

**DEPARTMENT OF THE ARMY
Wilmington District, Corps of Engineers
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PUBLIC NOTICE

This Public Notice is being issued in response to questions regarding regulation and guidance affecting the Corps of Engineers Wilmington District Regulatory Division's review of requests for authorization under the Nationwide Permit Program (NWP).

Background

In the July 19, 1977 issue of the Federal Register (Vol. 42, No. 138, pp. 37146-37147), the Corps issued the first Clean Water Act, Section 404 Nationwide Permits (NWP's). These NWP's are intended to authorize categories of actions that have been determined to, individually and cumulatively, result in minimal impacts to the aquatic environment. This volume of the Federal Register also included a requirement that discharges should be avoided and minimized when practical, and a provision that allowed the District Engineer to require an individual permit for an activity otherwise qualifying for nationwide permit authorization, in cases where he determines individual or cumulative adverse impacts to the aquatic environment warrant such review. These Nationwide permits are subject to review, including Public Notice and the opportunity for public hearing, at least every five years.

With the November 22, 1991 reissuance of the NWP's, the Corps began to discuss the role of compensatory mitigation in the NWP program. The Corps added Nationwide General Permit Condition 13, which addressed notification requirements, and included the statement that "the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal." The Corps also included a condition that stated "discharges... must be minimized to the maximum extent practicable at the project site, unless the District Engineer has approved a compensation mitigation plan for the specific regulated activity (Condition 4 of the 'Section 404 only conditions')."

On January 15, 2002, the Corps reissued all of the existing NWP's with some modification (33 CFR § 330.5). Currently, mitigation in all forms (avoidance, minimization and compensation) has become an integral part of the NWP program. General condition 19 (added to the program on March 9, 2000) specifically addresses when and how mitigation should be considered in efforts to "ensure that the adverse effects to the aquatic environment are minimal." This condition requires the project be "designed and constructed to avoid and minimize adverse effects to waters of the US to the maximum extent practicable at the project site" and stipulates

that “mitigation in all its forms (avoiding, minimizing, rectifying, reducing or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.”

Regulatory Guidance Letter (RGL) 02-02 became effective December 26, 2002. The stated purpose of this RGL is to support “the national policy for ‘no overall net loss’ of wetlands” and to reinforce “the Corps commitment to protect waters of the United States including wetlands.” While this guidance did not change any existing regulation or policy, it did emphasize the Corps responsibility to consider the appropriate and practicable level of compensatory mitigation necessary to ensure projects receiving Corps authorization (via General, Nationwide or Individual Permit) result in minimal adverse effects to the aquatic environment.

Current Issue

The purpose of this Public Notice is to clarify the current requirements for authorization under NWP. A project qualifies for NWP authorization only if it results in minimal individual and cumulative impacts to the aquatic environment. Projects authorized by NWP’s must comply with all the terms and conditions of the NWP including the requirement to avoid and minimize impacts to waters and wetlands when practicable¹. Many Nationwide permits also require a pre-construction notification² (PCN) be sent to the Corps prior to undertaking any work. In efforts to adequately address the issue of avoidance and minimization, the Corps currently asks all applicants submitting a PCN to include a site-specific design plan showing all proposed development. Based on the stated purpose for the proposed activity, the Corps must examine all practicable on-site alternatives. This may include alternative sizing and arrangement of buildings and amenities.

Upon deciding that all appropriate avoidance and minimization efforts have been achieved, the Corps must decide whether compensatory mitigation is required to ensure impacts to the aquatic environment are minimal. General condition 19 states that “compensatory mitigation at a minimum one-to-one ratio will be required for all wetland impacts requiring a PCN, unless the District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement.” Therefore, in most cases, projects requiring a PCN will require some type of compensatory mitigation. The Corps does, however, have the latitude to wave this requirement if it is determined that mitigation is not practicable or that the adverse impacts of the proposed project are minimal without such mitigation.

¹ For the purpose of CWA regulation, the term “practicable” is defined at 40 CFR 230.3 (q) to mean “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.”

² Nationwide permit general condition 13 provides information on the timing and contents of this notification .

Many NWP's require the applicant to submit a compensatory mitigation proposal. This proposal may be either conceptual in nature, or detailed. Proposed compensatory mitigation may consist of activity-specific wetland restoration or creation projects, purchase of credit from a mitigation bank, payment into an approved in-lieu fee arrangement, or, in limited circumstances, preservation of existing wetlands. Applicants may also provide the Corps with any information relevant to the decision of whether compensatory mitigation should be required for the specific impact. When submitting a PCN for NWP's not specifically requiring a compensatory mitigation proposal, applicants are encouraged to submit such a proposal, or a statement identifying specific reasons why no mitigation should be required, in order to expedite the review process.

For further information regarding the Nationwide permit program or the terms and conditions of specific nationwide permits or for the full text of any of the above-referenced documents, please visit the Wilmington District Corps Regulatory Program website at <http://www.saw.usace.army.mil/WETLANDS/index.html>. You may also contact your local Corps Regulatory field office.