



Memorandum

U.S. Department
of Transportation

**Federal Highway
Administration**

Subject: **INFORMATION:** Section 404 Nationwide Permits--Revised Regulations

Date: JAN 2 1997

From: Director, Office of Environment and Planning

Reply to
Attn. of: HEP-40

To: Regional Administrators
Federal Lands Highway Program Administrator

On December 13, the Corps of Engineers (COE) issued a final regulation that revises and reissues Nationwide Permits under Section 404 of the Clean Water Act. The COE reissued most of the Nationwide Permits either without revision or with only minor clarifications. There should be little, if any, affect on the types of highway projects that currently use these permits. There are, however, revisions to other permits which will impose significant limitations. Attached is a detailed discussion of the permits which could be used by highway agencies. Emphasis is given to changes which may affect highway project activities.

The most significant changes established by the rule occur in Nationwide Permit 26, which covers activities in headwaters and isolated waters. Highway agencies may commonly use this permit, particularly for minor actions affecting small headwater tributaries and isolated wetlands (potholes, playa lakes, etc.). The final rule establishes a number of new threshold criteria that will substantially limit the use of this Nationwide Permit. For example, the rule places a new limit on the acreage of impacted area. Previously, the permit could be used for actions affecting up to 10 acres. The new rule establishes the limit at 3 acres. By itself, this reduction may dramatically reduce the use of this general authorization.

The revised Nationwide 26 also establishes new reporting requirements. Any action affecting one-third to 3 acres of headwaters or isolated waters must now be reviewed and approved by the COE in consultation with the Environmental Protection Agency and the U.S. Fish and Wildlife Service. Actions affecting less than one-third acre may proceed without prior contact, but a report must be completed and sent to the COE when the work is finished. These coordination and reporting requirements bring the general authorization of Nationwide 26 very close to the process required for an individual permit.

Finally, Number 26 has been the most controversial permit since the inception of the Nationwide Program. During this reauthorization, the COE received numerous comments on whether to retain the permit as part of the Nationwide Program. In the end, the COE determined that the authorization should be scaled back and then phased out over the next 2 years. Consequently, Nationwide Permit 26 expires early in 1999. Beginning at that time, the types of actions previously utilizing this authorization would require an individual permit unless some other nationwide or regional general permit could be used. The COE has indicated that additional permits will be developed in the future to cover some of the specific types of activities that now utilize the general authorization of Nationwide 26.

Please direct your questions and requests for assistance on the Nationwide Permit Program to either Fred Bank at (202) 366-5004 or Paul Garrett at (202) 366-2067 in the Environmental Analysis Division, or Fred Skaer at (202) 366-2058 in the Environmental Operations Division.


Kevin E. Heanue

Attachment

, FHWA:HEP-40:FBank:nb:65004:12/18/96

Revised:12/23/96

Disk:Fred's, File name:np26regs.mem

cc: HPD-1, HEP-1, HEP-40, HEP-30, PDT,
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Discussion of Nationwide Permits
33 CFR Part 330, Final Rule - December 13, 1996
Federal Register, Vol. 61, No. 241

GENERAL

The final regulation reissues the existing Nationwide Permits and issues 2 new ones. Most of the previous Nationwide Permits were reissued unchanged, but several contain slight to major revisions which may affect the use of these general permits by the State highway agencies (SHAs). 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 2 years of the damage unless the Corps of Engineers (COE) 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 COE 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, is allowable upon approval of the COE 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 one-third 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 permit 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 COE 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 one-tenth 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 COE 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 COE must first review and approve of an agency's categorically excluded actions. In the past, the COE has authorized our categorical exclusions under 23 CFR 771.117 (c) and (d) as allowable under Nationwide 23 with certain conditions. When the revised FHWA/FTA NEPA regulations are reissued, our categorical exclusion should be sent to the COE 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 impact less than 3 acres of affected waters. The prior permit allowed up to 10 acres of impact. 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 the COE District Engineer for concurrence when the fill impacts exceeded 1 acre. **The reissued permit drops that limit to one-third acre. Also on fills affecting under one-third acre, the project sponsor must notify the COE within 30 days following completion of the work with information about the project.** All acreage limitations are absolutes. They cannot be increased through mitigation credits or in combination with other Nationwide Permits.

The revised permit clarifies the meaning of "acres of loss" to include the fill footprint area plus the acres of waters adversely affected only by flooding. This is a change from the previous permit which included also the area impacted by drainage, excavation, etc. So, in some ways the new language on affected area is a loosening of the required consideration of impacts and may lead to clearer and quicker approvals by the COE for applicants wanting to use the permit.

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 COE will close out this authorization completely within 2 years. **Nationwide 26 will expire on February 11, 1999. Beginning on that date, the types of actions previously approved under the authorization would then require an individual or other general permit, as appropriate.** 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 Nationwide Permits, 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 COE District Engineer must be notified prior to utilizing this permit. The notification must include a restoration plan to avoid and minimize aquatic impacts. A new provision is that the COE 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 COE 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

The following summarizes changes to general conditions:

- **Wild and Scenic Rivers** - The COE will allow the use of Nationwide Permits 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 Nationwide Permits 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 (USFWS) is included as a Federal Management Agency.
- **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.
- **Notification** - Several specific changes were made to this general condition, as follows. The COE will:
 1. upon receipt of notification contact the coordinating resource agencies on behalf of the permit applicant. This covers Nationwide Permits 14, 21, 26, 29, 33, 37, and 38. The COE will upon receipt of a notification, provide immediate notification to the USFWS, State historic preservation officer, State natural resources or water quality agency, and National Marine Fisheries Service, if applicable. The agencies must notify the COE within 5 days of their intention to comment. If the COE is notified by a commenting agency, an additional 10 days must elapse (15 days for Nationwide 26) before a decision is made on the notification;

2. discontinue coordination with the resource agencies on Nationwide Permit 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 Nationwide 26 from 30 to 45 days;
 4. notify the Federal Coordinating Agencies on Nationwide Permits 29 and 31; and
 5. in addition, notification for Nationwide Permits 14, 18, 21, 26, 29, 34, and 38 must include delineations of affected special aquatic sites, including wetlands. For Nationwide 33, a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources must be included.
- **Compliance Certification** - Every permittee who has received a Nationwide Permit verification must submit a signed certification that the authorized work was done in accordance with the COE authorization, including any general or specific conditions, and that mitigation was completed in accordance with the permit conditions.
 - **Multiple Use of Nationwide Permits** - In any case where any Nationwide Permit 12-40 are combined within a single project, the permittee must notify the COE District Engineer in accordance with paragraphs a, b, and c on Condition 13. Nationwide Permits 1-11 may be combined with any others without notification to the COE, unless otherwise specifically required. Two or more different Nationwide Permits can be combined to authorize a single and complete project. However, the same permit cannot be used more than once for a single and complete project.

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

- **Mitigation** - Discharges of dredged or fill material into waters of the U. S. must be minimized or avoided to the maximum extent practicable at the project site (i.e., on-site), unless the COE District Engineer approves a compensation plan that 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 COE 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 COE 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 COE 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 their COE District Engineers. Under the Nationwide Permit Program, wetland banking measures and "in lieu fees" compensation are mentioned as forms of mitigation that the permittees should consider.