

MEMORANDUM

Corps of Engineers Section 404 Permits

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Director, Office of Environmental Policy

Regional Federal Highway Administrators
Regions 1-10
Direct Federal Program Administrator

On October 5, 1984, the Corps issued a Final Rule amending several parts of its July 22, 1982, Interim Final Rule for Regulatory Programs. The rule, which was published to comply with a settlement agreement reached in National Wildlife Federation vs. Marsh (D.C.C. December 22, 1982) includes several policy and procedural changes and modifications to five nationwide permits.

The attached information identifies the major changes in the regulation which are important to the highway program. The area of immediate concern is the status of the three nationwide permits affecting the highway program, sections 330.5(a)(7), (23) and (26) (including the one for the Federal Highway Administration list of categorical exclusions). Some States have denied or conditionally approved certification under Section 401 of the Clean Water Act and denied or conditionally concurred in the consistency determination under the Coastal Zone Management (CZM) Act. The denial or conditioning of the Section 401 certification/CZM consistency concurrence prohibits or restricts, respectively, the use of the affected nationwide permits. In those situations, a site specific Section 404 permit may be required. Further, a number of States have not taken a final position on Section 401 certification/ CZM consistency concurrence for the five nationwide permits, but should be doing so in the near future.

The Corps Headquarters and field offices are working with the affected States to resolve their concerns on the use of the affected nationwide permits. The current status of the denials or conditioning is noted in item 3 of the attachment. However, that status may change as the Corps and each State reach agreement or the remaining States take a final position on the Section 401 certification/CZM consistency concurrence.

In view of the significant revisions to the Corps Section 404 permit program and the potential for more changes as various States finalize their positions on the Section 401 and CZM certifications, we believe each Division Office should maintain close contact with the involved Corps District Office(s) on this matter.

/S/

Ali F. Sevin

Information
on the
Corps of Engineers' October 5, 1984, Regulations

The following information identifies the major changes between the Corps of Engineers' October 5, 1984 and July 22, 1982 regulations.

1. 404(b)(1) Guidelines

The October 5 regulation clarifies the role of the Environmental Protection Agency 404(b)(1) guidelines in the Corps' permit process by clearly identifying that compliance with the guidelines is a prerequisite to issuance of a section 404 permit. The 404(b)(1) guidelines will be used by the Corps in determining the environmental effects of a proposed discharge into waters of the United States, including adjacent wetlands. For individual permits, the Corps conducts the 404(b)(1) evaluation concurrently with the public interest review. For general permits, either nationwide or regional, the Corps applies the 404(b)(1) guidelines during the development of the permit categories and subsequent public notification process. For certain nationwide permits (at sections 330.7(c) and (d)), the guidelines will also be applied a second time as part of the Corps pre-discharge notification review.

It is clear from the regulation that responsibility for the 404(b)(1) evaluation and application of the guidelines is vested in the Corps. Nevertheless, it is suggested that Federal Highway Administration (FHWA) and State highway agency personnel with environmental and Section 404 permit responsibilities become familiar with the guidelines to ensure that project environmental/permit analyses adequately address the areas of concern covered in the guidelines and consequently minimize any potential delay in the permit process.

2. Public Notice

The new regulation requires the Corps to publish a public notice for any new proposed regional and nationwide permits and for modifications to, or reissuance of, such existing permits. For nationwide permits, the Chief of Engineers will publish notices in the Federal Register to (a) seek public comment and provide the opportunity for a public hearing on proposed changes and (b) publish the changes in final form. The district engineers will also publish a notice for the nationwide permits, concurrently with the Federal Register publication of final regulations, and include any applicable regional conditions adopted by the division engineer. For regional permits, the district engineers will publish notices within their area of jurisdiction for proposed and adopted permits.

Five nationwide permits at sections 330.5(a)(7), (17), (21), (23) and (26) were modified and reissued in the new regulation. Three of these (section 330.5(a)(7), (23) and (26)) affect the highway program. Accordingly, the Division office and State highway agency jointly should consult with the appropriate Corps district office to assure that any Corps regional conditions are included in the Division/State procedures

for managing the nationwide and regional permit program.

3. State Certification of Nationwide Permits

In its May 12, 1983, draft regulation, the Corps proposed to revise and reissue all of Part 330 (Nationwide Permits) and allow the States to reconsider water quality certification for all nationwide permits pursuant to Section 401 of the Clean Water Act. Also, States with approved coastal zone management plans were allowed to reconsider consistency determinations under the Coastal Zone Management (CZM) Act. As a result, a large number of States formally raised their concerns and objected to granting the Section 401 certification/CZM consistency concurrence for one or more of the 26 nationwide permits.

Although the various States' concerns/objections covered all the nationwide permits at Part 330, the October 5, 1984 Corps regulation responds only to the objections on the five nationwide permits (at sections 330.5(a)(7), (17), (21), (23) and (26)) revised by the new regulation. The concerns/objections on the remaining nationwide permits are not in effect and will not become effective until the Corps issues its final regulations on the balance of Part 330 sometime next year. Until such time, those nationwide permits (which have not been revised) remain in effect as issued under the July 1982 regulation.

The status of each State's position regarding Section 401 certification/CZM consistency concurrence on the five nationwide permits is currently in one of the following categories: (a) Section 401 certification has been denied or conditionally approved for one or more nationwide permits, and CZM consistency concurrence has been denied or conditionally approved for one or more nationwide permits; (b) a final position has not been taken; or (c) the requirements have been waived as permitted by law. For categories a and b, the following is the best information that can be provided at this time:

Thus far, the Section 401 certification has been denied by 11 States--Connecticut, Rhode Island, Vermont, Massachusetts, New York, New Jersey, West Virginia, Florida, Missouri, Iowa, and Wisconsin--and conditioned by seven States--Maine, New Hampshire, Tennessee, Colorado, Michigan, Washington and Alaska--for one or more of the five revised nationwide permits. Accordingly, in the affected States, the nationwide permits for which Section 401 certification was denied are not, in effect and another nationwide permit (if applicable) or an individual permit is required. Similarly, in those States which granted conditional certification, the conditions associated with a specific nationwide permit must be adhered to when a project is advanced under that permit.

The CZM consistency concurrence was denied by four States--Massachusetts, Connecticut, Florida, and Louisiana--for one or more of the five nationwide permits. In the affected States, the nationwide permits without the CZM consistency concurrence are not in effect for those projects covered under a permit and requiring a CZM consistency action. For such projects, another nationwide permit (if applicable) or an individual permit is required. Other projects

covered under an affected nationwide permit, but requiring no CZM consistency action, may be advanced under such permit provided that all other applicable conditions are met.

In those States which raised concerns with the nationwide permits, but have not taken a final position on Section 401 certification/CZM consistency concurrence, the Corps will continue to use the State's position taken for the nationwide permits issued in July 1982, until a final action has been taken. The Corps Headquarters office is currently sending letters to those States requesting a final position within 60 days. Therefore, it is conceivable that additional States will be denying or conditioning the Section 401 certification/CZM consistency concurrence.

The Corps Headquarters and field offices are working closely with those States which have denied or conditioned the Section 401 certification/CZM consistency concurrence to resolve the concerns raised. The Corps is optimistic that in time all denials will be rescinded and, as a minimum, conditional Section 401 certification/CZM consistency concurrence granted. Unless already aware, each Division Office and State highway agency should consult with the Corps district office regarding the status of the nationwide permits in their State.

4. Categorical Exclusion Nationwide Permit

The categorical exclusion (CE) nationwide permit (section 330.5(a)(23)) remains in effect for FHWA's list of CEs, except in those States where Section 401 certification/CZM consistency concurrence has been denied as discussed in item 3 above. The new regulation, however, requires that proposed modifications or additions to FHWA's list of CEs be approved by the Office of the Chief of Engineers, Corps of Engineers, in order to qualify for this nationwide permit. As a part of the approval process, the Chief of Engineers must solicit comments through publication in the Federal Register before taking action on the request.

The proposed revision of FHWA and Urban Mass Transportation Administration environmental regulations includes modifications to most CEs. As indicated above, under the Corps' new regulations-the new list of CEs must be approved by the Chief of Engineers before qualifying for the CE nationwide permit. The Office of Environmental Policy has been coordinating with the Corps Headquarters Office to ensure that the CE nationwide permit status is not lost during the transition from the existing to the new environmental regulations.

5. Nationwide Permit for Headwaters and Isolated Waters

The new regulation (section 330.5(a)(26)) modifies the nationwide permit for discharges into "headwaters" and "isolated waters," including wetlands, previously found at sections 330.4(a)(1) and (2) of the July 1982 regulation. The new nationwide permit is limited to discharges which cause the "loss or substantial adverse modification" of less than 10 acres of such waters, including wetlands. When the "loss or substantial adverse modification" is 10 acres or more, the nationwide permit does not apply and a site-specific permit is required. Definitions

of "loss" and "substantial adverse modification" are given in the "Supplementary Information", section 330.5(a)(26) of the regulation.

As discussed in item 7 below, this nationwide permit is subject to a pre-discharge notification of the Corps district engineer (section 330.7) where there is a "loss or substantial adverse modification" of 1 to less than 10 acres involvement. Where the involvement is less than 1 acre, no pre-discharge notification of the Corps is required.

6. Grandfathered Activities

The new regulation (section 330.5(c)) provides a conditional grandfather provision for the nationwide permit activities in "headwaters" and "isolated waters," including wetlands, previously authorized under sections 330.4(a)(1) and (2) as modified and issued at 330.5(a)(26). Under the grandfather provision, those activities covered by the earlier nationwide permit continue to be authorized for 18 months from the effective date of the regulation if one of the three criteria specified in the regulation is met and the permittee demonstrates compliance with the applicable criterion to the Corps district engineer by December 5, 1984.

As the above indicates, the grandfather provision does not automatically allow project activities to continue under the nationwide permit. Therefore, projects being advanced under the earlier nationwide permit that may qualify for the grandfather provision should be brought to the Corps district engineer's attention immediately. That office will advise of the type and extent of documentation necessary for it to determine whether the project activities can be grandfathered.

7. Pre-discharge Notification

The new regulation (section 330.7) requires a pre-discharge notification to and a determination by the Corps division or district engineer for the nationwide permits at sections 330.5(a)(7), (17), (21) and (26), except for the grandfathered activities discussed in item 6 above. (For nationwide permits at 330.5(a)(26), the pre-discharge notification is not required where the "loss or substantial adverse modification" is less than 1 acre). The Corps determination will address the environmental effects of the proposed discharge which will include undertaking the 404(b)(1) evaluation. If the Corps determines that the proposed discharge would result in more than minimal impacts to waters of the United States, an individual permit may be required. The permittee must not proceed, with a proposed project under any of these four nationwide permits until notified by the Corps district engineer that an individual permit is not required.

The pre-discharge notification procedures at section 330.7 are clear on the requirements and parties involved in the process for the nationwide permit at section 330.5(a)(26), but are not clear for the nationwide permits at sections 330.5(a)(7), (17) and (21). For the nationwide permit at section 330.5(a)(26), the permittee notifies the Corps district engineer directly. However, for the nationwide permits at 330.5(a)(7), (17) and (21), the Corps district engineer is notified through other already existing permit or consultation procedures required for those types of activities. For example, the activities under the nationwide

permit at section 330.5(a)(7) require a National Pollutant Discharge Elimination System permit which must be reviewed by the Corps district office before being issued. When the Corps receives notification through the existing permit or consultation process, it will also conduct the pre-discharge review and make the determination required at sections 330.7(c) and (d). These concurrent actions by the Corps are intended to avoid duplication of effort and minimize the time required for the notification process.

The CE nationwide permit at section 330.5(a)(23) and the July 1982 nationwide permits not modified by the new regulation do not require a pre-discharge notification. However, under the FHWA and Corps agreement for the CE nationwide permit, FHWA will advise the Corps district office of those projects that may result in more than minor water quality impacts (Mr. Sevin's June 17, 1983 memorandum). Because of the Corps regulatory responsibilities under Section 404, its district offices need to be kept fully informed when use of the CE nationwide permit is a close call.

8. Corps Regulations

The Corps Headquarters office advises that its regulatory permit program is in a state of flux. The agency is currently finalizing parts of its July 1982, Interim Final Regulation and the May 1983 proposed regulation to be issued within the next few months. In late 1985, it plans to finalize the remaining parts of the 1982 and 1983 regulations and, after combining the entire regulatory permit program, issue the package as a single regulation.