

Discussion of Nationwide Permits
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General

The final regulation reissues the existing Nationwide permits and issues 2 new ones. Most of the previous Nationwides were reissued unchanged, but several contain slight to major revisions which may affect the use of these general permits by the State highway agencies (SHA). Primary among these changes is the major revision to Nationwide #26, for activities impacting isolated waters and waters above stream headwaters. Discussion below provides detail on these changes and their likely impact on the highway program

Specific

The following discussion covers Nationwide permits which may apply to FHWA and SHA activities. These summary descriptions give emphasis to the changes and additions made to the program. Please refer to the final regulation for complete wording of each permit.

- **Nationwide Permit #3 - No Change** - authorizes the maintenance and repair of a currently serviceable fill or structure, as long as the facility is not put to a different use. It also authorizes the repair, rehabilitation, and replacement of structures destroyed by storms, fires, etc. Work must occur within two years of the damage unless the Corps determines that the damage was as a result of a catastrophic event (tornado, hurricane, etc.) and the project sponsor can justify delays due to contracting, funding, or other reasons.
- **Nationwide Permit #7 - No Change** - authorizes the construction of outfall structures that are in compliance with regulations under the National Pollutant Discharge Elimination System program. This may include certain stormwater outfalls. The permit requires that the permittee notify the District engineer concerning the proposed project prior to taking action.
- **Nationwide Permit #13 - Minor Change** - authorizes bank stabilization activities for erosion control purposes only. Basically, the permit applies when work is less than 500 feet in length and involves no more than 1 cubic yard of fill per linear foot of work. Work cannot be conducted in wetlands nor can it affect water flow into or out of adjacent wetlands. Work in excess of 500 feet in length or greater, is allowable upon approval of the Corps District engineer. **One new clarification is provided indicating the permit cannot be used for stream channelization work.**

- **Nationwide Permit #14 - *Minor Change*** - authorizes minor fills for roads crossing waters of the U.S., including wetlands. The permit allows fills up to 1/3 acre in size, provided that no more than 200 lineal feet of the fill is in a wetland or other special aquatic site. The width of the fill is limited to only that minimum necessary for the road. The allows such fills in tidal waters. Provisions to provide adequate bridging or culverting to prevent the restriction of flows must be included. If the fill will involve special aquatic sites, the project sponsor must notify the Corps District engineer and provide a delineation of the sites. **A new provision states that this authorization cannot be combined with Nationwide #18 or #26 (see below) to increase the footprint of the road crossing.**
- **Nationwide Permit #15 - *No Change*** - authorizes fills incidental to the construction of Coast Guard approved bridges (approved Section 9 permit). The types of fills covered include cofferdams, abutments, piers, foundation seals, and temporary fills for construction and access. The permit does not include approach fills to such bridges.
- **Nationwide Permit #18 - *Minor Change*** - authorizes very minor fills of 25 cubic yards or less. The discharge cannot cause the loss of more than 1/10 acre of wetland or other special aquatic site, either through direct filling loss or losses caused by impounding or dewatering. The permit is not available for stream diversion activities. Discharges over 10 cubic yards or any amount in a wetland or other special aquatic site require notification to the District engineer with a delineation of any affected special aquatic sites. **A new stipulation specifies that this permit cannot be used in conjunction with Nationwide #26.**
- **Nationwide Permit #19 - *No Change*** - authorizes the incidental discharges associated with minor dredging activities. The permit limits the allowable dredged yardage to 25 cubic yards. In addition, no dredging under this permit may now occur in wetlands, coral reefs, anadromous fish spawning areas, or submerged aquatic vegetation beds.
- **Nationwide Permit #23 - *No Change*** - authorizes discharges associated with agency activities approved as categorical exclusions. The Corps of Engineers must first review and approve of an agency's categorically excluded actions. In the past, the Corps has authorized our categorical exclusions under 23 CFR 771.117 (c) and (d) as allowable under Nationwide #23 with certain conditions. When revised FHWA/FTA NEPA regulations are reissued, our categorical exclusion should be sent to the Corps for clearance relative to the use of Nationwide #23.
- **Nationwide Permit #25 - *No Change*** - authorizes the discharge of materials (concrete, sand, rock, etc.) into tightly sealed forms during the construction of support members for larger over-water structures, such as the piers for a bridge crossing. Structural supports for buildings, homes, parking areas, and other such structures are specifically excluded.
- **Nationwide Permit #26 - *Major Changes*** - authorizes discharges into headwaters and

isolated waters. These are waters having no connection to other waters, such as potholes with no inlets or outlets and all waters in drainages above the point where the average annual flow exceeds 5 cubic-feet per second. **In these areas, the only fills now authorized are those which are less than 3 acres in area.** The prior permit allowed up to ten-acre fills. **Furthermore, the new permit allows these fills to affect no more than 500 linear feet of stream bed.**

The previous permit required the project sponsor to contact Corps District Engineer for concurrence when the fill exceeded one acre. **The reissued permit drops that limit to 1/3 acre. Also on fills under 1/3 acre, the project sponsor must notify the Corps within thirty days following completion of the work with information about the project.** The revised permit clarifies the meaning of "acres of loss" to include the fill area plus the acres of waters adversely affected only by flooding. **This is a change from the previous permit which included also drainage and excavation as adverse impacts.** As with the previous permit, these acreages are absolutes. They cannot be increased through mitigation credits or in combination with other nationwides.

The reduction in the acreage thresholds is a big change in the permit which may have far reaching effects on some highway agencies. However, even more significant may be the fact that the Corps will close out this authorization completely within two years. **Nationwide #26 will expire on February 11, 1999.** The effect of these changes on any given State will depend how much Nationwide #26 has been used in the past. States may have to explore greater use of the other Nationwides, regional permits, and other general authorizations to lessen the impact on their programs.

- **Nationwide Permit #33 - *Minor Change*** - authorizes temporary discharges necessary for construction activities. This includes cofferdams, access fills, and dewatering measures. Relative to the highway program, this permit covers temporary fills associated with bridge construction not subject to other Federal regulation. (See the discussion of Nationwide permit #15 for comparison.) The Corps District engineer must be notified with prior to utilizing this permit. The notification must include a restoration plan to avoid and minimize aquatic impacts. **A new provision is that the District Engineer may add individual requirements on use of the permit, such as seasonal construction restrictions and alternate construction methods.**
- **Nationwide Permit #36 - *No Change*** - authorizes activities necessary to construct boat launching ramps. This permit is restricted by several conditions: (1) discharges do not exceed 50 cubic yards of concrete, rock, crushed stone, or gravel into forms or the placement of pre-cast concrete elements; (2) the ramp is no wider than 20 feet; (3) the base material is crushed stone or gravel; (4) all excavation is limited to the area necessary for the ramp and the material is disposed on upland; and (5) the work does not occur in a special aquatic site.
- **Nationwide Permit #38 - *No Change*** - authorizes discharges necessary for the containment, stabilization and removal of hazardous and toxic wastes. The District engineer must be contacted through the notification procedure and any special aquatic

sites to be affected must be delineated. Neither the expansion of existing disposal sites nor the creation of new ones is allowed under this permit.

Conditions

General Conditions.

The following general conditions were continued without change:

1. Navigation
2. Proper maintenance
3. Erosion and siltation
4. Aquatic life movement
5. Equipment
6. Regional and Case-by-Case Conditions
8. Tribal rights
9. Water quality certification
10. Coastal zone management
12. Historic properties

The following summarizes changes to general conditions.

7. Wild and Scenic Rivers. The Corps proposes to allow the use of NWP's on components of the National Wild and Scenic Rivers system after coordination with the managing agency has resulted in a determination that the project will not adversely affect the status of the river. None of the NWPs or conditions override or obviate the need for any other Federal agency's requirements for permits or coordination. The federal agency responsible for managing the affected waterway must determine whether all requirements of the Wild and scenic Rivers Act have been met. The responsible Federal agency is required to complete all coordination of activities as specified in their regulations. The U. S. Fish and Wildlife Service is included as a Federal management agency.

11. Endangered Species. A statement was added to this condition to clarify that authorization of a project under a Nationwide Permit does not authorize a taking of a species listed or "proposed for listing" under the Endangered Species Act. This change does not alter the requirements of the condition.

13. Notification. Several specific changes were made to this general condition, as follows. The Corps will 1) upon receipt of the PCN contact the coordinating resource agencies on behalf of the permit applicant. For NWP 14, 21, 26, 29, 33, 37, and 38, the Corps will upon receipt of a notification, provide immediate notification to the USFWS, SHPO, State natural resources or water quality agency, and NMFS if applicable. The agencies must notify the Corps within 5 days of their intention to comment. If the Corps is notified,

they will wait an additional 10 days (15 days for NWP 26) before making a decision on the notification. 2) discontinue PCN coordination with the resource agencies on NWP's 5, 7, 13, 17, 18, and 34, but allow Regional Directors or Administrators to request coordination; 3) increase the notification/construction delay time period for NWP 26 from 30 to 45 days; 4) notify the Federal coordinating agencies on NWP 29 and NWP 31; and 4). In addition, PCN's for NWP's 14, 18, 21, 26, 29, 34, and 38 must include delineations of affected special aquatic sites, including wetlands. For NWP 33, a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources must be included.

14. Compliance Certification. Every permittee who has received a NWP verification must submit a signed certification that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions, and that mitigation was completed in accordance with the permit conditions.

15. Multiple Use of NWP's. In any case where any NWP's numbers 12-40 are combined within a single project, the permittee must notify the District Engineer in accordance with paragraphs a, b, and c on Condition 13. Any NWP's 1-11 may be combined may be combined with any other NWP without notification to the Corps, unless otherwise specifically required. Two or more different NWP's can be combined to authorize a single and complete project. However, the same NWP cannot be used more than once for a single and complete project.

404 Only Conditions

404 Only Conditions 1-3 and 5-9 remained unchanged. Condition 4, Mitigation, was changed as follows:

Condition 4, Mitigation. Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e., on-site), unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization or avoidance measures.

Mitigation

Previously, the Nationwide Permit program addressed mitigation through conditions which specified management practices and measures to avoid and minimize impacts through the use of other practicable on-site alternatives to the proposed action, including no action. The revised program retains these basic mitigation concepts. On activities that require notification, the Corps District

engineer may specify the need for mitigation when determining whether a proposed action qualifies for a Nationwide permit. In cases where mitigation will be required in order to use the permit, the permittee must submit a mitigation proposal that the District engineer must approve before authorizing the work to proceed.

In the highway program, the SHAs should consider submitting a mitigation proposal with all notifications to the Corps District Engineer in order to speed the review and authorization process. Whenever appropriate, the SHAs should also consider mitigation banking measures and other measures in their proposals to the District engineers. Under the Nationwide program, wetland banking measures and "in lieu fees" compensation are mentioned as forms of mitigation that the permittees should consider.