishing the proposal for public comment and coordinating with states. Publication in the Federal Register of the proposed permits initiates a 60-day public comment period on the draft permits and also serves as the Corps' request to states to issue, deny, or waive certification of the NWPs. Concurrent with the Federal Register Notice, Corps district offices solicit comments on proposed regional conditions and also their proposals to suspend or revoke some or all of the NWPs, if they have issued or propose to issue regional general permits, programmatic general permits, or letters of permission in lieu of NWPs. The comment period for district public notices is 45 days.

After reviewing public comments on the draft NWPs, the Corps prepares final NWPs, which are subject to another round of review by interested federal agencies (but not the public). The Corps then publishes the final NWPs, which become effective 60 days after publication. All of these steps are intended to be done in sufficient time before the current NWPs expire. When the proposed NWPs were published in September 2006, the Corps intended to issue final NWPs in January 2007, in order to provide a 60-day period for state certification and regional conditioning by division engineers before expiration of the 2002 permits on March 18, 2007. However, final NWPs were delayed and were not issued according to that schedule, leading some to be concerned about a gap between the time that the Corps publishes the final package of permits and the time needed by states. In mid-February, Corps officials acknowledged that there could be a theoretical gap, but they stated that they expect to make the NWPs effective immediately upon publication. Further, they will encourage states to issue programmatic determinations, with opportunity to make later, more detailed assessment.<sup>34</sup> Whether such an outcome will satisfy state officials or environmental critics of the NWPs is uncertain.

During the 60-day post-publication period, Corps division engineers approve regional conditions for the final NWPs and issue decision documents which address the environmental considerations related to the use of NWPs in specific Corps districts. The decision documents certify that the NWPs, together with any regional

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<sup>33</sup> For additional information, see CRS Report 97-488, *Clean Water Act Section 401: Background and Issues*, by Claudia Copeland.

<sup>34</sup> "Corps Working with States to Make Permit Coverage Gap 'Theoretical,'" *Water Policy Report*, Feb. 19, 2007.

conditions or geographic revocations, will only authorize activities that result in minimal individual adverse effects on the aquatic environment at the regional level.

Also during the 60-day post-publication period, states and Indian tribes complete their 401 water quality certification and CZMA consistency decisions. Water quality certifications and/or CZMA consistency determinations may be issued without conditions, issued with conditions, or denied for specific NWP. Conditions placed as a result of 401 certification or CZMA concurrent by a state automatically become part of a nationwide permit in that state. Many states have denied blanket water quality certification for certain NWPs. For example, many states have opposed NWP 29, the single-family residence nationwide permit since it was first issued in 1995, and about one-third of states have denied 401 certification, because the permit was determined to be inconsistent with state water quality standards or other state wetlands management activities. Other states have attached additional conditions to the use of NWPs to ensure that water quality impacts are minimal.

The Corps believes, in general, that activities authorized by NWPs will not violate state or tribal water quality standards and will be consistent with CZM plans. Thus, if a state denies a water quality certification or disagrees that the activities authorized by the NWPs are consistent with a state CZM program, the Corps will deny authorization for the affected activities within that state, but does so without prejudice. Thus, when applicants request approval of such activities, and the Corps determines that the activities meet the terms and conditions of the NWP, the Corps will issue provisional verification letters, notifying the applicant that NWP authorization is contingent upon obtaining the necessary project-specific water quality certificate or waiver thereof, or CZMA consistency determination, from the state, through a process called “individual certification of NWP use on a case-by-case basis.”

An issue of long-standing concern to states is the fact that, if a state denies 401 certification or CZM concurrence, 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 object that when the Corps issues provisional verification of NWP authorization, this puts pressure on states to certify projects. Many states take the position that, if a state denies certification, the Corps should evaluate the project under the individual permit process. 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 does not believe that state denial of 401 certification should be the sole basis for requiring an individual permit. 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 through issuance of a project-specific 401 certification or CZM consistency determination.

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 certification.

One option is for states to seek approval of a programmatic general permit (PGP; see discussion in footnote 4), 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 a number of states with PGP programs, which replace some or all of the federal nationwide permits. State PGPs are duplicative of some nationwide permits and offer a more streamlined regulatory process for applicants. 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 able 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.

#### **Defining Minimal Adverse Effects, Assessing Cumulative Impacts.**

Some observers have been critical that, while the Corps has made some environmentally strengthening improvements to many of the nationwide permits since 1996, it has not addressed a number of outstanding concerns. For example, both environmental groups and industry groups have criticized the Corps for declining to define what are “minimal adverse effects.” Industry groups contend that a determination of minimal effects is central to whether an individual permit is required. If the Corps cannot define “minimal effects,” they say, how can it claim that any particular restriction is required to achieve it? Environmental groups argue a different point, that without defining what “minimal” is, the Corps cannot argue that, even with specified restrictions, a given activity will have only minimal environmental impacts. 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 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 has 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 argues that 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. 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 continued to hold that the program has no significant impact on the

environment or on endangered species.<sup>35</sup> The Corps viewed 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>36</sup> and the Corps said at the time that a final PEIS would be issued early in 2002. This did not occur, because the Corps determined that it was not necessary to complete the PEIS. For the nationwide permits, the Corps contends that it fulfills the requirements of NEPA through the issuance of environmental assessments.<sup>37</sup>

Rather than conducting an EIS for any of the nationwide permits individually or a PEIS for the package of permits, the Corps prepares “preliminary decision documents” for each proposed NWP, including an environmental assessment and a Finding of No Significant Impact. These documents consider the environmental effects of each NWP from a national perspective. Environmental groups are strongly critical of these documents, saying that they “consist mostly of rote boilerplate with little actual analysis and no real evaluation of alternatives.”<sup>38</sup> Other environmental commenters argued that the documents “are nearly identical in language for each NWP, and merely reiterate the language of section 404(e) of the Clean Water Act, as if repeating the mantra that the impacts are minimal, they magically become minimal.”<sup>39</sup> By extracting data from each of the 2006 draft decision documents, environmental groups estimated that the permits proposed by the Corps would impact 31,800 acres over five years, or 49.7 square miles. While these groups argue that the data used by the Corps are flawed and undercount likely impacts, they also argue that it is not reasonable to conclude that impacts of that scope are below the required threshold of minimal, even with the addition of regional conditions and district engineers’ discretionary authority to limit impacts.<sup>40</sup>

## Congressional Interest

Congressional interest in legislation to revise the federal wetlands regulatory program has been apparent for several years, as groups have pursued proposals intended to simplify and streamline permitting; revise federal and state roles in permitting; or clarify the geographic reach of Clean Water Act programs, in response to court cases that have created jurisdictional uncertainties. (For additional information, see CRS Report RL33483, *Wetlands: An Overview of Issues*.) None

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<sup>35</sup> U.S. Department of the Army, Corps of Engineers, “Finding of No Significant Impact for the Nationwide Permit Program,” June 23, 1998.

<sup>36</sup> U.S. Department of the Army, Corps of Engineers, “Draft Nationwide Permits Programmatic Environmental Impact Statement,” July 31, 2001.

<sup>37</sup> David B. Olson, U.S. Army Corps of Engineers, personal communication, Nov. 17, 2006.

<sup>38</sup> Natural Resources Defense Council, et al., Comments Submitted on Docket #COE-2006-0005, p. 32.

<sup>39</sup> Gulf Restoration Network, et al., Comments Submitted on Docket number COE-2006-0005, p. 13.

<sup>40</sup> *Ibid.*, pp. 2-5.

has focused specifically on nationwide permits. For some time, controversy over the direction of overall wetlands policy has been a major component of debates on the Clean Water Act and is partly the reason that no comprehensive clean water legislation has been enacted. Interest groups have been unable to reach consensus on whether legislative reform is needed and, if so, how far it should extend.

Congress has shown some interest in permitting 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 other issues.<sup>41</sup> In June 1997, the Senate Environment and Public Works Subcommittee on Clean Air, Wetlands, and Private Property held a similar hearing.<sup>42</sup> 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, responding that the changes would allow the Corps to implement a more fair, flexible, and effective program which is appropriately responsive to environmental protection needs.

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 the FY2000 Energy and Water Development Appropriations bill. As approved by the House in July 1999, this bill included a provision to require the Corps to submit a study on the workload impact and compliance costs of replacement permits for NWP 26. 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 would increase wetlands loss in the nation by delaying issuance of replacement permits. The final bill, P.L. 106-60, 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. In March 2000, The Corps reported estimates of increased permitted workload and compliance costs associated with changes to the nationwide permit program that were proposed in July 1999.

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 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.

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<sup>41</sup> U.S. Congress, House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, "Recent Regulatory and Judicial Developments on Wetlands," Hearing, 105<sup>th</sup> Congress, 1<sup>st</sup> session, April 29, 1997 (105-36), 461 p.

<sup>42</sup> U.S. Congress, Senate, Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety, "Wetlands: Review of Regulatory Changes," Hearing, 105<sup>th</sup> Congress, 1<sup>st</sup> session, June 26, 1997 (S.Hrg. 105-328), 230 p.

This bill was enacted in October 2000 as P.L. 106-377 (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 (which differed in a number of ways from the July 1999 proposal); 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. A revised analysis of the permitting changes and incremental compliance costs for the 2000 permits was issued in August 2001.<sup>43</sup> This report concluded that the replacement package would increase by about 25% the number of individual permit applications submitted to the Corps, due to activity restrictions and new general conditions, and that processing time and pending applications would rise steadily each year. In principle, the additional permitting time could be avoided if the Corps' permitting budget were increased sufficiently, the report said.<sup>44</sup>

It has been nearly 10 years since Congress examined the nationwide permit program through oversight hearings and more than six years since there was legislative consideration, in connection with appropriations bills. As this report has described, the program has continued to evolve and to generate wide-ranging concerns among stakeholder and interest groups. Future congressional attention may address the overall regulatory program, as well as specific issues raised by the Corps' 2006 proposal for permit reissuance.

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<sup>43</sup> U.S. Army Corps of Engineers, Institute for Water Resources, "Cost Analysis for the 2000 Issuance and Modification of Nationwide Permits," August 2001.

<sup>44</sup> Appropriations for the Corps' regulatory program, which totaled \$117 million in FY2000, have increased 35% to \$158.4 million in FY2007. The President's FY2008 budget requests \$180 million.