

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Final Notice of Modification of Nationwide Permit 29 for Single Family Housing

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: On April 30, 1998, a court order was issued by the United States District Court, District of Alaska, remanding the Secretary of the Army to consider lower acreage limits for Nationwide Permit (NWP) 29 and consider excluding high value waters from NWP 29. NWP 29 authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction of single family residences, including attendant features. The court order also prohibited the Corps of Engineers (Corps) from accepting preconstruction notifications for any NWP 29 activity after June 30, 1998. In the July 1, 1998, **Federal Register** (63 FR 36040-36078) the Corps proposed to modify NWP 29 to reduce the acreage limit from $\frac{1}{2}$ acre to $\frac{1}{4}$ acre. In that **Federal Register** notice, the Corps also announced the suspension of NWP 29 for activities that result in the loss of greater than $\frac{1}{4}$ acre of non-tidal waters of the United States. As a result of the Corps review of the comments received in response to the July 1, 1998, **Federal Register** notice, NWP 29 has been modified to reduce the acreage limit to $\frac{1}{4}$ acre. In response to the court order and the modification of NWP 29, the Corps has also issued a new environmental assessment (EA) for NWP 29. The new EA responds to the court order by addressing the use of NWP 29 in high value waters of the United States, including the process whereby division and district engineers restrict or prohibit the use of NWP 29 to authorize discharges of dredged material into high value waters. The revised EA also discusses the Corps consideration of lower acreage limits for NWP 29 and the Corps decision to reduce the acreage threshold to $\frac{1}{4}$ acre. Since the revised EA fulfills the requirements of the court order, the Corps is no longer prohibited from receiving and processing preconstruction notifications for proposed NWP 29 activities. PCNs for NWP 29 will be accepted starting September 30, 1999.

DATES: The modification of NWP 29 is effective on September 30, 1999.

ADDRESSES: Further information can be obtained by writing to: HQUSACE, ATTN: CECW-OR, 20 Massachusetts

Avenue, NW, Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson at (202) 761-0199 or access the Corps of Engineers Regulatory Home Page at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

SUPPLEMENTARY INFORMATION:

Nationwide Permit (NWP) 29, which authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of single family housing and attendant features, was first issued on July 27, 1995, as part of the President's Wetlands Plan to ensure that regulatory programs are fair, flexible, and effective. NWP 29 was issued to reduce the regulatory burden on small landowners who desire to build or expand a single family home on their property. NWP 29 was reissued on December 13, 1996, with minor modifications, for a period of five years.

On July 15, 1996, a lawsuit was filed in Alaska District Court by several organizations against the Corps, challenging the issuance of NWP 29 under Section 404 of the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). The plaintiffs challenged the issuance of NWP 29 because they believe that: (1) the Corps violated the CWA by issuing an NWP for activities that result in more than minimal adverse environmental effects; (2) the Corps violated the CWA by issuing an NWP for activities that are not similar in nature; (3) the Corps violated the procedural requirements of the Section 404(b)(1) Guidelines of the CWA; (4) the Corps violated the Endangered Species Act (ESA) by failing to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS); (5) the Corps violated the Fish and Wildlife Coordination Act by failing to consult with the FWS and NMFS; (6) the Corps violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS); and (7) the issuance of NWP 29 was arbitrary, capricious, and an abuse of discretion. After the Corps reissued NWP 29 on December 13, 1996, a supplemental complaint was filed by the plaintiffs challenging the reissuance of NWP 29.

On April 30, 1998, a court order was issued by the United States District Court, District of Alaska, remanding the Secretary of the Army to consider excluding high value waters from NWP 29, consider lower acreage limits for NWP 29, and to set forth those

considerations in an amended environmental assessment (EA). The court determined that the EA for NWP 29 that was issued on December 10, 1996, inadequately addressed the Corps consideration of the exclusion of high value waters and consideration of lower acreage limits. Pending the Secretary of the Army's consideration of these issues, the court enjoined the Corps from accepting any preconstruction notifications (PCNs) for NWP 29 after June 30, 1998, unless otherwise ordered by the court.

In the July 1, 1998, **Federal Register** notice, the Corps proposed to reduce the acreage limit of NWP 29 from $\frac{1}{2}$ acre to $\frac{1}{4}$ acre, to provide further assurance that NWP 29 would authorize only those single family housing activities with minimal adverse effects on the aquatic environment, individually or cumulatively. The Corps did not request comments on the other terms and conditions of NWP 29.

In response to the July 1, 1998, **Federal Register** notice, the Corps received more than 80 comments addressing the proposed modification of NWP 29. A number of commenters supported the Corps proposal to reduce the acreage limit of NWP 29 to $\frac{1}{4}$ acre. Many commenters opposed the proposed acreage limit reduction. Several of these commenters indicated that the Corps has not provided sufficient supporting evidence demonstrating that the lower acreage limit is necessary to ensure that only activities with minimal adverse effects on the aquatic environment are authorized by NWP 29. One commenter stated that decreasing the acreage limit of NWP 29 will result in more landowners seeking individual permits to fill more wetlands. This commenter indicated that the $\frac{1}{2}$ acre limit encourages minimization of impacts to wetlands because landowners have incentive to design their projects to comply with the $\frac{1}{2}$ acre limit of NWP, but that a $\frac{1}{4}$ acre limit would discourage minimization. This commenter also stated that the proposal is contrary to Administration's wetlands program because lowering the acreage limit will increase burdens on the regulated public by causing more single family housing activities to require individual permits. Several commenters objected to NWP 29, suggesting that it should be revoked.

We believe that a $\frac{1}{4}$ acre limit for NWP 29 is necessary to ensure that this NWP limits authorization of single family housing activities so that there will be no more than minimal adverse effects on the aquatic environment. NWP 29 is still an effective means of

reducing the regulatory burden on the public for single family housing activities in non-tidal waters of the United States, while minimizing effects on the aquatic environment. It is unnecessary to revoke this NWP because the PCN process allows district engineers to review all proposed activities and determine if those activities comply with the terms and conditions of the NWP and result in minimal adverse effects on the aquatic environment. Regional conditioning of NWP 29 provides for Corps districts to restrict or prohibit the use of NWP 29 to authorize single family housing activities in high value non-tidal waters and ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. We are proposing an NWP condition for all of the NWPs that will address the use of NWPs in critical resource waters (see 64 FR 39252 and the discussion at the end of this preamble).

We disagree that reducing the acreage limit of NWP 29 will substantially increase the number of individual permits for single family housing activities. Most landowners can design their single family residences to comply with the lower acreage limit. The data collected by the Corps concerning the use of NWP 29 during 1996, 1997, and 1998 demonstrates that the average acreage loss resulting from activities authorized by NWP 29 is less than $\frac{1}{4}$ acre. (The actual data indicates an average of 0.19 acre.) This lower average acreage loss is partly due to the PCN process, because district engineers review each proposed NWP 29 activity and, where appropriate, require additional minimization to ensure that the adverse effects on the aquatic environment are minimal. Reducing the acreage limit for NWP 29 to $\frac{1}{4}$ acre merely reinforces the on-site avoidance and minimization process required for NWP activities.

Several comments suggested other acreage limits for NWP 29. One commenter recommended a 3 acre limit for NWP 29. Another commenter said that NWP 29 should have the same acreage limit as the proposed modification of NWP 40 for agricultural activities and proposed NWP 39 for residential, commercial, and institutional activities. This commenter believes that the regulated public would be less confused if the PCN thresholds for the proposed NWPs 40 and 39 are the same. Two commenters suggested an acreage limit of $\frac{1}{10}$ acre. One commenter suggested an acreage limit of $\frac{1}{5}$ acre, based on the average loss of non-tidal wetlands for NWP 29

authorizations cited in the July 1, 1998, **Federal Register** notice.

A 3 acre limit for single family housing activities is unlikely to comply with the minimal adverse effects requirement for general permits, including NWPs, nor is it likely to comply with the condition that requires the permittee to minimize and avoid impacts on-site (see Section 404 Only Condition 4). In addition, a 3 acre limit is unnecessary since approximately 90% of residential landowners in the United States own parcels that are $\frac{1}{2}$ acre or less in size (see the July 27, 1995, **Federal Register** notice (60 FR 38650—38663) announcing the issuance of NWP 29). Single family housing activities resulting in the loss of greater than $\frac{1}{4}$ acre of waters of the United States can be authorized by individual permits or, if available, regional general permits issued by Corps districts. Reducing the acreage limit of NWP 29 to $\frac{1}{10}$ acre would substantially reduce the utility of this NWP and greatly increase the number of individual permits required for many single family housing activities that result in minimal adverse effects on the aquatic environment. All PCNs for NWP 29 activities will be reviewed by district engineers to determine if the proposed work complies with the terms and conditions of NWP 29 and results in minimal adverse effects on the aquatic environment. In addition, division engineers regionally condition NWP 29 to reduce the acreage limit in areas where there is greater potential for more than minimal individual or cumulative adverse effects on the aquatic environment. Regional conditions are adopted to prohibit or restrict the use of NWP 29 in certain high value waters.

A couple of commenters stated that NWP 29 violates Section 404(e) of the Clean Water Act. Several commenters opposed the proposed modification of NWP 29, stating that the NWP would result in more than minimal adverse effects on the aquatic environment. Some commenters stated that the proposed $\frac{1}{4}$ acre limit would still result in substantial cumulative losses of wetlands from activities authorized by NWP 29. A couple of commenters stated that NWP 29 should be applicable only in isolated wetlands. These commenters also recommended conditioning the NWP to require septic tanks and other sewage disposal and collection systems to be located on uplands to the maximum extent practicable. One commenter stated that the NWP should be conditioned to require the prospective permittee to submit a statement with the PCN demonstrating how impacts to wetlands were avoided

and minimized to the maximum extent practicable. One commenter stated that the provision allowing the use of NWP 29 with other NWPs should be removed.

NWP 29 complies with Section 404(e) of the Clean Water Act because it authorizes activities that are similar in nature (i.e., the construction or expansion of single family residences and attendant features). All activities authorized by NWP 29 require submission of a preconstruction notification, which will allow district engineers to review all proposed NWP 29 activities on a case-by-case basis to ensure that those activities result only in minimal adverse effects on the aquatic environment. The PCN process allows district engineers to monitor the use of NWP 29 to determine if the authorized activities will result in more than minimal cumulative adverse effects on the aquatic environment on a watershed basis. We do not agree that it is necessary to restrict the use of NWP 29 only to isolated waters or condition the NWP to limit sewage disposal systems to uplands. State and local regulations usually address the siting of sewage disposal systems. In those areas where state and local regulations do not address the siting of sewage disposal systems, district engineers can consider that issue during review of the PCN. Through regional conditions, division engineers can prohibit or restrict the use of NWP 29 in high value waters identified by district engineers. Division or district engineers can also exercise discretionary authority and require an individual permit for single family housing activities that involve discharges into high value waters, if those discharges will result in more than minimal adverse effects on the aquatic environment.

We do not agree that using NWPs other than NWPs 14, 18, or 26 with NWP 29 should be prohibited. For example, bank stabilization activities authorized by NWP 13 may be necessary to protect the home site from erosion. District engineers will review all NWP 29 activities, including those which involve the use of other NWPs to authorize single and complete projects, to ensure that the proposed work will result in minimal adverse effects on the aquatic environment.

Paragraph (c) of NWP 29 requires the permittee to take all practicable actions to minimize on-site and off-site impacts resulting from discharges of dredged material into waters of the United States. This condition reinforces the requirements of Section 404 Only Condition 4, which states that discharges of dredged or fill material into waters of the United States must be

minimized or avoided to the maximum extent practicable on the project site. We do not believe it is necessary to require a statement from the prospective permittee to demonstrate that impacts to waters of the United States have been avoided on-site to the maximum extent practicable for these small projects. District engineers will review PCNs for all NWP 29 activities and may require additional minimization on a case-by-case basis.

One commenter recommended that the requirement for vegetated buffers should be deleted, because the Corps lacks the regulatory authority to impose such a requirement.

The Corps currently has regulatory authority through the Clean Water Act to require vegetated buffers for NWP 29 activities where such vegetated buffers, including upland buffers, help prevent degradation of water quality and aquatic habitat. The establishment and maintenance of wetland or upland vegetated buffers adjacent to open waters, streams, or other waters of the United States can be considered compensatory mitigation for losses of waters of the United States authorized by Corps permits. One of the goals of the Clean Water Act is the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Regulatory agencies can place conditions on a permit or authorization as long as those conditions are related to the activities regulated by that agency. The Section 404 activities regulated by the Corps usually cause adverse effects on the aquatic environment. To offset these adverse effects, we can require measures, such as vegetated upland buffers adjacent to streams, that prevent or reduce adverse effects on the aquatic environment. Vegetated buffers, including uplands, adjacent to open waters of the United States provide many of the same functions and values of wetlands, such as flood mitigation, erosion reduction, the removal of pollutants and nutrients from water, and support aquatic habitat values. Permit applicants must recognize that NWPs are optional permits and if the applicant believes that the NWPs are too restrictive, then he or she can apply for authorization under the individual permit process.

In response to the court order issued by the United States District Court for the District of Alaska and the modification of NWP 29, we have issued a modified environmental assessment (EA) for NWP 29. The revised EA considers lower acreage limits and the exclusion of high value waters. For NWP 29, the Corps has several mechanisms to protect high value

waters, including wetlands. In high value waters, division and district engineers can: (1) prohibit the use of the NWP in those waters and require an individual permit or regional general permit; (2) decrease the acreage limit for the NWP; (3) add regional conditions to the NWP to ensure that the adverse environmental effects are minimal; or (4) add special conditions to specific NWP authorizations, such as compensatory mitigation requirements, to ensure that the adverse effects on the aquatic environment are minimal. NWPs can authorize activities in some high value waters as long as the individual and cumulative adverse effects on the aquatic environment are minimal.

Corps districts also monitor cumulative impacts to ensure compliance with the CWA. Corps districts generally monitor regulated activities on a watershed basis to ensure that the activities authorized by NWP 29 and other Corps general permits do not result in more than minimal cumulative adverse effects on the aquatic environment in a particular watershed. Division engineers will revoke NWP 29 in high value aquatic environments or in specific geographic areas (e.g., watersheds), if they determine that the use of NWP 29 in these areas will result in more than minimal individual and/or cumulative adverse environmental effects to the aquatic environment.

All activities authorized under NWP 29 require preconstruction notification to the Corps. The preconstruction notification allows district engineers to review each proposed single family housing activity to determine if that activity will result in minimal adverse environmental effects, and if necessary, add special conditions to the NWP authorization to further minimize adverse effects on the aquatic environment. If the proposed work will result in more than minimal adverse environmental effects on the aquatic environment, then the District Engineer will exercise discretionary authority to require an individual permit, with the requisite alternatives analysis and public interest review.

The general conditions for the NWPs apply to NWP 29, and can be found in the December 13, 1996, issue of the **Federal Register** (61 FR 65874-65922). NWP 29 will expire on February 11, 2002, unless otherwise modified, suspended, or revoked. The modification of NWP 29 does not require new Section 401 water quality certifications or Coastal Zone Management Act consistency determinations since the modification decreased the acreage limit, which will

result in fewer single family housing activities that can be authorized by NWP 29.

As a result of our consideration of comments received in response to the October 14, 1998, **Federal Register** notice, we have proposed in the July 21, 1999, **Federal Register** (64 FR 39252-39371), three new NWP general conditions to further protect the aquatic environment. If adopted, these new general conditions will become effective when the new and modified NWPs that will replace NWP 26 become effective. General Condition 25 prohibits the use of several NWPs, including NWP 29, to authorize discharges of dredged or fill material into designated critical resource waters, including wetlands adjacent to those waters. For the purposes of General Condition 25, designated critical resource waters include NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding natural resource waters officially designated by the state in which those waters are located. Discharges into National Wild and Scenic Rivers or adjacent wetlands may be authorized by NWP if the activity complies with General Condition 7. Discharges into designated critical habitat for Federally-listed threatened or endangered species may be authorized by NWP if the activity complies with General Condition 11 and the FWS or NMFS has concurred in a determination of compliance with General Condition 11. General Condition 26 addresses the use of NWPs to authorize discharges in impaired waters of the United States and wetlands adjacent to those impaired waters. For the purposes of General Condition 26, impaired waters are those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. General Condition 26 requires the prospective permittee to clearly demonstrate that the activity will not further impair the waterbody. General Condition 27 prohibits the use of several NWPs, including NWP 29, to authorize permanent, above-grade fills in waters of the United States in 100-year floodplains.

Dated: August 23, 1999.

Eric R. Potts,

Colonel, U.S. Army, Executive Director of Civil Works.

Accordingly, Nationwide Permit 29 is modified as follows:

29. *Single Family Housing:* Discharges of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands, for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of more than 1/4 acre of non-tidal waters of the United States, including non-tidal wetlands;

b. The permittee notifies the District Engineer in accordance with the "Notification" general condition;

c. The permittee has taken all practicable actions to minimize the on-site and off-site impacts of the discharge. For example, the location of the home may need to be adjusted on-site to avoid flooding of adjacent property owners;

d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the United States of 1/4 acre for the entire subdivision;

e. An individual may use this NWP only for a single-family home for a personal residence;

f. This NWP may be used only once per parcel;

g. This NWP may not be used in conjunction with NWP 14, NWP 18, or NWP 26, for any parcel; and,

h. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation.

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area previously permitted, the proposed filled area, and any other waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Whenever any other NWP is used in conjunction with this NWP, the total acreage of impacts to waters of the United States of all NWPs combined, can not exceed 1/4 acre. This NWP authorizes activities only by individuals; for this purpose, the term "individual" refers to a natural person and/or a married couple, but does not include a corporation,

partnership, or similar entity. For the purposes of this NWP, a parcel of land is defined as "the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or that individual's spouse), and comprises not only the area of wetlands sought to be filled, but also all land contiguous to those wetlands, owned by the individual (and/or that individual's spouse) in any form of ownership." (Sections 10 and 404)

[FR Doc. 99-22285 Filed 8-27-99; 8:45 am]

BILLING CODE 3710-92-P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 29, 1999.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW, Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by

office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: August 24, 1999.

William E. Burrow,

Leader, Information Management Group, Office of the Chief Information Officer.

Office of Educational Research and Improvement.

Type of Review: Reinstatement.

Title: National Assessment of Educational Progress (NAEP) Secondary Analysis Grant Program.

Frequency: Annually.

Affected Public: Businesses or other for-profit; Not-for-profit institutions; State, local or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 15.

Burden Hours: 360.

Abstract: Congress has mandated that reports be produced using the data from the National Assessment of Educational Progress. This grant program will encourage researchers to study the NAEP data and expand our understanding of the relationship between school and student characteristics and academic achievement. Grant applicants will be universities, educational research organizations and consulting firms.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890-0001). Therefore, this 30-day public comment period notice will be the only public comment notice published for this information collection.

Written comments and requests for copies of the proposed information collection request should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, D.C. 20202-4651, or should be electronically mailed to the internet address vivian_reese@ed.gov or should be faxed to 202-708-9346.

For questions regarding burden and/or the collection activity requirements, contact Kathy Axt at 703-426-9692. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information