



# 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*. 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* 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

waters do not require section 10 permits to a note.

NWP 27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* (Cat 2) We are proposing to change the title of this NWP to more accurately reflect the types of activities it authorizes, since aquatic habitats other than streams and wetlands can be restored, established, or enhanced by activities authorized by this NWP. The term "creation" would be replaced with "establishment," to conform with the terminology in Regulatory Guidance Letter 02-02 for wetland project types and the definition in the Council on Environmental Quality's April 2006 report entitled "Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal." We are proposing to modify this NWP to prohibit the conversion of natural wetlands to another aquatic use, but the relocation of non-tidal wetlands on the project site would still be authorized provided certain conditions are met. In addition, we are proposing to add shellfish seeding to the list of examples of authorized activities, since shellfish seeding is used to restore oyster populations.

We are also proposing to modify this NWP to require permittees to submit copies of: Binding wetland enhancement, restoration, or establishment agreements; NRCS documentation for voluntary wetland restoration, enhancement, or establishment actions; or Surface Mining Control and Reclamation Act (SMCRA) permits issued by the Office of Surface Mining or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP. Standard PCNs are not required for activities conducted pursuant to one of these instruments (except reversion activities; see below), but the submission of these already prepared documents will allow the Corps to ensure that the conditions for use of the NWP have been satisfied, with minimal burden to the project proponent.

We are proposing to replace "values" with "services" because ecosystem services provide more objective measures of the importance of aquatic resource functions to human populations. Services are the benefits that humans derive from the functions performed by wetlands and other aquatic resources. Examples of wetland services include flood damage reduction, water quality improvement, and opportunities for viewing birds and other wildlife. Aquatic resource

restoration, establishment, and enhancement activities authorized by this NWP are likely to provide ecosystem services that benefit human populations. Values of aquatic resources are difficult to describe objectively, and are usually dependent on the point of view of the person making the assessment. Values may relate to either monetary or non-monetary measures, whereas services can be described in physical terms that are easier to evaluate and address, where necessary, in NWP authorization letters and special permit conditions.

We are proposing to modify the reversion provision of this NWP by adding the Farm Service Agency (FSA) and appropriate designated state cooperating agencies of the U.S. Fish and Wildlife Service, Natural Resources Conservation Service, FSA, National Marine Fisheries Service, and National Ocean Service to the list of agencies that may execute wetland restoration, enhancement, or establishment agreements with landowners. This NWP authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland that has not been abandoned or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies. There may be cases where the designated state cooperating agency has taken over the operational aspects of executing wetland restoration, enhancement, or establishment agreements with landowners for those federal agencies. The Conservation Reserve Enhancement Program (CREP) administered by FSA may involve wetland restoration, enhancement, and/or establishment activities, and this program may be delegated to state agencies for implementation. A CREP contract between the landowner and the administering agency may be for a term of 10 to 15 years. We are also proposing to add the phrase "or on uplands" to the third sentence of this paragraph, since wetlands may be established on uplands as a result of an agreement between the landowner and another government agency.

We are also proposing to modify this NWP by moving the requirement to notify the district engineer prior to conducting any reversion activities to the "Notification" provision. The "Notification" provision requires the permittee or appropriate Federal or State agency to notify the district engineer in accordance with general condition 27. For reversion activities,

the permittee must show that the activity qualifies for reversion by providing documentation showing that a prior agreement has expired, or that the reversion activity is otherwise authorized. This documentation may consist of either: (1) A copy of the original wetland enhancement, restoration, or establishment agreement between the landowner and the NRCS, FSA, FWS, or appropriate designated state cooperating agency that shows the expiration date, if the agreement has an expiration date; (2) the NRCS documentation for voluntary wetland enhancement, restoration, and establishment actions demonstrating compliance with NRCS regulations; or (3) a copy of the SMCRA permit issued by the OSM or applicable state agency.

We are proposing to modify the "Note" at the end of this NWP, by removing the first sentence. Since the first paragraph of this NWP states that it authorizes only those activities that result in a net increase in aquatic resource functions and services (except for authorized reversion activities), it is redundant to restate this requirement in the Note. We are also proposing to remove the text stating that compensatory mitigation is required for impacts to waters of the United States caused by the authorized construction of compensatory mitigation projects, including mitigation banks and in-lieu fee programs.

In addition, we are proposing to remove the last sentence of the "Note," which states that NWP 27 can be used to authorize the construction of a mitigation bank only when that bank has been approved in accordance with the procedures in the interagency mitigation banking guidance issued on November 28, 1995 (60 FR 58605). This provision is contrary to the 1995 guidance, which states that a bank sponsor may proceed, at his or her own risk, with the construction of the mitigation bank after receiving the Department of the Army permit, if the mitigation banking instrument has not yet been approved.

NWP 29. *Residential Developments.* (Cat 2) We are proposing to combine NWP 29 and the provisions of NWP 39 pertaining to residential developments into a single nationwide permit that authorizes single unit residences (e.g., single family homes) and multiple unit residential developments. In other words, we are proposing that NWP 29 authorize both single unit and multiple unit residential developments while NWP 39 would authorize commercial and institutional developments because residential developments differ from commercial and institutional

24. *Indian Tribe or State Administered Section 404 Programs.* Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. (Section 10)

**Note 1:** As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

**Note 2:** Those activities that do not involve a State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)).

25. *Structural Discharges.* Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a section 10 permit if located in navigable waters of the United States. (Section 404)

26. [Reserved]

27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* Activities in waters of the United States associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the establishment of tidal and non-tidal wetlands and riparian areas, the restoration of non-tidal streams, and the restoration and enhancement of non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels and

drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; **shellfish seeding;** activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP does not authorize the conversion of a stream or natural wetlands to another aquatic use, such as the establishment of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and services. For example, this NWP may authorize the establishment of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by establishing that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

*Reversion.* For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS pursuant to NRCS regulations; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.*, prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a

limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland that has not been abandoned or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements will be at that future date. The requirement that the activity result in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

*Reporting.* For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding wetland enhancement, restoration, or establishment agreement; (2) the NRCS documentation for the voluntary wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSM or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

*Notification.* Except as provided below, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Except for reversion activities, pre-construction notification is not required for:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. FWS, NRCS, FSA, NMFS, NOS, or their designated state cooperating agencies;

(2) Voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS pursuant to NRCS regulations; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSM or the applicable state agency.

However, the permittee should submit a copy of the appropriate documentation. (Sections 10 and 404.)

**Note:** This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee programs. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

**28. Modifications of Existing Marinas.** Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10.)

**29. Residential Developments.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence or a multiple unit residential development. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Subdivisions:** For residential subdivisions, the aggregate total loss of

waters of United States authorized by this NWP cannot exceed 1/2 acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

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

**30. Moist Soil Management for Wildlife.** Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments or other open water bodies. (Section 404)

**Note:** The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3.

**31. Maintenance of Existing Flood Control Facilities.** Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, by 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Activities, including the discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the

maintenance baseline, are authorized under this NWP. This NWP does not authorize the removal of sediment and associated vegetation from the natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the United States, and proper siltation controls must be used.

**Maintenance Baseline:** The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels, but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

**Mitigation:** The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that