Public Notice

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POH-2006-351	**March 19, 2007**

U.S. Army Corps of Engineers
Honolulu District

Reply to:
U.S. Army Engineer District, Honolulu
Regulatory Branch, CEPOH-EC-R
Building 230
Fort Shafter, Hawaii 96858-5440

Respond by: N/A

PUBLIC NOTICE FOR FEDERAL REGISTER NOTICE ANNOUNCING NEW NATIONWIDE PERMITS

On March 12, 2007, in Part II of the *Federal Register* (72 FR 11092), the U.S. Army Corps of Engineers (Corps) announced the reissuance of all existing Nationwide Permits (NWPs), general conditions, and definitions with some modifications. The Corps has also issued six new NWPs, two new general conditions, and 13 new definitions. The NWPs will be effective on March 19, 2007.

In addition, the Honolulu Engineer District has developed Regional Conditions (RCs) in order to provide additional protection for the aquatic environment by ensuring that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. Draft proposed Regional Conditions were first published by Public Notice dated October 2, 2006. Comments received during the aforementioned public notice comment period have been incorporated into the attached proposed final RCs for the Honolulu District. Regional conditions will help ensure protection of high value waters within the District.

The publication of this *Federal Register* notice also begins the 60-day period for states and territories to complete their water quality certification (WQC) process for the NWPs. This *Federal Register* notice also provides a 60-day period for coastal states and territories to complete their Coastal Zone Management Act (CZMA) consistency determination processes. This 60-day period will end on May 11, 2007.

While the states and territories complete their WQC processes, the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual water quality certification or a case-specific WQC waiver. Likewise, while states and territories complete their CZMA consistency determination processes, the use of an NWP to authorize an activity within, or outside, a state's or territory's coastal zone that will affect land or water uses or natural resources of that state's or territory's coastal zone, is contingent upon obtaining an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence.

The March 12, 2007, *Federal Register* notice is available for viewing at the Honolulu District Regulatory Branch Office, Building 214, Fort Shafter, Hawaii, or on the Internet at http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp_2007_final.pdf . As an alternative, World Wide Web users can access the *Federal Register* through the U.S. Government Printing Office at http://www.gpoaccess.gov/fr/index.html .

The Corps has also issued final decision documents for the new and reissued NWPs. These documents are also available on the Internet at http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp_final.htm and Corps district offices. Furthermore, the NWP decision documents will be supplemented by Division Engineers to address decisions concerning regional conditioning of the NWPs.

For your use and information, attached are an index of the final 2007 NWPs, General Conditions and Definitions, and the proposed final Honolulu District Regional Conditions which must be complied with in order for your project to be verified under the NWPs. A subsequent Public Notice will be posted announcing the final RCs and WQC/CZMA determinations.

Index of Nationwide Permits, Conditions, and Definitions

Nationwide Permits

34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
39. Commercial and Institutional Developments
40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
45. Repair of Uplands Damaged by Discrete Events
46. Discharges in Ditches
47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs
48. Existing Commercial Shellfish Aquaculture Activities
49. Coal Remining Activities
50. Underground Coal Mining Activities

Nationwide Permit General Conditions

1. Navigation
2. Aquatic Life Movements
3. Spawning Areas
4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. Suitable Material
7. Water Supply Intakes
8. Adverse Effects from Impoundments
9. Management of Water Flows
10. Fills Within 100-Year Floodplains
11. Equipment
12. Soil Erosion and Sediment Controls
13. Removal of Temporary Fills
14. Proper Maintenance
15. Wild and Scenic Rivers
16. Tribal Rights
17. Endangered Species
18. Historic Properties
19. Designated Critical Resource Waters
20. Mitigation
21. Water Quality
22. Coastal Zone Management
23. Regional and Case-by-Case Conditions
24. Use of Multiple Nationwide Permits
25. Transfer of Nationwide Permit Verifications
26. Compliance Certification
27. Pre-Construction Notification
28. Single and Complete Project

Nationwide Permit Definitions

Best management practices (BMPs)
Compensatory mitigation
Currently serviceable
Discharge
Enhancement
Ephemeral stream
Establishment (creation)
Historic property
Independent utility
Intermittent stream
Loss of waters of the United States
Non-tidal wetland
Open water
Ordinary high water mark
Perennial stream
Practicable
Pre-construction notification
Preservation
Re-establishment
Rehabilitation
Restoration
Riffle and pool complex
Riparian areas
Shellfish seeding
Single and complete project
Stormwater management
Stormwater management facilities
Stream bed
Stream channelization
Structure
Tidal wetland
Vegetated shallows
Waterbody

REGIONAL ADVISORIES

Use of Embedded or Bottomless Arch Culverts:
Use of embedded or bottomless arch culverts is encouraged for NWPs 3, 12, 14, 27, 29, 37, 39, 40, 41, 42, and 45, especially where frequent culvert maintenance or replacement is needed. Many undersized conventional culverts contribute to flooding and degrade the aquatic environment by causing channel incision, bank destabilization, and/or prevent fish passage.

Site-Specific Best Management Practices (BMPs):
To facilitate efficient review of a project, the Corps strongly recommends submittal of site-specific BMPs as part of the Pre-Construction Notification (PCN) for any project involving the discharge of dredged and/or fill material into waters of the U.S. Site-specific BMPs are generally a requirement of the State of Hawaii's Department of Health Section 401 Water Quality Certification, which is required for the Corps to issue a valid verification that work can begin on an activity regulated pursuant to Section 404 of the Clean Water Act. Further, submitting site-specific BMPs as part of the PCN allows the Corps to evaluate all potential regulated activities. Project proponents risk delays, or, worse, enforcement action, should their contractor commence work pursuant to a contractor-submitted site-specific BMP plan that includes regulated activities, such as temporary access fills or stream diversions, not reviewed and/or permitted under the original request for NWP authorization. Please also note the permittee is liable for such actions even if site-specific BMPs have been approved by the DOH.

Definition of Coral Reefs:
For the geographic area regulated by the Honolulu Engineer District, coral reefs are defined as structures made of and by living coral and other animals and plants (including, but not limited to, their calcareous remains, reef flats, slopes, lagoon bottoms, pinnacles, and other coral reef features). This definition is strictly advisory in nature and the Corps will make the final determination on the applicability of this definition to the presence or absence of coral reefs for projects proposing work in accordance with any of the NWPs.

REGIONAL CONDITION 1 (Geographical Exclusions)

The following geographic areas and waters of the U.S. are excluded from coverage by the indicated NWPs.

1. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes (Hawaii only) (NWPs 7, 12, 14, 18, 29, 39, 40, 41, and 42).

2. Designated Critical Resource Waters and adjacent wetlands (pursuant to General Condition 19), as well as American Heritage Rivers, National Wildlife Refuges, and State Marine Life Conservation Districts (including Marine Preserve Areas in Guam). However, a discharge may be authorized in National Wild and Scenic Rivers if the activity complies

with General Condition 15 or in designated critical habitats for Federally listed threatened or endangered species if the activity complies with General Condition 17 and the U.S. Fish and Wildlife Service or National Marine Fisheries Service, whichever agency has jurisdiction, has concurred in a determination of compliance with this condition (NWPs 7, 12, 14, 39, 40, and 42).

3. Kihei Wetlands - The area located on Maui between the Mokulele Hwy and Kilohana Drive, extending from the Piilani Highway to the ocean. (NWPs 7, 29, 39, 40, 41, and 42).

4. State of Hawaii (NWP 43 and 44).

5. Commonwealth of the Northern Mariana Islands, Territory of Guam and Territory of American Samoa (NWPs 29, 39, 41, 42, 43, 44).

6. State of Hawaii – Yards and recreation facilities such as playgrounds, playing fields, and golf courses (NWP 29); Recreational facilities, unless the project purpose is recreation (NWP 39).

7. Shrimp pond aquaculture – NWP 48. Commercial operations in Hawaii should be permitted individually because of the scale, frequency of siting in existing wetlands, and potential for impacts different from bivalve culture. Note: This regional prohibition refers only to new activities, not routine maintenance activities.

REGIONAL CONDITION 2 (Notification)

Pursuant to the final 2007 NWPs, all activities conducted under the following NWPs require pre-construction notification, regardless of acreage impacted: 7, 8, 17, 21, 29, 31, 33, 34, 37, 38, 39, 40, 42, 44, 45, 46, 49 and 50. In Hawaii and the Pacific Islands, the following additional NWPs require notification to the District Engineer in accordance with General Condition 27* for all discharges of dredged or fill material into waters of the U.S. or work within Section 10 navigable waters of the U.S.: 3, 4, 5, 6, 12, 13, 14, 16, 18, 19, 22, 25, 27, 28, 35, 36, 41 and 48.

*Note: For projects directly impacting “Impaired Waters” as identified on the most recent CWA Section 303(d) list for the State of Hawaii, the PCN will identify the waterbody as an Impaired Water and, where practicable, shall identify any mitigating measures or BMPs required/recommended by the State for work in these areas.

REGIONAL CONDITION 3 (Acreage Limitation)

Maximum losses of waters of the U.S. under NWPs 3, 7, 40, 41, 42, 43, 45 and 46 in Hawaii are limited to 1/3 acre. Maximum loss of waters of the U.S. under NWP 29 and 39 is limited to 1/4 acre. Maximum loss of waters of the U.S. in Guam, American Samoa, and the CNMI for a single and complete project is 1/10 acre (total impact of use of one or more NWP on the same project).

REGIONAL CONDITION 4 (Length Limitation)

The maximum length of fill within waters of the U.S. is limited to 200 linear feet under NWPs 12, 13, 14, 29, 39, 40, 42, 43, 45 and 46. Note: This limit applies to intermittent and ephemeral streams as well as perennial waters.

REGIONAL CONDITION 5 (Bank Stabilization)

New rigid structures (ex: pre-cast concrete, concrete rubble masonry, or cast-in-place structures) are excluded from use as bank stabilization to protect restoration of storm-damaged uplands under NWP 3 for both tidal and non-tidal waters of the U.S.

REGIONAL CONDITION 6 (Sidecasting)

For NWPs 12 and 41, sidecast materials must be removed within 30 days of placement within waters of the U.S. Removal of the sidecast material may be phased in accordance with the progress of the work.

REGIONAL CONDITION 7 (Runways and Taxiways)

Runways and taxiways are excluded from NWP 14 authorization in tidal waters of the U.S.

REGIONAL CONDITION 8 (Stream Modification)

Permanent stream channelization and/or the construction of dams that impound waters of the U.S. may not be conducted under NWPs 7, 12, 14, 18, 39, 40, 41, 42 and 43 in Hawaii, CNMI, Guam and American Samoa.

REGIONAL CONDITION 9 (Compensatory Mitigation)

Upland vegetation buffers cannot be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under NWPs 12, 14, 29, 39, 40, and 42 in Hawaii; they cannot be used for this purpose under any of the NWPs within the CNMI, Guam and American Samoa. Use of vegetated upland buffers is strongly encouraged, however as part of a compensatory mitigation plan that replaces lost wetland and aquatic areas through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas shall be at a minimum ratio of 1:1 (acres, square feet, etc.).

REGIONAL CONDITION 10 (Mitigation Measures)

A plan employing the techniques listed below shall be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction must be revegetated as soon as possible. Erosion protection shall be provided

and remain in place until the soil is permanently stabilized.

1) Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

*Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

*Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

2) Revegetation techniques may vary with site conditions and include, but are not limited to the following:

*Seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting should follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species should be used only when native species are not available. The following species are known to be highly invasive and may not be used under any circumstances for revegetation under these NWPs: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01).

REGIONAL CONDITION 11 (Site Identification)

Project limits of authorized sites shall be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) prior to clearing and construction to ensure that impacts to waters of the U.S. *(*including wetlands) beyond project footprints are avoided.

REGIONAL CONDITION 12 (Endangered Species)

1) A survey of the project area should be performed just prior to commencement or resumption of construction activity to ensure that no protected species are in the project area. If protected species are detected, construction activities must be postponed until the animal(s) voluntarily leave the area.

2) If any listed species enters the area during conduct of construction activities, all activities should cease until the animal(s) voluntarily depart the area.

3) All on-site project personnel shall be apprised of the status of any listed species

potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian .

4) Any incidental take of marine mammals should be reported immediately to NOAA Fisheries' 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Conditions 12.1-12.4 pertain to projects within waters that may support listed marine mammals and/or sea turtles. Additional requirements may be designated by the Corps as appropriate for specific projects.

5) Pursuant to the Endangered Species Act, any take of federally protected species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525.

REGIONAL CONDITION 13 (Standard Best Management Practices)

The following measures (as applicable) shall be incorporated into projects to minimize the degradation of water quality and impacts to fish and wildlife resources:

1) Turbidity and siltation from project-related work shall be minimized and contained to the immediate vicinity of the project through the appropriate use of effective silt containment devices and the curtailment of work during adverse tidal and weather conditions.

2) The work shall be conducted in the dry season or when any affected stream has minimal or no flow, to the extent practicable. The work shall be discontinued during flooding, intense rainfall, storm surge, or high surf conditions where runoff and turbidity cannot be controlled. Shoreline work will be done during low tides as much as possible.

3) Dredging/filling in the marine/aquatic environment shall be scheduled to avoid coral spawning and recruitment periods.

4) Dredging and filling in the marine/aquatic environment shall be designed to avoid or minimize the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.) and compensatory mitigation shall be implemented for the unavoidable loss of special aquatic sites.

5) All project-related materials and equipment (dredges, barges, backhoes etc) to be placed in the water shall be cleaned of pollutants prior to use.

6) No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the water (intertidal zones, reef flats, stream channels, wetlands etc.).

7) All debris removed from the marine/aquatic environment shall be disposed of at an approved upland or ocean dumping site.

8) No contamination (trash or debris disposal, alien species introductions etc.) of adjacent marine/aquatic environments (reef flats, channels, open ocean, stream channels, wetlands etc.) shall result from project-related activities.

9) Fueling of project-related vehicles and equipment should take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

10) Any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

11) Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as plastic sheeting, filter fabric etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.).

12) Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to and within 10 feet of the toe of any fill, or soil exposed within 25 feet of a standing or flowing waterbody, if the fill site has a downslope or surface connection to the waterbody; and (b) adjacent to any fill placed or soil exposed within a standing or flowing waterbody. All silt fences, curtains, and other structures must be installed properly and maintained in a functioning manner for the life of the construction period where fill material and exposed soils might cause transport of sediment or turbidity beyond the immediate construction site.