



# Federal Register

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**Tuesday,  
September 26, 2006**

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**Part III**

## **Department of Defense**

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**Department of the Army, Corps of  
Engineers**

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**Proposal To Reissue and Modify  
Nationwide Permits; Notice**

**DEPARTMENT OF DEFENSE****Department of the Army, Corps of Engineers**

[ZRIN 0710-ZA02]

**Proposal To Reissue and Modify Nationwide Permits****AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Notice.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is soliciting comments for the reissuance of the existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also proposing to issue six new NWPs and one new general condition. The reissuance process starts with today's publication of the proposed NWPs in the **Federal Register** for a 60-day comment period. The purpose of this **Federal Register** notice is to solicit comments on the proposed new and modified NWPs, as well as the NWP general conditions and definitions. Shortly after the publication of this **Federal Register** notice, each Corps district will publish a public notice to solicit comments on their proposed regional conditions for the new and modified NWPs. The comment period for these district public notices will be 45 days.

**DATES:** Submit comments on or before November 27, 2006.

**ADDRESSES:** You may submit comments, identified by docket number COE-2006-0005 and/or ZRIN 0710-ZA02, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*E-mail:* [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil). Include the docket number, COE-2006-0005, and/or the ZRIN number, 0710-ZA02, in the subject line of the message.

*Fax:* 202-761-0140.

*Mail:* U.S. Army Corps of Engineers, Attn: CECW-OR/MVD (David B. Olson), 441 G Street NW., Washington, DC 20314-1000.

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* Direct your comments to docket number COE-2006-0005 and/or ZRIN 0710-ZA02. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the

comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [regulations.gov](http://regulations.gov) or e-mail. The [regulations.gov](http://regulations.gov) Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through [regulations.gov](http://regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to [regulations.gov](http://regulations.gov). All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Consideration will be given to all comments received within 60 days of the date of publication of this notice. **FOR FURTHER INFORMATION CONTACT:** Mr. David Olson at 202-761-4922 or by e-mail at [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil) or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

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

The current nationwide permits (NWPs), which were published in the January 15, 2002, issue of the **Federal Register** (67 FR 2020) expire on March 18, 2007. With this **Federal Register** notice, we are beginning the process for reissuing the NWPs so that the reissued NWPs will be in effect as the current NWPs expire.

Section 404(e) of the Clean Water Act provides the statutory authority for the

Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States.

Activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and cause only minimal cumulative adverse effect on the aquatic environment. Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899. The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

One goal of today's notice is to simplify the text of the reissued NWPs. Since NWPs were first issued in 1977, the NWP program has become increasingly complex. With each issuance or reissuance of NWPs, the text of the permits and the general conditions has become lengthier, and in some cases, redundant language was added that may make them more difficult to comprehend. Compliance with the NWPs and their general conditions is more difficult if users of those permits cannot easily understand the requirements of the NWPs and what they authorize. Simplifying the text will facilitate compliance with the NWPs and thus help protect the aquatic environment.

Federal agencies are required by Executive Order 12866, Regulatory Planning and Review, to draft regulations that are simple and easy to understand, to minimize uncertainty. This principle is also applicable to the NWPs, which are now considered to be rules under the Administrative Procedures Act (APA). In addition, a Presidential Memorandum issued on June 1, 1998, requires Federal agencies to use plain language in government writing, so that rules and other documents are clear to the public and others.

We are proposing to revise the text of the NWPs, general conditions, and definitions so that they are clearer, more concise, and can be more easily understood by the regulated public, government personnel, and interested parties, while retaining terms and conditions that protect the aquatic environment. Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will benefit the aquatic environment. This proposal also reflects the Corps support of the administration's goal of improving regulatory efficiency, by making the

Pipeline operators are expected to use the RBMPs while conducting inspection and repair activities.

Activities authorized by this NWP must comply with the "endangered species" general condition (GC 17) and the "historic properties" general condition (GC 18). If a proposed pipeline inspection and/or repair activity may affect endangered or threatened species or critical habitat, section 7 consultation is required. Activities that may affect historic properties require consultation under Section 106 of the National Historic Preservation Act. We are coordinating with PHP to determine who will be the lead federal agency for ESA and section 106 consultation.

**NWP D. Commercial Shellfish Aquaculture Activities.** We are proposing a new NWP to authorize continued operation of existing commercial shellfish aquaculture activities in navigable waters of the United States. This NWP would support the U.S. Department of Commerce's Aquaculture Policy, which is intended to "assist in the development of a highly competitive, sustainable aquaculture industry in the United States that will meet growing consumer demand for aquatic foods and products that are of high quality, safe, competitively priced and are produced in an environmentally responsible manner with maximum opportunity for profitability in all sectors of the industry." The proposed new NWP also supports the National Aquaculture Act of 1980, as amended (16 U.S.C. 2801 *et seq.*), which declared that aquaculture development is in the national interest, and included requirements for Federal agencies to address barriers to aquaculture development.

This NWP authorizes structures or work in navigable waters of the United States, as well as discharges of dredged or fill material into all waters of the United States. Examples of commercial shellfish species for which this NWP could be used to authorize aquaculture activities include oysters, clams, geoducks, mussels, and scallops. The proposed NWP does not authorize commercial aquaculture activities for crustaceans or finfish.

This NWP does not authorize the expansion of existing commercial aquaculture activities or facilities, however we are soliciting comment on this limitation. We are also soliciting comments on whether to impose a limit on the quantity of dredged or fill material that could be discharged into navigable waters, on the acreage of the facility as a whole or of submerged aquatic vegetation, and/or on the types

of activities authorized. For example, discharges of dredged or fill material may be necessary to prepare a suitable substrate for shellfish seeding. Should this activity be authorized by the NWP?

There are different types of shellfish seed that can be used to increase shellfish production. Shellfish seed may consist of immature individual shellfish, an individual shellfish attached to a shell or shell fragment (*i.e.*, spat on shell) and shellfish shells or shell fragments placed into waters to provide a substrate for attachment by free swimming shellfish larvae (*i.e.*, natural catch).

To ensure that activities authorized by this NWP result in minimal individual and cumulative adverse effects on the aquatic environment, we are proposing to require pre-construction notification if: (1) The project area is greater than 25 acres; (2) more than 10 acres of the project area is occupied by submerged aquatic vegetation; (3) the permittee intends to relocate existing operations into portions of the project area not previously used for aquaculture activities; or (4) dredge harvesting is conducted in areas inhabited by submerged aquatic vegetation. For the purposes of this NWP, we are proposing to define the project area as the area of navigable waters of the United States occupied by the aquaculture operation. In most cases, the project area will consist of a site for which the operator has obtained a permit, license, or lease from a state or local agency specifically authorizing aquaculture activities in that particular location. The project area may include areas in which there has been no previous aquaculture activity and/or areas that periodically are allowed to lie fallow as part of the normal operation of the facility. Relocation of existing operations into portions of the project area not previously used for aquaculture activities will require a pre-construction notification. Because shellfish require healthy ecosystems for their growth and productivity, in addition to providing the aquatic ecosystem services of improved water quality and increased food production, we believe that there is generally a net overall increase in aquatic resource functions in estuaries or bays where shellfish are produced. We are requesting comments on the potential beneficial and adverse effects that commercial shellfish aquaculture activities have on the aquatic environment. We are also seeking comment on this proposed PCN threshold, including the appropriateness of attempting to quantify these aquatic operations in terms of acres, ecosystem health,

shellfish productivity, or some other threshold to ensure minimal adverse effects.

Commercial shellfish aquaculture activities often take place in, and are found to co-exist with, intertidal areas that are occupied by submerged aquatic vegetation (*i.e.*, vegetated shallows). To minimize adverse effects to this type of aquatic habitat, we are proposing to require PCNs if more than 10 acres of the project area is occupied by submerged aquatic vegetation.

This proposed NWP does not authorize the cultivation of new species. In other words, the NWP does not authorize aquaculture activities for those species that were not previously cultivated by the existing commercial shellfish aquaculture activity. The commercial production of a shellfish species that has not been previously commercially produced by the existing facility may be authorized by an individual permit or a regional general permit.

We are proposing that division engineers complete reviews of commercial shellfish aquaculture activities in the estuaries or bays in their areas on a recurring basis, in coordination with interested agency and shellfish producers as appropriate. These reviews would occur at least every 5 years in conjunction with the NWP reissuance cycle, but may occur more frequently.

This NWP is limited to work associated with the continued operation of existing commercial shellfish projects, many of which have been in place for hundreds of years. We feel the potential for adverse environmental impacts from such existing operations is minimal, and we support the objectives of the U.S. Department of Commerce's Aquaculture Policy to increase shellfish productivity in this country. Although new projects are not authorized initially by this NWP, once authorized by another form of Department of the Army permit, such as a regional general permit or an individual permit, the commercial shellfish activities may continue in accordance with the terms and conditions of the issued permit and/or this NWP until expired. We are committed to conducting reviews of commercial shellfish activities to validate, collect data, and ensure that the Corps is authorizing only those activities that result in minimal individual or cumulative adverse effects on the aquatic environment with this NWP or other general permits for aquaculture activities. These reviews will begin as soon as possible (but no later than 2007) in all coastal divisions, and will involve Federal, State and local

agencies, stakeholders and the general public to help the Corps develop regional and special conditions to mitigate impacts to the aquatic environment or other aspects of the public interest which may result from commercial shellfish aquaculture activities.

This NWP authorizes the continued operation of existing commercial shellfish aquaculture activities. Those activities may have been previously authorized by another form of DA authorization. The construction period for a DA permit is the period of time where the permittee is authorized to conduct work in navigable waters of the United States and/or discharge dredged or fill material into waters of the United States. Once the DA permit expires, further authorization is not required to maintain the structures or fills, but if additional work in navigable waters or discharges of dredged or fill material in jurisdictional waters are necessary for the continued operation of those activities, then another DA permit is required. The proposed NWP provides the DA authorization for the continued operation of previously authorized commercial shellfish aquaculture activities. For example, the continued operation of an aquaculture activity may involve removing and replacing structures in navigable waters of the United States on a recurring basis.

New commercial shellfish aquaculture activities or the substantial modification (e.g., the culture of different species) of existing commercial shellfish aquaculture activities in waters of the United States may be authorized by individual permits or regional general permits.

NWP E. *Coal Remining Activities*. We are proposing this new NWP to authorize the restoration of mine sites throughout the United States that are causing physical and/or chemical impacts to waters of the United States. Many of these sites were abandoned or closed prior to the 1977 Surface Mining Control and Reclamation Act (SMRCA) and are currently on state lists for reclamation, although funding is limited. Other sites could include bond forfeitures on active mine sites and "no cost" abandoned mine land projects under SMCRA (e.g., government sponsored construction projects). In some cases, due to changes in technology, additional coal may be excavated as part of the reclamation process. In other cases, these sites may be combined with adjacent unmined areas to put together a project that is economically viable. The net result of these larger projects is that sources of pollution to downstream waters,

including acid mine drainage and sources of sediment, will be eliminated or substantially diminished when the site is reclaimed. The integrated permit processing procedure and its potential applicability to this NWP is addressed above in the preamble discussion for NWP 21.

As a result of the reclamation activity on these remined areas, local water quality would be improved. Reclamation activities may also involve the construction of emergent wetlands to help improve the quality of water from mines. Net increases in aquatic functions may be determined through available assessment methods, including functional assessments. Assessments may be used to compare ecosystem functions and site conditions that existed prior to remining to the ecosystem functions and site conditions that are predicted to be in place at the site after reclamation has been completed. Reclamation activities may result in the establishment of permanent structures or fills, to sustain ecological functions at the site. Such permanent structures or fills may include treatment wetlands, permanent water diversion structures, and permanent impoundments. Permanent roads may also be constructed, to facilitate site access and maintenance of the reclaimed site.

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States. This NWP may be used on sites where the ratio of previously mined areas to new coal removal areas is greater than 60 percent, therefore, we are proposing to allow up to 40 percent of the mine site to include unmined areas. In addition, to qualify for authorization under this NWP, we are requiring that the applicant clearly demonstrate that the overall project, including the reclamation activity and any new mining, will result in a net increase in aquatic resource functions. Such increases in aquatic resource functions will be identified through local functional assessment methods that have been approved for use by the Corps district in that region.

In response to a PCN, the district engineer may impose special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

NWP F. *Underground Coal Mining Activities*. We are proposing a new NWP

to authorize discharges of dredged or fill material into non-tidal waters of the United States resulting from underground coal mining activities. This type of mining involves excavating rock and soil on the surface to expose the coal seam and providing access for people, equipment, and ventilation facilities, a process referred to as "facing up." In steep terrain, excavated material from these "face-up" areas may result in small fills if the excavation is limited to providing coal seam access or larger fills if facilities such as fill for coal processing plants and coal processing waste areas are needed. Underground mining may also create fills from excavating non-coal waste rock underground. The mine operator may have to place fill in small streams adjacent to the preparation facility in order to dispose of coal waste from the cleaning and preparation of coal. Similarly, the operator of a preparation facility may need an impoundment in an adjacent stream valley for withdrawal of cleaning process water. The integrated permit processing procedure and its potential applicability to this NWP is addressed in the preamble discussion for NWP 21.

Examples of activities that may be authorized by this NWP include, but are not limited to, treatment facilities for controlling water pollution during mining and reclamation (e.g., acid mine drainage impoundments, sedimentation ponds), access and haul roads, diversion ditches, support facilities, processing areas, and mined waste impoundments or embankments. This NWP would also authorize permanent structures or fills that would remain after reclamation activities have been completed (e.g., permanent diversion structures to minimize erosion and prevent water from contacting toxin-producing deposits).

The proposed NWP has a 1/2 acre limit, and is limited to discharges of dredged or fill into non-tidal waters of the United States. The NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

The proposed NWP does not authorize coal preparation and processing activities outside of the mine site; those activities may be authorized by NWP 21. Pre-construction notification is required for all activities authorized by this NWP, and if reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification.

of the United States, or in streams that have been relocated in uplands.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if the dredged or fill material will be discharged into more than 500 linear feet of ditch or canal. (See general condition 27.) (Section 404.)

**C. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.** Activities required for the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that have been identified by the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP) within the U.S. Department of Transportation as time-sensitive (see 49 CFR parts 192 and 195) and additional maintenance activities done in conjunction with the time-sensitive inspection and repair activities. All activities must meet the following criteria:

(a) Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary structures, work and discharges, including cofferdams, are necessary for construction activities or access fills or dewatering of construction sites;

(b) Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect);

(c) Temporary fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary structures and fills must be removed upon completion of the activity and the affected areas returned to pre-construction conditions;

(d) In wetlands, the top 6" to 12" of the trench should normally be backfilled with topsoil from the trench so that there is no change in preconstruction contours;

(e) To the maximum extent practicable, the restoration of open waters must be to the pre-construction course, condition, capacity, and location of the waterbody;

(f) Any exposed slopes and stream banks must be stabilized immediately upon completion of the project;

(g) Additional maintenance activities done in conjunction with the time-sensitive inspection or repair must not result in additional losses of waters of the United States; and,

(h) The permittee is a participant in the Pipeline Repair and Environmental Guidance System (PREGS).

**Reporting:** The permittee must submit a post construction report to the PHP within seven days after completing the work. The report must be submitted electronically to PHP via PREGS. The report must contain the following information: project sites located in waters of the United States, temporary access routes, stream dewatering sites, temporary fills and temporary structures identified on a map of the pipeline corridor; photographs of the pre- and post-construction work areas located in waters of the United States; and a list of best management practices employed for each pipeline segment shown on the map. (Section 10 and 404.)

**D. Commercial Shellfish Aquaculture Activities.** This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, and other structures necessary for the continued operation of the aquaculture activity. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize the expansion of the project area for the commercial shellfish aquaculture activity. This NWP does not authorize the cultivation of new species (i.e., species not previously cultivated by the existing commercial shellfish aquaculture activity).

**Notification:** The permittee must submit a pre-construction notification to the district engineer if: (1) The project area is greater than 25 acres; (2) more than 10 acres of the project area is occupied by submerged aquatic vegetation; (3) the permittee intends to relocate existing operations into portions of the project area not previously used for aquaculture activities; or (4) dredge harvesting is conducted in areas inhabited by submerged aquatic vegetation. (See general condition 27.) (Sections 10 and 404.)

**Note:** The permittee should notify the applicable U.S. Coast Guard office regarding the project.

**E. Coal Remining Activities.** Discharges of dredged or fill material

into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal, provided the activities are already authorized by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure. Areas previously disturbed by mining activities include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts. The permittee must clearly demonstrate to the district engineer that the reclamation plan will result in a net increase in aquatic resource functions. As part of the project, the permittee may conduct coal mining activities in an adjacent area, provided the newly mined area is less than 40 percent of the area being remined and reclaimed.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404.)

**F. Underground Coal Mining Activities.** Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure.

The discharge must not cause the loss of greater than 1/2 acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

**Notification:** The permittee must submit a pre-construction notification to the district engineer. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404.)

**Note:** Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.