

Corps of Engineers Proposal to Modify the Nationwide Permit Program

**Fred R. Wagner
Tamsen Plume
Beveridge & Diamond, P.C.**

On August 9, 2001, the U.S. Army Corps of Engineers ("the Corps") unveiled its proposal to reissue and modify its Nationwide Permit ("NWP") Program. The NWP Program is the Corps' streamlined permit process which authorizes certain types of activities that have a minimal impact to wetlands and other waters of the United States subject to a pre-determined set of General Conditions.

By way of background, these modifications are the latest in a series of significant changes to the NWP Program. Last year (after several proposals, revisions and delays), the Corps eliminated NWP 26, one of the most controversial nationwide permits, which authorized fills up to 3 acres without regard to the type of activity. The Corps replaced NWP 26 with six activity-specific permits and several modified General Conditions. The overall effect made the NWP application process more akin to the cumbersome Individual Permit process while substantially reducing the range of qualifying development activities. The Corps has found that, in practice, the new NWP Program is unduly restrictive and bureaucratic and has proposed these modifications to address these concerns.

The Corps' proposal has already sparked controversy. The Environmental Protection Agency, which shares regulatory authority over the 404 Permit Program with the Corps, the U.S. Fish and Wildlife Service, and a host of environmental groups oppose the changes, arguing that they effectively "relax" the program and "rubber stamp" directives designed to benefit applicants.

The Corps is currently soliciting comments on the proposal, and will accept comments until September 25, 2001. This letter summarizes the most significant aspects of the Corps' proposal in order to notify you of changes that may effect your present or future plans and give you an opportunity to submit comments.

The Corps proposes to modify several of the NWPs, specifically: NWP 14 (Linear Transportation Crossings), NWP 21 (Surface Coal Mining), NWP 27 (Wetland and Riparian Restoration), NWP 31 (Maintenance of Existing Flood Control Facilities), NWP 37 (Emergency Watershed Protection), NWP 39 (Residential, Commercial, and Industrial Developments), NWP 40 (Agricultural Activities), NWP 42 (Recreational Facilities) and NWP 43 (New Stormwater Management Facilities). The Corps also proposes to modify several General Conditions, specifically: General Condition 4 (Aquatic Life Movement), General Condition 9 (Water Quality), General Condition 13 (Notification), General Condition 19 (Mitigation), and General Condition 21 (Management of Water Flows), and to add new General Condition 27 (Construction Period).

Of the modifications to the NWP's, the following are the most significant:

- NWP 14 (Linear Transportation Crossings):
 - (1) Eliminates the distinction between public and private applicants, which will allow private applicants to impact up to ½ acre (rather than only 1/3 acre) of non-tidal wetlands or waters. The 1/3 acre limit for tidal waters remains the same for both public and private applicants.
 - (2) Eliminates the 200 linear foot maximum cap on impacts to streambed (the maximum cap would only be determined by acreage). For drier areas, which have more long, narrow, ephemeral drainages, this should allow more projects to qualify for NWP 14.

- NWP 31 (Maintenance of Existing Flood Control Facilities): Requires new "as built" documentation of stormwater facilities to establish a "baseline maintenance plan" for on-going maintenance. However, all mitigation requirements would then be determined on an "one-time" basis. If the facility undertakes the maintenance in accordance with the plan, the Corps will not require any additional mitigation. This will initially require more planning on the part of the flood control districts, but is intended to give the flood control districts and others greater certainty.

- NWP 39 (Residential, Commercial, and Institutional Developments):
 - (1) Clarifies that for residential subdivisions "the aggregate total loss of waters of the US associated with NWP 39 cannot exceed ½ acre. This includes any loss of waters associated with the development of individual lots within the subdivision." For example, if a NWP 39 were used for 1/4 acre of impacts during the development of the infrastructure, then any subsequent use of NWP 39 within the subdivision for the development of individual lots --even by a subsequent homeowner--cannot exceed the remaining 1/4 acre.
 - (2) Eliminates "one-cfs" restriction on stream impacts, which prohibited the use of NWP 39 to impact any area downstream of a point on a stream with an average flow of greater than 1 cubic foot per second ("cfs"). The Corps reasons that the restriction is overly restrictive and that the notification requirement gives the Corps the chance to determine if the actual impacts will be more than minimal.
 - (3) Replaces the prohibition against using NWP 39 to impact greater than 300 linear feet of streambed with a project specific "waiver." On a case-by-case basis, the applicant would be able to submit a notification to the Corps which demonstrates that impacts to over 300 linear feet (a) still fall within the overall ½ acre limit and (b) do not have greater than minimal impact on the environment based on evidence of the relative functions and values of the stream length. However, the applicant (a) must submit a

notification for ANY impacts to greater than 300 linear feet regardless if the acreage is less than 1/10 acre and (b) cannot begin work without written verification from the Corps. The Corps also retains the discretion to require an Individual Permit if the impacts are more than minimal. While more projects may qualify for NWP 39, particularly in the west where the Corps regularly delineates dry ephemeral drainages high in the watershed, the Corps retains significant discretion so the effect will vary from District to District (and staffer to staffer). This modification to the 300-foot cap also applies to NWP 40 (Agricultural Activities), 42 (Recreational Facilities), and 43 (New Stormwater Management Facilities).

Of the modifications to the General Conditions, the following are the most significant:

- General Condition 4 (Aquatic Life Movement): Clarifies that the condition is not intended to prohibit filling which would prevent any aquatic movement where the fill was placed, but to limit impacts in locations that would have more than a minimal effect on important aquatic movements (i.e., salmon migration etc.).
- General Condition 9 (Water Quality): Clarifies that compliance with water quality standards may be fulfilled by complying with the requirements of the state's 401 water quality certification or other local water quality programs.
- General Condition 13 (Notification): Clarifies that while the applicant may submit plans, drawings, or sketches, it is not required to complete the application. In most cases, detailed engineering drawings should not be required to issue the verification. This should help applicants avoid time consuming and expensive planning before submitting a permit application, but the Corps does retain the right to request additional information, so the effect will vary from District to District.
- General Condition 19 (Mitigation): Replaces the strict requirement that an applicant mitigate impacts to wetlands on a 1:1 ratio with a case-by-case determination of the most appropriate mitigation for the circumstances. For example, impacts to ½ acre of isolated wetlands may be more appropriately replaced with the some combination of creation, restoration, or preservation of stream and adjacent vegetated buffer. The Corps intends to allow the staff and applicants more flexibility to replace functions and values in the circumstances, with particular emphasis on accepting (or requiring) upland vegetated buffers. Although this change essentially makes the mitigation requirement more like an Individual Permit, it should allow more creative mitigation opportunities. As with many of these proposed revisions, however, the increased discretion means that the effect will vary from District to District.
- General Condition 21 (Management of Water Flows): Clarifies that the NWPs authorize changes in water flow from pre-construction conditions, so long as the change is minimal. While the Corps staff may review the project to ensure limited channelization, proper culvert location/design, and retention ponds, it need not require or review detailed

engineering drawings or water flow studies. This is intended to allow applicants to obtain permits early enough in the design process to avoid extensive/expensive design and planning prior to submitting an application.

- General Condition 26 (Fills within the 100-year Floodplain): Eliminates the requirement that an applicant submit documentation that its project will comply with FEMA requirements for any fill project in the 100 year floodplain with its application. Instead, the applicant will, as a standard condition, simply have to certify that it complied with FEMA requirements. This will help reduce application burdens.
- *NEW* General Condition 27 (Construction Period): Adds a condition which clarifies that projects that have been authorized under a NWP that has expired will remain authorized for a period of time after expiration to complete construction and authorizes Corps staff to establish a specific reasonable construction period in the written verification. This authority will provide much-needed certainty for longer term projects.

Beveridge & Diamond, P.C. is a firm of over 70 lawyers with offices in Washington D.C., San Francisco, Baltimore, New York City, and Saddle Brook, New Jersey. We practice land use, natural resources, and environmental law throughout the nation, and specialize in counseling involving federal and state regulatory matters, including the federal wetlands program and comparable state programs. We have obtained permits for a wide range of clients for project such as planned communities, shopping malls, golf courses, industrial developments, transportation projects, mining operations, flood control projects, and agricultural operations.

If you have any additional questions about how these changes potentially effect you or are interested in commenting on the proposal, please feel free to contact Fred Wagner in Washington, D.C. (phone: 202/789-6041; e-mail: fwagner@bdlaw.com), or Tamsen Plume in San Francisco (phone: 415/262-4012; e-mail: tplume@bdlaw.com).