



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

November 6, 2006

Colonel Kevin J. Wilson
U.S. Army Corps of Engineers
P.O. Box 898
Anchorage, Alaska 99506-0898

Re: SPN 2006-216
Proposed Regional Conditions

Attn: Dave Casey

Dear Colonel Wilson:

The National Marine Fisheries Service (NMFS) has reviewed the above referenced Special Public Notice for the Corps of Engineers' Alaska District (Corps) proposal to reissue its Nationwide Permits (NWP) and associated Regional Conditions. NWP are general permits issued on a nationwide basis to streamline the authorization of activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Due to regional issues concerning the work authorized by various NWP, Division Engineers are authorized to add regional conditions specific to the needs and/or requirements of a particular region or state. Regional conditions are important mechanisms to ensure that impacts to the aquatic environment authorized by the NWP are minimal, both individually and cumulatively. Division Engineers may also suspend or revoke specific NWP in certain geographic areas (e.g., states or watersheds) or high-value aquatic systems where impacts authorized by those NWP may be more than minimal.

Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires federal agencies to consult with NMFS regarding any action that may adversely affect Essential Fish Habitat (EFH). The federal action agency must complete an EFH Assessment as described in 50 CFR 600.920(e), and the level of detail in the EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action.

We appreciate the Corps' coordination in this process and have found the two meetings between our staffs to be very beneficial. Based on those meetings we understand that the Corps intends to submit an EFH assessment and request a General Concurrence for those NWP which may adversely affect EFH, but with the inclusion of appropriate special conditions the action will likely result in no more than minimal adverse effects individually and cumulatively.

Several instances exist where use of a NWP would likely result in adverse effects to EFH and the aquatic environment. Our specific comments (enclosure) reflect our general concerns with the NWP program as well as specific suggestions regarding particular regional conditions and NWP as they relate to EFH. Further, we understand that you



intend to coordinate separately with our Protected Resources Division regarding consultation requirements under the Endangered Species Act (ESA). Please contact Mr. Brad Smith in our Anchorage Office at (907) 271-3023 for any questions regarding ESA issues.

We look forward to working with you as you develop your EFH assessment as part of the EFH consultation. Should you have any questions please contact Ms. Jeanne Hanson of my staff at 907-271-3029.

Sincerely,



Robert D. Mecum
Acting Administrator, Alaska Region

Enclosure

cc: Records
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**NATIONAL MARINE FISHERIES SERVICE (NMFS) COMMENTS ON
SPECIAL PUBLIC NOTICE 2006-216
NATIONWIDE PERMIT REISSUANCE**

General Comments

Cumulative impacts

The Corps has stated that activities authorized under the NWP program have no more than minimal cumulative effects. We however, are unaware of any definitive studies that evaluate the cumulative effects of the NWP program on either a national or regional basis. NMFS is very concerned with the cumulative effects of habitat loss on living marine resources as a result of the NWP program. Acres lost cumulatively over time as a result of numerous small activities, and/or the combinations of several NWPs together, may have an effect on fisheries dependent on wetlands during specific stages of their life cycles. On a regional basis the Corps can tell how many times a specific NWP was used, and in some instances the acreage. However, there is no understanding of the impact these actions are having on habitat.

Therefore, NMFS strongly recommends that the Corps undertake a thorough accounting of the loss of wetlands under the NWP program. The information from that study should then be shared with natural resource agencies and other partners willing to work cooperatively in evaluating the impacts of the loss of wetlands under the NWP program on a watershed basis. Only after such an analysis is made can the Corps determine whether activities authorized under the NWP program are truly having minimal cumulative effects on the environment.

Specific Comments

Regional Conditions

Regional Condition A - Bank Stabilization Projects (*This regional condition applies to all proposals for a NWP that involve bank stabilization*).

We are concerned that bank stabilization projects that may occur in estuarine or nearshore marine environments are not addressed through this condition. We recommend that there be a Pre-construction Notification (PCN) for all projects that occur in estuarine or marine areas.

Regional Condition B – Agency Coordination (*This Regional Condition establishes geographic and habitat areas that will require agency coordination for less than ½ acre*).

The wording on this regional condition is confusing. Currently it states:

“Except as described below, for projects requiring a Pre-Construction Notification (PCN) and occurring within the following geographic/habitat areas, the Corps will conduct agency coordination with the appropriate

agencies according to General Condition No. 27 regardless of the amount of loss of waters of the U.S.”

We suggest that the Regional Condition summarize what is required under paragraph (d) of General Condition 27. This would help clarify what follows under the Regional Condition.

Also, we recommend modifying two of the five geographic areas. Currently #4 states:

Jurisdictional areas within 100 feet as measured from the Ordinary High Water (OHW) or the High Tide Line (HTL), of anadromous fish streams as identified (in #3) above.

NMFS supports notification regarding projects that may occur within 100 feet of jurisdictional areas. We would like to clarify that the intent of this provision does not mean 100 feet from bank to bank, but a buffer that begins at the OHW mark for both sides. Additionally, we believe that it should not be limited to only those areas identified as anadromous and suggest that there may be marine or estuarine areas that may contain EFH and /or managed species where a greater setback is warranted. Therefore, we recommend that #4 be rewritten to state the following:

Jurisdictional areas within 100 feet as measured from the Ordinary High Water (OHW) of anadromous fish streams as identified (in #3) above and jurisdictional areas within 100 feet of the High Tide Line (HTL).

#5 of Regional Condition B states:

Eelgrass beds

We recommend that this regional condition be modified to include other living marine substrates to state:

Living marine substrates to include seagrass beds, marine algae, and corals

Regional Condition C – Wood Preservatives (This regional condition applies to all NWP's that include wooden structures).

We compliment the Corps on recognizing regional concerns regarding the use of wood preservatives. We look forward to seeing this issue addressed in your EFH Assessment. Further, in order to avoid and minimize impacts to living marine resources including EFH, we recommend that the wording in this Regional Condition be expanded to include the following:

1. The use of any wood that has been surface or pressure-treated with creosote or treated with pentachlorophenol should be prohibited from in- or near-water applications. Creosote contains numerous constituents that are toxic to aquatic

organisms including polycyclic aromatic hydrocarbons (PAHs), phenolic compounds, and nitrogen - sulfur - or oxygenated heterocyclics (WDF&G 2001). Leaching of these constituents continues throughout the life of the wood and has been associated with the development of tumors, immune system suppression, decreased fecundity and abnormal embryonic development. Pentachlorophenol has high chronic toxicity to aquatic life.

2. Alternatives to treated wood that are less or non-toxic and are also stronger than wood, such as concrete or steel, should be used wherever practicable. In addition to reducing the impacts from treated wood, use of alternatives may entail less in-water structure and associated benthic disturbance. Untreated wood can be used for temporary structures, or structures that are designed to function as impact cushions (i.e. bumpers, piles or rails). Anchors can be used in place of pilings for dock structures. Anchors that screw into substrate further minimize benthic disturbance.
3. If treated wood must be used, any wood that comes in contact with marine or aquatic environments should be treated with waterborne preservatives approved for use in aquatic and/or marine environments. These include: Chromated Copper Arsenic (CCA) Type C, Ammoniacal Copper Zinc Arsenate (ACZA), Alkaline Copper Quat (ACQ), Copper Boron Azole (CBA) or Copper Azole (CA). The project should only use wood that has been treated in accordance with best management practices developed by the Western Wood Preservers Institute. Treated wood should be inspected before installation to ensure that there are no superficial deposits of preservative material on the wood.
4. For over-water structures, the structure should be designed to prevent abrasion and splintering of wood. Protective wear strips (e.g., high density polyethelene), coatings or wrappings will also prevent abrasion. All cutting and boring of treated wood should take place in upland areas; all waste materials cut wood, chips or sawdust from treated wood should be collected promptly and disposed of at an acceptable upland site so that they do not enter the aquatic environment.
5. Treated wood materials should not be stored in-water.

Specific NWPs

NWP 3 – Maintenance

This NWP authorizes the repair, rehabilitation and replacement of previously authorized, currently serviceable structures or fills. Minor deviations in the structure's configuration or filled area, given certain qualifications are authorized. This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of and within existing structures and the placement of new or additional riprap to protect the structure.

Regionally, depending where and when this NWP was applied, there could be adverse impacts to living marine resources including EFH. NMFS recommends that your EFH assessment address this possibility. Ways to address this could include excluding specific activities on a regional basis. We look forward to further coordination on this issue.

NWP 4 – Fish and Wildlife Harvesting, Enhancement and Attraction Devices and Activities

Regionally, depending where and when this NWP was applied, there could be adverse impacts to living marine resources including EFH. NMFS recommends that your EFH assessment address this possibility. Ways to address this on a regional basis could include excluding large commercial scale activities that may be better addressed under NWP D.

NWP 6 – Survey Activities

This NWP pre-dates the current three-dimensional seismic surveys that are now commonly used by the oil and gas industry to help determine the location of offshore oil and gas deposits. The sound waves generated by seismic surveys can have a variety of harmful effects on fish, including physical injury and dispersement.

In addition, such survey activities can adversely affect fishing activities. Typically, these operations are conducted during the open water season and can end up competing with fishing activities for time and space on the water. Also, seismic survey equipment can interfere with, damage, or remove fishing gear.

Thus, this NWP has the potential to adversely affect living marine resources including EFH on a regional basis. Ways to address our concern could include a PCN for seismic activities that would be covered by this NWP.

NWP 12 – Utility Line Activities

This NWP authorizes the activities required for the construction, maintenance, repair and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½ acre of waters of the United States.

This NWP would allow the construction and installation of “utility lines”; defined as any pipe or pipeline for the transportation of any gaseous liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The Federal Register notice states that this NWP does require a PCN and does contain a special note that:

“Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e. section 10 waters) copies of the PCN and NWP verification will be sent to the NOAA and the National Ocean Service (NOS), for charting the utility line to protect navigation.

From the wording of the NWP (in the Federal Register Notice) and the “Note” we also understand that the Corps would be sending on a copy of the PCN to the NOS Office of Coast Survey (another NOAA line office) in Silver Spring, MD. We agree that this is important to protect navigation; however, as part of NOAA, regionally NMFS would expect to receive a copy of the PCN.

NWP 13 – Bank Stabilization

See our concerns under Regional Condition “A”.

NWP 28 – Modifications of Existing Marinas

This NWP would allow for the reconfiguration of existing docking facilities within an authorized marina area. However, no dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States would be authorized by this NWP.

NMFS is concerned that this NWP may allow for the driving of piles, in order to complete reconfiguration of facilities. Several studies on pile driving have documented adverse effects on fish. Ways to address this issue may include timing restrictions and the possibility of using a vibratory method for pile driving. We recommend that this be evaluated in your EFH assessment

NWP D – Commercial Shellfish Aquaculture Activities

It is our understanding that the Alaska District’s regional general permit (GP) for aquaculture projects in State waters (up to 3 miles), basically supports the State's permitting program (see - <http://www.dnr.state.ak.us/mlw/aquatic/>).

NMFS suggests that the Corps consider suspending the use of NWP D in State waters and use the existing Regional GP. Additionally, given the variety of concerns for living marine resources, including EFH and possible commercial fishing interactions, NMFS recommends that a PCN be required for all projects beyond the State water boundary of three nautical miles.